

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 66/06
ARC 122/05**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN STEPHEN CLARK
 Plaintiff

AND NORTHLAND HUNT INCORPORATED
 Defendant

Hearing: 2 and 3 October 2006
 (Heard at Whangarei)

Appearances: Mark Ryan, Counsel for Plaintiff
 Stuart Henderson, Counsel for Defendant

Judgment: 27 November 2006

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] The first issue to be decided in this case is whether the plaintiff was engaged by the Northland Hunt Inc (Northland Hunt) as its huntsman pursuant to a contract for services or whether he was an employee. Mr Clark, formerly a policeman, entered into a contract to perform work as the Northland Hunt's huntsman. Legal consequences flow depending upon the status of his engagement. If he was an employee then he claims to have been unjustifiably dismissed. This then raises the second issue for me to consider. Mr Clark claims loss of remuneration and compensation for his alleged unjustifiable dismissal.

[2] The matter has been before the Employment Relations Authority. In a reasoned decision the Authority member applied the standard tests established by

legal authorities. She decided that the real nature of the relationship between Mr Clark and the Northland Hunt was one of a contract for services. Accordingly, she decided the Authority lacked jurisdiction to determine the dispute between Mr Clark and Northland Hunt.

[3] I proceeded on the basis agreed with counsel at the outset that evidence led by the parties would not only relate to the issue of the status of engagement but also the issues of liability and quantification of damages in the event of Mr Clark being held to be an employee of the Northland Hunt. A misunderstanding arose between myself and Mr Ryan, Mr Clark's counsel, on this process. At the close of Mr Clark's case there was no evidence as to the measure of alleged loss of remuneration or compensation that he was claiming. No evidence had been led as to the effect the termination of his engagement had upon him. There was some suggestion in final submissions of his counsel that the matter could be dealt with by memorandum once status and liability issues had been dealt with. This would not be possible without evidence.

[4] Following submissions on the point and over the objection from Mr Henderson, counsel for Northland Hunt, I allowed Mr Clark to be recalled so that evidence on the measure of remuneration and compensation sought could be led. There had, prior to that point, been no evidence to support Mr Clark's pleaded allegations of humiliation, loss of dignity and injury to feelings. I considered that any misunderstanding, which had arisen between counsel and myself, should not be visited upon Mr Clark and it was for this reason that I allowed him to give further evidence. It is timely to mention and emphasise how important it is that evidence on damages is as equally essential as evidence on liability.

Factual background

[5] Mr Clark commenced his engagement with Northland Hunt in 1998. He had for the previous 11 years been employed in the New Zealand Police based in Whangarei. He retired on medical grounds due to an injured right knee. This occurred approximately six months before he applied for and was offered the huntsman's position with Northland Hunt. In his evidence he said that for the first season he was apparently on trial and never had a contract. During the period leading up to the termination of his engagement in 2005, it appears that he may have

executed contractual documents. In evidence a document was produced purporting to be a “*deed of agreement*” dated 12 January 1998. This would appear to be the document upon which Mr Clark was originally engaged. It is unsigned but is in identical terms to a later contract dated 21 September 2004. That document is signed by the parties. It commenced on 1 October 2003, and expired on 30 September 2005. The contracts are identical in terms. The original contract was due to expire on 1 August 1998. Apparently during the intervening period other written contracts were submitted by the Northland Hunt to Mr Clark periodically. One of these may have been executed but the others remained unsigned. Certainly the signed contract upon which Mr Clark based his claims was that dated 21 September 2004.

[6] The contract specifically provided that the relationship between Mr Clark and Northland Hunt was deemed to be that of principal and independent contractor. The special relationship between the master and huntsman was spelled out. The income was expressed as “*contracting income*”. It was specified to be paid in equal monthly instalments. GST if applicable was to be added. A formula for annual adjustments was included.

[7] Under the contract the huntsman was required to occupy the house and land owned by Northland Hunt at Wheki Valley, Whangarei. No rental was payable and Mr Clark was entitled to use the land as he wished. This would include earning extra income from any additional business activity (such as grazing cattle or agisting horses) he chose to follow. He could also undertake other employment in addition to his position with the Hunt. He took on other such employment officiating at local horse racing club meetings. He was required to keep the land and buildings in a good state of repair. In addition to residing on the property he was required to undertake the huntsman’s responsibilities. Members of Northland Hunt had the entitlement to reasonable access at a time convenient to Mr Clark. Presumably this was for inspection of the property, the pack of hounds and other facilities used by the Hunt.

[8] The respective responsibilities of the huntsman and Northland Hunt were specified in clauses 4 and 5 of the contract, which reads as follows:

4. Responsibilities of the Huntsman

- 4.1 *The Huntsman will at all times, both in private life and in public, conduct himself in a manner befitting the dignity of the Northland Hunt Inc.*
- 4.2 *The Huntsman will act as Huntsman at the Hunt's appointed fixtures.*
- 4.3 *The Huntsman will maintain the hounds and pups owned by the Hunt and attend to the feeding, training, housing, exercising and general care of the hounds. The Huntsman will look after the hounds in a proper and careful manner and in accordance with the recognised way in which a pack of hounds is usually looked after and keep them in good hunting condition. The hounds and pups will always remain the property of the Hunt.*
- 4.4 *The Huntsman and the Master will determine the appropriate breeding programme for the hounds which will then be implemented by the Huntsman.*
- 4.5 *The Huntsman's transport vehicle is to be tidy and to be of a reasonable and reliable standard.*
- 4.6 *The Huntsman will present not less than eight couples of hounds to hunt at the appointed fixtures.*
- 4.7 *The Huntsman will provide a minimum of two horses for his own use, of a standard suitable to maintain his position in the hunting field.*
- 4.8 *The Huntsman shall make the Hunt property available for all activities as required by the Hunt. This includes the right to hold a Hound auction and show on the property.*
- 4.9 *The Huntsman will be responsible for the following expenses:*
 - (a) *Hound feeding costs.*
 - (b) *Horse costs, including provision of feed, veterinary expenses, saddlery and shoeing.*
 - (c) *Maintenance of the Huntsman's regalia.*
 - (d) *Supply labour for repairs to any damage and maintain the property's fencing and water supply.*
 - (e) *Electricity (excluding electricity at the kennels) and all telephone toll calls.*
 - (f) *Cost of staff replacement, necessary subject to the Huntsman's leave of absence entitlement as set out in clause 6.*

5. Responsibilities of the Hunt

- 5.1 *The Hunt will provide kennels and run, chiller and killing facilities on the property of the Hunt.*
- 5.2 *The Hunt will provide the Huntsman's jacket and horn.*
- 5.3 *The Hunt will be responsible for the following expenses:*

- (a) *Hound registration costs and veterinary expenses including vaccinations. The Huntsman shall consult the Master of the Hunt before incurring these expenses.*
 - (b) *Cost of insurance for house replacement and outbuildings.*
 - (c) *Rates.*
 - (d) *Telephone rental, excluding toll calls.*
 - (e) *The control and eradication of all weeds including blackberry on the Hunt's property.*
 - (f) *Materials required for repair and maintenance of property's fencing and water supply.*
 - (g) *Electricity for kennels.*
- 5.4 *The Hunt shall supply and spread on an annual basis fertiliser to an amount and type determined by the Hunt, such fertiliser to be paid for by the Hunt. Any additional fertiliser required by the Huntsman shall be his responsibility and cost.*

[9] Other provisions provided for reimbursement of travel costs, leave of absence entitlements (three weeks per annum at a mutually acceptable time), health and safety, termination, arbitration of disputes, variation of duties and variation of the contract itself during its term. Under the heading of health and safety the Northland Hunt was required to obtain an adequate public liability insurance policy for the huntsman while performing his duties. This would have some consistency with the allegation by Northland Hunt that Mr Clark was engaged as an independent contractor. If he was an employee the Northland Hunt itself would be liable to indemnify him for any acts committed by him and would need to insure itself.

[10] The contract could be terminated by its expiry or breach by the huntsman.

[11] The leave of absence provisions, while imposing some elements of control inconsistent with a contract of services, nevertheless left it to the huntsman to employ and pay for a replacement while on leave.

[12] Effectively Mr Clark as huntsman contracted to maintain the Northland Hunt's pack of hounds using the property provided. This included breeding programmes, feeding (at his expense), and so on. In addition he had to provide and maintain his horses and riding regalia, although the hunt provided his jacket and horn. The Hunt also covered hound expenses apart from feed. The evidence led

suggested that animals were slaughtered on the property as feed for the hounds. Some connections apparently were used by Northland Hunt members (and possibly Mr Clark himself) for the provision of such animals for slaughter at preferential rates.

[13] On hunt days the huntsman was required to provide the pack of hounds and under the jurisdiction of the master, perform the duties traditionally performed by the huntsman at the Hunt.

[14] Between his initial engagement and the raising of difficulties leading to termination of the contract, Mr Clark performed his duties satisfactorily. There was evidence of some complaints arising mainly as to his allegedly poor relationship with some Hunt members. Quite spurious and unsubstantiated allegations were raised by some witnesses for the defendant that Mr Clark was abusing drugs. The evidence was totally hearsay and without foundation. I made it clear that I was not prepared to give any weight to these allegations as from a reading of the prepared briefs there was absolutely no evidence to justify them. Mr Henderson, counsel for the Northland Hunt, agreed that this was so when I raised it with him early in the hearing.

[15] It seems unfortunate that some members of the Northland Hunt raised such unfounded allegations. It appears that new conditions inserted in the new contract, which Mr Clark was asked to sign, concerning drug testing, fanned his feelings that the health and safety issues were connected to the allegations made against him. I don't think that this was necessarily so, but an unfortunate connection was made in Mr Clark's mind. This led to a somewhat tragic standoff at the time of the contract being renewed. There was the combination on the one hand of Mr Clark's refusal to sign the renewal because of his view that he was in any event an employee and on the other hand the Northland Hunt's insistence on a greater measurement of control over this behaviour. Once Mr Clark took the view, clearly upon legal advice, that he was an employee the position could not be resolved. For reasons, which I elaborate upon in this decision, the legal advice was wrong and led to an inability to achieve compromise so that Mr Clark could stay on as huntsman to the Northland Hunt.

[16] The impasse, which arose, led to the Northland Hunt, sure that Mr Clark was an independent contractor, refusing to renew his previous contract on the same terms. When Mr Clark refused to sign the new contract the Northland Hunt engaged a replacement for him. Proceedings were commenced in the Employment Relations Authority and as a compromise, pending the outcome of those proceedings, Mr Clark remained in occupation of the Northland Hunt property. He was no longer engaged as huntsman. He vacated the property once the Employment Relations Authority's decision was issued.

[17] Before turning to the circumstances leading to the eventual termination of his engagement, I refer to the new contract. It was never executed by Mr Clark. It was apparently adapted by the executive of the Northland Hunt based on a template prepared for another hunt. However, it was agreed in evidence that the greater specification of duties for the huntsman were in any event those, which had previously and always applied to Mr Clark. It therefore has some relevance to the issues that I have to decide. The new clause 4 as to the huntsman's responsibilities is set out as follows:

4. ***Responsibilities of the Huntsman***

4.1 *The Huntsman will at all times, both in private life and in public conduct himself in a manner befitting the dignity of the Northland Hunt Inc.*

4.2 *The Huntsman will act as Huntsman at the Hunt's appropriate fixtures.*

4.3 *The Huntsman will maintain the hounds and pups owned by the Hunt and attend to the feeding, training, housing, exercising and general care of the hounds. The hounds and pups will always remain the property of the Hunt. The Huntsman will look after the hounds in a proper and careful manner and in accordance with the recognised way in which a pack of hounds is usually looked after and keep them in good hunting condition. More specifically the Huntsman will:*

Dose the hounds for internal parasites

Vaccinate hounds

Spray hounds for fleas and mange

Feed each hound an adequate diet to maintain that animal in the weight range regarded as normal for a hound of that age, sex and condition

Feed and look after bitches and their pups

Discipline hounds for fighting (whether this be at night or day)

Take all other necessary measures to ensure the hounds are healthy and well cared for.

- 4.4 *The Huntsman and the Master will determine the appropriate breeding programme for the hounds which will then be implemented by the Huntsman.*
- 4.5 *The Huntsman's transport vehicle is to be tidy and to be of a reasonable and reliable standard.*
- 4.6 *The Huntsman will present not less than eight couples of hounds to hunt at the appointed fixtures.*
- 4.7 *the Huntsman will provide and maintain a minimum of two horses for his own use, of a standard suitable to maintain his position in the hunting field.*
- 4.8 *The Huntsman shall make the Hunt property available for all activities as required by the Hunt. This includes the right to hold a Hound auction and show on the property.*
- 4.8 *The Huntsman will utilize all physical and medical aids including glasses if required to undertake his function as the Huntsman.*
- 4.10 *The Huntsman will be responsible for the following expenses:*
- (a) *Hound feeding costs.*
 - (b) *Horse costs, including provision of feed, veterinary expenses, saddlery and shoeing.*
 - (c) *Maintenance of the Huntsman's regalia.*
 - (d) *Supply labour for repairs to any damage and maintain the property's fencing and water supply.*
 - (e) *Electricity (excluding electricity at the kennels) and all telephone toll calls.*
 - (f) *Cost of staff replacement, necessary subject to the Huntsman's leave of absence entitlement as set out in clause 10.*
- 4.11 *The Huntsman acknowledges that his duties include (but are not limited to) the following:*
- *dump offal in pit*
 - *collect livestock, kill and prepare excess for freezer and put offal in pit*
 - *visit other hunts to select stallion hounds for breeding purposes in consultation with the Master*
 - *keep the deep freeze maintained and clean*
 - *keep the chiller maintained and clean*
 - *tidy up broken branches from trees, mend fences, gates, water pipes and generally maintain the Hunt's property*
- 4.12 *Keep a tidy and accurate breeding record of hounds.*

- 4.13 *Attend to the breeding and culling of hounds in consultation with the Master.*
- 4.14 *Select, prepare and show hounds at Hound Shows, in consultation with the Master.*
- 4.15 *Tattoo and/or identify all surviving hound pups annually with a National Hound Register number and name.*
- 4.16 *Consult with the Hunt as to the identification system to be adopted.*
- 4.17 *In the event of termination of this agreement, the Huntsman will ensure that the Hunt or its representative is familiar with this identification system and before he ceases his duties with the Hunt.*
- 4.18 *Keep the Hunt's Hound Stud Book up to date including the recording of details as to:*
- (i) each hound's name*
 - (ii) each hound's National Hound Register identification number*
 - (iii) the blood lines of each hound ie. Its sire and dam*
 - (iv) each dam's mating and whelping records*
 - (v) a health record showing any veterinary treatment, vaccinations and dosing dates of each hound*
 - (vi) culling details*
 - (vii) records of any death with an explanation of each*
 - (viii) records of any notable performance or characteristic traits of each hound*
 - (ix) carry at all times the hounds current hydatids clearing certificate*
- 4.19 *Train hounds in the art of hunting.*
- 4.20 *Carry out other duties relevant to the Huntsman's position in consultation with the Master. In this regard and in all contractual relationships the Hunt will be represented by the Master.*
- 4.21 *Such duties may include assisting with Hunt working bees when required, preparation of Hunt land, attending Hunt functions, and restoring hunted properties to pre-hunting condition.*
- 4.22 *Maintain a current firearms license at all times at his own cost and present to master on request.*
- 4.23 *Attend to keeping the kennels clean and tidy and well maintained, in particular by:*
- washing down all kennels and runs*
 - burn bones and empty ashes from the bone burner*
- 4.24 *The Huntsman's overall and first duty is to ensure that members of the Hunt enjoy first rate hunting. The Huntsman expressly acknowledges that, to a large extent, this depends on the Huntsman's horses and the Hunt's hounds being healthy and well trained, and on the Hunt's property being well maintained and fully functional, and on*

a relationship of cordiality and mutual respect between the Hunt and Huntsman being preserved. The Huntsman expressly agrees that he will take all reasonable steps to achieve these goals.

- 4.25 *Before each Hunt the Huntsman will meet with the Master to receive instructions on how the carded hunt property is to be hunted for that day.*
- 4.26 *At any stage during a hunt the Master may issue instructions to the Huntsman. Failure to follow these instructions shall be treated as a breach of contract and may lead to the termination of the contract.*
- 4.27 *In the event of the termination of this agreement, the Huntsman will ensure that the Hunt property is restored to the same condition as when the contract commenced.*
- 4.28 *The Huntsman must perform any duties that the Master may reasonably require the Huntsman to perform.*
- 4.29 *It is noted that a horse training arena will be constructed by the Hunt. This will be available for general use by the horse riding public and for use by the Huntsman. The Huntsman will be responsible for the maintenance and control of access by the public. The Huntsman may not unreasonably deny access.*

[18] The new contract contained a substantial elaboration of the responsibilities of the huntsman. The Hunt's responsibilities remained the same as those specified in the earlier contract. In addition to the greater specification of duties and unacceptable to Mr Clark, was the enhancement of the health and safety requirements, including the drug and alcohol provisions. The Northland Hunt also required under the contract wider grounds than previously to terminate the contract. Generally, these specified areas where the huntsman could be in breach. While the responsibilities are elaborate they are generally aimed at setting a standard for performance and for the product to be produced, namely the pack of hunting hounds, than per se imposing conditions of control on Mr Clark. In addition his responsibility to meet many of the expenses himself is totally inconsistent with a contract of service.

[19] As I say, difficulties arose in the relationship between Mr Clark and some members. Attempts were made to enable the differences between the respective factions to be reconciled. A perusal of some of the minutes of the executive meetings held might disclose an attitude of some members towards Mr Clark inconsistent with his occupation of the position as an independent contractor.

Clearly there were personality difficulties between Mr Clark and those members leading also to a disaffection between them and Northland Hunt itself. It was a difficulty needing urgent resolution.

[20] Having observed Mr Clark give evidence I perceive that he is of a rigid, somewhat stoic and uncommunicative personality. His police background may have led him to deal with some more sensitive members of the Northland Hunt in a hierarchical and regimented fashion. In other words, he may not have helped himself in the difficulties that arose.

[21] In the end I am of the view that the Northland Hunt acted in a manner consistent with its belief that Mr Clark's position was as a self employed independent contractor. It considered it was, at the expiry of the old contract, entitled to introduce new conditions for renewal if it wished. It agreed, despite the difficulties, to renew Mr Clark's contract but on condition that he accepted the new provisions. He refused to do this. If he had been an employee that would have been his entitlement. From perusal of the minutes of the Hunt's executive, which have been produced, it is clear the executive agonised over the matter. Factions had developed on the executive and generally within the Hunt's membership. Those who were intent on treating Mr Clark fairly appear to have prevailed. It is clear from correspondence produced that this is so. Unfortunately, in such a situation his refusal was tantamount to acquiescing in the previous contract not being renewed and thereby termination of his engagement with the Northland Hunt.

Principles applying

[22] Counsel in their submissions referred me to the principles established in numerous decisions on this particular aspect of employment law. Generally counsel referred to the principles now endorsed in *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581, ([2005] 1 ERNZ 372 (SC)). In assessing the real nature of the employment relationship, the Court tends to apply a number of tests. This is the approach, which was adopted in *Bryson*. None of the tests individually will necessarily be conclusive although respective weight will be placed upon them depending upon the overall factual matrix: *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374. A consideration of each of the tests in turn, will give the Court an

overall feeling for the underlying nature of the relationship. In some cases the position will be patently obvious, in other cases there will be a fine balance.

The statutory provisions

[23] The starting point is s6(1), (2) and (3) of the Employment Relations Act 2000 (the Act):

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 homemaker; 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.*

(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.*

...

[24] In her judgment in *Bryson* now confirmed by the Supreme Court, Judge Shaw considered those provisions and set forth the basis for the analysis of the facts which must follow (paragraphs [19], [21] and [22]):

[19] Since s 6 of the Employment Relations Act 2000 changed the tests for determining what constitutes a contract of service there have been two cases [Koia v Carlyon Holdings Ltd [2001] ERNZ 585 and Curlew v Harvey Norman Stores (NZ) Pty Ltd [2002] 1 ERNZ 114 which have interpreted the changes to the law. The principles established by these cases may be summarised as follows:

- *The Court must determine the real nature of the relationship.*
- *The intention of the parties is still relevant but no longer decisive.*

- *Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.*
- *The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the “fundamental” test.*
- *The fundamental test examines whether a person performing the services is doing so on their own account.*
- *Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.*

...

[21] I am not prepared to go so far as to say that under the Employment Relations Act 2000 evidence of industry practice should be completely disregarded. It would be contrary to the common law and would mean the Court could not take account of matters which are important to the parties. The ultimate decision in a case such as this depends upon the entire factual matrix.

[22] In Muollo v Rotaru, [1995] 2 ERNZ 414 a case brought under the Employment Contracts Act 1991, the Chief Judge held that the Court may consider industry practice when assessing the nature of an employment contract especially where a custom or practice is sufficiently well established. In such a case, the Chief Judge held that such practice could go to establishing the intention of the parties.

[25] It is of assistance in the present case to consider the nature of the employment of Mr Bryson in comparison with what I have already set out relating to the engagement of Mr Clark by the Northland Hunt. However, in the end it is necessary having considered the formulaic approach adopted in *Bryson*, to gain an overall impression of the underlying and true nature of the relationship between the parties. This is the approach adopted by Justice McGrath in the dissenting judgment of the Court of Appeal; *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526 CA, (2005) 7 NZELC 97,653.

The contract

[26] The first ground of real distinction between the position of Mr Clark and Mr Bryson whose engagement was regarded by the Court as one of employment, is the nature and form of the contractual documents involved. In *Bryson* the conditions were printed on the reverse side of a timecard/tax invoice, which Mr Bryson was required to complete at the end of each week of work to secure payment. The position insofar as Mr Clark was concerned was considerably different. From a relatively equal bargaining position, Mr Clark entered into a formal written contract,

which required a signature. While the contractual statements asserting the nature of the relationship are not decisive, the particular contract, which Mr Clark signed, specifically highlighted that it was a contract for services. A consideration of the contract as a whole and the way Mr Clark was required to act under it, point to the relationship between Mr Clark and the Northland Hunt being one of independent contractor.

[27] This approach of adopting ordinary contractual principles and looking at the way in which performance is effected has authority in the following statements from *Cunningham v TNT Express Worldwide (NZ)* [1993] 1 ERNZ 695 at 711, 713 (CA):

...The parties signed a written contract and it can be assumed they were working in accordance with its terms. On ordinary principles of construction their intention about the nature of their relationship is to be arrived at from a consideration of the contents of that document read in the light of all the surrounding circumstances at the time of its execution.

...

Both the Tribunal and the Court referred to evidence of the way the contract was carried out, but I am satisfied that none of it raised any suggestion of material inconsistency with the provisions of the written contract.

...

[28] In determining the real nature of the relationship between the parties a clear starting point is the way the parties negotiated the relationship to exist between them. If a written document is executed in advance then it gives a clear indication as to their intentions. Mutuality may not exist where the party paying the consideration is in an overbearing position as a result of unequal bargaining power. However, I do not perceive that to be the position in Mr Clark's case. He had been a professional policeman for many years. During that period and following his termination of employment with the police he had partially earned income in a self employed capacity. He was registered for GST. He would have filed tax returns on the basis of being self employed and he would have been well aware of the benefits that could be obtained by way of deductions against income for tax purposes. For several years after he entered into the arrangement with Northland Hunt and with the assistance of the accountant for Northland Hunt, who gave evidence, he administered his position as a GST registered provider. The accountant prepared the invoices for him, assisted in accounting for the tax and dealt with his expenses claims. No doubt with the

assistance of his own accountant, he would have prepared the necessary returns both in respect of GST and income tax. Quite apart from that the contract specifically provided for him, whether he took the opportunity or not, to use the property he occupied rent free from the Northland Hunt to generate income quite separate from that provided under the contract. He earned income in addition officiating at local horse racing club meetings.

[29] Simply because a contract contains a provision, which the Courts have sometimes frowned upon as being mere labelling, that does not mean in every case where such terminology is used its weight will be diminished. There is a clear distinction between the contractual formalities that existed between Mr Clark and the Northland Hunt and those which Judge Shaw saw in dealing with what was purported to be the formal contractual arrangements between Mr Bryson and his employer but, which in reality, were far from that.

Control

[30] The control test involves an assessment of the manner in which the person providing the work exercises and assumes supervision and control over the person performing it. The greater the level of control, the more likely the Court will be prepared to find that a contract of service exists. The test has been formulated in a number of decisions. Mr Ryan referred me to an Australian decision of *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263. That decision of the High Court of Australia involved a claim for damages for personal injuries caused to a pedestrian by a cyclist courier. Whether or not the courier was an employee or self employed was crucial to which entity (and I perceive underwriter) would be liable for any damages. While the overall issue to be resolved was different from the present and different policy considerations may be involved, the High Court's analysis of whether the courier was an employee or self employed contractor is helpful.

[31] The significance of the control test and its historical context is seen in the following passages from the decision at 275-276:

"Control"

[43] *These notions also influence the meaning to be given today to "control" as a discrimen between employees and independent*

contractors. In *Stevens v Brodribb Sawmilling Co Pty Ltd*, the Court was adjusting the notion of "control" to circumstances of contemporary life and, in doing so, continued the developments in *Zuijs v Wirth Brothers Pty Ltd* and *Humberstone v Northern Timber Mills*. In *Humberstone*, Dixon J observed that the regulation of industrial conditions and other statutes had made more difficult of application the classic test, whether the contract placed the supposed employee subject to the command of the employer. Moreover, as has been pointed out:

"The control test was the product of a predominantly agricultural society. It was first devised in an age untroubled by the complexities of a modern industrial society placing its accent on the division of functions and extreme specialisation. At the time when the courts first formulated the distinction between employees and independent contractors by reference to the test of control, an employer could be expected to know as much about the job as his employee. Moreover, the employer would usually work with the employee and the test of control and supervision was then a real one to distinguish between the employee and the independent contractor. With the invention and growth of the limited liability company and the great advances of science and technology, the conditions which gave rise to the control test largely disappeared. Moreover, with the advent into industry of professional men and other occupations performing services which by their nature could not be subject to supervision, the distinction between employees and independent contractors often seemed a vague one."

[44] *It was against that background that in Brodribb Mason J said that, whilst these criticisms might readily be acknowledged:*

"...the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, "so far as there is scope for it", even if it be "only in incidental or collateral matters": Zuijs v Wirth Brothers Pty Ltd. Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered."

[45] *So it is that, in the present case, guidance for the outcome is provided by various matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability. These include, but are not confined to, what now is considered "control".*

[32] The Court then went on to consider a number of factors some of which have been summarised by Mr Ryan. The Court considered these factors in determining that the nature of the engagement of the courier in that case was a contract of service. The factors relevant to Mr Clark's position are:

- (a) The courier was not providing skilled labour which required special qualifications. The courier was unable to follow an independent career as a freelancer or to generate any "goodwill".

- (b) The courier had little control over the manner of performing the work.
- (c) Livery and the fact that the courier was presented to the public as a representative of the employer.
- (d) Issues of liability (these would equate to the insurance considerations in Mr Clark's contract)
- (e) Superintendence of the financial aspects of the relationship, ie how remuneration is dealt with.
- (f) Control over leave.
- (g) Supply of tools or other equipment or facilities to perform the duties.
- (h) The right to exercise control but also the actual exercise of that control and performance and whether there was a right to delegate performance.

Integration

[33] The integration test arose from the analysis of Lord Justice Denning (as he then was) in *Stevenson Jordan & Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101, 111:

... under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

[34] These considerations were also part of the overall decision in *Hollis*. Judge Shaw in applying this test in *Bryson* held that the evidence before her strongly pointed to Mr Bryson's work being an integral part of the employer's business. Witnesses before her spoke of the work being collaborative and based on team work and Mr Bryson as not in any way an adjunct to the miniatures unit but an integral part of it.

Fundamental or economic reality

[35] The third test applied in *Bryson* was the fundamental or economic reality test. Again these factors were considered in *Hollis*. Unlike the other two tests, this is more oriented to the way the person engages himself to perform the duties required. The fundamental test requires an examination of whether and how the claimant structured his or her alleged self employed business. Taxation considerations may be relevant. In the *Bryson* case, and adopting the standard endorsed by *Lee Ting Sang v Chung Chi-Keung*, Judge Shaw asked the following question to demonstrate the test:

Did Mr Bryson engage himself to perform the services with Three Foot Six as a person in business [on] his own account?

In answering that question, there were some trappings of a person operating on a self employed basis. However, the overwhelming conclusion the Judge reached was that Mr Bryson was not operating a business on his own account.

Industrial practice

[36] This is another factor to be considered in dealing with the overall assessment of the underlying nature of the relationship between the parties. Industry practice received some prominence in the Court of Appeal decision in *Bryson*. However, Judge Shaw had dealt with it as a matter, which could assist but, which was not determinative. She said it was far from the primary question but a matter to consider in the entire factual matrix. When *Bryson* went further to the Supreme Court that approach was upheld.

[37] In the present case the issue of industry practice assumed some prominence in the evidence. The evidence before me demonstrated that there was no overwhelming practice amongst the hunts in New Zealand to employ the huntsman as an individual contractor for services. Either mode is used. Mr Henderson in his submissions correctly assessed it as “*industry ambivalence*”.

Conclusions

[38] At the outset Mr Clark entered into a contract specifically providing that his position was one of independent contractor. He had previously been an employee when in the police force but subsequently became self employed. He must have also

run a private business while employed in the police force because it was during that time that he became registered for GST. He was no stranger therefore, to the requirements for being in business on his own account and the requirements attached to registration for GST purposes. Benefits in the form of deductions for tax purposes and so on attached to the self employed status. He clearly took advantage of those. He professed when giving evidence to some naivety and lack of knowledge in these areas, which led to him placing reliance upon the accountant who was on the executive of the Northland Hunt. However, I suspect he was downplaying his real acumen in such areas.

[39] I am of the view that when he entered into the contract with Northland Hunt he knew and understood the real nature of his engagement. There is no evidence he was in a weak or desperate bargaining position and, in my view, understood the benefits of being in a self employed status and was quite prepared to take the “*perceived advantages*” of those: *TNT Worldwide Express*, p695, Casey J. Of course now that he has had the contract terminated he sees advantage in maintaining his ignorance in such matters and hopefully acquire the financial consequences, which flow to his benefit, if I find that he was all along an employee.

[40] Mr Ryan submitted that there were a substantial number of factors evidencing control over the performance of Mr Clark by the Hunt. Mr Henderson on the other hand using some of the same factors submitted the opposite. Some care needs to be taken in this case not to confuse factors aimed at standards of performance and quality control in production of the pack of hounds, with control, which would exist between master and servant in performance of duties. My view is that overall Mr Clark was given a substantial degree of autonomy. He exercised influence by his somewhat forceful manner in the way that breeding of the dogs was carried out. He had the free run of the Hunt’s house and lands. The fact that he was not allowed to sub-let the house, as submitted by Mr Ryan, does not seem to be a significant factor. Long periods of time elapsed between meetings with the master or Hunt executive. Certainly there was no day to day reporting or oversight of performance.

[41] Insofar as control is concerned, he was largely left to his own devices. There was some interaction between himself, the master and the executive in the breeding and maintenance of the hounds. However, through his strong personality he

maintained his independent position in this. He insisted that in breeding matters his own views prevail over alternative positions suggested to him. Indeed, that friction was but one of the sources of discontent. On a day to day basis the evidence is clear that there was very little if any control, exercised by the Northland Hunt over how Mr Clark used the property, maintained the pack of hounds, and maintained the horses and other paraphernalia such as vehicles and the like associated with his position as huntsman.

[42] It is true that on hunt days his position in the hierarchy meant that he had to accept an element of control and supervision from the master. However, I do not regard that as conclusive as to his status. The hunt is a day of pageantry, pomp and ceremony. This derives from its history. The whole system operating is hierarchical and regimental. The master is in charge. The huntsman fits into the hierarchy as do the other participants in the hunt. Terminology and forms of address, which might operate between the players on a normal day to day basis, do not apply when the hunt is in progress. Despite this there was evidence that Mr Clark had a substantial degree of autonomy in how he managed the pack of hounds on the day. This of course was his primary responsibility and one of the areas of criticism of him seems to be that he exercised this responsibility in an autocratic fashion.

[43] The duties and responsibilities, which the Northland Hunt sought to impose upon him in the new contract proffered, were certainly more extensive than those set out in the previous contract. However, the evidence as I have already stated, showed that the witnesses were in agreement that these duties already applied to Mr Clark in any event. A close analysis of the items contained in the newly proffered contract do not necessarily reveal his relationship as being more in the nature of employment than independent contract. Even with a contract for services there needs to be some elements of control. However they are more in the form in this case of setting the standards to be performed or like the specifications for a production of a commodity being manufactured, except in this case, the underlying product to be produced was the pack of hounds and the use put to them on the various hunt days.

[44] All of these factors lead me to the overwhelming conclusion that Mr Clark was engaged by the Northland Hunt as an independent contractor for services. It is true that the description of his responsibilities in the contracts, to which I have

referred, imply some elements of control. But as I have said these matters were directed more to ensuring the quality than providing the basis for day to day superintendence over his activities. Simply because issues of control are expressed like this does not mean that the relationship per se is one of master and servant. In my view the Northland Hunt was anxious to ensure that the pack of hounds, which Mr Clark was to take control of and continue to breed, were of the highest quality to suit the purposes of the Northland Hunt. On hunt day when Mr Clark was directly under the supervision and control of the master, he continued to exercise considerable autonomy and independence.

[45] If I were to relate the factors extrapolated earlier from *Hollis* I would conclude in each case that Mr Clark was clearly not subject to a contract of service.

[46] Putting aside the control test, it is clear to me that Mr Clark remained somewhat independent and aloof from the Hunt itself. In a situation with a single employee like this the integration test is not all that suitable as a measure to be applied. However, insofar as it is applicable, I am not filled with any sense that Mr Clark was integrated within the hunt as an employee.

[47] It is in respect of the fundamental or economic reality test that I am substantially persuaded that Mr Clark was self employed. The whole nature of the way that he was allowed to use the Hunt's land for his own business purposes is part of that consideration. Prior to and during the entire period of his engagement as huntsman he had been and was registered for GST purposes and structured his remuneration, business accounting and taxation records accordingly. As I say he professed some naivety in this regard, but I did not find that assertion overly credible. Over the years of his engagement until the final termination of his contract, Mr Clark structured his engagement with the Northland Hunt as a separate business and took advantage of minimising his tax liabilities accordingly. This occurred over many years and I find his assertion that he simply left all this to his accountant somewhat disingenuous when considering the overall factual position.

Disposition

[48] Accordingly, I find that Mr Clark was not an employee pursuant to s6 of the Employment Relations Act 2000. All factors indicate the intention of the parties was

to enter into a contract for services. The real nature of the relationship between them was not that of a master and servant. The conclusion reached by Authority Member Oldfield was correct, in that she did not have jurisdiction to determine the dispute presented to her.

[49] It follows that Mr Clark has no personal grievance based on an unjustifiable dismissal, pursuant to s103(1)(a) of the Employment Relations Act 2000.

[50] Continuing what I said earlier about the nature of the evidence in this matter, I indicate that even if I had found that Mr Clark was an employee and entitled to bring a personal grievance for unjustifiable dismissal, I would have had great difficulty in assessing lost remuneration and compensation. Even though I allowed Mr Clark to be recalled to give evidence, the evidence that I heard from him disclosed he took inadequate steps to mitigate loss of remuneration following termination of his engagement. Mr Ryan conceded this at the conclusion of the further evidence. Further, Mr Clark seemed so reluctant to allow his true emotions and feelings to be known to the Court that it is debatable whether there was any evidence at all upon which I could base any compensation order.

Costs

[51] Finally there is the issue of costs. Both parties have made a claim for costs, but the costs should follow the event in the usual way. I will allow the parties 14 days in which to file memoranda in respect of costs, if that matter cannot be settled between them. Any submissions should include consideration of the present High Court Scale.

M E Perkins
Judge

Judgment signed at 12.30pm on Monday, 27 November 2006

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