IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 79
ARC 7/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ROY MARTYN BROOK Plaintiff
AND	WILLIAM GRANT MACOWN Defendant
AND	KINGSLEY JOHN GAINSFORD Defendant
AND	DARRELL JAMES CROZIER Defendant
AND	d'ARTAGNAN RICHARD KENNEDY Defendant

Hearing:	11-13 November 2013 and 12-13 March 2014, and additional submissions filed on 25 March and 4 April 2014
Appearances:	M Dew, counsel and A Choi, advocate for plaintiff K Dalziel and P Brown, counsel for defendant
Judgment:	20 May 2014

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] In comparison to employees, volunteers hold a relatively tenuous legal position. Employees enjoy basic employment rights and legislative protection in relation to the work they do, including minimum annual and sick leave entitlements and the ability to pursue personal grievances. Volunteers are not afforded the same

statutory entitlements and protections,[1] although they may devote considerable time, effort and skills to the organisations or causes they work for. Volunteers are not an homogenous group. They may, but need not, operate under an agreement, receive some form of payment, and perform services on a regular or ad hoc basis. They may devote years to one cause or engage in one-off acts of kindness.

[2] This case involves the dance community, which (like many sporting and other endeavours) relies on the commitment and enthusiasm of many volunteer workers. The particular issue that must be decided is whether the plaintiff, Roy Brook, was an employee of the New Zealand Dance and Dancesport Council (NZDDC or Council) during his time as Registrar.

[3] Mr Brook held the position of Registrar of the NZDDC for a number of years. He has made a significant contribution to dance and dancesport in New Zealand, both in his capacity as Registrar and more generally. Mr Brook's time as Registrar came to an unhappy end in January 2012 when a process server was sent to his home to serve a letter from the Council advising him that his services would no longer be required. This action arose against the backdrop of circumstances that will be discussed in more detail in this judgment. Mr Brook subsequently pursued an unsuccessful claim in the Employment Relations Authority (the Authority) for unjustified dismissal. The Authority concluded that he was not an employee of the Council.[2] Mr Brook challenges the Authority's determination on a de novo basis.

[4] While a number of issues are raised by these proceedings, the central argument put forward by the defendants is that Mr Brook was a volunteer and accordingly falls outside the ambit of the protective provisions in the Employment Relations Act 2000 (the Act).

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[1] Certain volunteers are afforded protection under the Health and Safety in Employment Amendment Act 2002, s 3C.
[2] *Brook v Macowan* [2013] NZERA Auckland 15.

Background

[5] The NZDDC, a non-profit administrative organisation representing professional and amateur dancers, was established in 1965. Its general purpose is to foster dance and dancesport within New Zealand and act as a coordinating and liaison body between the member associations. The Council is governed by the Council Rules (the Rules)[3] and is comprised of two delegates from each member association. Dancer registrations are dealt with by the New Zealand Dance and Dancesport Registration Authority (NZDRA or Registration Authority), administered by a Registrar. A number of people held the role of Registrar over the years, many for several years running, although the position was subject to an annual appointment process.[4]

[6] The position of Registrar was held by Robert Connors on a temporary basis immediately prior to Mr Brook's appointment. Mr Connors was asked to formulate a job description, which he did. At the Council's General Meeting on 28 July 2003 it was proposed that Mr Brook be appointed as Registrar. A letter from the Council dated 29 July 2003 confirmed Mr Brook's appointment as Registrar until the Council's Annual General Meeting (AGM) in 2004. At the AGM of 14 February 2004 Mr Brook was appointed for the remainder of that year.[5] It is apparent that Mr Brook was provided with the job description that Mr Connors had prepared prior to taking up the role.

[7] The job description expressly stated that the Registrar was "an officer of the New Zealand Dance and Dancesport Council" and that he/she would be appointed at the AGM of the Council, holding office until subsequent reappointment or replacement at an AGM. A number of responsibilities were set out, including maintaining an up to date register, banking money received from registration fees, and dealing with queries. The job description made it clear that the Registrar would need to be able to accommodate the registration records at their home, and have sufficient storage space to do so. Reference was also made to the sort of time

[3] The New Zealand Dance and Dancesport Council Official Rule Book, amended 28 February 2010 (Official Rule Book).
[4] Official Rule Book, r 12.
[5] The Council subsequently voted on the appointment of Registrar each year.

commitment that would be expected, with the busy registration period (March to June) taking around four hours per day and otherwise reducing to about four hours per week.

[8] The job description concluded with the following:

> *An expense allowance* is provided to the Registrar, this is determined annually at the NZDDC Annual General Meeting (as at February 2003 this sum is $1500 per year). (emphasis added)

[9] It is this payment of $1,500 per annum that Mr Brook says was his wage as an employee. If that is so it equates to around $3 per hour, based on the anticipated hours set out in the job description. It is from this springboard that Mr Brook's claim for wages arrears is launched.

[10] There was a general consensus amongst witnesses that the role could be demanding in terms of the time required to deal with registrations, and that Mr Brook worked hard at it. He was assisted in various tasks by his wife, Sheila Brook.

[11] It is evident that significant internal difficulties arose within the Council, the details of which were not before the Court. It is also evident that issues began to develop between the Council and Mr Brook as to how he was undertaking his role. In particular there was a concern about the extent to which he may be acting autonomously. Such concerns gave rise to discussions, including at the Council meetings, as to how Mr Brook might best be controlled. It was in this context that consideration was given to whether an employment agreement for the position should be drafted at a Council meeting on 9 August 2009.

[12] While tensions had been simmering, and factions developing, for a considerable time, in April 2011 the New Zealand Dancesport Association Inc (NZDA) resigned from NZDDC. A second member association, the New Zealand Federal Association of Teachers and Dancing Inc (NZFATD), also resigned from the Council in July 2011. Matters came to a head between NZDDC and Mr Brook around August 2011 over a disagreement relating to the disbursement of funds. Mr Brook took the step of transferring NZDRA funds to a separate savings account

without the knowledge or authorisation of NZDDC. In doing so he paid $19,249 to an account set up under the name "NZDRA Savings Account" (on 19 August 2011) and $4,750 to "RM Brook" (8 September 2011). Mr Brook did not advise the Council of the transfer of these funds until 20 September 2011 when he emailed Grant Macown (the first defendant) informing him that he would continue to hold the funds until "either you, William Joyce and all involved reach agreement or a court orders payments". The NZDDC responded by removing Mr Brook's signing authority and access to bank accounts for NZDRA.

[13] In November 2011 NZDA issued proceedings in the Disputes Tribunal naming each of the current NZDDC delegates and Mr Brook as respondents. It claimed a portion of the NZDRA funds that Mr Brook was withholding on the terms referred to above. The bank subsequently reversed the $19,249 transaction, after accepting that it ought to have required a co-signatory. The funds were returned to the NZDRA current account. The bank declined to take a similar approach in relation to the $4,750 payment.

[14] The NZDDC took steps to continue to work with Mr Brook despite its concerns as to how Mr Brook had handled the situation. Witnesses said that they reluctantly did so because they felt they were 'over a barrel', in the sense that Mr Brook retained the residual funds and he also held sole control of the NZDRA's registration and other records, much of which was on the computer that he had in his possession at his home. There was a concern, informed by earlier comments that Mr Brook had made, that he might delete or otherwise compromise the electronic records.

[15] A settlement was reached of matters before the Disputes Tribunal, recorded in a consent order dated 20 January 2012. At a meeting the same day a resolution was passed terminating Mr Brook's appointment as Registrar. A letter entitled "Notice of Termination as Registrar" was delivered to Mr Brook on 24 January 2012. It was signed by the then delegates to the NZDDC (the defendants), other than Mr Kennedy. The letter advised that termination was as a consequence of irregularities discovered in the NZDDC bank statements associated with disbursements performed by him between July 2011 and September 2011, contrary to Council instructions, as

well as repeated failures to explain, address, or account for these and other irregularities relating to his role as Registrar. He was asked to immediately surrender all property and/or assets belonging to the Council.

[16] Mr Brook wrote to Council delegates on 25 January 2012 purporting to raise a personal grievance.

Analysis

[17] "Employee" is defined in s 6 of the Act as follows:

> **6 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) includes—
> (i) a homeworker; or
> (ii) a person intending to work; but
> (c) excludes a volunteer who—
> (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; and
> (d) excludes, in relation to a film production, any of the following persons:
> (i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer:
> (ii) a person engaged in film production work in any other capacity.
>
> (1A) However, subsection (1)(d) does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee.
>
> (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.
>
> …

[18] Read literally, s 6(1)(c) may be taken as excluding only a sub-group of volunteers (those not expecting or receiving a reward) rather than volunteers more generally. However, as the essence of volunteering is the gratuitous provision of services it can safely be assumed that the provision defines "volunteer" in juxtaposition to those who fall into the category of employee.

[19] It is clear that the inquiry does not start and stop with an assessment of whether a person is a volunteer. If the requirements of s 6(1)(c)(i) and (ii) are met it follows that they are not an employee. However, it does not follow that they are an employee if these requirements are not met. That is because subsections (2) and (3) require a more expansive enquiry. The assessment is an intensely factual one, requiring consideration of all relevant matters, including material from which the intention of the parties can be gleaned.

[20] While Ms Dew, counsel for the plaintiff, submitted that subjective intention is irrelevant to the Court's inquiry, this cannot be so in respect of the assessment required under s 6(1)(c), which focuses on the person's expectation of reward at the outset of the relationship.

[21] What constitutes a "reward" for the purposes of s 6(1)(c)? The term is not defined in the Act. It is arguable that it includes non-monetary recognition of services provided. This was the approach recently adopted in *The Salad Bowl Ltd v Howe-Thornley*.[6] In that case Chief Judge Colgan considered that the plaintiff who completed a three hour work trial was not a volunteer because she had expected to be rewarded (by way of monetary payment) for the trial period and was in fact rewarded by receiving a free salad at the end of the day.

[22] The issue regarding the relevant distinction between a volunteer and employee has received surprisingly little judicial consideration. In *McCulloch v Director General of the Department of Social Welfare*[7] the Court considered that the absence of remuneration would prevent the appellants (foster parents) being found to be "employees" under the first limb of the definition of that term in the Employment

[6] *The Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152.
[7] *McCulloch v Director General of the Department of Social* Welfare [2000] 1 ERNZ 467 (EmpC).

Contracts Act 1990 as they were not persons employed by an employer to do any work for "hire or reward". Judge Travis held that:[8]

> I am satisfied that the evidence supported what I have described as the Tribunal's key finding that the parties did not treat the appellants' position as an employment relationship for which wages or salary would be paid. The appellants undertook the foster parent role for the finest altruistic reasons but not in the expectation that they would receive remuneration in the form of wages or salary for providing a family environment for the children placed in the family home. They were therefore volunteers and were entitled to abandon the appointment on proper notice.

[23] The focus on something other than an intangible benefit was emphasised (albeit in a different statutory context) in *Prior v Millwall Lionesses Football Club*.[9] There the United Kingdom Employment Appeal Tribunal (EAT) rejected a claim by the General Secretary of a football club, who had fulfilled the role for twenty years, that she was an employee. This finding was based on two grounds. First, that there was no contract between the parties as there was no mutuality of obligation. The reimbursement of expenses did not amount to consideration and nor did any intangible benefit, such as the standing she received in the footballing world. Second, even if there was a contract, there was no contract of service between the parties. The EAT found that the appellant was not an employee as no remuneration was provided and also noted, in distinguishing another case, that an honorarium would not be appropriate consideration under a contract of service.

[24] The EAT relied upon *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* where McKenna J observed that one of the three crucial indicia of a contract of service is that:[10]

> There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be.

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[8] At 474.
[9] *Prior v Millwall Lionesses Football Club* EAT/341/99, 28 February 2000.
[10] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515.

[25] The English Court of Appeal has subsequently confirmed this requirement in *Nethermere (St Neots) Ltd v Gardiner* where Stephenson LJ, citing *Ready Mixed Concrete* approvingly, observed that:[11]

> There must, in my judgment, by an irreducible minimum of obligation on each side to create a contract of service, I doubt if it can be reduced any lower than in the sentences I have just quoted.

[26] While in everyday usage the concept of "reward" is broad, and can include intangible or non-monetary benefits, I doubt that this is so for the purposes of s 6(1)(c). After all, many people carry out voluntary work for the personal satisfaction they receive and accordingly expect to be, and are, "rewarded" in a broad sense. It is doubtful that something in the nature of a handshake or a bunch of flowers was within Parliament's contemplation when enacting the volunteers' exception to s 6. Rather, it appears that s 6(1)(c) was inserted as a "belts and braces" measure to make it clear that volunteers did not fall within the definition of "employee".[12]

[27] In the present case it is clear that Mr Brook took on the role because he, like many others, wished to make a positive contribution to the dance community. He knew at the outset that he would receive an annual payment, and he subsequently did receive such payments. I do not however consider that the payment he expected and received constituted a "reward" for the purposes of s 6(1)(c). This is reinforced by Mr Connor's evidence, which I accept, that he made it clear to Mr Brooks at the time that the role, like others in the organisation, was voluntary.

[28] Notably the Registrar's job description refers to an "expense allowance", consistently with a payment for reimbursement of the costs associated with the Registrar's position, including maintenance of a home office. Reference to the payment comes as the last bullet point under the subheading "Other matters the Registrar must be able to accommodate", which makes express mention of home storage space and computer use.

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[11] *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 (EWCA Civ) at 623.
[12] *Employment Relations Bill: Report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee* (June 2000) at 21.

[29] This is reflected in the Council's statements of financial performance for the NZDRA prepared on an annual basis, distinguishing between expenditure relating to printing, stationery and postage and the Registrar's expenses. Mr Brook himself drew a distinction between out of pocket expenses and the Registrar's "honorarium" in the 2011 schedule of transactions.

[30] The annual payment to the Registrar was increased from time to time. I accept that this was by reference to the expenses associated with the position, including those relating to running a home office, with a modest added portion by way of recognition for the Registrar's time and effort.

[31] Furthermore, I do not consider that it could sensibly be suggested that the defendants would have had any legal remedy against Mr Brook if at any stage during the eight years at issue he had declined to perform any work as Registrar. While the services he provided were of considerable value, they were performed without contractual or legal obligation.

[32] I do not consider that Mr Brook expected to be rewarded for his work and nor was he "rewarded" for the work in the sense required by s 6(1)(c). The payment Mr Brook received comprised reimbursement of expenses and subsequently a modest amount as a token of appreciation of his efforts (the honorarium). The payment, and the amount of it, was otherwise not causally linked to the services he performed.

[33] Accordingly I find that Mr Brook was a volunteer for the purposes of the Act and his claim must be dismissed.

[34] Even if I am wrong on this point, my conclusion that Mr Brook was a volunteer would not otherwise have determined the ultimate issue, namely, whether he was an employee. This requires an assessment of the real nature of the relationship having regard to a range of factors that can be summarised as follows: [13]

- the written and oral terms of any contract, usually containing an indication of common intention;

[13] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 271 at [32].

- any divergences from those terms and conditions in practice;
- the way in which the parties have actually behaved in implementing their contract; and
- the levels of control and integration.

[35] Although these factors are taken from the Supreme Court's judgment in *Bryson v Three Foot Six Ltd*, in the context of an assessment of whether the plaintiff was an employee or independent contractor, the same framework can sensibly be applied in the present case.

[36] There was no written employment agreement (although various delegates had experience with employment matters, including Mr Brook who had been an employee, a manager at a large company, a union member, and had worked in numerous roles on a voluntary basis within the dance community). Mr Brook was however provided with a copy of a job description for the role of Registrar. He was also give a letter of appointment dated 29 July 2003, and says that he was provided with a copy of the Rules prior to taking on the role. Ms Dew submitted that these three documents, together with the actions of the parties at the time, reflect an intention to create legal relations and the creation of duties and obligations consistent with an employment relationship.

[37] The letter of appointment states:

> **Re: Appointment of NZ Dance & Dancesport Council Registrar**
>
> At the General Meeting of the NZ Dance & Dancesport Council held in Wellington 28th July 2003 Council Delegates approved your application for the position of Registrar to the Council. The Council has asked that you work with guidance from Mr R Connors who was appointed `acting Registrar' at the 2003 AGM.
>
> The appointment is effective as from the date of this letter until the Annual General Meeting of Council in February 2004.
>
> The Registrar's position is appointed/reappointed yearly at the Annual General Meeting.

[38] The job description set out a summary of the position, its purpose and a "detailed position description". The introductory paragraph stated that:

> The Registrar is an officer of the [NZDDC], responsible to NZDDC for the efficient maintenance of registration records for all (amateur) registered dancers in New Zealand. The Registrar is appointed by NZDDC at the Annual General Meeting of Council and holds office until subsequent reappointment or replacement at an Annual General Meeting (or if required, at a Special General Meeting). Appointment is made under the constitution of the NZDDC.

[39] The job description made it clear that the Registrar must be able to accommodate home office facilities, including storage space for voluminous records and a computer. It concluded with the following statement:

> During the first 4 months of the registration period (March through June), the hours required may be up to 4 per day in order to keep on top of the volume of re-registrations occurring, subsequently this time commitment drops down to about 4 hours per week
>
> An expense allowance is provided to the Registrar, this is determined annually at the NZDDC Annual General Meeting (as at February 2003 this sum is $1500 per year).

[40] The Rules refer to the President and the Secretary being the "Officers" of the Council and state that:

> The Authority will be administered by a Registrar who shall be a paid servant of the Council and will be appointed annually by a full meeting of the Council from candidates who meet with the requirements of the position.

[41] It was submitted that the reference to "paid servant" is pivotal as any appointment occurs under the Rules. Ms Dew submitted that the natural and ordinary meaning of the phrase "paid servant" is consistent with an employment relationship. She further submitted that the reference to "officer" in the job description was an anomaly and contrary to the Rules under which appointments were to be made.

[42] While I accept that the phrase "paid servant" would generally point to an employment relationship, the terminology adopted in any particular case is not decisive and must be viewed in context. That is particularly so where, as here, there is an inconsistency of terminology across the relevant documents at the time the relationship was entered into. The reference to "officer" points away from an employment relationship. It is also notable that as early as February 1989 it is apparent that, while the Rules referred to the Registrar as a paid servant, the Council

was referring to the annual "election" of the Registrar. In any event, and as s 6(3) makes clear, the label ascribed to the relationship by one or other or both parties is not determinative.

[43] As Ms Dew points out, the letter of appointment did not refer to Mr Brook being a volunteer. Conversely it did not refer to him being an employee.

[44] I accept that the reason why the letter of appointment did not make specific reference to the status conferred by the position was because it was commonly known that the role was a voluntary one. This had been emphasised to Mr Brook by Mr Connors and was a point reiterated by others. I do not accept the plaintiff's evidence to the contrary. While Mr Taylor gave evidence that he was involved in the establishment of the NZDDC and the decision to create the position of Registrar, and that he believed that the Registrar was an employee, this was based on his memory of events over 40 years ago. In any event, the focus must be on Mr Brook's position and an objective assessment of the parties' intention at the relevant time, namely when the action said to give rise to the alleged personal grievance occurred, as status may change over time.[14]

[45] The job description (and the Rules) both refer to annual reappointment or replacement. It is apparent that each year the appointment process was the subject of discussion at the Council's AGM and delegates were invited to put forward nominations on behalf of their respective organisations. This sort of process, adopted by the Council year after year (including with Mr Brook's knowledge), is inconsistent with an employment relationship.

[46] Further, it is apparent that on at least one occasion more than one nomination was received and voted on. This is reflected in the minutes of the Council's meeting of 12 February 2011, which record an agenda item "Appointment of Registrar, for 2011/2012". Another person was nominated, and that nomination was seconded (by Dr Joyce). As it transpired Mr Brook was also nominated and the vote was divided. Accordingly the status quo remained, with Mr Brook being appointed as Registrar for 2011. Ms Taylor (delegate for NZFATD at the time) described the process in

[14] *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 (EmpC) at [21] and [38].

evidence as a performance review but that is not reflected in the documentation and is at odds with delegates having to ascertain their "riding instructions" in terms of the way their vote would be cast from their own organisations in advance of meetings.

[47] The nature and extent of any payments made to a person will be relevant to an assessment of whether he or she is an employee. For example, a lump sum payment generally points away from a contract of service, whereas regular payments may weigh in favour of such a relationship. Additionally, payments that are designed to reimburse a person for expenses tell against an employment relationship and payments that do not relate to expenses actually incurred can amount to wages and so be indicative of employee status.

[48] Reference was made to the Council's annual statements of financial performance of the Registration Authority. These statements set out the Registration Authority's income for the year less its expenditure, including the Registrar's expense allowance. Mr Walker gave evidence that he was never informed of any agreement that Mr Brook was an employee during the time that he was preparing the Council's financial statements. He says, and I accept, that if he believed, or even considered it possible, that Mr Brook was an employee he would have drawn it to the Council's attention.

[49] At the AGM in February 2008 a suggestion was made that honorariums for three positions ought to be reviewed and this was agreed to. Mr Brook and the Secretary were asked to leave the meeting while this discussion took place and returned later. As a result of the discussion between delegates the honorariums for the positions were raised – the Secretary's to $5,200, the Registrar's to $3,900 and the Financial Adviser's to $200. It was further agreed that delegates would be reimbursed at $150 per day plus $50 meal allowance for two day meetings, and that local delegates would be reimbursed for mileage.

[50] Mr Brook was present and must have known, as he accepted in evidence, that honorariums were being discussed (as opposed to salaries or wages). Ms Maxfield, an accountant who gave evidence for Mr Brook, was also present at this AGM. Her

evidence was that she understood that Mr Brook was an employee, but it is difficult to reconcile this with her role on the Council that set the honorarium. And while she became the Council's Financial Adviser from February 2009, and was accordingly involved in assessing its financial liabilities and expenditure, she did not raise her subsequently expressed belief that Mr Brook was an employee or any concerns that this might give rise to in terms of potential, and accruing, liabilities.

[51] The nature of the payments made to Mr Brook and the way in which they were dealt with by the parties is not consistent with an employment relationship.

[52] This is reinforced by other features of the way in which the parties acted in practice. Mr Brook did not keep, and was not asked to keep, any time or leave records. He did not take annual leave and he was not required to advise when he was intending to be away. Nor was he obliged to give notice. He essentially set his own hours of work and was able to assign various tasks to his wife as he saw fit and without the involvement of the Council. The job description set out a flexible but usual minimum commitment of weekly hours expected of the Registrar, but I do not accept that there was an agreement to provide work for him.

[53] Mr Brook did not receive payslips. No provision was made within the NZDDC accounts or financial statements (which he received) for Kiwisaver, holiday pay, sick leave or annual leave. It is common ground that no PAYE was paid. There is no evidence before the Court that Mr Brook included payments from the Council in his personal tax returns, despite his professed belief that he was an employee for the nine year period at issue.[15]

[54] It is clear that there were a number of concerns about the way in which Mr Brook was conducting himself in the Registrar's position, most notably in respect of the autonomous way in which he was acting. These concerns were discussed at Council meetings, although there is a conflict as to the exact nature of these discussions. However, what is clear is that Council members were concerned to

[15] Mr Brook was equivocal about how his personal tax affairs were structured, saying that he was not aware of what went through his accounts.

ensure that some controls were placed around Mr Brook and the way in which he was operating.

[55] It was not until February 2011 that Mr Brook announced that he might be an employee. This came after a number of difficulties had arisen over the unauthorised transfer of funds and arose in the context of Mr Brook asserting that he was an officer of the Council (notably not asserting that he was an employee) and ought to be formally acknowledged as such. On 17 February 2011 he wrote to the then Council delegates in the following terms:

> Dear Delegates
>
> …
>
> The council has failed to fulfil its part of the contract in as much as it should have modified the rules to show the position of Registrar to be an "Officer" not a "Paid servant". I do not accept the spokeperson['s] assertion that I should be considered as a contractor. This is not the case and would require a formal contract to be drawn up between the parties.
>
> If council is denying its part in the contract then I am a paid servant of council (An Employee). This is not necessarily the contention that I would accept as I believe a contract exists between me and council and the council is duty bound to comply with its part of the contract. As an Officer of council I should as of right have been allowed to attend the whole of the AGM held on Saturday the 12th February without any votes by the delegates. The fact that I was not there was because of the treatment I received and denial of my basic rights as an officer to be present on the same terms and conditions as the other Officers.

[56] Three days earlier Mr Brook had written to the Secretary of NZDDC advising that:

> On a further note, the job description for the position of registrar quite clearly sets me out as being an officer of the council yet some delegates insist that I am an employee. This being the case then there are serious ramifications for council. I tend to accept some of the assertions that I am an employee of council and this means that council should be mindful of their obligations under the Employment Act in respect of my employment.

[57] Mr Brook gave evidence that he firmly believed that he was an employee from 2003 but this is plainly at odds with his subsequent correspondence. It is also at odds with Mr Walker's evidence (which I preferred), who said that discussions with Mr Brook were on the basis that he was a volunteer, an approach he never disputed at the time.

[58] The fact that the Council delegates engaged in discussions in 2011 about possible ways of managing Mr Brook going forward reinforces the position. The draft minutes of the February 2011 meeting note that:

> 2009 NZDA proposed they put forward an employment contract. NZDA would like to proceed with this or at the very least a job description.
>
> …
>
> DK moves that KG drafts within one month a new 'position description' for the Registrar.
>
> Seconded WJ.
>
> Carried 8/0.

While there was some dispute as to whether the draft notes of the meeting accurately encapsulated the detail of the discussions I am satisfied that consideration was given to the desirability of an employment or other arrangement as a control mechanism going forward. I pause to note that there would be no need to advance a proposal to "put forward" an employment contract if Mr Brook was already an employee.

Conclusion

[59] Having considered each of the factors identified above I conclude that Mr Brook was not an employee. It is beyond dispute that Mr Brook devoted a considerable amount of time and effort to the organisation and made a valuable contribution to dance and dancesport in New Zealand. However he took on the role on a voluntary basis and only sought to assert that he was an employee when internal disputes and the relationship with delegates on the NZDDC soured. While I accept that a person's status may change over time I do not consider that it did in this case.

[60] There is no suggestion of a power imbalance in the present case, such as may otherwise be relevant to a consideration of the factors identified in s 6(2) and (3). I agree with Judge Travis' observation in *Chief of Defence Force v Ross-Taylor* that:[16]

> [it] is a very serious matter for the Authority or the Court to find, notwithstanding the clear intention of highly capable and knowledgeable persons who have equal contracting strength and sound reasons for the

[16] *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, [2010] ERNZ 61 at [30].

> arrangements they have mutually entered into, that, after those arrangements have been terminated, the real nature of their relationship was completely different.

[61] Ms Dew submitted that a cautious approach should be taken to any determination as to whether a person is a volunteer rather than an employee, but I do not consider it helpful to introduce some sort of weighting exercise in terms of threshold requirements. Each case will depend on its own particular facts and a consideration of the relevant factors.

[62] Even if I had found that Mr Brook was an employee there would have been difficulties with his personal grievance claim.

[63] While the defendants accepted that there were infelicities with the process followed in terms of the decision to terminate and the way in which this was communicated to Mr Brook, I accept Ms Dalziel's submission that he substantially contributed to the situation he found himself in. While Mr Brook did not intend to personally benefit from the transfer of funds he was well aware that he did not have NZDDC approval for such a step. And while he may have thought that such a step was required of him in some sort of trustee capacity, and may have believed that this had been reinforced by advice he had received, that does not explain the unhelpful approach that he took to resolving matters or addressing the Council's reasonable concerns. The $4,750 remained outstanding until after mediation had taken place and I accept that there was a reasonably held concern that if pre-emptive action was not taken the integrity of the Council's records may be in peril. Further, and as Mr Brook accepted, he failed to take any steps to find alternative work after his termination.

[64] Difficult issues also arose as to the extent to which delegates of the Council could be held personally liable for Mr Brook's claims, which had accrued over a number of years, particularly in circumstances where they received instructions from their member organisations on how they were to cast various votes. I do not need to reach a concluded view on these matters given the conclusions I have reached.

[65] The plaintiff's claims are dismissed.

[66] At the request of both parties costs are reserved. The parties are encouraged to seek to agree costs. If that does not prove possible the defendants may file and serve a memorandum and any supporting documentation within 30 days of today's date, with the plaintiff filing and serving within a further 20 days, with five days for any reply.

Christina Inglis
Judge

Judgment signed at 11.15 am on 20 May 2014