

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 15
5370906

BETWEEN

ROY MARTYN BROOK
Applicant

A N D

WILLIAM GRANT
MACOWAN
First Respondent
KINSLEY JOHN GAINSFORD
Second Respondent
DARRELL JAMES CROZIER
Third Respondent
d'ARTAGNAN KENNEDY
Fourth Respondent

Member of Authority: T G Tetitaha

Representatives: Maria Dew, Counsel for Applicant
Paul Brown, Counsel for Respondent

Investigation meeting: 11 to 12, 30 October 2012

Submissions Received 30 October 2012 from Applicant
30 October 2012 from Respondent

Date of Determination: 16 January 2013

DETERMINATION OF THE AUTHORITY

Orders/Directions

- A. Mr Brook was not an employee of the Council.**
- B. Parties to file submissions on costs by 29 January 2013.**

Employment relationship problem

[1] The New Zealand Dance and Dance Sport Council (the Council) is an unincorporated entity comprised of member associations representing professional and amateur dancers operating since 1965. The Council is governed by the Council

Rules (the Rules).¹ The Council is comprised of two delegates from each member association. The respondents are all delegates of member associations.

[2] Two officers, President and Secretary, are elected from amongst the delegates.² The President is the first respondent, William Grant Macowan. The Secretary is his wife, Sheryl Macowan.

[3] The New Zealand Dance and Dance Sport Registration Authority (the NZDRA) is an unincorporated entity administering registrations of amateur and professional dancers' and monitoring their respective dance levels on behalf of the Council. Dancers paid the NZDRA a registration fee disbursed to the member associations in accordance with a fees schedule approved by the Council.³

[4] The NZDRA is run by a Registrar described in the Rules as a "*paid servant of the Council*".⁴ The Registrar was appointed annually by the Council and is a co-signatory of the NZDRA bank accounts. The Registrar's duties included maintaining two bank accounts for receipt and disbursement of registration fees, processing individual dancer registrations and maintaining information on registrants' dance levels.⁵ The Registrar received an expense allowance of \$1,500.⁶

[5] Roy Martyn Brook was appointed Registrar of the NZDRA in July 2003. He worked with the previous Registrar, Mr Robert Johaan Connors, prior to appointment. Mr Brook received a copy of a job description Mr Connors drafted.⁷ There is a conflict of evidence between Mr Brook and Mr Connor over what was said at the time about the Registrar's role.

[6] Tensions developed between the Council and Mr Brook in 2009 regarding access to information on dancers held by the NZDRA. This prompted discussion on the Registrar's status and a Council motion to draft an employment agreement for Mr Brook⁸ which was never acted upon.

¹ NZD&DC Rules amended 28th February 2010 contains all rule changes since 1999 confirmed 21 August 2010

² See above n1 Rule 6 and 11

³ See above.

⁴ See above n1 Rule 12.

⁵ See above n1 Rule 13

⁶ Job Description – The Registrar prepared by RJ Connors 2003 p3 Applicants Bundle of Documents (ABD) Tab 1

⁷ See above.

⁸ Draft Minutes of the Council 9 August 2008 ABD Tab 18 p80

[7] In February 2011 further tensions arose between member delegates and Mr Brook leading to his exclusion from the Council AGM. Mr Brook sent an email on 17 February 2011 advising his job description stated he was an officer of council entitling him to attend the AGM. He also said if the Council denied he was an officer, he was “*a paid servant of council (An Employee).*”⁹

[8] The Council disagreed. Mr Brook was not appointed an officer nor offered an employment contract.

[9] In April 2011 one of the member associations resigned from the Council due to ongoing tensions. It later demanded payment from the Council of funds held by the NZDRA. In anticipation of this event, Mr Brook earlier emailed the Council auditor, Mr William Stanley George Walker, seeking advice on disbursement of funds held by the NZDRA. Mr Walker advised it would be prudent to seek a Court ruling.¹⁰

[10] The issue of payments to departing member associations and disbursement of fees was discussed by Council at a Special General Meeting on 12 June 2011. Mr Brook prepared a Registrar’s report including proposed disbursements of the NZDRA budget and the fees schedule.¹¹ The proposed NZDRA budget recorded Registrars Expenses of \$3,900. The Council approved disbursements as set out in the Registrars report¹².

[11] During this period Mr Brook obtained the Secretary’s signature to two blank cheques for the NZDRA bank account for payment of the disbursements. No payment of the disbursements was made by Mr Brook.

[12] In July 2011 another member association resigned from the Council.

[13] In August 2011 the second respondent, Mr Darrell James Crozier, approached Mr Brook regarding the non-payment of disbursements. Mr Brook raised his concerns about the departing member associations. There was agreement to seek legal advice. The legal advice was for the Registrar to comply with the Council directives so long as they were within the Rules. No further legal advice was sought.

⁹ Email R Brook to the Council 17 February 2011 ABD Tab 4

¹⁰ Email S Walker to R Brook dated 1 March 2011 ABD Tab 6

¹¹ Registrar’s Report 31 December 2010 ABD Tab 7

¹² Council Minutes dated 12 June 2011 ABD Tab 18 p 97

[14] On 19 August 2011 Mr Brook used one of the blank cheques to withdraw \$19,249.00 from the NZDRA's bank account and paid it into an account operated by Mr Brook only.

[15] On 8 September 2011 Mr Brook used the second cheque to withdraw \$4,750.00. The cheque was made out to R.M. Brook. The same day Mr Crozier emailed seeking payment of the disbursements.

[16] Mr Brook did not seek legal advice on his above actions nor advised the Council what he had done.

[17] On 14 September 2011 Mr Macowan emailed Mr Brook regarding the Council's growing concerns about his non-payment of disbursements. Mr Brook now refused to pay the disbursements as his belief was the Council had lost its mandate and he would hold the funds until all involved reach agreement or a court ordered payment.¹³ Mr Brook did not advise these funds were no longer in the NZDRA bank account.

[18] The Council requested the bank send copies of the NZDRA bank account statements and subsequently resolved to remove Mr Brook as signatory to the NZDRA bank accounts at a Special General Meeting on 1 October 2011.¹⁴

[19] The Council then discovered Mr Brook had withdrawn funds totalling \$23,999.00. A Special General Meeting was held on 30 October 2011. Despite the Council's request to return the funds, Mr Brook refused to do so.

[20] On 18 November 2011 the Council sought repayment by the bank of the sums withdrawn by Mr Brook.¹⁵ The bank was only able to recover \$19,249.00. The sum of \$4,750.00 remained outstanding.

[21] Despite the above, Mr Brook continued as Registrar. In January 2012 he was instructed to send registration renewal notices to dancers for 2012. The notice sent did not include the bank details for the dancers to make direct deposits. Mr Brook asked dancers to contact him to arrange direct deposits. This was discovered by Council delegates whom maintained their registrations upon receipt of the notice. The

¹³ Email R Brook to WG Macowan dated 20 September 2011.

¹⁴ Minutes Special General Meeting held 1 October 2011.

¹⁵ Letter Council to ASB dated 18 November 2011.

Council viewed this as suspicious and evidence of possible further misconduct. Mr Brook does not.

[22] On 20 January 2012 a Disputes Tribunal order resolved payment of fees to withdrawing member associations.

[23] On 23 January 2012 Council terminated Mr Brook as Registrar due to irregularities in the NZDRA bank statements and other irregularities relating to his role as Registrar. The sum of \$4,750.00 was returned following termination.

[24] Mr Brook alleges he is an employee, not a volunteer. He seeks to recover wages and holiday pay totalling \$50,622.33 and 3 months lost income of \$2,811.25.¹⁶

[25] The Council deny he was an employee. Even if he was, they allege serious misconduct reducing any remedies payable to nil.

Issues

[26] The issues for determination are:

- (a) Was Mr Brook an employee of the Council?
- (b) If yes, has there been serious misconduct contributing to the reduction of remedies payable and if so by how much?

Was Mr Brook an employee of the Council?

[27] Mr Brook claims the Rules, job description and the parties conduct indicate he was an employee because:

- a. The Rules describe the Registrar as a “paid servant”;
- b. There was a detailed job description;
- c. The role was for work and reward albeit expressed as an expense allowance;
- d. He was not a volunteer;

¹⁶ Applicants Amended Schedule A to Statement of Problem (SOP).

- e. The President had control as expressed in the Rules and job description;
- f. The Registrar was an integral role within the Council;
- g. The duties were excessive and beyond casual or voluntary duties;
- h. He was issued with directives and it was understood these were not voluntary duties he could come and go from;
- i. The fundamental nature of the relationship was part-time employment with no other work except consultancy work for Mr Macowan;
- j. The Rules and the job description set out the terms and conditions of his employment agreement.

Legal Framework

[28] The issue for determination is whether Mr Brook was an employee of the Council. It is not whether he was a volunteer. Even if he wasn't a volunteer, it does not automatically mean he was an employee. However if Mr Brook is not an employee, the Authority has no jurisdiction to consider his claims.

[29] An "employee" is "any person ... employed by an employer to do any work for hire or reward under a contract of service" (s6(1)). In deciding whether Mr Brook was employed by the Council, the Authority must determine "the real nature of the relationship between them" (s6(2)). This assessment includes considering "all relevant matters, including any matters that indicate the intention of the persons" and "is not to treat as a determining matter" any statement by the parties describing "the nature of their relationship" (s6(3)).

[30] In considering "all relevant matters" under s6, the Authority shall apply 'tests' such as control, integration, and what is known by the shorthand of 'the fundamental test'¹⁷.

[31] To determine whether there is an employment relationship falls into two parts. Firstly, did the parties enter into a legally binding agreement of any sort - is there evidence of an intention to create legal relations by an offer and acceptance, and valuable consideration? If yes, the Authority would proceed to consider the nature of

¹⁷ [Curlew v Harvey Norman Stores \(NZ\) Pty Ltd](#) [2002] 1 ERNZ 114 (EmpC) at [46]

any such agreement and inquire whether the real nature of the relationship was one of employment or not.¹⁸ The Authority must examine the terms and conditions of the contract and the way in which it actually operated in practice, before it is possible to examine the relationship in light of the control, integration and fundamental tests.¹⁹

[32] To create an employment contract there must be a common intention of the parties to enter into legal obligations. Whether a "common intention" can be read into an arrangement between the parties is to be determined in the evidence of their respective statements and/or actions at the time of, or before, or after that arrangement is made.²⁰

[33] The Authority must examine the terms and conditions of the contract and the way in which it actually operated in practice²¹. When the intention of the parties has to be gathered partly from documents but also from oral exchanges and conduct, the terms of the contract are questions of fact.²²

[34] Intention can also be derived from parties' statements at the time the employment contract was allegedly made and if not clear, from their subsequent conduct and dealings.²³

Credibility

[35] There is a substantial conflict of evidence between the parties. This requires express findings of credibility²⁴ upon evidence given by brief (signed and unsigned) and orally at hearing.

[36] Credibility can be assessed on two bases – the witness personally²⁵ and the story the witness tells. Some factors relevant to personal credibility are:

- (a) Demeanour²⁶;

¹⁸ *Caccippoli v Board of Trustees of Edmund Hilary School* ERA Auckland AA402/04, 7 December 2004 at [21].

¹⁹ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372 at [32] where the Supreme Court reconciled *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681, [1993] 1 ERNZ 695 (CA) with s 6.

²⁰ *Inspector of Awards and Agreements v Religious Society of Friends (Quakers) Wellington Monthly Meeting* [1984] ACJ 409

²¹ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372 at [32]

²² *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372 at [20]

²³ *Page v Waipu Citizens and Services Club Inc*, unreported, AEC 1/98.

²⁴ *RNZAF Museum Trust Board v Hunter* Employment Court Wellington WC11/00, 1 March 2000 at p6

²⁵ *Kelly v Accident Rehabilitation & Compensation Insurance Corporation*

- (b) Inconsistencies and contradictions of all kinds²⁷;
- (c) Prevarication²⁸;
- (d) Reasons to lie²⁹
- (e) Concessions made where due, despite any perception by the witness of a risk to credibility in giving that evidence³⁰.

[37] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?³¹

[38] The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.³²

Did the parties intend to enter into a legally binding agreement?

The Rules and Job Description

[39] It is accepted there was no employment contract signed between the parties or express offer of employment either orally or in written form from the Council to Mr Brook. Mr Brook submits this can be inferred from the Rules and job description he was provided with at the time he accepted the employment.

[40] Mr Brook submits the words “paid servant” in the Rules indicate he was intended to be an employee and provided dictionary definitions of “master” and/or

²⁶ *Hakaraia v Foodstuffs (Wellington) Co-operative Society Ltd* Employment Court, Wellington WC6/01, 22 February 2001 at [14]; *T v SAR Ltd* ERA Christchurch CA126/05, 23 September 2005; *Young v Venables t/a Mt Eden Bakery & Delicatessen* Employment Court Auckland AC88/00, 7 November 2000 at p 6

²⁷ *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment* [2012] NZERA Auckland 252

²⁸ *Griffith v Sunbeam Corporation Ltd* EMC Wellington WC13/06, 28 July 2006 at [108]

²⁹ See above at [109]

³⁰ See above at [110]

³¹ See above at [111]; *Corbett v National Mutual Finance Ltd* (CA 172/91, 10 February 1992, p10

³² *New Zealand Merchant Service Guild IUOW Inc v New Zealand Rail Ltd* [1991] 2 ERNZ 587 (LC), at 603

“servant”³³ in support. Although the job description described the Registrar as “officer of Council” he submitted this made no difference as it was possible for the Registrar to be both “paid servant” and an “officer”. He submits the job description contained relevant matters of “control” for example reporting to the President, detailed tasks requiring an estimated 632 hours work annually³⁴ and payment of an “expense allowance” determined annually by the Council (\$1,500 as at February 2003)³⁵ indicating an employment relationship.

[41] Documentation evidencing the alleged agreement between parties is a useful indication of their intentions.³⁶ The Rules were originally drafted in 1965 then revised in 1999 and 2010. There are indications in the Rules which negate an intention to create an employment relationship. Although the Registrar is described as a “paid servant” it is not defined as employment. The position of Registrar is an annual appointment by Council with no guarantee of re-appointment.³⁷

[42] There is no evidence previous Registrars were employed. Mr Maurice Taylor was the inaugural President at the time the Rules were drafted. He understood the Registrar was a “paid servant” but did not know if this meant he was an employee.³⁸ Mr Taylor and Mr Macowan, the current President of the Council, agreed Council did not employ anyone to their knowledge. No Council member, some of whom were tax advisors/experts, raised employment or tax liabilities in respect of the Registrar.

[43] The job description was drafted by the previous Registrar, Mr Robert Johaan Connors in 2003.³⁹ Mr Connor’s said he used “officer” to reinforce the voluntary nature of the position similar to the President and Secretary - positions subject to annual nomination, reappointment at the AGM and approval of an expenses allowance by Council.⁴⁰ No point was taken that either of these officer positions were anything other than voluntary.

³³ *The Concise Oxford Dictionary* 7th edition

³⁴ ABD Tab 1 p3 March to June 4 months @ 4 hours per day = 488 hours; 7 months @ 4 hours per week = 144 hours total hours 632

³⁵ Job Description p 3 ABD Tab 1

³⁶ *Hutton & Ors v Provencocadmus Ltd & Anor* [2012] NZEmpC 207 at [80]

³⁷ See above n1 Rules 12 to 13 the appointment is made annually by Council. Payment is inferred but the amount and purpose is not.

³⁸ At hearing Mr Taylor amended his brief of evidence (BOE) at paragraph 10 to delete the reference to “employee” stating the Registrar was a “paid servant” not a volunteer or officer.

³⁹ ABD Tab 1

⁴⁰ BOE RJ Connors paragraph 3.1 to 4.2

[44] There were no set hours of work or expected targets or performance review requirements. There was no time recording, budgets or control over the number of hours Mr Brook spent on Registrars duties and other projects for Council.

[45] The Registrar's payment was described by the parties as either an "honarium" or "registrars expenses" or both.⁴¹ An "honarium" is a voluntary payment for professional services rendered without the normal fee.⁴²

[46] Mr Stanley Walker, the Council accountant and auditor for 20 years, used "registrars expenses" in its financial accounts to refer to expenses such as travelling to meetings and running a home office. Reimbursement of expenses does not confer any additional benefit and would not indicate an employment agreement.

[47] The expense allowance was paid irrespective of the amount of hours worked. It was approved up to two years in advance.⁴³ Payment was at the absolute discretion of the Council. Where the discretion to pay an honarium is absolute the Authority has accepted that this is inconsistent with the existence of an employment agreement.⁴⁴ The payment of an honarium does not confer any additional benefit beyond reimbursement of expenses incurred.⁴⁵

Parties Conduct

[48] Prior to appointment, Mr Brook met with Mr Connors⁴⁶ and assisted him as Registrar.⁴⁷ There is a dispute about what Mr Brooks was told about the Registrar's role at the time. Mr Brook says he was never told he was a volunteer. Mr Connors disagrees. He recalled telling Mr Brook:

There is no way Council is able to pay anyone what this role is worth. It needs to be on a voluntary basis and there is a small honarium payable.

⁴¹ ABD Tab 7 & 16 Mr Brook's Registrar Reports refer to the payment received as either "expenses" or an "honarium"; ABD Tab 19 p 68 Minutes AGM of the Council 17 February 2008 the payment is described as an "honarium".

⁴² The New Zealand Oxford Dictionary 2005

⁴³ Minutes of Council 17 February 2008 ABD Tab 19 p68

⁴⁴ *Caccipoli v Board of Trustees of Edmund Hilary School* ERA Auckland AA402/04, 7 December 2004 at [16] and [19]

⁴⁵ See above at [26].

⁴⁶ BOE RM Brook paragraph 13 and 14

⁴⁷ ABD Tab 19 at p17 Minutes General Meeting of the Council 28 July 2003 record Mr Brook assisting Mr Connors as Registrar. This evidence was not disputed by Mr Brook at hearing.

[49] Mr Connor’s evidence is preferred. It was unequivocal and consistent with Mr Brook’s own evidence. Mr Brook confirmed they had met. In a subsequent letter he stated the “*role of Registrar involves many hours of work much of it voluntary*”⁴⁸ and his evidence at hearing was “*there was not always an expectation of payment for work I did as Registrar.*” If Mr Brook did not always expect to be remunerated for his work, it is more probable than not he was working in a voluntary capacity as Registrar.

[50] Mr Connor’s credibility was not particularly tested in cross-examination. He made concessions that he could have used “registrar expenses” as well as honorarium when talking to Mr Brook. Having drafted a detailed job description and spent time with Mr Brook in the role as Registrar, it seems improbable Mr Connor would fail to explain to Mr Brook the voluntary nature of the Registrars role.

[51] Mr Brook’s Counsel invited the Authority to set aside Mr Connor’s evidence as he was not making the offer of employment. It declines to do so. The evidence is relevant, cogent and consistent with other evidence including Mr Brook’s. There is also evidence he was authorised by Council to approach Mr Brook about the position of Registrar.⁴⁹

[52] In contrast Mr Brook’s denial he knew the role of Registrar was “voluntary” as opposed to an employee was inconsistent with his own evidence and at times prevaricated.

[53] Mr Brook is a retired engineer running a private consultancy business. He would have been aware from the job description the position was lowly paid with a high number of hours. His hourly rate in 2003 would have been estimated at \$2.37 per hour.⁵⁰ Despite this knowledge he continued in this position for over 8 years.

[54] It was common ground no PAYE or other tax was deducted from this payment. Payment of PAYE is a relevant factor supporting an employment relationship.⁵¹ At hearing Mr Brook admitted knowledge PAYE should be deducted from an employee’s wages, but was not deducted from the Registrars payment. His explanation taxation “*was the Council’s problem*” was not credible in the

⁴⁸ Letter R Brook to the Council dated 14 February 2011 produced by Respondent

⁴⁹ ABD Tab 19 at p17 Minutes General Meeting of the Council 28 July 2003

⁵⁰ \$1,500 (expense allowance) divided by 632 (hours estimated in the job description)

⁵¹ *Kaur v Sri Guru Singh Sabha Auckland Inc* [2012] NZERA Auckland 52 at [22]

circumstances. It ignored his role in managing the NZDRA and Council finances. He received their income, produced annual reports and budgets for approval by the Council setting out its liabilities for the year including the payments made to him. Nowhere in the reports and budgets produced did he provide for payment of PAYE or any other employment related expense.⁵² His reports indicate he is meticulous and careful to advise the Council about potential liabilities.⁵³ His failure to advise Council of their PAYE liability is inexplicable if Mr Brook believed he was an employee.

[55] Mr Walker, the Council's auditor and accountant for 20 years with expertise in taxation liabilities, also failed to advise Council of PAYE obligations but his explanation was more plausible - he did not believe Mr Brook was an employee. Mr Walker conceded in cross-examination "paid servant" in the Rules may not mean volunteer, but did not agree it meant employee either.

[56] A previous Registrar, Mr Robin Stowers, believed the role was "voluntary" because of the small annual honorarium of \$1,500, lack of time recording and non payment of PAYE.⁵⁴

[57] Mr Brook's evidence prevaricated. He alleged reporting to Mr Macowan "*almost daily*"⁵⁵ despite earlier stating "*I do not actually report to anyone*".⁵⁶ Mr Brook said at hearing this was a mistake. But he made other statements that reinforced the lack of control Mr Macowan or the Council had over his activities.⁵⁷ Mr Brook conceded at hearing he determined what he did on a daily basis. This is consistent with Mr Macowan's evidence at hearing Mr Brook initiated contact – and only when there were matters he could not handle.

[58] Although Mr Brook submitted he received Council directives which were not voluntary, there was evidence he did not always follow them.⁵⁸ The serious misconduct occurred without Council directive and in breach of the Rules.⁵⁹ There

⁵² See for example Registrars Report at ABD Tab 7 p10 and Registrars Accounts ABD Tab 16

⁵³ See for example Registrars Report at ABD Tab 7

⁵⁴ BOE R Stowers p3 last paragraph and p4 paragraph 3.0.

⁵⁵ BOE R Brook paragraph 30

⁵⁶ Exhibit C BOE KJ Gainsford Email R Brook to KJ Gainsford 12/03/11 responding to queries about who the Registrar reported to

⁵⁷ See above n 55 where the email stated "*the [NZDRA] was always run as an autonomous body*" and "*I only refer matters to council where they are not covered by the rules and then require a decision.*"

⁵⁸ BOE KJ Gainsford p11 paragraph 42 refers to the Council wanting a newsletter sent in November 2011 which was ignored by Mr Brook.

⁵⁹ Rule 12(b)(ii)

was evidence of non-compliant behaviour. Refusal to supply the information from an opinion poll directed by Council led to the tabling of a motion of no confidence in Mr Brook.⁶⁰ His conduct indicates he treated the directives as optional not mandatory.

[59] Standing back and assessing this matter objectively, there was no evidence of a common intention by the parties to enter into an employment relationship at all. Accordingly Mr Brooks was not an employee. Given this determination there is no need to consider the issue of misconduct.

Costs

[60] Parties are to file submissions on costs by 3 pm 29 January 2012.

T G Tetitaha
Member of the Employment Relations Authority

⁶⁰ BOE KJ Gainsford p6 paragraphs 2.5 to 2.8 where the 9 August 2009 Draft Council Minutes note problems delegates had accessing information held by Mr Brook from an opinion poll directed by the Council. Mr Gainsford alleged tensions arose because Mr Brook controlled and withheld access to the NZDRA information.