IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2010] NZEMPC 132
CRC 26/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MALCOLM JAMES MCDONALD Plaintiff
AND	ONTRACK INFRASTRUCTURE LIMITED First Defendant
AND	ALLIED WORK FORCE LIMITED Second Defendant

Hearing: 29 April 2010
(Heard at Wellington)

Court: Chief Judge G L Colgan
Judge B S Travis
Judge A A Couch

Appearances: Peter Churchman and Ms Beecroft, counsel for plaintiff
Peter Chemis an Ms Ahn, counsel for first defendant
Gillian Service and Mrs Moore, counsel for second defendant

Judgment: 5 October 2010

JUDGMENT OF THE FULL COURT

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[1] This is the first case in New Zealand to deal with triangular or tripartite employment relationships. The plaintiff, Mr McDonald, had a written agreement (described as an "Individual Employment Agreement (Casual Staff)" (the written casual agreement)), with the second defendant (Allied), a labour hire company that provides individuals on a casual basis to clients to cover temporary work requirements. One of those clients was the first defendant (Ontrack). Ontrack has a number of permanent employees but also uses Allied to source casual labour as and

when required. There is a formal contractual relationship between Ontrack and Allied for the supply of such temporary workers. There is no suggestion that these contractual arrangements are a sham.

[2] In March 2007 the plaintiff accepted an assignment from Allied to work for Ontrack, in a gang of 11, repairing the railway line between Picton and Invercargill. Nine members of the gang were permanent employees of Ontrack, the plaintiff and one other member of the gang had come from Allied. This placement was terminated on 8 November 2007.

[3] Mr McDonald claims that the circumstances of the placement constituted a contract of service between him and Ontrack which enabled him to invoke the provisions of the Employment Relations Act 2000 (the Act) and to bring a personal grievance that he had been unjustifiably dismissed by Ontrack.

[4] The plaintiff, through his counsel, Mr Churchman, has submitted that this is not a case where the written casual agreement between Mr McDonald and Allied ceased while he was placed with Ontrack. It is the plaintiff's contention that while the written casual agreement remained, some time after he started the placement there came into existence an additional employment agreement between Mr McDonald and Ontrack.

[5] The defendants claim that while he was assigned to Ontrack, Mr McDonald remained under a contract of service with Allied and was never employed on a contract of service by Ontrack. They claim there was no contract of any nature between Ontrack and Mr McDonald.

The course of the proceedings

[6] In the Employment Relations Authority there was an issue between the parties as to what test or approach should be applied to determine whether there was a contract of service and with whom. The Authority recorded the defendants' submissions that the real nature test in s 6 of the Act was not relevant in a tripartite arrangement of temporary agency employment and placement with an end user,

given the express contractual arrangements between the parties. Section 6, insofar as it is relevant, provides:

> **6 Meaning of employee**
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> (1) In this Act, unless the context otherwise requires, **employee**—
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> (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
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> (b) includes—
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> (i) a homeworker; or
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> (ii) a person intending to work; but
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> (c) excludes a volunteer who—
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> (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.
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> (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—
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> (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.
>
> ...

[7] The Authority accepted the defendants' submissions that in applying s 6 to determine whether there was a contract of service between Mr McDonald and Ontrack, it was bound to apply the traditional tests adopted by the Supreme Court in *Bryson v Three Foot Six Ltd*[1] namely the intention, control, integration, and the fundamental tests. The Authority observed that, given the particular situation, all of the traditional tests might not be straightforward to apply.

[8] In a carefully reasoned decision the Authority endeavoured to apply those tests to determine, in accordance with s 6(2), the real nature of the relationship between Mr McDonald and Ontrack. It found it was not necessary to imply an employment agreement between Mr McDonald and Ontrack and that Ontrack was not his employer. It held he was employed by Allied. It found Mr McDonald to have had no unjustified dismissal grievance against Ontrack but ordered Allied to

[1] [2005] ERNZ 372.

pay him, under s 23(2) of the Holidays Act 2003, 8 per cent of his gross earnings during his placement with Ontrack.

[9] Mr McDonald has accepted the Authority's determination of his holiday pay claim. The defendants have not challenged any part of the Authority's determination. Mr McDonald has, however, challenged the finding of the Authority that he did not have a contract of service with Ontrack by way of a non de novo challenge against this part of the Authority's determination.

[10] As the issue of triangular employment relationships had not previously been dealt with by courts in New Zealand, and there appeared to be a fundamental disagreement between the parties as to the approach the Authority or the Court should take to resolving the issue of whether there was a relevant contract of service, Chief Judge Colgan determined that the matter should be dealt with by a full Court. It was intended that the full Court would determine the approach to be taken by the employment institutions to resolving the issue and would then proceed to decide whether or not there was a contract of service between Mr McDonald and Ontrack. If there was, a single Judge would then resolve Mr McDonald's personal grievance claim against Ontrack. To this end the parties agreed to proceed by way of an agreed statement of facts with no viva voce evidence and an exchange of legal submissions in advance of the hearing.

[11] At the commencement of the full Court hearing the Court observed that in at least two material respects, the plaintiff's written submissions referred to factual matters that were not agreed between the parties. It was also clear, from the cases relied on by the parties, that the inquiry into whether there was a contract of service was an intensely factual one.

[12] After hearing submissions from the parties it became clear that the full Court could not resolve the issue of whether there was a contract of service between Mr McDonald and Ontrack from the agreed statement of facts and documents that had been filed. The Chief Judge then issued a ruling on behalf of the Court the relevant part of which states:

> Unlike the situation in the Authority the parties now all agree that s 6 of the Employment Relations Act 2000 is applicable to the matter now before the Court. Cases on s 6 including in particular *Bryson* in the Supreme Court all emphasise that considerations under s 6 are intensely factual. So too do the cases to which we have been referred by counsel in preparation for today's hearing. We have a concern that evidence which may be relevant, may not have been adduced before the Authority or, if it was, sufficiently addressed before the Authority and in the Authority's determination. Likewise, we have a concern that relevant evidence may not be sufficiently addressed in the parties' statement of agreed facts ... The role of the Court in today's hearing will be to determine the law applicable to the facts that are to be determined subsequently by a single Judge ... In those circumstances we will proceed to hear counsel's submissions but the application of the facts to those submissions will necessarily have to be at a subsequent hearing before a Judge which will answer the question of the identity of Mr McDonald's employer and the merits of his grievance.

The current position

[13] In his non de novo challenge Mr McDonald seeks "reinstatement to his former position as a trainee track worker with the first defendant" (Ontrack). He also seeks reimbursement of lost wages, interest, and compensation for humiliation, loss of dignity and injury to feelings. As presently pleaded, it is not clear from which defendant this relief is sought.

[14] As the Chief Judge's ruling indicates, it had become common ground between the parties that Mr McDonald can only pursue his claim for relief against Ontrack if he can establish that a contract of service existed between him and that company. It was also now common ground that the provisions of s 6 were to be applied in determining whether such a contract existed. Further, the parties were now agreed that the tests endorsed in *Bryson* were relevant to the issue of determining the status of a contract, that is to say whether it was a contract of service, or a contract for services. A person employed under the latter contractual arrangement is an independent contractor and has no rights to pursue a personal grievance under the Act. In this case there is no issue between the parties that, if there was a contract between Mr McDonald and Ontrack, it was a contract of service governed by the provisions of the Act. The tests in *Bryson*, therefore, had no direct application and, as a matter of practicality, did not appear to assist in determining whether there was any contract at all between Mr McDonald and Ontrack.

[15] As the factual matters will not be determined in this judgment, we will not attempt to summarise them further or refer to the agreed statement of facts.

Submissions of the parties

[16] Mr Churchman for the plaintiff contended, in applying s 6 to determine whether there was an employment relationship, stressed the meaning of "employee" in s 6(1)(a) which centres on a contract of service. He submitted that the Court or the Authority must look at the real nature of the relationship and no other test can be contemplated. He addressed the English case law, including cases such as *James v London Borough of Greenwich*.[2] This case, he submitted, turned on whether a contract should be implied on the facts and involved the application of the business efficacy or reality test set out in *The Aramis*[3] and dicta in *Dacas v Brook St Bureau (UK) Ltd.*[4] In *Dacas* the Court of Appeal said[5]:

> 17 The critical point is that, although the construction of the contractual documents is important, it is not necessarily determinative of the contract of service questions, as contractual documents do not always cover all the contractual territory or exhaust all the contractual possibilities. In determining the true nature of the relationship (if any) between each of the respective parties, it is necessary to consider the total situation occupied by the parties. The totality of the triangular arrangements may lead to the necessary inference of a contract between such parties, when they have not actually entered into an express contract, either written or oral, with one another. Although there was no express contract between the applicant and the end-user in this case, that absence does not preclude the implication of a contract between them. That depends on the evidence, which includes, but may not be confined to, the contractual documents.

[17] In both *Dacas* and *James* the workers were engaged under contracts for services by the agencies. This meant that if they did not have any contractual relationship with the end user, they had no protection under the English employment legislation. Similarly they would have had no protection in New Zealand under the Act.

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[2] [2008] EWCA Civ 35, [2008] IRLR 302(CA).
[3] [1989] 1 Lloyds Rep 213.
[4] [2004] EWCA Civ 217, [2004] ICR 1437.
[5] At [17].

[18] As Mr Churchman noted, however, the English statutory framework defines a contract of service as including an "implied contract".[6]

[19] Mr Churchman observed that *James* was applied in the Employment Appeal Tribunal in *East Living v Sridhar*,[7] the following passage from which was cited by the Employment Relations Authority with approval in the present matter:

> That is one should ask firstly whether or not the express contractual arrangements put in place at the outset adequately explain the actual relationship of the three parties involved at that stage. Then, secondly, if they do, ask whether or not any subsequent words or conduct of the parties have changed matters. Then, thirdly, if they have (or if the answer at the first stage was in the negative), ask whether or not in light of those changes, it is necessary to imply a contract of employment, taking into account at that stage of the irreducible minimum mutuality of obligation that is required for there to be a contract.

[20] Mr Churchman then referred to the Australian case law and in particular the Federal Court of Australia's decision in *Damevski v Giudice*[8] which, he submitted, set out some tests[9] for when the end user has been held not to be the employer of the worker. These included:

(a) where the hiring agency interviewed and selected the workers and determined their remuneration without reference to the end user;

(b) where the workers have been required to keep the agency informed of their availability to work and were not free to undertake work for a client which had not been directed or arranged by the agency;

(c) where equipment was either supplied by the worker or the hiring agency, except for specialised safety equipment supplied by the end user; and

(d) whether the dismissal could only be effected by the hiring agency.

[21] *Damevski* had distinguished an earlier Federal Court decision in *Building Workers Industrial Union of Australia v Odco Pty Ltd.*[10] Mr Churchman relied on one of the factors taken into account in *Odco*, that the hiring agency would be liable

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[6] Section 230(2) Employment Rights Act 1996 "a contract of service or apprenticeship whether express or implied, and (if it is express) whether oral or in writing": see *Dacas* at [16].
[7] 2008 WL 4898825.
[8] 202 ALR494, [2003] FCAFC 252.
[9] At [174] (per Merkel J).
[10] (1991) 29 FCR 104.

to pay the worker at the rate they had agreed, whether or not it received payment from the end user. Finally he referred to *Melbourne v JC Techforce Pty Ltd*,[11] in which it had not been argued there was an employment contract with the end user, although the Industrial Relations Commission of South Australia suggested that most of the normal indicia of an employment contract appeared to have existed.

[22] Turning to the New Zealand cases, Mr Churchman referred to a decision of the Taxation Review Authority[12] where the relationship between the taxpayer, which was an employment agency, and the workers, who were described as self-employed contractors, was being examined and not the relationship between the workers and the end users with the clients. It was held that the agency did not have to make PAYE contributions because the workers were not controlled by the agency or integrated into its organisation and were not its employees.

[23] Mr Churchman then referred to another determination of the Authority, *Yukich v Allied Workforce Far North Ltd.*[13] This case did not deal with the relationship (if any) between the end user and the worker. We agree it does not assist.

[24] Mr Churchman submitted that the principles to be derived from the overseas cases which have dealt with tripartite arrangements are somewhat difficult to reconcile, but what could be seen clearly was a willingness by both the Australian and English courts to make the inquiry a factual one, whether against the agency and alleged employee or the alleged employee and the end user. He submitted that these jurisdictions can be reconciled with New Zealand's broad and encompassing test under s 6(2) of the Act. We agree that the effect of s 6(2) is to make the inquiry into whether the person is employed under a contract of service an all inclusive and largely factual exercise. Mr Churchman then submitted that guidance from the overseas cases on the express and implied tests should be considered as part of the real nature test and that the distinction between an express and an implied employment relationship does not have any significant weight in light of s 6(2). This

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[11] [1998] SAIR Comm 62 (unreported, 23 July 2008).
[12] *M122* (1990) 12 NZTC 2,779, (1990) 15 TRNZ 308.
[13] AA 3/08, 11 January 2008.

is an issue we shall deal with later. He submitted that an employment agreement can be an oral agreement and there does not need to be compliance with s 65 of the Act for such agreement to be enforceable, citing *Warwick Henderson Gallery Ltd v Weston (No 2).*[14]

[25] Mr Churchman referred to the guidance the Court could derive, when considering all relevant matters, from cases such as *Curlew v Harvey Norman Stores (NZ) Pty Ltd*[15] and *Koia v Carlyon Holdings Ltd.*[16] These cases show, he submitted, as does s 6(2), that the labels the parties have used should not be treated as determinative.

[26] Mr Churchman also submitted that factors such as those outlined in *Jinkinson v Oceana Gold (NZ) Ltd,*[17] a case which determined that a relationship had moved from casual to permanent employment, could be applied in the present case. These factors could determine whether, although at the start of the relationship between Mr McDonald and Ontrack there might have been no mutual obligations of ongoing work, events had occurred by the end of the placement which had superseded the original, casual, temporary arrangement.

[27] Mr Chemis, counsel for Ontrack, contended that the issue for the Court was whether the otherwise unambiguous and lawful tripartite labour arrangement changed at some point in time. He submitted the issue was whether the plaintiff at some point ceased to be an employee of Allied and had become an employee of Ontrack, or whether he had become an employee of both Allied and Ontrack. He submitted these were questions of law and fact that needed to be considered and determined within the framework of s 6. He observed that this situation was quite different from where the Court is asked to consider whether an existing contract between two parties is a contract of service or a contract for services. In the present case the parties were in a formal legal relationship and the Court must determine whether there was a contract of any nature between Mr McDonald and Ontrack.

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[14] [2005] ERNZ 921, [2006] NZLR 145 (CA).
[15] [2002] 1 ERNZ 114 at 46.
[16] [2001] ERNZ 585.
[17] [2009] ERNZ 225.

[28] Mr Chemis submitted that s 6 was not an open ended framework that would allow the Court to otherwise disregard or ignore contractual principles. Before the Court could "impose" a contract, he submitted it must have a sound legal basis for doing so and all the standard legal elements essential for the formation of a contract must be present, that is offer and acceptance, certainty of terms, intention to create legal relations and consideration. To succeed, he submitted, the plaintiff would need to establish that these elements were present or implied. In this regard he submitted that the English case law and particularly *James*, was on point and should be adopted. It provided that in a tripartite employment situation, where the arrangements are genuine and represent the actual relationship, it will be a rare case where the Court will imply a contract between the workers and the end users. Mr Chemis submitted it will only be appropriate to imply a contract if there are some words and conduct which suggest that the express contractual arrangements in place no longer adequately reflect the relationship between the parties. The relationship at the beginning will have to be shown to have changed materially. For the reasons we will give we accept these submissions.

[29] Mr Chemis referred to *Harlow District Council v O'Mahony*[18] as an example of a case where the circumstances did change and the Employment Appeal Tribunal found that the reality of the relationship between the end user and the claimant was only consistent with an employment agreement being implied between them. One of the most material factors in that case was that a month into the placement another position came up and the end-user offered that role to the claimant. A new arrangement was entered into directly between the claimant and the end user after negotiations between them for a pay increase, all without the involvement of the agency.

[30] Mr Chemis submitted that the Australian case law was helpful as it approaches the issue in the same manner. He cited the *Damevski* case which required the established principles of contract law to be applied to all the relevant evidence including the conduct of the parties to determine whether a contract could be implied to exist. He also referred to the *Melbourne* case which he distinguished

[18] 2007 WL 3001900, 21 June 2007.

on the basis that it was a claim by a temporary worker against the labour hire agency with whom she had a casual employment relationship and there was no issue that the agency was the employer. Turning to the New Zealand position, Mr Chemis distinguished the *Yukich* case, which was also about the nature of the employment relationship between the employee and Allied, the labour hire company employer. He then cited *Mehta v Elliott (Labour Inspector)*,[19] where Chief Judge Colgan stated that the question of who was the employer must be determined at the outset and if that identity is said to have changed there must be evidence of mutual agreement.

[31] Ms Service, for Allied, submitted the Court should be extremely hesitant in finding that an employment relationship between Mr McDonald and Ontrack existed in circumstances where the parties expressly intended one not to exist. She submitted that this would introduce unnecessarily widespread change and significant uncertainty to an established and entirely legitimate labour hire industry. She observed that such arrangements are not uncommon nor are they unique to New Zealand citing *Workforce 2020 Forces For Change in the Future Labour Market of New Zealand.*[20] She submitted there are no specific provisions in New Zealand law that directly addressed the issue of employer identity in the context of tripartite arrangements. She referred to the Employment Relations Amendment Bill (No 3) which proposed to allow remedies against "controlling third parties" who caused or contributed to the situation giving rise to the grievance. The Bill did not purport to interfere with the legitimate tripartite arrangements. The Bill was introduced on 9 September 2008 and did not survive beyond its first reading, being discharged in March 2009.

[32] Ms Service addressed what she described as the "liquidation cases" where there was no dispute that an employment relationship existed, but the identity of the employer was in question, usually as the result of the identifiable employer having been struck off the New Zealand company register. She relied in particular on *Mehta* and *Orakei Group (2007) Ltd v Doherty*[21] from which she derived the following principles:

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[19] [2003] 1 ERNZ 451 at [22].
[20] Wellington, Department of Labour, October 2008.
[21] [2008] ERNZ 345.

(a) Where the identity of the employer is in question the onus is on the employee on the balance of probabilities to prove the identity;

(b) the Court must make an objective assessment of the evidence of identity;

(c) the identity of the employer must be determined as at the outset of the employment relationship; and

(d) any subsequent changes to that relationship must be supported by evidence of mutual agreement.

[33] Ms Service also addressed the overseas authorities and submitted that the English Court of Appeal had shown a reluctance to conclude that an employment relationship existed between an agency worker and the end user when no express agreement existed. She noted that this has been so even where the relationship between the agency and the worker was that of an independent contractor and the claimant will therefore have no recourse against either the agency or the end user. Ms Service distinguished that situation from the present case where Mr McDonald has argued that he is without remedy if Ontrack was not his employer. This is not correct, she submitted, because Mr McDonald was at all times employed by Allied and therefore has remedies against Allied for any proved grievance.

Discussion and decision

[34] We agree with counsel that the Court must approach the issue of whether there is a contract of service between Ontrack and Mr McDonald by applying s 6 of the Act. We also note that, contrary to the submissions made by Mr Churchman, s 6 does not refer to "employment relationships". It requires, for the purpose of deciding whether a person is employed by another person under a contract of service, that the Court must determine the real nature of the relationship between them (s 6(2)). The Supreme Court in *Bryson* confirms that a contract of service is a definition which reflects the common law.

[35] If the real nature of the relationship between the parties is something other than a contract of service, there is no coverage under the Act.

[36] The onus is on Mr McDonald to establish the existence of a contract of service between himself and Ontrack. We agree with Mr Chemis that such a contract must satisfy the common law requirements of offer, acceptance, contractual intention, consideration, and certainty. That is consistent with the English and Australian authorities cited.

[37] The provisions of the Employment Relations Act do not refer to an implied contract, unlike the English provisions.

[38] In a recent decision of the Federal Court of Australia, *Wilton & Cumberland v Coal & Allied Operations Pty Ltd*,[22] which dealt with a tripartite arrangement, Conti J expressed reservations as to whether, what he described as the controversial notion of implied relationships of employment acknowledged in the statute in the United Kingdom, should be imputed into the general law of Australia. He noted the difficulty of imputing any implied contract of employment in circumstances of labour hire which would be a transaction which inherently constituted dual contractual arrangements, one being between the provider of the hired worker and the hired worker, and the other being between the provider of the hired worker and the third party.

[39] However, if an "implied contract" is meant to cover the situation where all of the necessary incidents of a contract are established by implication from the parties' overt conduct rather than by reference to their expressed intentions, then we have no difficulty in accepting and applying that term as a tool to analyse the present situation.

[40] To determine the real nature of the relationship the Court must consider "all relevant matters" including those that indicate the intentions of the parties and is not to treat any statement by the parties describing the nature of their relationship as

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[22] [2007] FCA 75.

determinative (s 6(3)). As was stated in *Bryson* "all relevant matters certainly include the written and oral terms of any contract between the parties."

[41] We agree with counsel that the starting point in a case like the present is the contractual documents that existed at the commencement of the placement. That will not, however, be determinative of the real nature of the relationship between Mr McDonald and Ontrack or Mr McDonald and Allied. If there have been any communications or actions or documentation from which the intention of the parties can be derived, then the real nature of the relationship may be determined as something different to that disclosed in the contractual documents. If, on the totality of the evidence, the Court is able to conclude that Mr McDonald and Ontrack, at some point, entered into a contract of service, and this was their relationship at the termination of the placement, Mr McDonald will be free to pursue his personal grievance against Ontrack.

[42] From the agreed statement of facts it does not appear that Mr McDonald asserts that, at the commencement of the placement, there was a contract of service between himself and Ontrack. That would be difficult to assert on the state of the documentation at the outset and the lack of communication between Ontrack and Mr McDonald at that point in time. Nor does Mr McDonald claim there was an offer made to him in express terms of a contract of service. Instead, he is seeking to have the Court imply a contract of service with Ontrack from the totality of his dealings, presumably with both Ontrack and Allied.

[43] The authorities referred to by counsel provide some guidance on the sort of factors that have led other courts to conclude whether or not there is a contract of service between a worker and the end user. Where, for example, an express offer of another position has been made by the end user and there have been negotiations for a pay increase which excluded the agency, it is not surprising that the Employment Appeal Tribunal in the *Harlow District Council* case found a contract of service had come into existence.

[44] We also gained some assistance from the *Wilton & Cumberland* decision. In that case a labour hire entity had supplied casual labour for a coal mine operator

where the labourers worked on site alongside the mining company's employees. The issue was whether those persons so hired became employees of the mining company as a matter of law, irrespective of the extent of the contractual relationship which they had with the labour hire provider. The Judge examined the Australian and United Kingdom authorities and found that no employment arrangement as a matter of fact existed between the mining company and the workers. The Court was invited to look at the total relationship between the applicants and the coal miner and, in particular, the conduct that occurred after the relationship commenced. The Court cited from *Mead v New England Seed Traders Pty Ltd*,[23] where it was noted that:

> The parties to a contract may well not be conscious either that the legal consequence of what they have done is the creation of an enforceable contract, or that the law will spell a contract of service out of their dealings.

[45] After examining the English and Australian authorities, including all of those referred to by counsel in the present case, the Court stated that the test was to determine the real nature of the employment relationship which included examining whether there had been an intention to create legal relations and the issues of agreement and consideration.

[46] After referring to the issue of whether the parties had agreed on all essential terms on an objective basis, the Court found that the concept of a contract existing by mutual assent has been recognised in circumstances where the traditional analysis of offer and acceptance is inappropriate. *Damevski* is one of the cases cited as authority for that proposition.

[47] We agree with the quotation contained at para [28] of the *Wilton & Cumberland* case from *Ermogenous v Greek Orthodox Community of SA Inc*[24] as to whether a contract of employment was mutually intended[25]:

> Because the inquiry about this last aspect may take account of the subject matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances, not only is there obvious difficulty in formulating rules intended to prescribe the kinds of

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[23] [1972] WCR (NSW) 113 at 117 from the joint judgment of Kerr CJ and Hope JA.
[24] [2002] 209 CLR 95.
[25] At [25].

> cases in which an intention to create contractual relationship should, or should not, be found to exist, it would be wrong to do so. Because the search for the "intention to create contractual relations" requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any perspective rules. Although the word "intention" is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties.

[48] In the end the Court concluded there was a lack of evidence of mutual assent and found therefore, there was no contract in the mining company.

[49] We find that the search for the intention to create contractual relations is echoed in s 6(3)(a) of the Act which requires the Court to consider any matters that indicate the intention of the persons. That appears to us to correspond with the common law inquiry into whether there is an intention to create contractual relations.

[50] We also agree that it is not helpful to set out rules or even factors to be taken into account in determining whether the real nature of the relationship between a worker and the end user in a tripartite agreement is a contract of service: that in the end will turn on the facts of each case and a consideration of all relevant matters.

[51] This is an area of law where, although Parliament has legislated (in s 6 of Act), a considerable overlay of Judge made law will be necessary. As mentioned at the outset of this judgment, this is the first case of this sort of which we are aware in New Zealand. Courts should move cautiously in developing doctrines such as implied triangular employment relationships, especially where, as in this case, only very broad principles can be stated. As in many such cases, the inquiry will be intensely factual and the result of the case determined accordingly.

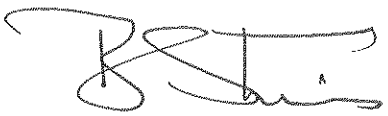
[52] For these reasons we feel confident in saying that, by reference to s 6 of the Act and legal principles enunciated in other jurisdictions, it is open potentially for someone such as Mr McDonald to argue that he was employed by an entity at the third point of the triangle, that is by a person who was not originally his employer

but with whom his employer had a commercial relationship which included the exclusive provision of the employee's services to that third party. It will be for Mr McDonald to establish that legal position on the particular facts of his case if he is to maintain his claims against the first defendant.

Consequential orders

[53] The issue of who was Mr McDonald's employer and the merits of any proven grievance against that employer will now be determined by a single Judge. A call-over conference to make appropriate directions concerning such matters as the evidence to be led, the venue and length of the fixture will be arranged with counsel through the registry.

[54] Costs are reserved.



B S Travis
Judge
for the full Court

Judgment signed at 12 noon on 5 October 2010