



Volunteers

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

Distinguishing between volunteers and employees is not necessarily simple. In “*The Advocate*” No 223 we looked at *The Salad Bowl* decision in terms of the validity of a pre-employment work trial period. In *Salad Bowl Ltd v. Howe-Thornley* [2013 NZEmpC 152] the employer alleged that it had not employed Ms Howe-Thornley but had engaged her on a non-paid pre-work trial. The Court determined that she was an employee rather than a volunteer.

The Chief Judge of the Employment Court found against the employer on several fronts. Firstly, he held that Howe-Thornley expected to be remunerated for the trial (and did receive non-monetary reward by way of a free meal) and therefore could not be called a ‘volunteer’ under the Employment Relations Act 2000. He then went on to find an employment relationship existed between Howe-Thornley and the Salad Bowl:

“[51] Was the defendant “a person intending to work” and therefore an employee? The evidence establishes that she had been offered, and accepted, work as an employee, even if this was for as short a period as several hours as was the plaintiff’s original intention for the employment trial, and then followed by a period in which the plaintiff’s assessment of the defendant’s candidacy would be considered and its decision communicated to the employee. More than that, the defendant performed work for the plaintiff that contributed to its commercial enterprise.”

The definition of employee in s.6 of the Employment Relations Act 2000 expressly 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.”

The 2011 decision *Hamley v. Museum of Transport and Technology* considered the case of Mr Hamley and others who had for a number of years been engaged as Voluntary Section Heads. While being paid a significant honorarium, the Authority found that MOTAT was not obliged to provide work to the Heads and they in turn were not obliged to partake in work when it was available. Their positions were not advertised and they did not apply. The Authority found that despite the payment of an honorarium there was no mutual intention between the parties to create an employment relationship.

A recent case; *Brook v. Macown & Oers* [May 2014 NZEmpC 79] again considered the status of volunteers in light of the potentially more rigid approach taken by the Court in the *Salad Bowl* decision. Brook was the Registrar of the NZ Dance and Dancesport Council (NZDDC) from 2003 until January 2012 when he was formally served with notice stating that his services were no longer required. Mr Brook was formally appointed to the position at the NZDDC AGM. He had a job description and was paid an expense allowance of \$1500.00 per annum plus an honorarium. The relationship ended very acrimoniously and Mr Brook claimed that he was an employee, had been underpaid on an hourly basis and unjustifiably dismissed.

In determining whether or not Mr Brook was an employee, the Court looked at the whole of s.6 of the Employment Relations Act 2000 which defines an employee as “any person . . . employed by an employer to do any work for hire or reward under a contract of service”.

Merry
CHRISTMAS

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson, or Peter Zwart**.

Contact Details:

Ground Floor
71 Cambridge Terrace
PO Box 892, Christchurch
Tel (03) 365 2345
Fax (03) 365 2347
www.mgz.co.nz

Neil McPhail
Email neil@mgz.co.nz
Mobile 0274 387 803

Raewyn Gibson
Email raewyn@mgz.co.nz
Mobile 0274 387 802

Peter Zwart
Email peter@mgz.co.nz
Mobile 0274 367 757

The definition goes on to expressly include some groups (as home workers) and exclude others (volunteers and film production). It goes on to require the Court, when establishing the nature of the relationship to determine 'the real nature of the relationship' (ss 6 (2)) and requires the Court to consider all relevant matters not just 'any statement by the persons that describes the nature of their relationship'. (ss 5(3)). In **Brook** the Court determined that the mere fact that a person has an expectation to be rewarded for work and received reward does not necessarily mean that they are an employee. The assessment must be factual. The Court accepted the **Salad Bowl** determination that the concept of reward was wider than monetary payment, and could include intangible benefits; "many people carry out voluntary work for the personal satisfaction they receive and accordingly expect to be, and are, rewarded in a broad sense. Mr Brook knew at the outset that he would receive an annual payment, and he subsequently did receive such payments". The Court similarly determined that NZDDC would have no legal remedy against Mr Brook if he failed to perform any work as Registrar; the services he provided, while valuable, 'were performed without contractual or legal obligation'.

He did not expect to be 'rewarded for the work'. The payment received 'comprised reimbursement of expenses and . . . 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 provided.'

He was found to be a volunteer on the grounds that he was not rewarded for the work done.

"[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."

In conclusion reward is not, of itself, the sole determination of the contractual relationship. The nature of the reward and its causal link to the work done will also be significant determining issues. Having determined that he was not an employee the Court also stressed by way of belts and braces, the necessity to look beyond the reward to 'the real nature of the relationship'. The factors to be considered were:

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

Whether or not someone is a volunteer is a factual matter that will vary from case to case. **Brook** assures us that mere reward is not enough to make the call. What is needed is a causal link between the reward and the work **plus** a consideration of the real nature of the relationship.

Christmas Shutdown

We hope you all have a great Christmas and are able to "put your feet up" and relax for at least some part of the break. **Our office will be unattended from Monday 22 December 2014 until Monday 5 January 2015.**

If you require assistance during this period please feel free to contact us on the following numbers:

Neil	0274 387 803
Raewyn	0274 387 802
Peter	0274 367 757

