



employee OR independent contractor?

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Towards the end of each year dental students about to graduate from the dental school begin to look for work opportunities. The issue of 'Am I an employee or independent contractor?' arises. My advice to these young dentists is to seek individual advice from their accountant or lawyer. However, the following abridged version from an interpretation by the IRD Commissioner may be of interest to NZDA members and is sourced from the full document found at <http://www.ird.govt.nz/technical-tax/interpretations/>

It describes the common law tests developed by the courts for determining whether a person is an employee or an independent contractor.

Relevance of employment status

A taxpayer's tax obligations differ according to his or her employment status, so it is important to know if he or she is an employee or not. The employment status of a person has the following consequences for tax purposes:

- payments to employees from their employer are salary or wages, which must have PAYE deducted at source;
- employees cannot register for or charge GST for services they supply as employees;

Independent contractors:

- may deduct certain expenses incurred in deriving assessable income;
- must account to Inland Revenue for tax, and ACC earner and employee premiums for themselves and any employees; and
- must meet all the requirements of the Goods and Services Tax Act 1985 if the services they supply are in the course of a taxable activity, and they are registered (or liable to register) for GST.

It is not possible for taxpayers to alter their employment status (or the resulting tax implications) merely by calling themselves independent contractors when they are essentially still employees.

TNT Worldwide Express v Cunningham

A leading New Zealand case on the question of whether the relationship between two parties is one of employee and employer, or independent contractor and principal, is the Court of Appeal decision in *TNT Worldwide Express*. In that case the court gives guidance as to the appropriate focus of inquiry in deciding this question.

In *TNT Worldwide Express* the respondent was engaged by the appellant company, TNT, as an owner-driver to conduct a courier service for the company. The owner-driver:

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

The company terminated the respondent's contract, and the respondent sought to invoke the personal grievance procedure under the *Employment Contracts Act 1991*.

The *Employment Court* held that an owner-driver courier for TNT was an employee and not self-employed. In reaching that conclusion, considerable emphasis was placed on the rigorous control which the company exercised over its owner-drivers. The *Employment Court* found that the company's actions showed that it treated the owner-driver as its employee. In particular, the court found it significant that the company:

- imposed an obligation on the owner-driver to provide a licence, wear a uniform, and have the company's logo painted on the vehicle;
- exercised strong control over the volume, type, quality, and location of his work;
- supervised him closely;
- restricted him from carrying freight for anyone else;
- had all ownership rights over the business and goodwill; and
- could regulate his income (by controlling where and how much he worked).

The Court of Appeal's decision reversed that finding, holding that the written contract entered into by the parties created a genuine independent contractor relationship. The court accepted that an owner-driver courier was an independent contractor rather than an employee where his or her contract with TNT:

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

The court acknowledged the extensive control exercised by TNT 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.

Tests of the employment relationship

In cases where the nature of the relationship is unclear, the courts have developed various tests to determine the type of contract that exists. Cases may not be clear-cut and the tests may overlap. Therefore, the results of the various tests must be carefully weighed to find the predominant factors that will determine the relationship.

Although there are no single tests or exhaustive lists that are appropriate, there are five broad factors or tests which are useful in determining this question. These are not alternative tests but are simply relevant factors to be considered. A discussion of the tests follows.

1. The control test

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, regulate and/or dismiss a person, the more likely it is that the person will be an employee. This test used to be considered as the deciding factor, but this is no longer the case. The Court of Appeal in *TNT Worldwide Express* emphasised that control is only one of several factors relevant to the interpretation of the contract.

2. The independence test

This is the inverse of the control test. A high level of independence on the part of an employee or contractor is inconsistent with a high level of control by an employer or principal.

The following factors may indicate that a person has a high level of independence:

- works for other people or clients
- works from his or her own premises
- supplies his or her own (specialised) tools or equipment
- has direct responsibility for the profits and risks of the business
- hires or fires whomever he or she wishes to help do the job
- advertises and invoices for the work
- supplies the equipment, premises, and materials used
- pays or accounts for taxes, and government and professional levies

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).

Also, the fact that a person is contracted to one party only does not, of itself, necessarily dictate a conclusion that their legal relationship is one of employment.

3. The organisation or integration test

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

According to this 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 the worker

4. Intention of the parties

This 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 that a written contract states that a person is an employee or an independent contractor may indicate the intention of the parties, but is not determinative. Holland J in the High Court in *Challenge Realty Limited and Ors v CIR* [1990] 3 NZLR 42 stated at pages 55-56:

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.

Thus, if the actual circumstances point to an employment relationship, then simply labelling it an independent contract will not alter the actuality.

In *TNT Worldwide Express*, a clause in the written contract which 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 their part. However, the Court of Appeal in reversing this decision concluded, after weighing all the circumstances, that the TNT standard form contract created a genuine independent contractor relationship.

If an employment contract treats a person as an employee, for example by paying him or her at regular intervals, at a set rate, and deducting PAYE, this may indicate that there is an employment relationship.

5. The fundamental test

In 'Market Investigations', the English *Cooke J* said that the fundamental test for distinguishing an employee and an independent contractor was as follows:

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.

This 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;
- if 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

Usually, an independent contractor agrees to be responsible for his/her work. He/she cannot usually be dismissed, although the contract can be terminated if it is broken.

Summary

It must be emphasised that the tests outlined above are merely factors to be considered, rather than distinct tests, and it is important in each case to consider this question by balancing all the circumstances of the relationship between the parties. Often there will be competing factors that indicate differing conclusions as to whether someone is an employee or an independent contractor. In these circumstances, each of the tests described above should be applied to the facts of the case, and the resulting factors carefully and objectively weighed to determine the true nature of the relationship.