INTERPRETATION GUIDELINE: IG 16/01

DETERMINING EMPLOYMENT STATUS FOR TAX PURPOSES (EMPLOYEE OR INDEPENDENT CONTRACTOR?)

Relevant legislative provisions are reproduced in the Appendix to this Interpretation Guideline.

Contents

Summary

1. This Interpretation Guideline will help taxpayers determine their employment status for tax purposes.

2. This Interpretation Guideline updates and replaces Interpretation Guideline IG 11/01, "Income tax; Goods and services tax - Determining employment status for tax purposes (employee or independent contractor)", *Tax Information Bulletin* Vol 24, No 5 (June 2012): 3. IG 11/01 outlined the tests for determining whether a person is an employee or independent contractor. This Interpretation Guideline corrects an error regarding the control test in [5] of IG 11/01 (the test is stated correctly in the body of the item). This Interpretation Guideline also updates legislative references and case law and has been revised in places for clarity. The Commissioner's approach to determining employment status for tax purposes remains unchanged.

3. A taxpayer's tax obligations for amounts earned from work done depends on their employment status (ie, whether the taxpayer is an employee or an independent contractor).

4. The Income Tax Act 2007 (ITA) defines "employee" to include a person who receives or is entitled to receive a "PAYE income payment". A "PAYE income payment" is defined to include a payment of "salary or wages" or "extra pay". Both of these terms are defined as being "… made to a person in connection with their employment". Case law has determined that the use of the word "employment" in these definitions relates to "a contract of service". Under the Goods and Services Tax Act 1985 (GSTA), supplies of goods and services under a

"contract of service" are not taxable. These provisions do not explain how to determine whether there is a contract of service in any particular case. Therefore, we must rely on the common law to determine whether there is a contract of service.

5. The common law distinguishes between contracts **of** service and contracts **for** services. A contract of service means there is an employer–employee relationship; a contract for services means there is a principal–independent contractor relationship. At common law, the courts have developed various tests to determine whether there is a contract of service or a contract for services. The case law shows that the main tests are the intention, control, independence, fundamental and integration tests. These tests can be summarised as follows:

   - Intention of the parties test – looks at the intentions of each party to the agreement as to the nature of the relationship.
   - Control test – examines the degree of control the employer or principal exerts over the manner in which the work is done. A high level of control supports the conclusion that the person engaged to perform the services is an employee.
   - Independence test – examines the level of independence the person engaged to perform the services exerts over their work. A high level of independence supports the conclusion that the person engaged to perform the services is an independent contractor.
   - Fundamental test – considers whether the person engaged to perform the services is doing so as a person in business on their own account. If the answer is "yes", this supports the conclusion that the person is an independent contractor; if the answer is "no", this supports the conclusion that the person is an employee.
   - Integration test – looks at whether the person engaged to perform the services is integrated into the business. If the person is integrated into the business, this supports the conclusion that they are an employee. By contrast, if the person is not integrated into the business, but rather is an accessory to it, this supports the conclusion that they are an independent contractor.

6. The leading case on employment status is the Supreme Court decision in *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721. In *Bryson*, the Supreme Court considered whether a person was an "employee" under the Employment Relations Act 2000. *Bryson* is consistent with the Court of Appeal's decision in *TNT Worldwide Express Ltd v Cunningham* [1993] 3 NZLR 681 (CA).

Analysis

7. The analysis in this Interpretation Guideline is divided into the following sections:

   - **Types of employment relationship:** discusses the difference between "contracts of service" (which employees have) and "contracts for services" (which independent contractors have).
   - **Employment status and tax law:** outlines the significance to taxpayers of their employment status. It also explains how the common law on determining employment status can be relevant when determining a taxpayer's employment status under the GSTA and the ITA.
   - **Relevance of Employment Relations Act 2000 case law:** considers s 6 of the Employment Relations Act 2000. Section 6 defines "employee" for that Act. This part concludes that, when determining employment status for tax purposes, s 6 decisions are relevant to the extent that those decisions concern the common law on the employee/independent contractor distinction.

- **Determining employment status – leading New Zealand authorities:** discusses the leading New Zealand authorities on determining employment status – *Bryson* and *TNT.*
- **Common law tests of employment status:** summarises the main tests for deciding employment status – the intention of the parties, control, independence, fundamental and integration tests.
- **Relevant decisions:** summarises three cases that illustrate how the courts have applied the common law tests, and lists other decisions since *Bryson* on how to determine employment status.

Types of employment relationship

8. The law distinguishes between two types of employment relationship: the employer–employee relationship and the principal–independent contractor relationship. Each relationship has different legal rights and obligations. The type of employment relationship in any particular case depends on whether there is a "contract **of** service" or a "contract **for** services" between the persons concerned. In *New Zealand Educational Institute v Director-General of Education* [1981] 1 NZLR 538 (CA), the Court of Appeal stated at 539:

> On many occasions over the years the Courts have had to decide whether the relationship between two persons was that of employer and employee or, as it used to be called, master and servant. The inquiry normally involved the distinction between a contract of service in which the relation was that of employer and employee and a contract for services in which the relation was that between employer and independent contractor. A decision in any particular case required an examination of the contract between the two - it might be expressed in words or it might be implicit from the circumstances.

9. Employees have a "contract **of** service" with their employer. Contracts of service evolved from the earlier concept of a master–servant relationship. This type of relationship required an employee to be continuously available for service and to accept a high degree of control by the employer. A "contract **for** services" applies to the relationship between an independent contractor and a principal. It emphasises the nature of the services to be provided by a person rather than their availability to work as directed.

10. At common law, the courts have developed several tests to determine whether there is a contract of service or a contract for services. The case law shows that the main tests are the intention, control, independence, fundamental and integration tests. These tests are discussed below at [51] – [80]**.**

Employment status and tax law

Consequences of employment status for tax purposes

11. A taxpayer's tax obligations for amounts earned from work done depends on their employment status (ie, whether the taxpayer is an employee or an independent contractor). Employment status has the following consequences for tax purposes:
    - Payments to employees from their employer must have PAYE deducted at source.
    - Employees cannot register for GST or charge GST for services they supply as employees.
    - Independent contractors may deduct certain expenses incurred in deriving assessable income.
    - Independent contractors must account to Inland Revenue for tax and accident compensation earner and employee premiums for themselves and any employees.

- Independent contractors must meet all the requirements of the GSTA if the services they supply are in the course of a taxable activity and they are registered (or liable to register) for GST.

12. Taxpayers cannot change their employment status (or the resulting tax implications of that status) merely by calling themselves independent contractors when they are essentially still employees.

Relevance of common law tests under tax law

13. Neither the ITA nor the GSTA explains how to determine whether there is a contract of service or a contract for services in any particular case. We must therefore rely on the common law tests for determining employment status.

Income Tax Act 2007

14. The ITA defines "employee" in s YA 1 as follows:

> **employee**—
>
> (a) means a person who receives or is entitled to receive a PAYE income payment:
>
> (ab) for the purposes of the FBT rules, includes a shareholder-employee who has chosen under section RD 3(3) to treat amounts paid to them in the income year in their capacity as employee as income other than from a PAYE income payment:
>
> (ac) despite paragraph (a), in sections CE 1, CE 1B, and CW 16B to CW 16F (which relate to accommodation provided in connection with employment), includes an employee provided with accommodation or an accommodation payment as described in section CE 1(3)(a) (Amounts derived in connection with employment):
>
> (b) in sections CW 17, and CW 17B to CW 18B (which relate to expenditure, reimbursement, and allowances of employees) includes a person to whom section RD 3(2) to (4) (PAYE income payments) applies:
>
> (c) in the FBT rules, and in the definition of **shareholder-employee** (paragraph (b)), does not include a person if the only PAYE income payment received or receivable is—
> (i) a payment referred to in section RD 5(1)(b)(iii), (3), (3B), (6)(b) and (c) and (7) (Salary or wages):
> (ii) a schedular payment referred to in schedule 4, parts A and I (Rates of tax for schedular payments) for which the person is liable for income tax under section BB 1 (Imposition of income tax):
>
> (d) is defined in section DC 15 (Some definitions) for the purposes of sections DC 12 to DC 14 (which relate to share purchase schemes):
>
> (db) does not include an owner of a look-through company or a person who has a look-through interest for a look-through company, unless the owner or person is a working owner:
>
> (e) for an employer, means an employee of the employer

15. Paragraph (a) defines "employee" as a person who receives or is entitled to receive a "PAYE income payment". The latter term is defined in s RD 3(1) as follows:

> (1) The PAYE rules apply to a **PAYE income payment** which—
>
> (a) means—
>
> (i) a payment of salary or wages, *see* section RD 5; or
>
> (ii) extra pay, *see* section RD 7; or
>
> (iii) a schedular payment, *see* section RD 8:

16. Other relevant definitions include:

- "salary or wages" (s RD 5(1)(a)):

> (1) **Salary or wages**—
>
> (a) means a payment of salary, wages, or allowances made to a person in connection with their employment; … .

- "an extra pay" (s RD 7(1)(a)(i)):

> (1) An **extra pay**—

(a) means a payment that—

(i) is made to a person in connection with their employment; … .

- "employment" (s YA 1)

employment has a meaning corresponding to the meaning of **employee,** and—

(a) includes the activities performed by the Governor-General, a member of Parliament, or a judicial officer that give rise to an entitlement to receive a PAYE income payment for the activities: …

17. The use of the word "employment" suggests that the above provisions apply where there is a contract of service. This interpretation is supported by *Challenge Realty Ltd v CIR* (1990) 12 NZTC 7,212 (CA). In this decision, the Court of Appeal considered the definition of "salary or wages" in s 2 of the Income Tax Act 1976. This definition provided:

> 'Salary or wages', in relation to any person, means salary, wages, or allowances (whether in cash or otherwise), including all sums received or receivable by way of overtime pay, bonus, gratuity, extra salary, commission, or remuneration of any kind, in respect of or in relation to the employment of that person; … .

18. Delivering the judgment of the court, Bisson J stated at 7,224:

> In the context of "salary and wages" in sec 2, the word "employment", in our view, relates to a contract of service … . It is that word which governs the definition: the definition being intended to include all forms of remuneration received under a contract of employment … .

19. Consequently, the definition of "salary or wages" did not include amounts received as remuneration under a contract for services.

20. The ITA does not explain how to determine whether a taxpayer is employed under a contract of service. Therefore we must rely on the common law to determine employment status. As a general principle of statutory interpretation, where legislation makes use of terms with established meanings at common law, it is presumed that Parliament intended those terms to be given their common law meanings (subject to any contrary legislative intention): *Bank of England v Vagliano Bros* [1891] AC 107 (HL); *R v Kerr* [1988] 1 NZLR 270 (CA). As mentioned earlier, the common law distinguishes between contracts of service and contracts for services, and the courts have developed tests to establish whether there is a contract of service or a contract for services.

21. However, it is important to highlight that some parts of the relevant definitions in the ITA (see [15] and [16] above) **do not** rely on the common law. The ITA identifies particular classes of persons and payments that are specifically included or excluded from the definitions. For example:

- Section RD 3(1)(b) provides that "PAYE income payment" does not include:

  (i) an amount attributed under section GB 29 (Attribution rule: calculation):

  (ii) an amount paid to a shareholder-employee in the circumstances set out in subsection (2):

  (iii) an amount paid or benefit provided, by a person (the **claimant**) who receives a personal service rehabilitation payment from which an amount of tax has been withheld at the rate specified in schedule 4, part I (Rates of tax for schedular payments) or under section RD 18 (Schedular payments without notification), to another person for providing a key aspect of social rehabilitation referred to in paragraph (c) of the definition of **personal service rehabilitation payment** in section YA 1 (Definitions).

- Section YA 1 defines "employment" to include:

  … the activities performed by the Governor-General, a member of Parliament, or a judicial officer that give rise to an entitlement to receive a PAYE income payment for the activities; …

- Similarly, s RD 5(5) provides that "salary or wages" includes salary and allowances made to the Governor-General, members of Parliament and judicial officers.

22. A "PAYE income payment" includes "a schedular payment". A "schedular payment" is defined in s RD 8 to mean a payment of a class set out in sch 4 of the ITA. Schedule 4 lists payments made to a wide variety of workers, including, for example, insurance agents and shearers. A worker who receives "a schedular payment" will typically be an independent contractor at common law. If an independent contractor receives "a schedular payment", then tax must be deducted at source. However, the other consequences of being an independent contractor (set out at [11] above) remain.

Goods and Services Tax Act 1985

23. Under the GSTA, employees are not liable for GST on supplies of goods and services they make to their employers. This is because s 6(3)(b) excludes from the definition of "taxable activity", "any engagement, occupation, or employment under any **contract of service** or as a director of a company, subject to subsection (4)" [emphasis added]. The GSTA does not explain how to determine whether there is a "contract of service". For the reason explained in [20] above, the common law tests must be used to determine whether there is a contract of service or contract for services.

Relevance of Employment Relations Act 2000 case law

24. The common law tests for determining whether there is a contract of service or a contract for services have been developed by the courts over the course of many decisions. In some of these decisions the courts were determining employment status for tax purposes. However, in most decisions the courts were determining employment status under employment legislation. The employment legislation currently in force is the Employment Relations Act 2000 (ER Act). Sections 6(1), (1A), (2) and (3) of the ER Act define "employee" as follows:

> (1) In this Act, unless the context otherwise requires, **employee**—
>
> (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
>
> (b) includes—
>
> (i) a homeworker; or
>
> (ii) a person intending to work; but
>
> (c) excludes a volunteer who—
>
> (i) does not expect to be rewarded for work to be performed as a volunteer; and
>
> (ii) receives no reward for work performed as a volunteer; and
>
> (d) excludes, in relation to a film production, any of the following persons:
>
> (i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer:
>
> (ii) a person engaged in film production work in any other capacity.
>
> (1A) However, subsection (1)(d) does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee.
>
> (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
>
> (3) For the purposes of subsection (2), the court or the Authority—
>
> (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
>
> (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

25. The definition of "employee" in s 6 is only for the purposes of the ER Act. The definition does not affect the interpretation of "employee" in the ITA or "contract of service" in the GSTA. However, the case law on s 6 can be relevant when

determining employment status for tax purposes. In *Bryson,* the Supreme Court held at [32] – [33] that the definition of "employee" in s 6(1)(a) – "any person of any age employed by an employer to do any work for hire or reward under a contract of service" – reflected the common law. It also held that the common law tests for determining employment status were relevant when determining the "real nature of the relationship" between the parties under ss 6(2) and (3). Therefore, when determining employment status for tax purposes, s 6 case law can be relevant to the extent that those decisions concern the common law tests.

Determining employment status – leading New Zealand authorities

26. This part of the guideline discusses the leading New Zealand authorities on determining employment status. These authorities are the Supreme Court decision in *Bryson* and the Court of Appeal decision in *TNT*.

Bryson v Three Foot Six Ltd

Facts and decision

27. In *Bryson,* the Supreme Court considered whether a person was an "employee" under s 6 of the ER Act.

28. In this decision, the appellant, Mr Bryson, was a model maker for Weta Workshop. Weta Workshop had a close working relationship with Three Foot Six Ltd, which was the company that administered the production of The Lord of the Rings. Mr Bryson was seconded from Weta Workshop to Three Foot Six Ltd and soon took a permanent position there. Mr Bryson was not given a written employment contract when he started, but some months later Three Foot Six Ltd supplied a written contract to all staff (the "crew deal memo"). The crew deal memo set out the conditions of employment and, in particular, it referred throughout to "contractor" and "independent contractor". Mr Bryson was required to sign the crew deal memo every week to secure payment for work done. A year later Mr Bryson was made redundant and he alleged unjustifiable dismissal. He could bring an unjustified dismissal claim only if he were found to have been an employee.

29. The Employment Relations Authority held that Mr Bryson was not an "employee" under the ER Act. On appeal, Judge Shaw in the Employment Court reversed this decision: *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581. Her Honour held that Mr Bryson was an "employee" despite references to "independent contractor" in the crew deal memo. A majority of the Court of Appeal overturned the Employment Court's decision: *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526. However, the Supreme Court reversed the Court of Appeal's decision and upheld the Employment Court's decision: *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

30. The Supreme Court quoted Judge Shaw from the Employment Court as follows at [5]:

> Judge Shaw said that s 6 changed the tests for determining what constituted a contract of service. She summarised the principles she considered to have been established by Employment Court cases on that section as follows:
>
> "•
> - The Court must determine the real nature of the relationship.
> - The intention of the parties is still relevant but no longer decisive.
> - Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
> - The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the 'fundamental' test.
> - The fundamental test examines whether a person performing the services is doing so on their own account.

- Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question."

[Footnotes omitted]

31. The Supreme Court said at [32] that Judge Shaw had accurately stated what s 6 requires the courts to do, and had listed the relevant matters to be considered under that section. The Supreme Court said that "all relevant matters" certainly include the written and oral terms of the contract between the parties and that the terms will usually contain indications of the parties' common intention concerning the status of their relationship. The Supreme Court said it was clear from Judge Shaw's judgment that "she was very much alive to the need to begin by looking at the written terms and conditions which had been agreed to by Mr Bryson and Three Foot Six Ltd".

32. The Supreme Court made it clear that the common law tests for determining employment status were relevant under s 6 when the court stated at [32] that "'[a]ll relevant matters' equally clearly requires the Court or the authority to have regard to features of control and integration and to … the fundamental test". The court also said at [33] that Judge Shaw was correct in saying that the real nature of the relationship could be ascertained by analysing the tests that historically have been applied, such as the control, integration and fundamental tests:

> ...The Judge [Judge Shaw] obviously was not suggesting that these three customary indicia were to be applied exclusively. She correctly used them, in conjunction with the other relevant matters to which she referred, in an endeavour to determine the real nature of the relationship, as directed by s 6(2). …

33. In the Employment Court, Judge Shaw had concluded that the fact Mr Bryson required six weeks training for the position with Three Foot Six Ltd indicated that he could not be said to have been contracting his skills because he did not have the relevant experience. The company closely controlled the work Mr Bryson did, including requirements about attendance at meetings and specific work hours, which included time when his services were not required. If he had been an independent contractor, he would not have been paid for the down time and would have been free to get on with his own private business. Judge Shaw emphasised that her decision was based solely on the individual circumstances of Mr Bryson's employment and was not to be regarded as affecting the status of any other employee in the film industry.

Industry practice

34. The concept of industry practice was given prominence in *Bryson* because the outcome was thought to be critical to the New Zealand film industry. In *Bryson*, Judge Shaw stated that Three Foot Six Ltd did not contemplate that Mr Bryson was anything other than an independent contractor "because that was the invariable practice at Three Foot Six [and] across the film industry" (at [36] of the Employment Court decision). Judge Shaw in the Employment Court recognised that industry practice was relevant under s 6, but not determinative, as noted by the Supreme Court at [30] above.

35. At [21], Judge Shaw held that industry practice was also relevant under the common law. In support of this, at [22] her Honour cited *Muollo v Rotaru* [1995] 2 ERNZ 414 (EC) as a case where the Chief Judge held that:

> the Court may consider industry practice when assessing the nature of an employment contract especially where a custom or practice is sufficiently well established. In such a case, the Chief Judge held that such practice could go to establishing the intention of the parties.

36. However, Judge Shaw held at [36] that, on the facts of the case, the industry practice was of little use in establishing the intention of both parties. At [57] – [76], her Honour reviewed the evidence given by expert witnesses as to industry practice and stated at [68]:

> It is clear from the evidence that the defendant and the film and television industry in general has a real and genuine concern that any changes to the present employment arrangements

> which have been in place for many years will cause significant disruptions in the film industry with potentially adverse outcomes both in economic terms and in terms of attracting overseas film companies to bring the productions to New Zealand. Mr Binnie submitted that a decision in Mr Bryson's favour [ie, that he was an employee] would "automatically 'unwind'" every existing crew deal memo and any future crew contracts for movie productions.

37. Judge Shaw held that this evidence did not support finding that Mr Bryson was an employee. Her Honour stated at [68] that "[w]hilst these concerns are acknowledged … in the context of this case, they are overstated." Her Honour therefore gave little weight to industry practice on the facts.

38. The majority of the Court of Appeal held that the Employment Court had not given sufficient weight to the evidence of industry practice. It held that industry practice compelled the conclusion that Mr Bryson was not an employee (at [111], [113] and [117]). The Supreme Court disagreed. It held that the Employment Court had not erred in its treatment of industry practice. At [35]:

> The question for this Court is whether the Court of Appeal majority was correct in holding that what the Judge said in relation to industry practice amounted to legal error. We do not believe that it was. She did not overlook or ignore the evidence of industry practice. In rejecting a submission from counsel for Mr Bryson, she in fact said that it could not be completely disregarded, referring with evident approval to a case under the Employment Contracts Act where the Chief Judge had held that industry practice could go to establish the intention of the parties. In the case before her, however, the Judge found that industry practice was not helpful in relation to establishing the common intention of Mr Bryson and Three Foot Six for the reasons given by her and mentioned at para [9] above. Later in her judgment she summarised the evidence on industry practice. It was, as she said, given in general terms. She found that it did not apply to Mr Bryson's situation. He had not been working on projects for several producers. He had not operated like a sole trader.

Summary

39. In summary, the following points can be taken from the Supreme Court's decision in *Bryson*.

40. When determining whether a person is an "employee" as defined in s 6 of the ER Act, the common law tests for determining employment status are still relevant. Consequently, when determining employment status for tax purposes, s 6 case law is relevant to the extent that it considers and applies the common law tests.

41. Consistent with the common law, s 6 requires the court not to treat as determinative any statement by the parties that describes the nature of their relationship.

42. Also consistent with the common law, s 6 requires the court to consider:

- matters indicating the intention of the parties, in particular the terms of the contract agreed to (whether in writing or orally) by the parties, and industry practice;
- any divergences from, or supplementations of, those terms and conditions that are apparent in the way in which the relationship has operated in practice;
- features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental test).

43. Following the Supreme Court's decision, Parliament amended s 6 of the ER Act to insert provisions concerning film workers. Section 6(1)(d) excludes from the definition of "employee" persons engaged in "film production work". "Film production work" is defined in s 6(7). However, s 6(1A) provides that this exclusion "does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee." As already discussed, s 6 of ER Act defines "employee" only for that Act.

TNT Worldwide Express Ltd v Cunningham

44. The other leading New Zealand authority on employment status is the Court of Appeal decision in *TNT.* In this decision, the Court of Appeal discussed in detail the intention, control and fundamental tests developed at common law. The Supreme Court in *Bryson* cited *TNT* with approval.

45. In *TNT*, the appellant company, TNT, engaged the respondent as an owner−driver to conduct a courier service for the company. The owner−driver:

- provided his own vehicle and was responsible for the vehicle's maintenance and upkeep;
- was responsible for his own tax and accident compensation payments;
- claimed deductions as if he were self-employed; and
- had a contract with TNT that said he was an independent contractor.

46. The company terminated the respondent's contract, and the respondent sought to invoke the personal grievance procedure under the Employment Contracts Act 1991 (now repealed).

47. The Employment Court ([1992] 3 ERNZ 1,030) held that an owner−driver courier for TNT was an employee and not self-employed. In reaching that conclusion, the court placed considerable emphasis on the rigorous control the company exercised over its owner−drivers. The Employment Court considered that the company's actions showed that it treated the owner−driver as its employee.

48. On appeal, the Court of Appeal held that the written contract entered into by the parties created a genuine independent contractor relationship. It accepted that an owner−driver courier was an independent contractor where the owner−driver's contract with TNT:

- required the owner−driver to provide his own vehicle, uniform, approved radio telephone, goods service licence under the Transport Act 1962 and insurance;
- paid the owner−driver mainly on a per trip basis;
- made the owner−driver responsible for employing any relief driver;
- referred to the owner−driver as an independent contractor; and
- gave TNT very extensive control over the owner−driver's operations.

49. The Court of Appeal acknowledged the extensive control TNT exercised over the owner−driver, but concluded that the owner−driver accepted only that degree of control and supervision necessary for the efficient and profitable conduct of the business he was running on his own account as an independent contractor. At 667, Casey J cited the following statement of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433 (QBD) at 447:

> A man does not cease to run a business on his own account because he agrees to run it efficiently or to accept another's superintendence.

50. The Court of Appeal said that when the contract is wholly in writing and it is not a sham, then the nature of the relationship intended by the parties is determined from the terms of that contract in the light of all the surrounding circumstances at the time the contract was made. Cooke P noted at 683 that "it is necessary to consider all the terms of the agreement". He also made the following observations at 686 and 687:

> When the terms of a contract are fully set out in writing which is not a sham (and there is no suggestion of a sham in this case) the answer to the question of the nature of the contract must depend on an analysis of the rights and obligations so defined.
>
> ...

> In the end, when the contract is wholly in writing, it is the true interpretation and effect of the written terms on which the case must turn.

Common law tests of employment status

51. In considering how the distinction between contracts for services and contracts of service is to be made, the Court of Appeal in *TNT* noted at 697 the following observation of the Privy Council in *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, 382:

> What then is the standard to apply? This has proved to be a most elusive question and despite a plethora of authorities the courts have not been able to devise a single test that will conclusively point to the distinction in all cases.

52. The Privy Council in *Lee Ting Sang* quoted with approval from the judgment of Cooke J in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, 184–185, where it was said:

> No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases.

53. Although there is no exhaustive list of considerations, the tests discussed below (established by the case law) provide useful guidance on the factors to be considered in determining whether someone is engaged as an employee or contractor. The relevance of the tests will depend on the particular facts in each case.

54. It is important when determining employment status to balance all the circumstances of the relationship between the parties. Often there will be competing factors that support differing conclusions on whether someone is an employee or an independent contractor. Applying the tests to the facts of a case requires an objective weighing of the various relevant factors to determine the true nature of the relationship.

55. Often the terms of the relationship between two persons will be recorded in a written agreement; though this is not always the case. If there is a written agreement, the first step is to analyse its terms and conditions. However, it is important to note that the nature of the relationship may change over time (eg, a person takes on more duties), and this may not be reflected in the written agreement. Changes in regulations and work practices may also cause the employment status of some workers to change. Alternatively, it could simply be that the written agreement does not accurately reflect how the relationship works in practice. How the parties actually work together must be considered when determining the type of employment relationship between them. As the Supreme Court in *Bryson* stated at [32]:

> It is not until the Court or authority has examined the terms and conditions of the contract, and the way in which it actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration and fundamental tests. Hence the importance, stressed in *TNT,* of analysing the contractual rights and obligations.

56. *Bryson* and *TNT* both discussed the main common law tests for determining employment status – the intention, control, fundamental and integration tests. In the following paragraphs, these tests (along with the independence test) are examined in greater detail.

57. It is important to remember that the application of the common law tests is a weighing-up process. Sometimes the facts of a particular case may suggest different characterisations of the relationship, and there may be either overlap or tensions between the tests.

58. Also, as the characterisation of the relationship is dependent on the particular facts at hand, it is crucial that the facts are well understood, including any changes to the relationship that have occurred over time.

Intention of the parties test

59. The intention of the parties test looks at the intentions of each party to the agreement regarding the nature of the relationship. The description given to a relationship by the parties to the contract is a strong, but not conclusive, indication of the type of relationship that exists. The fact a written contract states a person is an employee or an independent contractor may indicate the intention of the parties, but it is not determinative: *Bryson* at [32] (SCNZ). Holland J in the High Court in *Challenge Realty Ltd v CIR* [1990] 12 NZTC 7,022 said at 7,032:

> Obviously the Court's function in interpreting a contract is to determine the intentions of the parties. When, however, the question for determination is the legal relationship between the parties created by the contract, the expressed intention of the parties will not be determinative of the question. It is nevertheless an important factor, and if after considering all factors the exact state of the relationship is a matter of some ambiguity, may be decisive. In the present cases before me Harcourts is the only one with a written agreement. Nevertheless I would conclude that in all cases it was the intention of the parties to create an agency relationship rather than an employer/employee relationship. The question remains as to whether that result has been achieved.

60. If the actual circumstances point to an employment relationship, then simply labelling it an independent contract relationship will not alter the true position.

61. In *TNT*, a clause in the written contract that purported to override all other aspects of the agreement stated that the courier was an independent contractor. The Employment Court found that the actual conduct of the relationship showed that TNT imposed a high level of control and supervision of its staff that was inconsistent with any independence or initiative on the part of its staff. However, in reversing this decision, the Court of Appeal concluded, after weighing all the circumstances, that the TNT standard form contract created a genuine independent contractor relationship.

62. The taxation arrangements between the parties may be relevant when establishing their intentions. In *Bryson,* the Employment Court acknowledged at [55] that tax status can be an indicator of what a person intends his contractual relationship to be. For example, if the person engaged to perform the services is paid at a set rate at regular intervals and PAYE is deducted, this may support the view that the parties intended a contract of service. However, in some cases taxation arrangements between the parties may not be given much weight. In *Bryson*, Mr Bryson completed IR3 forms, which referred to the taxpayer as being self-employed in business or trade, and had claimed deductions for work-related expenses. The Employment Court stated at [55] that this was not conclusive evidence that Mr Bryson was an independent contractor. This was because he had not registered for GST and payslips received from Three Foot Six Ltd referred to PAYE deductions having being made. In these circumstances, it could not be said that Mr Bryson had acquiesced to independent contractor status.

63. In some circumstances industry practice may be relevant when determining the intention of the parties. As already discussed, in *Bryson* the Supreme Court agreed with the Employment Court's statement that industry practice could be relevant when considering the parties' intention, but that it was not determinative.

64. In *Bryson,* Three Foot Six Ltd considered Mr Bryson should be regarded as an independent contractor because the invariable industry practice was that production workers were hired as independent contractors. Expert witnesses explained that the reason for this practice was the project-based, intermittent nature of screen productions and the fact that production workers normally worked with several different producers during the course of the year. The Employment Court held at [59] – [60] that the evidence of industry practice was of little use on the facts of that case, because it was "necessarily general" and not consistent with the particular circumstances of Mr Bryson's case. Mr Bryson worked continuously for Three Foot Six Ltd alone and, unlike other workers in the

industry, did not own any plant or equipment and did not operate as a sole trader. Mr Bryson's working conditions were therefore not typical of the industry.

65. By contrast, in *Muollo v Rotaru*, industry practice was given considerable weight. In *Bryson,* the Employment Court cited *Muollo* as authority for the proposition that industry practice was relevant at common law when considering the parties' intention as to their employment relationship. In *Muollo,* the Employment Court considered whether Mr Rotaru, who worked as a crew member aboard a fishing vessel, was an employee for the purposes of the Employment Contracts Act 1991 (now repealed). There was no written employment agreement. The Employment Court concluded that Mr Rotaru was an independent contractor and considered this conclusion was supported by the "custom and usage in the commercial fishing industry". It stated at 425-426 that the evidence of industry practice:

> … presents a picture of an industry in which the co-operative venture is not only prevalent and a typical mode of conducting business but a commercial norm. All parties under such arrangements share in the proceeds. The commercial reasons for it suggested by Mr Gartrell were five in number, as follows:
>
> 1. It conduces to business viability;
> 2. ensures proper work attitudes;
> 3. takes cognisance of the fact that work is intermittent, and its duration uncertain;
> 4. acknowledges the seasonal nature of the work; and
> 5. means that there is not a pool of people waiting round in off-times with no work but still having to be paid.
>
> Mr Gartrell urged upon me the good sense of the industry's considerations moving it to adopt this custom, mentioning the sporadic nature of the enterprise and the use of a percentage basis of determining the rewards and sharing productivity and risk. Along much the same lines Mr Gartrell stressed a total of six factors that were particularly important to both appellants:
>
> 1. work was intermittent;
> 2. duration of work was uncertain;
> 3. no liability for sick and holiday pay;
> 4. the business did not want the liability of an employee when work was not available;
> 5. proper work attitudes;
> 6. business/work cohesion.

66. An expert witness also stated that he was not aware of any fishing vessels where a crew member was on a wage or salary. In the expert's opinion, the normal arrangement was for crew members to be paid according to their share of the catch, for withholding tax to be deducted at source, and for crew members to pay their own ACC levies. The Employment Court stated that this evidence was consistent with the circumstances in which Mr Rotaru provided his services. It concluded that the evidence of industry practice showed that the parties' intention was to enter into a contract for services.

67. In summary, industry practice may be relevant when establishing the parties' intention, especially where the custom or practice is sufficiently well established. Industry practice is not determinative, and it may be given less weight where it is inconsistent with the facts of the particular relationship considered.

Control test

68. The control test looks at the degree of control the employer or principal exerts over the work an employee or contractor is to do and the manner in which it is to be done. The greater the extent to which the principal or employer specifies work content, hours and methods and can supervise and regulate a person, the more likely it is the person is an employee.

69. The control test used to be considered the deciding test, but this is no longer the case. The Court of Appeal in *TNT* emphasised that control is only one of several relevant factors. The court endorsed the statement of Cooke J in *Market Investigations Ltd* (at 185) that while control will always have to be considered, it can no longer be regarded as the sole factor in determining the relationship between the parties. The Court of Appeal in *TNT* considered the Employment Court had given this factor too much weight.

Independence test

70. The independence test was not mentioned in *Bryson* or *TNT,* but has been discussed in several Taxation Review Authority cases that determined employment status: *Case U9* (1999) 19 NZTC 9,077; *Case X17* (2006) 22 NZTC 12,224; and *Case Z10* (2009) 24 NZTC 14,113. The independence test is simply the inverse of the control test. A high level of independence on the part of an employee or a contractor is inconsistent with a high level of control by an employer or a principal.

71. A person generally has a high level of independence if they:

- work for multiple people or clients (but the fact the person works for only one person or client does not necessarily mean the person is an employee);
- work from their own premises;
- supply their own (specialised) tools or equipment;
- have direct responsibility for the profits and risks of the business;
- hire or fire whomever they wish to help them do the job;
- advertise and invoice for the work;
- supply the equipment, premises and materials used;
- pay or account for taxes and government and professional levies.

72. On the other hand, when some independent contractors perform work for a principal, they may agree not to work for a competitor or give away trade secrets. This alone will not make the worker an employee (it actually emphasises that the worker is usually entitled to work for others).

Fundamental test

73. The Employment Court decision in *Bryson* applied *Market Investigations Ltd.* In that decision, Cooke J said that the fundamental test for distinguishing an employee and an independent contractor was as follows, at 184−185:

> "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service. ... factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

74. The Privy Council approved the fundamental test in *Lee Ting Sang.* This Privy Council decision was subsequently cited by four of the five judges in the Court of Appeal in *TNT*.

75. The fundamental test is also sometimes described as the "business test" or the "economic reality test". In *Challenge Realty*, the Court of Appeal stated at 7,219:

> If it is helpful to look for a test for application in this case, apart from that of control, which is a key feature of the Act, we favour that suggested by Adrian Merritt, Lecturer in Industrial Law, University of New South Wales in his article "'Control' v 'Economic Reality': Defining the Contract of Employment" (1982) Australian Business Law Review 105 at p 118,

> "The issue that must be settled in today's cases is whether the worker is genuinely in business on his own account or whether he is 'part-and-parcel of' - or 'integrated into' - the enterprise of the person or organisation for whom work is performed. The test is, therefore, one of 'economic reality'."

76. The fundamental test looks at factors such as:

- whether the type of business or the nature of the job justifies or requires using an independent contractor;
- the behaviour of the parties before and after entering into the contract;
- whether there is a time limit for completing a specific project;
- whether the worker can be dismissed;
- who is responsible for correcting sub-standard work;
- who is legally liable if the job goes wrong.

77. Usually, an independent contractor agrees to be responsible for their work. An independent contractor cannot usually be dismissed, although the contract can be terminated if it is broken.

Integration test

78. In *Enterprise Cars Ltd v CIR* (1988) 10 NZTC 5,126 (HC), Sinclair J said that the integration test is whether the person is part and parcel of the organisation and not whether the work is necessary for the running of the business.

79. Under the integration test, a job is likely to be done by an employee if it is:

- integral to the business organisation;
- the type of work commonly done by "employees";
- continuous (not a "one-off" or accessory operation);
- for the benefit of the business rather than for the benefit of the worker.

80. In the Employment Court decision in *Bryson,* at [50] Judge Shaw quoted Lord Denning's "classic description of this test" from his judgment in *Stevenson Jordan & Harrison Ltd v MacDonalds* [1952] 1 TLR 101, 111 (CA):

> ... under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

Relevant decisions

81. This part of the Interpretation Guideline discusses three cases heard in the Employment Court since the Supreme Court's decision in *Bryson*:

- *Tse v Cieffe (NZ) Ltd* [2009] ERNZ 20;
- *Kiwikiwi v Maori Television Service* (2007) 5 NZELR 6;
- *Tsoupakis v Fendalton Construction Ltd* (EC Wellington WC 16/09, 18 June 2009).

82. These decisions concern employment status under s 6 of the ER Act. As already discussed, s 6 decisions can be relevant when determining employment status for tax purposes to the extent that the decisions concern the common law tests.

83. The intention of this discussion is to illustrate how the courts approach the question of employment status following *Bryson*. When considering such decisions, it is important to remember that each case turns on its own facts. As Judge Shaw noted in *Tse v Cieffe (NZ) Ltd,* "previous case law is only useful in reiterating the relevant principles".

Tse v Cieffe (NZ) Ltd

Facts

84. The issue in *Tse v Cieffe (NZ) Ltd* was the plaintiff's employment status. Ms Tse worked for Cieffe from 2005 to 2008.

85. At the beginning of the relationship between the parties there was no written contract between the parties. An oral agreement was reached about the terms of the relationship between the parties. The terms included that Ms Tse would:

- work for 20 hours a week and would be paid at an agreed hourly rate;
- work on the company's internal system but also have some reception duties and general office administration duties;
- invoice Cieffe as a contractor rather than be paid as an employee.

86. In 2007, Cieffe provided Ms Tse with a written consultancy agreement. The agreement provided that Ms Tse's work would be performed under the general supervision and direction of a Cieffe representative, but that Ms Tse was not an employee of Cieffe. Ms Tse signed the agreement.

87. Ms Tse performed the duties that were agreed between the parties at the outset of the relationship, as well as sharing a variety of other office tasks, such as tidying and cleaning, with other employees. When the work Ms Tse had originally been engaged for was nearing completion she was asked to provide further ongoing services that were related to the original work. Ms Tse's work was closely supervised.

88. By her own choice, Ms Tse worked regular hours. She was not instructed to attend the office at any specific time. Over time, her hours increased to 40 hours a week with some overtime. When Ms Tse would not be at work she would advise Cieffe that she would not be present; she would not request leave.

89. Ms Tse invoiced Cieffe for the hours that she worked. Initially, Ms Tse invoiced Cieffe through a company that Ms Tse had set up with her partner. After several months, Ms Tse began invoicing Cieffe in her own name. For the first year of the relationship Ms Tse added GST to the invoices, but she stopped doing this when she discovered that she was not required to be registered for GST.

90. Cieffe provided Ms Tse with branded clothing at work, a credit card (which was used on a business trip) and a business card. The business card had Cieffe's logo and described Ms Tse as "Office Manager" and later as "Client Relationship Assistant Manager".

91. Several times throughout the period that Ms Tse worked for Cieffe, she referred to herself as a contractor.

Application of law

92. **Intention of the parties:** Judge Shaw found that "at the commencement of the relationship both parties deliberately entered into an independent contracting arrangement" (at [40]). The arrangement was evidenced by the method of invoicing and Ms Tse's references to herself as a contractor. Judge Shaw found that the consultancy agreement "confirms the nature of the relationship which had existed from the outset: a contract for services" (at [42]).

93. **Control:** Ms Tse's counsel argued that several factors pointed towards Ms Tse being under the control of Cieffe. One factor was that some of the tasks Ms Tse performed were not sufficiently specialised. Another factor was that Ms Tse's work was supervised by a Cieffe representative. Judge Shaw noted that the non-specific tasks (such as tidying and cleaning) would not generally be performed by a contractor. However, other factors pointed towards a lower level of control by

Cieffe than would be expected in an employment relationship. In particular, it was up to Ms Tse when she would undertake the work and she worked a variety of hours each month.

94. **Integration:** The integration test indicated that Ms Tse was an employee of Cieffe. Judge Shaw stated at [47]:

> In some respects the evidence points to a degree of integration of Ms Tse into the business. These are the business cards and the Cieffe-branded clothing. She used Cieffe equipment and had access to the building. Calling her an office manager or client relationship assistant manager certainly presents an image of her to the outside observer as somebody who was part of the management team rather than running a separate business on their own. Such integration would not normally be expected of a consultant.

95. **Fundamental test:** Judge Shaw found that Ms Tse's supply of invoices to Cieffe evidenced a business relationship. Ms Tse's references to herself as a contractor also supported the view that she was in business on her own account.

Conclusion

96. Judge Shaw concluded at [50]:

> While there were some elements in the conduct of her employment which, viewed in isolation, would not support a finding that she was self-employed, taken in the round I find that the real nature of the relationship between Ms Tse and Cieffe was, as intended, a contract for services.

Kiwikiwi v Maori Television Service

Facts

97. In *Kiwikiwi v Maori Television Service,* the issue was whether Mr Kiwikiwi was an employee or an independent contractor of Maori Television Service (MTS). Mr Kiwikiwi worked as a teleprompter for MTS.

98. When Mr Kiwikiwi started working for MTS, he was filling an urgent vacancy and had no experience as a teleprompter. There was no written agreement at the beginning of the relationship between the parties. Mr Kiwikiwi understood that he was on a one-month trial period with the prospect of a full-time job at the end of the trial period if he was suitable. He was told he would have at least 30 hours of work a week, with more at times. (As the volume of work for teleprompters fluctuates seasonally, hours were flexible.)

99. It was agreed between the parties that Mr Kiwikiwi would be operating on a roster that was prepared a month in advance. He would be paid an hourly rate and would present invoices to be paid.

100. Mr Kiwikiwi undertook teleprompting work but also did various ancillary duties, such as photocopying and banking. After he expressed concern at the additional tasks he was asked to perform, he was given a role profile description. Mr Kiwikiwi worked between 30 and 40 hours a week.

101. After seven and a half months of work, Mr Kiwikiwi was concerned that he still did not have an employment contract. He contacted MTS's operation manager to request an employment contract. Following this, his rostered hours were reduced. The operation manager began to have issues with Mr Kiwikiwi's performance and it was decided that Mr Kiwikiwi had to do some retraining before he could be re-rostered.

102. MTS argued that it was typical working practice in the television industry for teleprompters to be freelancers. Only one teleprompter had been an employee of MTS, with all other teleprompters being freelancers. However, the court heard evidence that TVNZ uses a combination of employees and freelancers as teleprompters.

Application of law

103. **Intention of the parties:** Judge Shaw found that there was no evidence of any common intention by the parties. The parties discussed some "incidents of employment", such as the hourly rate and rostered hours, but did not discuss Mr Kiwikiwi's employment status.

104. **Control:** MTS argued that Mr Kiwikiwi was free to do his work as he saw fit and was not subject to the control of MTS. Judge Shaw found that Mr Kiwikiwi was controlled by MTS's systems. Mr Kiwikiwi was required to comply with the set rosters, had no flexibility within the role and had to perform tasks in addition to teleprompting. The role profile description he was given was prescriptive. When standards slipped, Mr Kiwikiwi had to undergo retraining.

105. **Fundamental test:** Judge Shaw found that Mr Kiwikiwi was not in business on his own account as an independent contractor. The factors that led to this conclusion included:

- Mr Kiwikiwi was not registered for GST;
- Mr Kiwikiwi did not work for any other employer (apart from some shearing work over summer when little work was available from MTS);
- Mr Kiwikiwi had no separate accounts and did not operate under a business entity (such as a company);
- Mr Kiwikiwi did not bring any experience or skill to the position;
- Mr Kiwikiwi took no financial risk with his own capital and could not alter his profits by changing his work habits.

106. Judge Shaw stated that the invoices that Mr Kiwikiwi rendered each fortnight were inconclusive as he only rendered them to get paid.

107. **Integration:** Judge Shaw found that Mr Kiwikiwi's position was an integral part of the production process; it was "not an adjunct which the television station could do without" (at [42]).

108. **Industry practice:** Judge Shaw stated that industry practice can be relevant to both the intention of the parties and the nature of the continuing relationship. However, the industry practice was not black and white. MTS had employed a teleprompter as an employee in the past, and TVNZ used a combination of employees and independent contractors. Therefore, industry practice did not assist in determining Mr Kiwikiwi's employment status.

Conclusion

109. Judge Shaw concluded that the real nature of the relationship between Mr Kiwikiwi and MTS was one of employer/employee.

Tsoupakis v Fendalton Construction Ltd

Facts

110. The issue in *Tsoupakis v Fendalton Construction Ltd* was whether Mr Tsoupakis was an employee or an independent contractor. Mr Tsoupakis worked as a painter for Fendalton Construction for six months in 2005 and 2006 and then again for a year from 2007 to 2008. It was agreed by the parties that Mr Tsoupakis was an independent contractor during the 2005/2006 period. The issue before the Employment Court was whether Mr Tsoupakis was an employee or an independent contractor for the 2007/2008 period.

111. Fendalton Construction hired both employees and independent contractors to undertake painting work. Contractors were generally paid a higher hourly rate.

Fendalton Construction provided both types of staff with mobile phones to keep in touch during jobs.

112. Mr Tsoupakis was not given an employment agreement, despite repeatedly asking for a copy of his contract.

113. Mr Tsoupakis filled out a daily work record, including the hours worked and the address of the jobs worked on. He could reclaim costs of travel to jobs in some circumstances. Mr Tsoupakis submitted weekly invoices to Fendalton Construction for payment.

114. Mr Tsoupakis had his own business card that described him as a director of his own trading entity. There was no evidence that he used the card to solicit business for himself while working for Fendalton Construction. Mr Tsoupakis also had signwriting on his motor vehicle advertising his trading name and personal mobile number. Neither the car signwriting, nor the business card, referred to Mr Tsoupakis's association with Fendalton Construction.

115. While on jobs, Mr Tsoupakis was not supervised constantly by Fendalton Construction, but on most jobs Mr Tsoupakis's work was inspected by Fendalton Construction.

116. Fendalton Construction provided some of the tools required to do the jobs (although usually not paint brushes) and all of the consumables required (such as paint and rags). Mr Tsoupakis purchased materials as required for jobs using Fendalton Construction's trade accounts.

117. Mr Tsoupakis was given work on a daily basis with detailed work directions. He could be redirected to jobs when Fendalton Construction required. Mr Tsoupakis was expected to meet set criteria, such as the time to be taken and the volume of paint to be used. He was required to check in with Fendalton Construction when he finished a job. Mr Tsoupakis could not delegate his work to others to complete, and he was expected not to undertake other work.

Application of law

118. **Intention of the parties:** Chief Judge Colgan found that there was no discernible mutual intention of the parties as there had been no express discussion about the nature of their relationship.

119. **Control:** Chief Judge Colgan found that Fendalton Construction exercised a high degree of control over Mr Tsoupakis's work – both what was done and also how and when it was to be done. Mr Tsoupakis had to account in detail for his hours of work and had no ability to delegate or organise as he chose. In reality, he was constrained from working for anyone else or for himself.

120. **Integration:** The facts pointed towards Mr Tsoupakis having some elements of independence from Fendalton Construction – in particular, his business cards, the signwriting on his vehicle and that he was invited to the contractors' Christmas party (as opposed to the employees' party). Chief Judge Colgan found that, despite these elements, Tsoupakis was an integral part of Fendalton's business in the same way as would be expected of an employee. Factors pointing towards Mr Tsoupakis's integration were that he was held out as a member of Fendalton Construction's staff and that he was paid for the time that he worked rather than a set fee for each job.

121. **Fundamental test:** Chief Judge Colgan found that Mr Tsoupakis was not in business on his own account. Mr Tsoupakis provided his own paint brushes but other equipment was provided by Fendalton Construction. The fact Mr Tsoupakis was not trained by Fendalton Construction was a neutral factor, as Mr Tsoupakis was engaged as an experienced tradesperson.

122. **Industry practice:** Only limited evidence was presented to the court on industry practice in the painting industry. Chief Judge Colgan found that the evidence of industry practice was neutral, as it established that companies (including Fendalton Construction) engaged both independent contractors and employees as painters.

Conclusion

123. Chief Judge Colgan concluded that Mr Tsoupakis was an employee of Fendalton Construction for the 2007/2008 period.

List of other relevant decisions

124. Below is a list of relevant decisions of the Employment Court (EC), Employment Relations Authority (ERA) and Taxation Review Authority (TRA) since *Bryson*. This list may assist readers to locate decisions concerning occupations similar to the particular case before them. Decisions may also be found online via the following free searchable judgment indexes (links as at 2 March 2016):

- http://employment.govt.nz/workplace/determinations/
- https://forms.justice.govt.nz/jdo/Search.jsp
- http://www.justice.govt.nz/tribunals/taxation-review-authority/search-nzlii-nztra

125. It is important to note that each case turns on its specific facts. Consequently, the outcome reached in a particular case cannot be presumed to indicate the likely outcome in a case in the same industry but with a different factual background.

- *Case X17* (2006) 22 NZTC 12,224 (TRA) – relief driver hired by a courier driver.
- *Davis v Canwest Radioworks Ltd* (2007) 4 NZELR 355 (EC) – radio commentator.
- *Hollis v JV Hiab Transport Ltd* (ERA Auckland AA 394/07, 14 December 2007) – truck driver.
- *Bambury v Elation Ltd t/a Komodo Premium Bar* (ERA Auckland AA 12/08, 17 January 2008) – club manager.
- *Sage v NZ Underwater Assn Inc* (ERA Auckland AA 68/08, 29 February 2008) – business advisor.
- *Reading v Civil Engineering Solutions Ltd* (ERA Auckland AA 128/08, 3 April 2008) – business partner in a civil engineering company.
- *Evans v Gibbston Valley Wines Ltd* (ERA Christchurch CA 54/08, 2 May 2008) – cellar hand.
- *Hughes v Upper Hutt Cosmopolitan Club Inc* (ERA Wellington WA 120/08, 17 September 2008) – caterers.
- *Cameron v PBT Couriers Ltd* (ERA Christchurch CA 143/08, 25 September 2008) – courier driver.
- *King v Creative Energy Wholesale Ltd* (ERA Wellington WA 150/08, 11 November 2008) – sales manager.
- *Westwell v Wheeler* (ERA Auckland AA 10/09, 19 January 2009) – painter/foreperson.
- *Case Z10* (2009) 24 NZTC 14,113 (TRA) – relocation driver hired by rental vehicle company.
- *Hughes v Primary Care Development Solutions Ltd* (ERA Wellington WA 25/09, 9 March 2009) – medical researcher.

- *Philpott v London Ltd t/a Ladybirds for Gifts* (ERA Wellington WA 34/09, 23 March 2009) − shop attendant.
- *Pillay v Radius Security Ltd* (ERA Auckland AA 153/09, 14 May 2009) − accountant.
- *Dittmer v Progressive Investment Enterprise Ltd* (ERA Auckland AA 179/09, 11 June 2009) − manager.
- *Smith v Wairarapa Medical Ltd* (ERA Wellington WA 84/09, 15 June 2009) − medical practitioner.
- *Hunapo v Garin Family Trust* (ERA Auckland AA 209/09, 26 June 2009) − security officer.
- *Kelly v Lodge at 199 Ltd* (ERA Auckland AA 224/09, 8 July 2009) − lodge managers.
- *Newcombe v Summit Systems New Zealand Ltd* (ERA Christchurch CA 108/09, 21 July 2009) − marketers.
- *Shearer v Jardin Nous Ltd* (ERA Christchurch CA 124/09, 5 August 2009) − gardener.
- *Yang v New Zealand College of Chinese Medicine Ltd* (ERA Auckland AA 376/09, 29 October 2009) − teacher.
- *Te Amo v Becon Ltd* (EC Christchurch CC 17/09, 4 November 2009) − manager responsible for establishing a waste-sorting plant.
- *Wickbom v DRH (Northland) Ltd* (ERA Auckland AA 10/10, 15 January 2010) − sales and marketing manager.
- *Singh v Eric James & Associates Ltd* [2010] NZEmpC 1 − insurance salesperson.
- *Broad v Financial Gain (Auckland) Ltd* (ERA Auckland AA 103/10, 5 March 2010) − salesperson.
- *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22 − medical practitioner.
- *Poulter v Antipodean Growers Ltd* [2010] NZEmpC 77 − horticulturalist.
- *Keach v Brown & Son Construction Ltd* (ERA Christchurch CA 136/10, 29 June 2010) − builder's labourer.
- *Baldwin v Bossi's Hair & Beauty Ltd* (ERA Auckland AA 486/10, 18 November 2010) − hairdresser.
- *Webb v Professional Relief Services Ltd* (ERA Auckland AA 457/10, 22 October 2010) − courier van driver.
- *Ratcliffe v Weber* (ERA Auckland AA 510/10, 14 December 2010) − circus trainer.
- *Oliver v Brown t/a Autoweb Solutions* (ERA Wellington WA 203/10, 20 December 2010) − website developer.
- *Wu v JDC New Zealand Co Ltd* (ERA Auckland AA 527/10, 23 December 2010) − restaurant chef.
- *Brunton v Garden City Helicopters Ltd* [2011] NZEmpC 29 − airplane pilot.
- *Casares v AAV New Zealand Ltd* [2011] NZERA Auckland 34 − accounts manager.
- *Jaques v Annandale Logistics Ltd* [2011] NZERA Auckland 117 − truck driver.
- *Sanders v Pulp Media Ltd (in liq)* [2011] NZERA Auckland 133 − magazine editor.

- *May v Armourguard Security Ltd* [2011] NZERA Auckland 208 – security guard.
- *Gibbs v Grasshopper Lawnmowing Services Ltd* [2011] NZERA Christchurch 182 – lawn mower.
- *Lundbom v Avisit Solutions Ltd* [2011] NZERA Auckland 436 – marketing and graphic design work for the IT industry.
- *Olivier v Cloudberry Business Solutions Ltd* [2012] NZERA Christchurch 73 – personal assistant.
- *Champion v White, Fox & Jones* [2013] NZERA Christchurch 103 – law firm consultant.
- *Kearns v Southern Institute of Technology* [2013] NZERA Christchurch 122 – assignment marker.
- *Stringer v Sanford Ltd* [2013] NZERA Auckland 345 – engineer for a fishing company.
- *Franix Construction Ltd v Tozer* [2014] NZEmpC 159 – managerial role.
- *Kluge v Jim Crosbie t/a Operative Brick & Block* [2014] NZERA Christchurch 189 – bricklayer.
- *Bucknell v Woolston Store Ltd* [2015] NZERA Christchurch 40 – market manager.
- *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19 – commercial cleaner.
- *O'Sullivan v Stargate Operations Ltd* [2015] NZERA Auckland 276 – general manager.

References

Related rulings/statements

IG 11/01: "Income tax; Goods and services tax - Determining employment status for tax purposes (employee or independent contractor)" *Tax Information Bulletin* Vol 24, No 5 (June 2012): 3

Subject references

Employment status for tax purposes
Goods and services tax
Income tax
Meaning of "contract for services", "contract of service", "employee", "employment", "PAYE income payment" and "taxable activity"

Legislative references

Employment Relations Act 2000, s 6
Goods and Services Tax Act 1985, s 6
Income Tax Act 2007, ss RD 3, RD 5, RD 7 and YA 1 and Schedule 4.

Case references

Bank of England v Vagliano Bros [1891] AC 107(HL)
Bryson v Three Foot Six Ltd [2005] NZSC 34, [2005] 3 NZLR 721
Bryson v Three Foot Six Ltd [2003] 1 ERNZ 581 (EC)
Case U9 (1999) 19 NZTC 9,077
Case X17 (2006) 22 NZTC 12,224
Case Z10 (2009) 24 NZTC 14,113
Challenge Realty Ltd v CIR (1990) 12 NZTC 7,212 (CA)
Challenge Realty Ltd v CIR (1990) 12 NZTC 7,022 (HC)
Enterprise Cars *Ltd v CIR* (1988) 10 NZTC 5,126 (HC)
Kiwikiwi v Maori Television Service (2007) 5 NZELR 6 (EC)
Lee Ting Sang v Chung Chi-Keung [1990] 2 AC 374 (PC)
Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173
Muollo v Rotaru [1995] 2 ERNZ 414 (EC)
New Zealand Educational Institute v Director-General of Education [1981] 1 NZLR 538 (CA)
R v Kerr [1988] 1 NZLR 270 (CA)
Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433 (QBD)
Stevenson Jordan & Harrison Ltd v MacDonalds [1952] 1 TLR 101 (CA)
Three Foot Six Ltd v Bryson [2004] 2 ERNZ 526 (CA)
TNT Worldwide Express Ltd v Cunningham [1992] 3 ERNZ 1,030 (EC)
TNT Worldwide Express Ltd v Cunningham [1993] 3 NZLR 681 (CA)
Tse v Cieffe (NZ) Ltd [2009] ERNZ 20 (EC)
Tsoupakis v Fendalton Construction Ltd (EC Wellington WC 16/09, 18 June 2009)

Appendix – Legislation

Goods and Services Tax Act 1985

1. Section 6 reads:

6 Meaning of term taxable activity

(1) For the purposes of this Act, the term **taxable activity** means—

(a) any activity which is carried on continuously or regularly by any person, whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for a consideration; and includes any such activity carried on in the form of a business, trade, manufacture, profession, vocation, association, or club:

(b) without limiting the generality of paragraph (a), the activities of any public authority or any local authority.

(2) Anything done in connection with the beginning or ending, including a premature ending, of a taxable activity is treated as being carried out in the course or furtherance of the taxable activity.

(3) Notwithstanding anything in subsections (1) and (2), for the purposes of this Act the term **taxable activity** shall not include, in relation to any person,—

(a) being a natural person, any activity carried on essentially as a private recreational pursuit or hobby; or

(aa) not being a natural person, any activity which, if it were carried on by a natural person, would be carried on essentially as a private recreational pursuit or hobby; or

(b) any engagement, occupation, or employment under any contract of service or as a director of a company, subject to subsection (4); or

(c) any engagement, occupation, or employment—

(i) pursuant to the Members of Parliament (Remuneration and Services) Act 2013 or the Governor-General Act 2010:

(ii) as a Judge, Solicitor-General, Controller and Auditor-General, or Ombudsman:

(iia) pursuant to an appointment made by the Governor-General or the Governor-General in Council and evidenced by a warrant or by an Order in Council or by a notice published in the *Gazette* in accordance with section 2(2) of the Official Appointments and Documents Act 1919:

(iii) as a Chairman or member of any local authority or any statutory board, council, committee, or other body, subject to subsection (4); or

(d) any activity to the extent to which the activity involves the making of exempt supplies.

Income Tax Act 2007

2. Section RD 3 reads:

RD 3 PAYE income payments

Meaning generally

(1) The PAYE rules apply to a **PAYE income payment which**—

(a) means—

(i) a payment of salary or wages, *see* section RD 5; or

(ii) extra pay, *see* section RD 7; or

(iii) a schedular payment, *see* section RD 8:

(b) does not include—

(i) an amount attributed under section GB 29 (Attribution rule: calculation):

(ii) an amount paid to a shareholder-employee in the circumstances set out in subsection (2):

(iii) an amount paid or benefit provided, by a person (the **claimant**) who receives a personal service rehabilitation payment from which an amount of

tax has been withheld at the rate specified in schedule 4, part I (Rates of tax for schedular payments) or under section RD 18 (Schedular payments without notification), to another person for providing a key aspect of social rehabilitation referred to in paragraph (c) of the definition of **personal service rehabilitation payment** in section YA 1 (Definitions).

When subsections (3) and (4) apply: close companies

(2) Subsections (3) and (4) apply for an income year when a person is a shareholder-employee of a close company, and—

(a) they do not derive as an employee salary or wages of a regular amount for regular pay periods—

(i) of 1 month or less throughout the income year; or

(ii) that total 66% or more of the annual gross income of the person in the corresponding tax year as an employee; or

(b) an amount is paid as income that may later be allocated to them as an employee for the income year.

Income in current tax year

(3) The person may choose to treat all amounts paid to them in the income year in their capacity as employee of the close company as income other than from a PAYE income payment.

Income in later tax years

(4) All amounts paid to the person in later income years in their capacity as employee of the close company are treated as income other than from a PAYE income payment.

If questions arise

(5) If a question arises whether the PAYE rules apply to all or part of a PAYE income payment, other than an amount referred to in subsections (2) to (4), the Commissioner must determine the matter.

3. Section RD 5 reads:

RD 5 Salary or wages

Meaning

(1) **Salary or wages**—

(a) means a payment of salary, wages, or allowances made to a person in connection with their employment; and

(b) includes—

(i) a bonus, commission, gratuity, overtime pay, or other pay of any kind; and

(ii) a payment described in subsections (2) to (8); and

(iii) an accident compensation earnings-related payment; and

(c) does not include—

(i) an amount of exempt income:

(ii) an extra pay:

(iii) a schedular payment:

(iv) an amount of income described in section RD 3(3) and (4):

(v) an employer's superannuation contribution other than a contribution referred to in subsection (9):

(vi) a payment excluded by regulations made under this Act.

Employees' expenditure on account

(2) A payment of expenditure on account of an employee is included in their salary or wages.

Payments to working partners

(3) A payment to a working partner under section DC 4 (Payments to working partners) is included in their salary or wages.

Payments to working owners

(3B) A payment to a working owner under section DC 3B (Payments to working owners) is included in their salary or wages.

Payments to past employees

(4) A periodic payment of a pension, allowance, or annuity made to a person or their spouse, civil union partner, de facto partner, child, or dependant in connection with the past employment of the person is included in their salary or wages.

Payments to Governor-General, members of Parliament, and judicial officers

(5) The following payments made under a determination of the Remuneration Authority are included in salary or wages

(aa) salary made to the Governor-General:

(a) salary or allowances made to a member of Parliament:

(b) salary and principal allowances made to a judicial officer.

Sum payable after office of Governor-General becomes vacant

(5B) A payment to a person made under section 7 of the Governor-General Act 2010 is included in the salary and wages of that person.

Certain benefits and grants

(6) A payment of the following benefits or grants is included in salary or wages

(a) a gratuitous payment as described in paragraph (a) of the definition of **pension** in section CF 1(2) (Benefits, pensions, compensation, and government grants):

(b) an income-tested benefit:

(bb) a veteran's pension, other than a veteran's pension paid under section 182 of the Veterans' Support Act 2014:

(bc) New Zealand superannuation, other than New Zealand superannuation paid under section 26(2)(b) of the New Zealand Superannuation and Retirement Income Act 2001:

(bd) a retirement lump sum paid under Part 5, subpart 7 of the Veterans' Support Act 2014:

(be) weekly income compensation paid under Part 3, subpart 4 of the Veterans' Support Act 2014:

(bf) weekly compensation paid under Part 4, subpart 5 of the Veterans' Support Act 2014:

(bg) weekly compensation or aggregated payments, as applicable, paid under schedule 2, part 4, clause 54, 55, 58, or 59 of the Veterans' Support Act 2014:

(c) a basic grant and independent circumstances grant made under regulations made under section 193 of the Education Act 1964, section 303 of the Education Act 1989 or an enactment substituted for those sections.

Parental leave payments

(7) A parental leave payment made under Part 7A of the Parental Leave and Employment Protection Act 1987 is included in salary or wages.

Accommodation benefits

(8) A benefit treated as income under section CE 1(1)(bb) (Amounts derived in connection with employment) is included in salary or wages.

Cash contributions

(9) An amount of an employer's superannuation cash contribution that an employee chooses to have treated as salary or wages under section RD 68 is included in salary or wages.

4. Section RD 7 reads:

RD 7 Extra pay

Meaning

(1) An **extra pay**—

(a) means a payment that—

(i) is made to a person in connection with their employment; and

(ii) is not a payment regularly included in salary or wages payable to the person for a pay period; and

(iii) is not overtime pay; and

(iv) is made in 1 lump sum or in 2 or more instalments; and

(b) includes a payment of the kind described in paragraph (a) made—

(i) as a bonus, gratuity, or share of profits; or

(ii) as a redundancy payment; or

(iii) when the person retires from employment; or

(iv) as a result of a retrospective increase in salary or wages, but only to the extent described in subsection (2); and

(c) includes an amount of income that a person derives under section CE 9 (Restrictive covenants) or CE 10 (Exit inducements) if the income is derived in connection with an employment relationship between the person and the person who paid the amount; and

(d) does not include a payment of exempt income.

Limit on retrospective increase in salary or wages

(2) A payment described in subsection (1)(b)(iv) is included in extra pay only to the extent to which,—

(a) it accrues from the start of the increase until the start of the first pay period in which the increase is included in salary or wages; and

(b) when a week ends with a Saturday, the total of the increase for the week, and of the salary or wages for the week excluding the increase, and of any other salary or wages that the person earns for the week, is more than $4.

5. Section RD 8 reads:

RD 8 Schedular payments

Meaning

(1) A **schedular payment**—

(a) means—

(i) a payment of a class set out in schedule 4 (Rates of tax for schedular payments); and

(ii) in relation to a sale, the net amount paid after subtracting from the purchase price all commission, insurance, freight, classing charges and other expenses incurred by the seller in connection with the sale; and

(b) does not include—

(i) salary or wages; or

(ii) an extra pay; or

(iii) a payment for services provided by a public authority, a local authority, a Maori authority, or a company, other than a non-resident contractor, a non-resident entertainer, or an agricultural, horticultural, or viticultural company; or

(iv) a payment covered by an exemption certificate provided under section 24M of the Tax Administration Act 1994; or

(v) a payment for services provided by a non-resident contractor who has full relief from tax under a double tax agreement, and is present in New Zealand for 92 or fewer days in a 12-month period; or

(vi) a contract payment for a contract activity or service of a non-resident contractor when the total amount paid for those activities to the contractor or another person on their behalf is $15,000 or less in a 12-month period.

Protected payments

(2) The fact that a schedular payment may be protected against assignment or charge does not override a person's obligation to withhold the amount of tax for the payment.

Determination of expenditure incurred

(3) The Commissioner may determine from time to time the amount or proportion of expenditure that a person incurs in deriving a particular schedular payment or class of schedular payments.