

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Christine Mori (Applicant)
AND Auckland Philharmonia Society (Inc) (Respondent)
REPRESENTATIVES Ashley Sharp for applicant
Erin Davies for respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 22 October 2004
SUBMISSIONS 8 December 2004
DATE OF DETERMINATION 28 January 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

This determination deals with the question whether Ms Mori is an employee of the respondent. On 17 September 2004 (in determination AA 300/04) I declined Ms Mori's request to remove this matter to the Employment Court. In that determination I made some introductory remarks on the nature of the employment relationship problem. It is convenient to reproduce those remarks here by way of introduction to this determination:

"The first point at issue between the parties relates to a dispute about the applicant's status. In the originating statement of problem, Ms Mori seeks a determination that the relationship between her and the respondent is one of employer and employee and that the employment relationship between the parties be determined to be one based on an individual employment contract entered into upon the applicant commencing employment with the respondent.

The background to this is that Ms Mori is herself a member of the respondent (the Society) and plays in the Auckland Philharmonia (the orchestra). She has been a full member of the Society, and of the orchestra, since 1985. Until November 2003 the Society was governed by Rules which included, amongst other things, provisions relating to the relationship between the Respondent and members of the orchestra such as Ms Mori. These provisions included references to an employment relationship, including dismissal (paragraph 6) resignation (paragraph 7) annual and other sorts of leave (paragraph 8) payment (paragraph 13) and personal grievances (paragraph 17.)

On or about 28 November 2003 the society filed, with the Registrar of Incorporated Societies, notification that it had adopted a new set of rules and constitution. All of the provisions of the old rules which had referred to employment conditions had been removed.

The applicant asserts that from 1985 until November 2003 she was an employee and that she has not agreed to any change to this employment relationship. The statement of problem further sets out that she seeks:

“1.3 A determination that the terms of that employment relationship cannot be varied without the applicant’s express agreement. Accordingly any society rules adopted by a majority of members present and voting cannot form part of the employment relationship between the parties in the absence of express agreement between the applicant and the respondent.

1.4 That in its relationship with the Applicant the Respondent be directed to act in good faith and to adhere to the principles of natural justice in regard to a complaint about her performance “over the years” filed by the director of the Orchestra a few days after the new rules of the society were accepted by a majority of the members in meeting.

1.5 That the Applicant be compensated for the distress, humiliation and loss of dignity and injury to feelings that the respondent’s actions in breach of its obligation to maintain the necessary trust and confidence between it and its employees, alternatively the disadvantaging of the Applicant in her employment by the respondent through its actions [sic].”

The respondent maintains that Ms Mori is both a member of the respondent and in addition has at all material times been an independent contractor engaged by the respondent under a contract for services. It asserts that there is no employment agreement or employment relationship in place between the Applicant and the Respondent, and never has been. It further asserts:

[1] 1 “The terms and conditions on which the Respondent engages the Applicant are, among other things, contained in its Rules and Regulations including those adopted by a resolution of the Respondent’s members in November 2003.”

For this reason it says that the Authority has no jurisdiction in this matter. However, the respondent did express a willingness to attend mediation on a without prejudice basis. In due course I directed the parties to mediation however this process did not result in the resolution of any of the matters between the parties.”

After declining the application for removal I met with the parties to investigate the issue of employment status. I now proceed to determine that matter.

The facts

- [1] In February 1985 Ms Mori commenced as Principal Flute with the Auckland Philharmonia. Her initial appointment was subject to a trial period of one concert season at the end of which it was confirmed as permanent.
- [2] Ms Mori’s appointment as Principal Flute was conditional upon her becoming a member of the Respondent Society. It continues to be the case that all permanent performers are members of the Society although casual performers, of which a number are engaged at different times during the year depending on the requirements of the concert programme, are not offered membership.
- [3] The affairs of the Society are governed not just by its Constitution but also by a set of Rules formulated pursuant to the Constitution. The Rules of the Society were reviewed in the latter part of 2003. Two committees of the Society, the Concert Committee and the Artistic Committee respectively, were tasked with this review, each being responsible for a portion of the Rules. The Artistic Committee completed its part and put the new draft to a vote of members in November 2003. The balance remains a work in progress and has yet to be ratified. Relevant portions of the old Rules therefore remain in effect.

- [4] The Auckland Philharmonia was described to me by respondent witnesses as essentially in the nature of a collective of self-employed musicians. Only three permanent members of the orchestra are considered by the Society to be employees (the Concert Masters and Musical Director.) These individuals have executed written individual employment agreements and are taxed as employees.
- [5] Ms Mori told me in her evidence that she understood herself to be an employee from the outset.
- [6] Minutes of meetings of the Society over the years reveal that its members have turned their minds on several occasions to the question of their employment status and its implication for tax purposes. I do not propose to refer to the specifics set out there but record my overall impression that the members were uncertain as to how they should be classified in their capacities as performers. I do not consider anything contained there to be determinative of the issue. Rather the Minutes in view confirm only that the nature of the relationship between the Society and its members in their roles as performers did not fit easily into the category of either employee or self employed contractor.
- [7] Each week Ms Mori receives a payment of \$296.00 plus GST which is in the nature of a retainer. In addition she is also paid for each three hour "call" which term covers both rehearsals and performances. She is guaranteed a minimum of 250 calls each year and must make herself available to perform in the annual sponsors' function, fundraising concert and all the main concerts of the season.
- [8] Ms Mori must give personal service. When and where Ms Mori is to perform are advised to her via a regular call sheet. She is paid for all scheduled calls even if, as happens on rare occasions, the piece being performed does not require the Principal Flute. Respondent witnesses confirmed that this is done in order to ensure that a musician of suitable calibre is always available when needed.
- [9] Up until mid 2003, at approximately six monthly intervals, Ms Mori invoiced the respondent for payment. She ceased doing so upon receiving advice from the Labour Department "info line" that employees are not required to invoice. The respondent continued to pay her after she ceased invoicing.
- [10] Withholding tax is deducted from Ms Mori's pay by the respondent. She files her annual tax return with the assistance of an accountant and it is her custom to claim deductions for a number of expenses including clothing, hair appointments, instrument maintenance, sheet music, and petrol used in attending concerts. Ms Mori has been GST registered for the last eight years (since her earnings rose above the GST threshold) and claims GST back on her expenses. Along with all the other musicians she pays her own ACC levy.
- [11] The work she performs for the respondent is Ms Mori's principal source of income although she derives further income from teaching and from investments.
- [12] Ms Mori has six weeks leave each year during which time she continues to receive her retainer. She is also paid during periods of absence due to illness and has been given compassionate leave on the occasion of a bereavement. She believes herself eligible for paid study leave although she has paid for her own attendance at conventions. Should she perform a seventh day in a row she receives penal rates for that day.
- [13] Ms Mori is responsible to the Concert Master and through her to the Musical Director.

- [14] Ms Mori's scores and amendments to them are prepared by employees of the respondent.
- [15] Ms Mori must abide by the respondent's requirements in regard to dress, seating arrangements for concerts and so forth. On occasions she is required to wear a T-shirt carrying sponsor branding.
- [16] Ms Mori normally uses her own flute but when on occasions she is required to use an alto flute, this is supplied by the respondent. She has use of the respondent's library facilities.
- [17] Ms Mori is required to give three month's notice of resignation and may not perform for the New Zealand Symphony Orchestra or the Christchurch Symphony Orchestra without obtaining prior approval. Ms Mori has on one occasion sought and been granted leave to perform in another orchestra.
- [18] As indicated already, the Rules and Constitution of the Society formerly contained provisions which conferred upon its member/performers benefits similar to those seen in employment agreements. Most of these provisions have now been removed from those documents, although benefits such as sick pay continue to be paid.
- [19] I received evidence of the contractual arrangements for performers in other major New Zealand orchestras. I record my observation that no one form of contractual arrangement appears to predominate within the industry (although an opposite view has been expressed to me in submissions) and I conclude that there is no consistent industry practice in relation to employment status.

Determination

- [20] Ms Mori is both a member of the Society and a paid performer who has been engaged to fill the position of principal flute. The capacity of performer is not, in my view one and the same thing as membership of the Society. This is evidenced by the fact that not all performers are offered the opportunity to become members of the society (casual performers being excluded from that status.) I consider Ms Mori to have a dual relationship with the Society. This determination focuses on the nature of the agreement by which she is paid to perform in the role of Principal Flute.
- [21] This determination is made pursuant to section 6 of the Employment Relations Act 2000, which provides:
- “(1) In this Act, unless the contract 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;
- ...
- (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 persons; and
- (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.”

[22] I have had the opportunity to refer to *Three Foot Six Limited v Bryson* (12 November 2004, CA 246/03, Court of Appeal in which the Court of Appeal has considered section 6 of the Employment Relations Act 2000. At paragraph [79] the Majority noted:

“The policy underlying s.6 is to stop employers from inappropriately limiting the reach of the Employment Relations Act by resort to artificial contractual form. This policy and the requirement to focus on the “real nature of the relationship” presuppose that there are categories of workers whose “real” status is as employees irrespective of what is provided for in contractual terms which define the relationship. This in turn presupposes some standard against which that issue can be assessed.”

[23] The parties in this case have not executed a written employment agreement; that is they have not signed a record of the express terms upon which Ms Mori was to work. There is no question of a “resort to artificial contractual form.” My task (unlike the task before the Court in relation to Mr Bryson’s case) is not to “resolve an apparent contradiction between a formal written agreement and the “real nature of the relationship.””

[24] However it remains my task to determine whether the real nature of the relationship between the parties is that of a contract of service. In doing so I have had regard to the following passages from the decision in *Bryson*:

[101] “We consider that the phrase “real nature of the relationship” in s.6 is not just a short-hand for the result of an analysis based solely on the control and integration tests or the fundamental test applied primarily by reference to the control and integration tests. If this is what Parliament really intended, it could easily have said so. Something broadly along these lines was after all initially proposed in cl 6 of the Employment Relations Bill but this was not proceeded with. The terms of s 6 (especially when considered in light of the relevant Parliamentary history) suggest that a more open-textured inquiry is necessary.

[102] We think that Parliament used the expression “the real nature of the relationship” in a way which was at least consistent with Cooke J’s “fundamental test”...We agree that if the facts of the present case are analysed solely in terms of the criteria referred to by that Judge in that case...the conclusion that Mr Bryson was an employee might be thought to follow. But it is important to recognise that Cooke J was not purporting to list exhaustively all the relevant criteria. He was not dealing with a case in which the parties had specifically addressed the basis upon which they were contracting; nor was he addressing an industry in which the almost invariable practice is for workers to be engaged under contracts for services rather than contracts of service...

...

[105]...we are prepared to accept that s.6 of the Employment Relations Act proceeds on the basis that “the real nature of the relationship” is not controlled by contractual terms and this is so even in cases where the contractual form adopted by the parties cannot be stigmatised as a sham.

[106] On the other hand, such terms are not relegated to the status of secondary considerations...

[25] The Court goes on to consider the implications of taxation arrangements:

[107] The scheme of the contract was implemented in the way in which Mr Bryson invoiced the appellant and addressed his tax obligations. His status as an independent contractor under the contract was sufficiently real to be recognised by the tax system. Although the capital and infrastructure associated with his business were of modest proportions (consisting we assume largely or entirely of his collection of tools) he incurred some expenses which were recognised by the tax system in a way which would not have happened if he had been treated as an employee...

[108] We recognise that this aspect of the case is not altogether easy...putting in place a system of payment and associated taxation arrangements which proceed on the basis that the worker is an independent contractor is plainly not determinative of that worker’s status.”

- [26] Finally, the Court assesses the implications of industry practice. I have already concluded that there is no predominant practice in this industry. For this reason, I do not consider this aspect of the *Bryson* decision to be of any assistance in relation to Ms Mori's case, and take it no further.
- [27] Since no employment agreement was executed in Ms Mori's case the "open textured inquiry" must at once establish both the terms of the agreement and the nature of the relationship. Leaving aside industry practice for the reasons already given, and adopting an approach I consider consistent with the Court of Appeal in *Bryson* (as set out above) I focus on two key issues:
- what the evidence reveals of the intentions of the parties, and
 - whether Ms Mori was performing the services of flautist as a person in business on her own account (the 'fundamental' test.)
- [28] In doing so I have given consideration to evidence of the way in which Ms Mori's engagement operated in practice, documentary evidence including amongst other things the Constitution and Rules of the respondent, and evidence of the arrangements for payment and taxation.
- [29] Regarding the intentions of the parties, I have already recorded that over the years the members of the respondent society have given considerable thought to the question whether they are or should be classed as employees. On this issue there has been some uncertainty and debate amongst them. The prevailing view that seems to have emerged some years ago now was that they were self-employed, which is indeed consistent with the notion that they worked for their own Society. Although there is still no absolute consensus (hence these proceedings) recent changes to the Rules have tended in the direction of making the relationship look more like one of employment, and in my view are indicative of such intent on the part of the Society as a whole as well as the majority of its individual members.
- [30] Like Mr Bryson, Ms Mori's tax arrangements (for Goods and Services Tax and Income Tax) are those normally associated with a contract for services. In addition, she pays ACC levy as would a self-employed person. As stated in the extract from *Bryson* above, being taxed as a contractor is not in itself determinative of status. However, the duration and extent of Ms Mori's active participation in this taxation regime (including reaping the benefits of expenses claims over many years) is in my view indicative of an intention on her part to be treated as a contractor at least for tax purposes. Similarly, Ms Mori appears to have been happy for many years to invoice her employer in a manner consistent with that of a self-employed person.
- [31] Ms Mori was not able to provide any decisive evidence of having expressed a contrary intent until very recently (as problems emerged in her relationship with the Society.) Although she now expresses a wish to be classed and treated as an employee, this represents in my view a departure from the intention evidenced for many years through the taxation and invoicing arrangements.
- [32] As to the manner in which Ms Mori performed her work, and the way in which the parties' relationship was conducted, I consider it to be finely balanced whether these were consistent with a contract of service or for services.
- [33] Ms Mori supplied her own instrument, invoiced for her services, was taxed as a self-employed person and paid her own ACC levy. She had also been given the opportunity to take up membership of the respondent Society and participate fully in its decision making processes. Although, as I have noted, the status of membership is in my view parallel to but separate from

that of paid performer, the opportunity to take up that membership arose as a incident of her engagement as a permanent paid performer and provides her with a degree of input into management decisions affecting her role.

[34] Set against this was a significant degree of control by the respondent as to how and when she performed her work, payment of penal rates, and provision of paid leave, something not usually seen in “contractor” situations.

[35] Ms Mori’s relationship with the respondent Society is in my view in the category described by Justice McGrath in his dissenting judgement 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.”

[36] Based on the way in which it operated in practice, I conclude that Ms Mori’s engagement as a paid performer could be classified as either a contract for services or a contract of service. I therefore refer to the parties’ intentions to determine whether it is a contract of employment. My conclusions on that issue are already recorded above. For many years until recently, both parties have in my view demonstrated a clear intention that their agreement be a contract for services. I consider the respondent’s description of the Orchestra as a collective of self-employed musicians to be a good description of its real nature.

[37] I therefore conclude that Ms Mori is not an employee of the respondent Society and on that basis, that the Authority has no jurisdiction to assist with her problem.

Y S Oldfield
Member of Employment Relations Authority