Determination Number: AA 315/05
File Number: AEA 815/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Geoffrey Maurice Downey (Applicant)
AND	New Zealand Greyhound Racing Association Inc (Respondent)
REPRESENTATIVES	Richard Harrison, Counsel for Applicant Simon Menzies, Counsel for Respondent
MEMBER OF AUTHORITY	Y S Oldfield
INVESTIGATION MEETING	14 December 2004
FURTHER INFORMATION RECEIVED	30 May 2005
SUPPLEMENTARY SUBMISSIONS	29 July 2005, 3 August 2005
DATE OF DETERMINATION	18 August 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Downey was a Stipendiary Steward with the NZ Greyhound Racing Association (the Association) from 1 October 2002 until 20 July 2004. Mr Downey was engaged pursuant to a written contract containing the following:

"The Contractor shall at all times be appointed to the position of Stipendiary Steward as an independent contractor to the Association and shall not be deemed to be an employee of the Association for any purpose. The Contractor will not represent to any third party that his relationship with the Association is anything other than that of an independent contractor.

…

The Contractor is liable for all tax obligations incurred as a result of his services."

[2] Mr Downey told me that he took on the job knowing it was labelled "contractor" but without a full understanding of the consequences of this. However, Mr Downey now says that he was an employee because the "real nature" of the relationship between him and the Association was that of employee and employer. Mr Downey told me that the integrity of the Greyhound racing code rested on the shoulders of the Stewards, and the status of contractor is inconsistent with this.

[3] The Association denies all this and asserts that he was at all times a contractor. Mr Downey has asked the Authority to determine his status and that is the sole issue for determination here.

[4] Section 6 of the Employment Relations Act provides as follows:

*"**Meaning of Employee***

(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. …
(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 person; and
b. Is not to treat as a determining matter any statement by the persons that describes the nature of their relationship."

[5] In *Bryson v Three Foot Six Ltd [2005] NZSC 34* the Supreme Court outlined what are the "relevant matters" to be considered as follows:

""[32] All relevant matters" certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. "All relevant matters" equally clearly implies the Court or Authority to have regard to features of control and integration and to whether the contracted person had been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law. 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 test. Hence the importance…of analysing the contractual rights and obligations."

[6] My starting point is with the express agreement: the written terms and conditions of employment. That much is straightforward since it unequivocally labels the relationship as one of principal and contractor. I then proceed to determine the "real nature" of the relationship (with reference to the relevant matters set out above) and to ask whether this is consistent with the label that has been applied.

The way in which the relationship operated in practice

[7] Mr Downey's responsibilities were to control and regulate greyhound racing within the Northern Region, which involved travelling to and officiating at meetings in the Auckland area and in the central North Island. The contract between the parties sets out the race day and non race day services that the Contractor will provide. These include control and supervision of race meetings, ensuring compliance with rules, conducting inquiries into race day matters, preparation of reports, liaison with clubs, and inspection of kennels.

[8] In the performance of his duties Mr Downey was subject to the provisions of the Racing Act 2003 and to the Rules of the Association. Within these parameters he had a degree of discretion as to how he performed his duties; he was not directly supervised as he went about his work on the race course. Whilst at the track he had the use of a Steward's Room and on site equipment such as recording equipment, otherwise (when preparing reports and so forth) he worked out of an office at his home. With approximately 80-90 meetings per year the work was not full time. Should he be unable to attend a race meeting Mr Downey would arrange for one of his fellow stewards to take responsibility for the meeting.

[9] The contract contained the somewhat cryptic provision:

"The Contractor is limited to providing only services to the Association during the term of this Agreement…"

Nonetheless, many Stewards undertook paid work for other organisations with the agreement of the Association.

[10] Under "Compensation" the contract provided that:

"The Contractor will be paid by the Association for services provided ...the sum of $400.00 gross per race meeting irrespective of the number of races conducted…the fee is exclusive of Goods and Services Tax and will be payable on the completion of the race report."

[11] Separate provision was made for a payment of $30.00 per kennel inspection. Mr Downey presented monthly invoices to the respondent. These were usually (but not always) expressed to be from "G. M. Downey Consulting Services." The amounts invoiced varied depending on the number of meetings and inspections he had undertaken in the particular month. Mr Downey was usually paid by the 20th of the month following presentation of each invoice.

[12] Mr Downey was GST registered and filed a monthly GST return. Toll calls and mobile phone calls were reimbursed by the respondent, vehicle and home office expenses were not. Mr Downey was responsible for paying his own income tax and did so as a self employed person. He had his tax returns professionally prepared and claimed expenses against his income tax (vehicle maintenance and fuel and the costs of setting up a home office.) He did not receive sick pay or holiday pay. Mr Downey was indemnified by the respondent in relation to any risk associated with the performance of his duties.

[13] In October 2003 a new Chief Executive, Mr Bickford, was appointed to the respondent. He was concerned at the lack of standardisation across the sport and immediately initiated a review of the Association's structures. He noted that Stipendiary Stewards across the country operated differently and that there was little or no control over how they undertook their functions. Mr Bickford wondered whether standardisation and control in the Greyhound code might be improved if Stewards were employees, as they were in the Galloping and Harness Racing codes. The Stewards' contractual arrangements were therefore included within the scope of the review.

[14] On 16 October 2003, on behalf of all the Stewards, Mr Downey presented a discussion paper on the Stipendiary Steward function to the Board of the Association. In it he noted that the Stewards wished to have input into "*any current or future determination of the employment status of SS to continue as contractors or employees*." He explained that this was "*a basic request to be involved in any negotiations. There are varying factors within each region, and with each stipendiary steward that he may desire to enter into. Clearly the expansion of duties*

may bring the SS within a differing interpretation of taxation issues, and that the role of an employee would suit some SS but not others."

[15] He concluded his paper by saying that:

"It is also accepted that there are Inland Revenue Department issues that may yet have a bearing on the classification of the SS's status. Notwithstanding such issues, I contend, again without prejudice that the terms of the contract sought, as detailed herein, could readily be adapted to comply with IRD requirements whether through PAYE or withholding tax payments.

There are, within the existing SS, those who may prefer an upgraded contract to a full employment salary package. This would provide an ability to continue with other work projects and to be accountable on NZGRA contracted days. This would not in any way depreciate the work ethics and standards already in vogue. A commitment to the NZGRA to undertake all duties would be continued."

[16] In March 2004 the Association confirmed to the Stewards that it planned to take on several employees in the capacity of Steward/Field Officer. In comparison to the previous Stewards, these new employees were to have expanded responsibilities, more regular hours of work and to be supervised in a way the previous Stewards had not been, including reporting to and meeting with a new Racing Manager on a regular basis.

[17] When the positions were advertised Mr Downey applied but was unsuccessful. On 15 June 2004 he received one month's written notice that his engagement as Stipendiary Steward was terminated.

The real nature of the relationship: Employee or Contractor?

[18] In relation to the issues of control, integration and whether Mr Downey was in business on his own account, several features of the way the relationship worked in practice are inconclusive. Attendance on race days was a fixed requirement while non race day services were arranged by Mr Downey at his discretion. There was thus a degree of flexibility in the hours of work. Some equipment (such as the home computer) was provided by him but the Association's affiliated clubs also provided trackside equipment where necessary. Mr Downey operated from a home office but had the use of the Steward's Room at the track. Mr Downey organised his own replacement but this was subject to approval by the Association. Finally some costs (such as toll calls) were the responsibility of the respondent while others (such as vehicle expenses) were Mr Downey's responsibility.

[19] In some of its features the relationship resembled one of employment. Although not closely supervised as he went about his duties, Mr Downey was responsible under the Association's Rules to the Executive. He was indemnified by the respondent and bore no financial risk. The practice in the Harness and Gallop codes was for Stewards to be employed, and subsequently this has become the practice in the Greyhound industry also.

[20] On the other hand, some factors indicated that the real relationship was in the nature of a contract for services. Mr Downey was taxed as a contractor, and actively pursued the benefits which arose from this. Both Mr Downey's accountant and IRD treated him as a contractor, to the extent of accepting his expense claims. He received a fixed fee for his services and invoiced (in a genuine fashion) on a monthly basis. Within the Greyhound code, all the Stewards were engaged on the same basis.

[21] Weighing all the evidence in light of these considerations I am of the view that the relationship here is capable of being classified in either way. It is in the category described by Justice McGrath in his dissenting judgement in the Court of Appeal decision in *Bryson* as follows:

"[23] …The Act's emphasis on the real nature of the relationship requires that, in cases where the real nature of the work as constituted by the agreement's substantive terms and its objective features point clearly to an employment relationship, there will be little scope for the parties to agree that the relationship is nonetheless a contract for services. In cases where the real nature of the relationship is less certain, the parties will have greater freedom to constitute their relationship either way."

[22] In such a finely balanced case, the intention of the parties becomes the deciding factor.

[23] The first index of intent is found in the express terms themselves. They could not be plainer. Mr Downey seeks to counter this by professing to have been ignorant of the nature of a contract for services (with the implication that he did not know what he was agreeing to.) I do not accept this as credible because he has demonstrated his understanding in two further ways. The first was in his submissions on the function of the Stewards (quoted above) where he shows that he was cleat about the distinction between this form of agreement and one of employment. (Indeed, he notes that the Stewards wished to retain the option of remaining on a contract for services.) The second is in his handling of his tax. Simply being categorised as self employed for tax purposes does not indicate intent. Mr Downey however (with professional help and advice) acted in reliance on that status in order to be able to recoup GST and other expenses.

[24] I am satisfied that it was Mr Downey's intention, as well as the intention of the respondent, to enter into a contract for services.

[25] In summary, this relationship contains a mix of the elements of a contract for services and a contract of employment. Its real nature is finely balanced. The intent of the parties therefore becomes critical. The evidence about this is not finely balanced. It is clear that both parties intended to enter into a contract for services. Mr Downey was not an employee and falls outside this jurisdiction.

Costs

[26] I note that I have been advised that Mr Downey applied for legal aid. Notwithstanding this, the parties are invited to discuss the issue of costs between themselves. Should it fail to be resolved any submission as to costs should be lodged with the Authority within 28 days of the date of this determination.

Y S Oldfield
Member of Employment Relations Authority