EMPLOYMENT LAW

Contractor or employee? The fallout from *Leota*

By Diana Clement

Courier drivers are rejoicing about a key Employment Court decision that, they say, clarifies their status as employees rather than independent contractors. "Praise be to Allah, Mr Pollak. Thank you for finally giving us a voice," one of the many said in a call to employment lawyer Garry Pollak following the court's judgment in *Leota v Parcel Express*.

The decision – that Mika Leota is an employee of Parcel Express rather than a contractor despite paperwork he signed to that effect – opens the way for other courier drivers to challenge their status in order to gain full employment rights.

Although Chief Employment Court Judge Christina Inglis has been clear that her decision relates specifically to Leota's circumstances, many lawyers are hailing it as a test case.

The decision will make it easier for anyone feeling he or she is being unfairly categorised as an independent contractor to seek legal redress.

And Pollak has another "contractor" case in his sights. He is acting for an Uber driver who's seeking to test his status though his claim before the Employment Court has been delayed by the Covid-19 lockdown. The court will decide similar issues to those in *Leota*. "The question will be whether or not an Uber driver is truly running a business," Pollak says.

Uber cases are being heard all around the world. In some countries such as the UK there is a third category of worker called a dependent contractor. Even so, dependent contractors are still entitled to minimum standards. New Zealand has s 6 of the Employment Relations Act 2000 (ERA) rather than a middle ground, Pollak says.

For Leota, it has been a long road, reaching right back to the Employment Contracts Act 1991 which led to an explosion of workers labelled as contractors. Since the landmark *Cunningham v TNT* case in 1993, tens of thousands of New Zealand workers, including courier drivers, security guards, and even actors playing Hobbits, regularly sign agreements that class them contractors, meaning they have few of the rights of employees.

Catherine Stewart

It's a very salutary reminder that simply because a worker is labelled an independent contractor does not mean they actually are

At the centre of the *Leota* case is s 6. This addresses the meaning of the word "employee" but, in spite of a plethora of cases seeking to test the definitions of "contractor" and "employee", it had not been fully tested for courier drivers until now, says Auckland barrister Catherine Stewart, the convenor of ADLS' Employment Law Committee.

Stewart adds that in making her decision, Chief Judge Inglis drew on the Supreme Court's discussion in *Bryson v Three Foot Six Limited (No 2)* in deciding how s 6 should be interpreted, particularly in relation to matters that should be taken into account to determine the real nature of the relationship.

The facts

Samoan-born Mika Leota, represented by Garry Pollak & Co, was described in court as vulnerable and naïve. He was recruited at church in 2018 to become a courier driver for South Auckland-based Parcel Express. Leota signed an agreement which referred to him as an independent contractor.

The court heard how Leota had to purchase his own van and pay to have it sign-written. He had to use a route determined by the company and take no more than 20 days' holiday a year. There were several other restrictions that more closely resembled the conditions of an employment contract than a contracting arrangement, the court heard. Leota's work with Parcel Express was eventually terminated after a disagreement and eventually, with the help of legal aid, he had his day in court.

An employee?

The chief judge noted the *Leota* case does not mean all courier drivers in New Zealand are employees. "It makes a declaration of Mr Leota's status only." But it is seen by many lawyers, courier drivers, union representatives and others as just that: precedent setting.

"It's a very salutary reminder that simply because a worker is labelled an independent contractor does not mean they actually are," says Pollak.

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LOCAL/CENTRAL GOVT

Disability advocates slam scooters-on-footpaths plan

By Rod Vaughan

Living Streets Aotearoa, one of the charities being represented by Sir David Williams QC in its bid to rid the footpaths of e-scooters, bicycles and other powered devices, believes the health and safety of pedestrians, especially the disabled, is at serious risk.

Spokesman Dr Chris Teo-Sherrell says the government's proposed Accessible Streets Regulatory Package is bad law-making and would be better-named the Inaccessible Streets Package as far as pedestrians are concerned.

In a highly-detailed 37-page submission on the package, Living Streets Aotearoa slates proposed rule changes that will allow people to ride light individual transport devices (LITDs) on the footpath.

They must be used courteously and considerately and without endangering others, be less than 750 millimetres wide and ridden below 15 kph.

Teo-Sherrell says the proposed speed limit is about seven times the speed of an elderly person walking.

"It's only a little slower than Zane Robertson's men's marathon NZ record that works out about 19 kmh. A golden rule of transport safety is to separate modes travelling at such different speeds. Police have neither the equipment – speed cameras are not accurate at low speeds – nor the resources to enforce the speed limit. So it is likely the limit will be ignored. That is bad law-making," he says.

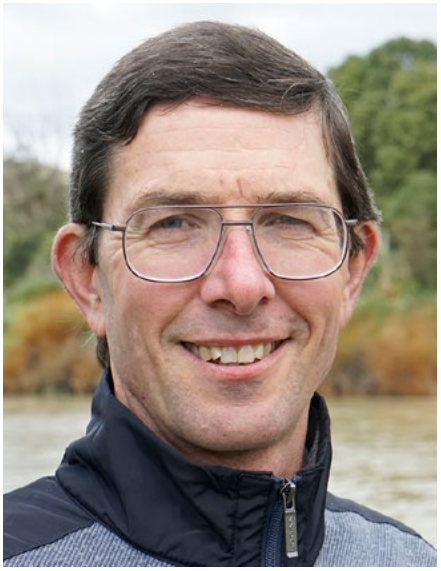
In its submission, Living Streets Aotearoa says nothing should be done that is likely to deter people from walking.

"To do otherwise would be contrary to the description of road safety given in the New Zealand Road Safety Strategy which the government has committed to," Teo-Sherrell says.

"Not only are there direct social and economic opportunity costs of discouraging people from walking but there are also environmental and congestion costs if those people who would have walked turn to motorised vehicles to get around.

"We point out that walking is the most space-efficient, affordable and environmentally-sustainable mode of transport that exists. It is also the second-safest mode of transport in New Zealand, outranked only by bus travel on a time-spent basis. The ability to walk about a city is also regarded as a key indicator of its liveability.

"Towns and cities will not be made more vibrant and liveable if footpaths are made unpleasant places for pedestrians. Having people out walking, socialising, shopping or exercising, not requiring them to be constantly vigilant for vehicles coming past them at speeds that make them feel unsafe, or at least uncomfortable, is what contributes greatly to vibrancy and liveability."



Dr Chris Teo-Sherrell

Towns and cities will not be made more vibrant and liveable if footpaths are made unpleasant places for pedestrians

Living Streets Aotearoa says allowing people of all ages to ride powered transport devices and bicycles on footpaths makes many pedestrians, not just the elderly or disabled, fearful of being struck, caused to fall, or expected to move out of the way.

"We have received reports of many pedestrians feeling unsafe in the presence of bicycles and e-scooters on the footpath, some to the extent that they are now fearful of going out on foot.

"We are baffled as to why the safety, and feelings of safety, of pedestrians on footpaths has been so compromised by these proposals. We believe the best way to achieve it is to provide distinct spaces for distinct modes of transport that travel at substantially different speeds. This is a basic principle of road safety.

"The Accessible Streets Package fails to achieve any improvements for pedestrians. It will make walking less safe for, and feel less safe to, pedestrians and consequently make our communities less accessible to us."

Living Streets Aotearoa says older people will be especially vulnerable.

"For older members of our community, a fall on a footpath can be fatal or result in long-term pain and incapacity and could make them very wary about using footpaths. They don't have to be hit to fall over. Even an e-scooter unexpectedly coming close to them can be enough for them to lose balance and fall. For some people, that is the nature of becoming old.

"As our older population increases, creating cities that are age-friendly will be even more important than it is today. Yet the proposal to allow all-ages-cycling and the riding of a wide range of other LITDs on footpaths is going in exactly the opposite direction."

Living Streets Aotearoa says for most people walking is the first and last exercise they undertake.

"In addition, for some older people who are unable or unwilling to drive or use public transport, walking may provide their only independent means of accessing services, facilities and events and so participate in the life of their community."

The group contends the proposed rule changes are likely to be profound for many disabled people, whether suffering from cognitive, sensory or motor impairments.

"Many disabled people are not old. Besides enabling many disabled people to access social opportunities, safe footpaths also enable access to work and learning opportunities.," Teo-Sherrell says.

"The financial cost of disabled people not being as able to be fully part of the workforce ....has been estimated [by NZIER] to be in the hundreds of millions of dollars. Transport was identified as one of the barriers disabled people faced. This barrier will be exacerbated if cycling and use of powered LITDs are allowed on footpaths.

"In turn, this will increase the economic cost and further disadvantage disabled people by preventing them from fully and equally enjoying all human rights and fundamental freedoms to which they are entitled in the same way that people who are not disabled are entitled to them."

Living Streets Aotearoa says this appears to be in contravention of the purpose of the 2006 UN Convention on the Rights of Persons with Disabilities (UN CRPD).

New Zealand was instrumental in developing the UN CRPD with Don Mackay, New Zealand's ambassador to the UN at the time, chairing the committee that drafted the text of the convention. "It would be extremely embarrassing for New Zealand to make such an egregious breach of the convention," Teo-Sherrell says.

"It is most disturbing that the UN CRPD was not recognised among our international obligations on p78 of the Accessible Streets Consultation

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EMPLOYMENT LAW

Covid-19: Getting relationships back on track

Employers who made staff redundant during the Covid-19 lockdown are being urged to rethink their decisions, particularly if proper termination processes were not followed.

To facilitate this, two ADLS committees – Employment Law and Immigration & Refugee Law – have compiled an information guide and checklist for employers and employees in a bid to get employment relationships back on track. Employment law is based on good faith and the committees say it is always possible to remedy situations through good faith discussions and agreement. Even if there has been a termination, it is possible to reinstate an employee – for example, if the situation has changed or wrong advice was followed.

Migrant workers are particularly vulnerable to redundancy and termination, says Deborah Manning, convener of the Immigration & Refugee Law Committee. At highest risk are those who found themselves outside New Zealand when the border was shut. Many have lived here for several years, Manning says, and have built lives in this country. But their work visas are tied to their jobs and if they're made redundant, they risk losing their visas and may face deportation.

"Employers have sent them a letter saying, 'as you can't return, you no longer have work'," Manning says. "But under employment law you can't just terminate someone. There needs to be a process you work through. We also know some employers got poor advice about what they could do when the border was closed and lockdown began.

"The concern is that people have been unlawfully terminated and their visa is at risk of being cancelled so they won't be able to return to New Zealand. Employers may have rushed into termination. We want them to take a deep breath, reinstate these employees and get the relationship back on track."

Onshore migrant workers are also facing the drastic consequences of termination as they cannot leave New Zealand but are not eligible for benefits. "They are in dire straits and we are saying the government needs to exercise its discretion and give them access to social security," Manning says.

Avoiding grievances

Resolving the employment situation is important for the employer, the two ADLS committees say. Engaging in good faith discussions can avoid a personal grievance being raised or other claims from being brought.

A personal grievance or other claim against an employer can lead to legal action by the employee and serious penalties from MBIE such as losing the ability to support visas in the future or being on a list of non-compliant employers.

Deborah Manning

Additionally, as New Zealand slowly starts to normalise after Covid-19, businesses will need employees again. By retaining employees, firms will not need to go through the recruitment and visa application process again.

FOR EMPLOYERS

Before you lay off your employee, consider the following:

- Can you apply for the wage subsidy from the government to help pay your employee's wages?
- Do you qualify for small business assistance from the government?
- Is your landlord willing to reduce or renegotiate your rent or lease?
- Is your bank willing to extend your loans or offer new ones at the current low interest rates?
- Can you approve unpaid leave for your employee until he/she can start work again?
- If you have no other options, have you gone through a proper and fair redundancy process?
  - Told the employee what you're proposing and why?
  - Given the employee time to consider your proposal and give you feedback, including proposing alternatives?
  - Genuinely considered their feedback before making a decision?
  - Offered your employee support?
  - Considered alternative positions or other options such as reduced hours?
  - Paid the employee's notice period and entitlements (eg, accrued annual leave and KiwiSaver)?

You need to follow a proper redundancy process and cannot make the decision by yourself. It needs to be discussed with your employee and a proper process followed. Otherwise, you may be opening yourself up to personal grievances, possible Employment Relations Authority action and/or not being allowed to support future visas by Immigration New Zealand.

If you have already laid off your employee without consultation, it's not too late to try to fix this if your former employee is also willing to try.

- If your employee is stuck offshore, discuss the option of taking unpaid leave until he/she can come back to New Zealand and work again.
- If your employee is in New Zealand, but you cannot pay his/her wages due to a drop in income:
  - Apply for the wage subsidy, or small business assistance.
  - Discuss the possibility of unpaid leave.
  - Discuss the possibility of reduced hours and pay.
- Remember, employees must agree to any changes to their employment terms. You cannot change them unilaterally.
- Employees have 90 days to raise a personal grievance (complaint) against employers.
- Your best option is always to negotiate with your employee and resolve matters through agreement. Employment is a relationship – keep it positive.
- Check the wording of the employee's contract to see what your options might be, especially if there is a Collective Employment Agreement. Check to see what it says about unpaid leave.

FOR EMPLOYEES

Resolving the employment situation is important for migrant visa holders. Losing an employment position leads to a cancellation of their visa. Staying employed is extremely valuable and important to the employee.

If you have been laid off without consultation:

- You have 90 days from the date of your termination (including redundancy) to raise a personal grievance against your employer. This timeframe can be extended only in exceptional circumstances.
- Send your employer this factsheet and start a conversation about your redundancy and whether there's a good alternative.
  - Your employer needs to discuss the possibility of redundancy with you, explain

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For the drivers, employee status is an important issue, says Pollak. Employees have access to a range of statutory entitlements, including minimum wages and holiday pay, redundancy, parental leave, KiwiSaver contributions by employers, and the personal grievance procedures and remedies under the ERA. Employees can also join unions and engage in collective bargaining.

Parcel Express is a small player in the industry with a minimal number of drivers. In evidence, however, its chief executive John Cole explained he had previously worked at Freightways, New Zealand's largest courier company, and his systems and practices at Parcel Post were "in most instances" consistent with those of the industry-leading player.

Freightways was sufficiently concerned about the potential outcome of the case that it applied, and was granted leave, to appear and be heard as intervener. It argued that the court's findings could potentially impact on all courier drivers in New Zealand and particularly on its business, since it operated a network of owner-driver contractors.

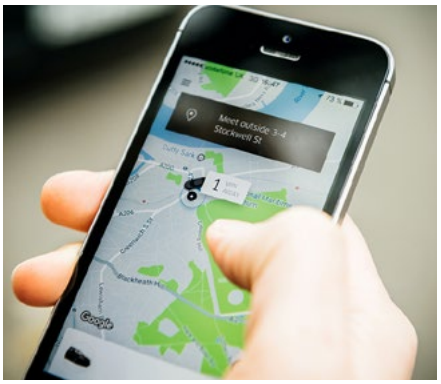
In his decision about the leave to appear, Judge Bruce Corkill said there was a longstanding, and at that time settled, common law position in New Zealand that couriers were classified as contractors. The judge noted: "Were it to be held the plaintiff was an employee, necessary changes to courier businesses may follow, and affect how services are to be provided to an end user."

Precedent setting?

Until now, the threshold question of status has been a point of contention and not well addressed, says Pollak. "Contractors are such a huge part of our economy and the practice of avoiding employment obligations has run riot. Very sadly, we have created an underclass of workers labelled independent contractors who are paid poorly and exploited."

He says the decision has put to rest the often-quoted *Cunningham v TNT* case. "This is a particularly well-written judgment – extraordinarily clear and concise in how she so correctly analysed the various legal threads. It is very timely and telling. It reinforces the principle that simply because you label a worker an independent contractor it does not mean in fact and in law that they are an independent contractor."

Though the chief judge was at pains to point out the facts of the case related to Leota alone and not courier drivers more generally, many lawyers are viewing it broadly.



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Are Uber drivers employees or contractors?

The court's decision to grant him employee status will help to embolden other workers to raise personal grievances

Stewart, for example, says it is more than a decision about a single worker. "This has been a long time coming. I have to say it is a very strong judgment." She is in no doubt this is a test case and should make future cases more straightforward. Similarities will be drawn, and it has laid the groundwork for further such employee versus contractor tests in the future.

In particular, says Stewart, the table of indicia included in the judgment strips back to fundamentals the question of whether the worker serves his or her own business, or someone else's. "That is a fundamental question, although there could still be room for an argument between the parties as to the application of the table or its components."

Nonetheless it is not a blueprint and each case should be considered in its totality of evidence, she says.

"There are some strong messages being given in this," says Stewart. "One clear message is that since the enactment of the Employment Relations Act the strict contractual analysis of an agreement is no longer appropriate in the current employment law sphere in New Zealand.

"The chief judge makes a statement that every worker in New Zealand has a statutory right to seek a declaration as to whether they are an employee. These situations are intensely factual so you can't be more black and white than her Honour has been."

Vulnerable workers

Leota v Parcel Express is likely to be influential further afield than employment law. It is already being referenced in other cases and is also being noted by policymakers.

The case could lead to better outcomes for groups of vulnerable workers such as Pasifika who figure too rarely in New Zealand's civil law system, says Pollak. "Civil law is expensive, perceived to be intimidating and often such workers choose to go to their church instead or do not pursue their legal rights."

The Ministry of Business, Innovation & Employment (MBIE) is working on a project to protect contractors. It is reviewing feedback from the Better Protections for Contractors discussion document and will report back to Workplace Relations and Safety Minister, Iain Lees-Galloway. That report will include options for change and will factor in Covid-19's impact on workforces and workplaces.

First Union has stepped up its discussions with drivers and courier companies and has reported that following the *Leota* decision, FedEx New Zealand gave notice to terminate all contracts with drivers, offering them employee status instead, says Jared Abbott, First Union's secretary for transport, logistics and manufacturing.

Abbott, who was an expert witness in *Leota*, says the irony that FedEx had merged recently with TNT was not lost on the union.

He says the union will expect drivers to be earning more than minimum wage and is hoping to be able to bargain collectively on their behalf across the industry. The union already has Freightways' employees working in other parts of the business as members.

The next step for Leota, says Pollak, is to pursue a dismissal case. Leota is seeking holiday pay and the resolution of his personal grievance. The court's decision to grant him employee status will help to embolden other workers to raise personal grievances, says Stewart.

The parties have 28 days from 7 May to appeal.