IN THE EMPLOYMENT COURT
AUCKLAND

AC 55/06
ARC 79/05

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GEOFFREY MAURICE DOWNEY Plaintiff
AND	NEW ZEALAND GREYHOUND RACING ASSOCIATION INC Defendant

Hearing: 21 and 22 August 2006

Appearances: Richard Harrison, Counsel for Plaintiff
Simon Menzies, Counsel for Defendant

Judgment: 27 September 2006

JUDGMENT OF JUDGE ME PERKINS

Introduction

[1] By virtue of s29 of the Racing Act 2003 the rules for horse and greyhound racing may provide for the appointment, functions and duties of stipendiary stewards. The use of the word "appointment" in the Act is not determinative of the issue in this case. The plaintiff, Mr Downey, was so appointed by New Zealand Greyhound Racing Association Inc (Greyhound Racing). The issue, which arises in this case, is whether he was appointed under a contract for services or a contract of service. He maintains he was an employee under a contract of service. Greyhound Racing maintains he was an independent contractor under a contract for services. Legal consequences flow from whichever status applies. The matter is now pertinent because whatever his status, Mr Downey had his position terminated on 20 July 2004.

[2] Greyhound Racing, the defendant, is the entity responsible for the control and regulation of greyhound racing throughout New Zealand. It is one of three such bodies in New Zealand. The other two are Harness Racing New Zealand Inc (Harness Racing) and New Zealand Thoroughbred Racing Inc (Thoroughbred Racing). These organisations control horse harness racing and horse gallop racing in New Zealand in a way similar to the way Greyhound Racing does for dog racing.

[3] Each of the three associations have developed rules in order to comply with the requirements of the Racing Act 2003. They are governed under that Act by the New Zealand Racing Board.

[4] The associations in turn make and maintain in force, rules regulating the conduct of racing by their respective code. The meetings are set up and held by racing clubs affiliated to their respective association. In the case of dog racing, greyhound racing clubs must be affiliated to the defendant. Greyhound Racing has established its rules in a rule book. For the purposes of the present proceedings, the March 2003 update of that rule book is relevant.

[5] I heard the briefest of evidence on the history of the position of stipendiary steward. The position is one clearly of some antiquity. Mr Downey indicated the position has been in place since racing began. "Generations" to use his word. The use of the word "stipendiary" might have indicated a special office holder paid a stipend. That has no relevance now and the name has clearly been retained as a matter of custom. As I say it is referred to in the Racing Act, but is not defined there.

[6] Mr Downey applied to the Employment Relations Authority (the Authority) to determine his status. In a well reasoned decision, the Authority member decided Mr Downey was engaged as an independent contractor under a contract for services. She held the matter was, however, finely balanced and resolved the issue on the basis of what she perceived the intention of the parties to be at the outset.

Pleadings

[7] Mr Harrison's statement of claim on behalf of Mr Downey is a model of brevity. It asserts that Mr Downey, from the date of his appointment to the date of cessation of his position as stipendiary steward, was an employee. That the real nature of the relationship between plaintiff and defendant was that of employment,

not one of a contract for services as maintained by Greyhound Racing. It particularises the matter as follows:

> *7 The plaintiff was not in business on his own account and as stipendiary steward was at all times under the control of the defendant.*
>
> *8 The plaintiff was integral to the defendant's operation during greyhound racing meetings and when providing the stipendiary steward services.*
>
> *9 Stipendiary stewards are employees within the wider racing industry.*
>
> *10 Following a review of the contractual arrangements between the defendant and stipendiary stewards (including the plaintiff), employment agreements were considered more appropriate in terms of reflecting the reality of the situation.*

In addition to seeking a finding that he was an employee, Mr Downey also seeks an order for costs. The challenge he makes from the decision of the Authority is by way of a hearing de novo.

[8] In an equally succinct statement of defence, Mr Menzies, on behalf of Greyhound Racing has put the defendant's position that Mr Downey was engaged as an independent contractor. As to the particular that Greyhound Racing reviewed the arrangements for stipendiary stewards and decided employment agreements were more appropriate, the defendant pleads such altered arrangements were to reflect a change in structure. In particular, the nature and duties of the stipendiary steward's position were changed.

Factual background

[9] For the plaintiff, I heard evidence from a number of witnesses. Mr Downey read and elaborated upon a written brief. Viva voce evidence was received on behalf of the plaintiff from four witnesses under subpoena: Mr Jeff Lenz, former Chief Executive Officer of Greyhound Racing; Mr Gavin Whiterod, currently a Stipendiary Steward/Field Officer with Greyhound Racing; Mr Thomas Carmichael, currently Chief Racecourse Inspector for Harness Racing; Mr John McKenzie, currently Chief Racecourse Inspector for Thoroughbred Racing. Mr Carmichael is also still employed as Racecourse Inspector for Greyhound Racing and has held that position for over 20 years.

[10] For the defendant I heard evidence from Mr Lance Bickford, the present Chief Executive Officer for Greyhound Racing and Mr Ross Gove, Racing Manager

for Greyhound Racing. Mr Gove's position arises out of the review referred to in the pleadings. He has held this position since June 2004.

[11] This being a de novo challenge to the decision of the Authority, I emphasise that in accordance with the provisions of the Employment Relations Act 2000 I have heard evidence, which may or may not have been before the Authority. I have no record of any evidence adduced at the inquiry by the Authority member as such evidence is not recorded.

[12] In a brief chronology of events contained in his opening remarks, Mr Harrison set out the sequence of events in this matter. The plaintiff was appointed to the position of stipendiary steward with Greyhound Racing commencing on 1 October 2002. He was required to sign a written contract. At a board meeting on 9 June 2003 the board of Greyhound Racing undertook a review of the stipendiary steward contractual arrangements and remuneration. The Chief Executive Officer at the time of this board resolution was Mr Lenz. Mr Lenz terminated his employment with Greyhound Racing in July 2003. In October 2003 a new Chief Executive Officer, Mr Bickford, commenced employment with Greyhound Racing. He met with Mr Downey on a number of occasions. Mr Downey was the designated spokesman for the stipendiary stewards concerning negotiation of possible future arrangements as to their status and remuneration. In March 2004, following the revision, Greyhound Racing proposed to advertise three stipendiary steward/field officer positions. These positions were intended to replace the existing stipendiary steward positions, the way their duties were performed and their status. By this stage Greyhound Racing had decided that the new stipendiary steward/field officers were to be employees. The plaintiff sought to amend the position specification for North Island stipendiary steward/field officers to four days per week instead of the proposed three days per week. All of the incumbent stipendiary stewards except Mr Downey were appointed to the new stipendiary steward/field officer positions. Mr Downey's contract was terminated on 15 June 2004 by the giving of 30 days' written notice.

The contract

[13] The document is entitled "Independent Contractor Agreement". It is dated 1 October 2002. The wording of the agreement is careful to note that the plaintiff,

Mr Downey is not an employee. It provides that he is not to represent to any third party that he is anything other than an independent contractor. Mr Downey (referred to throughout as "the contractor"), was required to insert his GST number next to his name in Clause 1 of the agreement. This has not been inserted in the photocopy of what I surmise to be the signed original, which is contained in the agreed bundle of documents. However, I shall deal with tax issues more fully shortly.

[14] The scope of the plaintiff's duties and obligations is set out in clause 2. Again the contract is careful in its wording to limit the plaintiff's ability to incur obligations on behalf of Greyhound Racing. He was required to protect confidence. There is a provision limiting Mr Downey to providing only services to the Association during the term of the agreement. There was some dispute in the evidence I heard as to whether Mr Downey was allowed to carry out other occupations during his contract with Greyhound Racing. Mr Downey interpreted the clause to mean he could not. Other witnesses gave evidence to the contrary. Indeed, Mr Whiterod gave evidence of other enterprises he undertook for profit outside his duties as a stipendiary steward. I think that in the context of the document this provision must be interpreted to mean that the stipendiary steward could not provide stipendiary steward duties to any other entity. I do not believe that the contract reasonably contemplated that an independent contractor would be unable to pursue other work.

[15] The contract is terminable upon 30 days prior notice in writing. It could clearly be terminated for breach and apparently in the event of Mr Downey's "bankruptcy and/or insolvency". This might have some significance in the context of the present dispute. In making a distinction between bankruptcy and insolvency it might imply Mr Downey could perform the duties individually or under the umbrella of a corporate or business entity. The idea of a corporation providing the services of a stipendiary steward to Greyhound Racing in the context of the Rules and indeed the Racing Act, establishes some conceptual difficulties in my mind. However, it was clear that Mr Downey could deal with the remuneration and taxation aspects under a trading name and business entity and he did so.

[16] The contract goes on to provide for the race day, non-race day and on call services required of Mr Downey. The remuneration payable including expenses, is set out in the clauses and a schedule. Compensation for redundancy, pension

benefits, medical, dental, life, disability or other assurance protection is specifically excluded. However, Mr Downey was required to comply with Greyhound Racing's health & safety policy and the provisions of the Health and Safety in Employment Act 1992.

[17] So far as taxation is concerned, GST is excluded from the quantum for remuneration provided. As Mr Downey was apparently required to be registered for GST purposes he was entitled to, and indeed did, submit GST invoices, adding GST to his fees for services provided. There was also evidence that on a regular basis he filed GST returns. He was to be liable for all his tax liabilities and indemnify Greyhound Racing not only for such liabilities but other liabilities arising out of enforcement costs for failure to account for tax.

[18] Mr Downey was at all times required to abide by the Rules of the Association. This presumably meant the rules contained in the Rule Book. He was, under the contract, to be liable for any wilful breach. He was to indemnify the Association against costs associated with any breach caused by him. These provisions in the contract would appear to be in conflict with the rules themselves. As pointed out by Mr Downey in his evidence he was by virtue of Rule 126 to be indemnified on a fairly wide basis by the Association. Mr Downey pointed to this provision as perhaps supporting his contention that he was an employee. However, my view is that it is more consistent with Greyhound Racing's position. If he was an employee he would be automatically indemnified by Greyhound Racing, as his employer, for all acts carried out in the course of his lawful duties. If this were his status there would be no need for the specific indemnity in the Rules. However, whether this is a significant consideration in the overall assessment of his true status, is a moot point. There is, nevertheless, an unfortunate inconsistency between the provisions of the contract and the rules.

Legal principles

[19] Following the Supreme Court's endorsement of the Employment Court judgment in *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 ([2005] 1 ERNZ 372 (SC)), the decision of Judge Shaw now really establishes the analysis to be undertaken in a case such as this. Indeed the parties in the closing submissions really proceeded on that basis, with only peripheral reference to other authorities.

[20] The starting point is clearly section 6(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 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.*
>
> *(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.*

[21] In her judgment in *Bryson*, Judge Shaw considered those provisions and set forth the basis for the analysis of the facts, which must follow (paras [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 which have interpreted the changes to the law* [Koia v Carlyon Holdings Ltd *[2001] ERNZ 585 and* Curlew v Harvey Norman Stores (NZ) Pty Ltd *[2002] 1 ERNZ 114*]. *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.*

[22] Judge Shaw came to the view that Mr Bryson was an employee. The way that she came to that conclusion is of assistance in determining the position as it relates to Mr Downey. By comparing Mr Downey's position with Mr Bryson's, it can be seen that Mr Downey's position was considerably different. This in turn assists me in deciding the true nature of the relationship between Mr Downey and Greyhound Racing.

[23] The first ground of distinction is the nature and form of the contractual document. In *Bryson*, the conditions were printed on the reverse side of a time card/tax invoice, which Mr Bryson was required to complete each week to secure payment. Mr Downey's position was, of course, different. There is the one formal contract, which required signature. Mr Downey had the opportunity to seek professional advice in advance of signing. While contractual statements asserting the nature of the relationship are not decisive, the whole tenor of the contract and the way Mr Downey, subsequent to signing, operated under it, point to the intent and nature of the relationship being one of independent contractor.

[24] This approach has authority in the following statements from *Cunningham v TNT Express Worldwide (NZ) Ltd* [1993] 1 ERNZ 695 (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.*
> (page 711)
> …
> *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.*
> (page 713)

[25] As was stated in *Cunningham* circumstances may change. They did when Mr Bickford completed the review of Mr Downey's position. However, for the period when Mr Downey was appointed he acted and worked under the contract in a way consistent with an intention to be an independent contractor.

[26] In an endeavour to ascertain the real nature of the relationship between Mr Downey and Greyhound Racing, I deal in turn with the tests applied by Judge Shaw in *Bryson*.

Control

[27] In dealing with this test the courts look at the level of control the alleged employer exerts over the alleged employee. The greater the level of control, the more likely the courts will be prepared to find that a contract of service exists. Conclusive in the control test for Mr Bryson were the crew deal memo itself, the training required from the employer before he could properly perform duties, the variable nature of the assignment of duties and daily routine established by the employer, daily call sheets and crew meetings, clear directions on set, specific instructions on how to dress models for filming and so on. All of these amounted to significant examples of control in Judge Shaw's findings. There was some discussion as to the fact that Mr Bryson had to provide his own tools. However, in addition to the control in respect of actual duties, his hours of work each week were specified. He was not simply on call as and when required. Justice McGrath in the dissenting Court of Appeal judgment adopted a similar approach ([2004] 2 ERNZ 526, 530).

[28] Mr Downey occupied a totally different position. While there were duties required to comply with the rules of racing, and in performance of his judicial functions, he was not required for specified hours on a week by week basis. Indeed he was on call although he knew well in advance the race meeting he was required to attend. He would, if he agreed, attend meetings outside his usual area if a stipendiary steward in another area could not attend. He worked from home. Apart from the pressing nature of some of his duties he was very much a free agent. Certainly the degree of control was nothing of the kind described for Mr Bryson's position. Added to this, there was the manner in which remuneration was dealt with – reimbursement by way of a flat fee for the number of meetings attended. In

addition there was the structuring for tax purposes. He had to submit his own GST invoices. While I doubt whether Mr Downey had much scope for profit in the sense described by Justice McGrath in *Bryson*, an overall assessment of the control test would lead to the conclusion that Mr Downey was not an employee.

[29] It is hard to glean from Mr Downey's evidence exactly what areas of control he points to as satisfying the control test and providing him with an argument that his appointment was in reality that of an employee. Doing the best I can from his evidence and his counsel's submissions it appears that he relies upon the following:

- The rules of Greyhound Racing are prescriptive and leave little room for autonomy. Mr Downey referred to the requirements placed upon him in relation to his high level of responsibility and accountability arising therefrom. This he says was particularly so in exercising power over club officials and imposition of penalties for breach. Mr Harrison referred to the provisions in the rules that Mr Downey was under the control and supervision of the executive and required to obey all orders and instructions. He also referred to the indemnity provisions. There was no elaboration on how such supervision and control was ever exercised and no instance of the need to call upon the indemnity was mentioned.

- Mr Downey was not able to substitute his personal services. If he was unable to attend then the executive or president had power to appoint an assistant stipendiary steward to substitute for him. It appears in practice the stipendiary stewards did relieve each other in their respective regions as required. Indeed Mr Downey mentioned occasions when this was so.

- The apparently onerous duties involved with "*kennelling*", collating correspondence held for him by club secretaries, inspection of track and kennel facilities and addressing and rectifying safety issues.

- Viewing the running and the calling of races and attending to post-race functions.

- Mr Harrison submitted that stipendiary stewards were the representatives of Greyhound Racing, to ensure compliance with rules and regulations and to regulate and control the conduct of race meetings. This also involved proper reporting post-race.

- Contact outside racing meetings from association board members, the chief executive and his office staff on very regular occasions.

[30] I do not doubt Mr Downey was kept busy in the performance of these functions. Indeed he appears to have found it onerous and sought greater remuneration. However, the matters specified above do not seem to me to indicate the kind of control on a day to day basis as was exercised for instance, over Mr Bryson by his employer. The fact that Greyhound Racing supplied equipment and reimbursed expenses does not advance matters in the particular circumstances of the present case.

[31] Care needs to be taken not to confuse the sometimes onerous statutory and regulatory functions of the stipendiary stewards with control, which an employer might normally exercise over an employee. Simply because these functions involved a high level of accountability and responsibility does not automatically impute control by Greyhound Racing in the sense used in the legal authorities. Indeed, in many respects the stipendiary stewards in exercising a type of judicial function had to remain independent from their paymaster and retain objectivity. (Mr Downey stated in his evidence that the role was quasi-judicial in nature.)

Integration

[32] The integration test derives 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.*

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 teamwork and Mr Bryson was not in any way an adjunct to the miniatures unit but an integral part of it.

[33] Mr Downey stressed that he was part of the team and not merely someone who worked on race days. No doubt this evidence was directed to try to bring him

within the sort of categorisation considered in the *Bryson* case. However, when comparing him with Mr Bryson, in the situation usually prevailing for an employee, he could hardly allege that the way in which his work was structured was an integral part of the business operated by Greyhound Racing.

Fundamental or Economic Reality

[34] The third test applied in *Bryson* was the fundamental or economic reality test. Unlike the other two, 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. In the *Bryson* case, and adopting the standard endorsed by *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, 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.

[35] If this question were applied to Mr Downey's position, the answer must be categorically in the affirmative. There is no doubt about the distinction between the two, when one considers such items as the methods of payment, taxation, the description of Mr Downey's business inserted in the GST invoices and so on.

Taxation

[36] As far as taxation and accounting is concerned, I found Mr Downey's explanation somewhat unconvincing. Mr Downey previously had experience as a self-employed person in business on his own account. It is clear he knew full well the nature of his engagement. He submitted GST invoices for his services in the name of a business entity, rather than in person. He was apparently content to remain with that status to enable some deduction against income for taxation relief. This was particularly so for motor vehicle and travel expenses. I was unable to ascertain his position in respect of depreciation. On the other hand he has indicated that such deductions were in fact minimal as a result of reimbursement he received from Greyhound Racing for telephone expenses and computer equipment.

[37] He maintained in his evidence that at the outset he simply accepted the advice of the Chief Executive of Greyhound Racing to register for GST and deal with income tax as a self-employed person in order to gain the maximum tax deductions. It seemed that his evidence was that he did not turn his mind specifically in that context to whether he was indeed an independent contractor or an employee. I found his evidence on this point somewhat ingenuous, particularly in view of his experience and the clear provisions contained in the agreement. While the Court needs to be careful in a dispute such as this not to rely upon labelling, the provisions of the contract are pointed and indeed repetitive in some respects in their emphasis on the status that the contractor is to occupy under it.

[38] I also found unconvincing Mr Downey's explanation as to the reasons for changing the status of billing at the termination of the contract. From the evidence I have, he appears to have invoiced in the name of "GM Downey Consultancy Services" throughout the period of the contract and up to the end of July 2004 when the contract came to an end. After termination he changed the invoicing to the name of "GM Downey" solely. All this was of no effect for GST purposes in view of the fact that his GST registration number was still endorsed on the invoice. I have some suspicion as to his motives, in the context of this litigation, for the change in description at this point in time. His own evidence was that the change, occurring on the termination of the contract, was purely coincidental.

Industry Practice / Contractual intention

[39] Industry practice, of course, received some prominence in the Court of Appeal decision in *Bryson*. However, Judge Shaw had dealt with it as a matter which would 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.

[40] Mr Downey's evidence along with his witnesses in total spent some time on this issue. Witnesses were called from the other codes. Quite a lot of evidence was directed towards Mr Downey's contention that the practice for employment of stipendiary stewards in the other codes is significant in a determination of the true status of stipendiary stewards contracted to Greyhound Racing. It is clear that the present position, so far as harness and thoroughbred racing is concerned, is that the stipendiary stewards are employees. There appears to be quite a lot of control by the

other Associations over the stipendiary stewards in their codes. I have no evidence on the history of the position in those other codes, but I surmise that at some stage, they too were formerly independent contractors, and at an earlier stage stipendiary office holders with judicial functions. However, it does not seem to me that the fact that the stipendiary stewards in the other codes are employees is determinative. A lot of time was spent on the comparison of the duties between the codes but in my view the greyhound racing role even with the revised duties is amenable to either category. Mr Bickford in his evidence was clear that control and consistency was lacking prior to the review and that once this was tightened up with the new structure and regime, Greyhound Racing accepted that the new position of stipendiary steward/field officer was more amenable to categorisation as a contract of service.

[41] Judge Shaw held that the intention of the parties is still relevant, but no longer decisive. Authority member Oldfield made her decision based on this criterion in circumstances where she found in all other respects the matter was finely balanced. Judge Shaw came to the conclusion that Mr Bryson in fact did not turn his mind to the nature of the employment. He simply accepted the employment offered as an opportunity to gain new skills. The fact that there was no written record at the outset, meant there was no opportunity nor evidence of a common intention as would be required to formalise a contract for services. The fact that the employer assumed a contract for services applied simply because that was industry practice, was held unacceptable in *Bryson* as that would mean that there was no active consideration at the outset as to the true nature of the relationship.

[42] Mr Downey tried to bring a similar argument from the opposite side of the spectrum. That is, that while he was required to actively consider and sign a formal contract, and he was effectively ambivalent at the outset, he now wishes to argue on the basis of industry practice that all along the true nature of the relationship was one of employment. There is no evidence that Mr Downey was aware at the outset of his engagement of the practice in other codes. Certainly I am not prepared to hold that it was a matter which coloured his true intention when he executed the contract.

[43] While a great deal of attention was paid in the evidence to industry practice and the other codes by the calling of witnesses from those other Associations, I am not sure that in the context of the judgment that I have to make so far as

Mr Downey's position is concerned, that evidence is altogether significant or conclusive.

Submissions of counsel

[44] Mr Menzies for Greyhound Racing in his final submissions, went through each category in turn and justified from the evidence that in each case, the only conclusion to be reached was that this was a contract for services. Mr Harrison analysed some of the terms of the contract as being more consistent with employment than an independent contractor. In the area of control and integration, he submitted Mr Downey's position was more consistent with a contract of employment. He spent some time in his final submissions dealing with industry practice. That point, in view of the now accepted position following *Bryson*, seems somewhat counter-productive to me. As a matter of principle, industry practice is far from determinative, whichever status is being proposed. Mr Harrison's submission that the change in status was not brought about by any fundamental change in the nature of the work, but rather a recognition of the true nature of the arrangement that had been in place might have some weight. However, on balance, I prefer the submission of Mr Menzies, based on the evidence of Mr Bickford and Mr Gove, that in the newly created position there was to be a greater emphasis on non-race day activities. However, even if the duties before and after were substantially the same, as Mr Downey suggests, that is not of itself conclusive. The position was effectively amenable to either arrangement or status. I agree with Authority member Oldfield, that in the end the matter comes down to an issue of the intention of the parties. The matter may not have been as finely balance as she suggested, but nevertheless on a complete analysis and overall assessment similar to that undertaken in *Bryson*, the ultimate conclusion is that Mr Downey was employed as an independent contractor. He knew the true position upon taking up the role, he acted accordingly in that status in virtually every respect.

Disposition

[45] In view of my conclusions, I find Mr Downey was not an employee but engaged under a contract for services by the defendant.

Costs

[46] Costs is obviously an issue which needs to be resolved. I will leave it to the parties to endeavour to deal with this between themselves if they can. If a specific order for costs is required, then Counsel should file the appropriate memoranda within 14 days.

ME Perkins
Judge

Judgment signed at 3 pm on Wednesday 27 September 2006

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