

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Stephen Clark (Applicant)
AND Northland Hunt Incorporated (Respondent)
REPRESENTATIVES Mark Ryan, Counsel for Applicant
Stuart Henderson, Counsel for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 22 November 2005
DATE OF DETERMINATION 30 November 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Respondent (“the Hunt”) is a not for profit organisation which operates solely on subscriptions from its small membership who are keen exponents of the sport of hunting with hounds. It does own assets, however, including a pack of hounds and a property on which those hounds are kennelled, and has one paid worker. From 1998 Mr Clark has been that paid worker. Recently differences have arisen between him and the Hunt and he now seeks the assistance of the Authority in resolving those differences.

[2] The Hunt says that Mr Clark was engaged pursuant to a contract for services, as set out in the written agreement between the parties which states

“1. Relationship

1.1 The nature of the relationship of the parties shall be deemed to be that of principal and independent contractor.”

[3] The agreement also contains the following clause:

“Arbitration

10.1 If any dispute shall arise as [sic] the interpretation of this Agreement, then the party raising the dispute shall give notice in writing to the other party and the matter referred [sic] to arbitration in accordance with the provisions of the Arbitration Act 1908 and Amendments.”

[4] I asked Mr Clark why he thought the Authority was the right place to come for help with his problem (that is, why he thought he was an employee.) He told me that he does not know much

about contracts but he had had two public sector jobs prior to going to work for the Hunt and did not see this situation as being very much different to those.

[5] The Hunt says that the Authority does not have jurisdiction to deal with the matter so the first issue for determination is whether Mr Clark is an employee.

Employee or Contractor?

[6] The Employment Relations Act provides at section 6:

“In deciding ... whether a person is employed by another person under a contract of service, the Court or the Authority...must determine the real nature of the relationship between them.

(3)...*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.”*

[7] In determining the nature of the relationship between the parties it is of course critical to examine the evidence as to their intention. This will include the label applied to the relationship. However this is only one of a number of elements which must be considered including:

- The written terms and any additional terms agreed orally;
- The way in which the agreement is performed, and whether the terms originally agreed have been varied in practice, and
- The prevailing industry practice, if any.

[8] Once the features of the relationship have been established the integration, control and fundamental tests must be applied to determine whether in reality the relationship is one of service or for services.

The elements of the relationship

[9] Periodically over the course of the seven years Mr Clark has worked for the Hunt the terms of his contract have been reviewed. The current terms and conditions of work are contained in a written agreement expressed to be for the period from 1 October 2003 until 30 September 2005, although it was not signed by the parties until September 2004. The parties confirmed to me that the written agreement was a comprehensive and accurate account of their obligations and that in practice the relationship largely conformed to its terms.

[10] Mr Clark is the only paid worker for the Hunt. It is governed by an Executive Committee, none of whom receive an honorarium. Mr Clark has two main areas of responsibility.

[11] Year round, he is required to reside on and maintain the Hunt’s property and to look after the hound pack which is kennelled there. This includes feeding the pack, ensuring that the hounds are in good health and receive any veterinary treatment they require (including vaccinations) organising and implementing a breeding programme, registering the pups and preparing them for the season. At one stage the Executive Committee had mooted the setting up of a hound breeding committee but Mr Clark was opposed to this and he has continued to have full responsibility for breeding. He is required to provide feed for the hounds at his own expense but

is reimbursed for veterinary bills and registration. He carries out any repair or maintenance work that is required on the kennels but materials are supplied by the Hunt.

- [12] During the hunting season he is required to select a pack for each hunt (of which there are about 40 each season.) He is consulted about the scheduling of hunts and is able to fit these around other commitments he might have, but once the programme of fixtures is set it cannot be altered. He must transport the animals to the hunt location, and manage them during the course of the hunt itself. He is responsible for providing and maintaining a suitable vehicle at his own expense but he is reimbursed his fuel costs. He is also required to keep and supply at least two suitable horses for his own use on hunt day. On the day of the hunt he is required to carry Huntsman's regalia (coat and horn) which are supplied by the Hunt but cleaned and maintained by him. At all times Mr Clark is required to conduct himself in a manner befitting a huntsman.
- [13] In return, Mr Clark receives an annual retainer of \$20,000.00 plus GST. (This figure has been increased as his contract has been renewed over the years.) Initially, this was paid in intermittent lump sums, but from early 2000 it has been paid by automatic payments. He also receives free accommodation in a house on the Hunt property where the kennels are located, and the full use of the property. He is free to run his own stock or horses on the land or to lease the grazing to farmers if he wishes (and has done so at different times over the years.) He told me that he can generate an annual income of at least \$5,000.00 if he leases the grazing.
- [14] Mr Clark told me he was already GST registered when he first went to work for the Hunt. He claims GST on his horse gear and shoeing and feed for the horses and hounds. He also claims GST on the diesel and maintenance for the two vehicles he uses in his role as Huntsman, and on vets bills despite being reimbursed for these items by the Hunt.
- [15] In addition to his retainer and any income he derives from the use of the Hunt property, he also earns a small amount from properties he owns himself and from occasional duties as a Racing official. He has also had a little casual work with a local business. Mr Clark uses the professional services of an accountant to prepare his tax returns and help him with GST. He told me that all income from all sources is treated as "one pot" as it were.
- [16] The Hunt provides kennels, chiller and killing facilities. It also provides fertiliser and weed killer to keep the land in a condition suitable for stock to be grazed and pays for the materials to repair fences and water supply. Mr Clark provides the necessary labour. The Hunt pays the rates on the land, and provides public indemnity insurance to cover any activities associated with the Hunt and the Huntsman's role. (Up until recently Mr Clark also maintained his own public indemnity insurance to cover any situations that might involve his own stock or horses.) The Hunt provides power to the kennels but the supply to the house is at Mr Clark's expense. The Hunt provides a landline telephone but Mr Clark pays for any toll calls.
- [17] On Hunt days, Mr Clark must turn up in person to carry out the role of Huntsman. Personal service is not an absolute requirement at other times however. He is free to plan and organise his own day; subject to making sure the hounds are fed each day, he may come and go from the Hunt property at his own discretion. He may delegate the feeding and daily care of the hounds to others, be it an employee, his partner, or a friend. Whom he brings in to do this work is at his discretion and if he pays them it is at his own expense. The same applies if he should take leave. If he does so he arranges for someone to stand in for him, and pays any wages out of his own pocket. His contract provides for three weeks leave each year, without deduction from his retainer, but in practice Mr Clark has not taken very much leave at all as he prefers not to be away from the hounds.

[18] The written contract provides that Mr Clark is responsible to the Master of the Hunt. It also provides that he and the Master are to meet monthly but this has tended to happen only two to three times per year. Instead, Mr Clark developed a practice of attending and reporting to meetings of the Hunt executive committee, although this practice has ceased since the parties experienced problems in their relationship. Outside the hunting season, weeks might go by without Mr Clark seeing or hearing from anyone from the hunt. When on the property, caring for the hounds, Mr Clark is his own boss. Even on Hunt days he is pretty much left to hunt as he sees fit since he knows most of the farm properties concerned very well. One of the areas of dispute between the parties has related to attempts by the current Master to increase the level of control he has over Mr Clark. Mr Clark has resisted this.

[19] Before moving on to apply the tests I record the following about industry practice. The evidence was that other Hunts around the country have a preference for engaging Huntsmen as contractors. Mr Brown, Treasurer for the Hunt, told me that it was preferred that Huntsmen be independent contractors since it would be difficult for the Hunt to manage an employee. (As far as I know, there are no Huntswomen although the Hunt has many women members.) However, that is not the invariable practice and over the years some Hunts have employed their Huntsmen. It is probably a stretch to describe the practice of hunting as an industry at all. Each Hunt is autonomous and they vary greatly in membership and financial position. Given these facts I consider that industry practice is of little relevance to this case.

Application of tests

[20] Beginning with the integration test I note that the respondent does not have an extensive organisation; there is only one paid worker and very little in the way of a structure for him to be integrated into. Mr Clark has had some involvement with the Hunt as an organisation (principally, attending executive meetings) but I consider that some such involvement might occur with both types of arrangement and is not conclusive either way.

[21] As for the control test, Mr Clark is accountable to the Master of the Hunt in an overall sense but receives little or no supervision in the performance of his work. It is up to Mr Clark how he looks after the hounds and maintains the property, provided he meets the key objective of presenting and managing a pack of hounds in “*good hunting condition.*” A degree of accountability exists even in a relationship between principal and contractor. A contractor must provide satisfaction in the performance of his or her work. In this case the respondent is not concerned with how Mr Clark goes about his work but rather with the achievement of a satisfactory outcome. This approach is in my view more consistent with the relationship of principal and contractor.

[22] Finally, the fundamental test is concerned with the economic reality of the situation. Mr Clark is free to use the Hunt property for whatever profit making enterprise he sees fit. He is not required to provide exclusively personal service, and must bear the expense of any replacement himself. Although the Hunt supplies the regalia, Mr Clark provides his own tools in the form of vehicles and horses. All of this is consistent with Mr Clark operating an enterprise of his own, albeit a modest one.

[23] Although it is of no significance in itself that PAYE is not deducted, it is relevant that Mr Clark claimed GST on a range of expenses incurred in his role as Huntsman. Claiming GST is not just a consequence of the labelling of the relationship, it is something that has to be actively pursued and in this case was, on advice from his accountant. Mr Clark was already GST registered when he went to work for the Hunt and had previously earned income from both

employment and from other sources. He must be taken to have understood that employees do not claim GST on employment expenses.

[24] In claiming GST on the expenses of the Huntsman's role, Mr Clark behaved as if he were in business on his own account and demonstrated an intention to be a contractor.

[25] In summary, neither industry practice nor the application of the integration test point clearly to one type of arrangement or the other. However, applying the control and fundamental tests indicates that the relationship is one of services. This is consistent with the label the parties have placed on it and with Mr Clark claiming GST.

[26] This leads me to the conclusion that overall, the real nature of the relationship between the parties is closer to a contract for services than a contract of service. I do not therefore have any jurisdiction to determine the dispute between Mr Clark and the Respondent.

Costs

[27] At this stage I leave it to the parties to discuss this issue between themselves. If it cannot be resolved, they have a period of 28 days from receipt of this determination in which to request that the Authority determine Costs.

Y S Oldfield
Member of Employment Relations Authority