Determination Number: CA 1/03
File Number: CEA 248/02

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Jamie MacGregor (Applicant)
AND	Les Mills Ferrymead Fitness Limited (Respondent)
REPRESENTATIVES	Jeffrey J McCall, Counsel for Applicant Rob Davidson, Counsel for Respondent
MEMBER OF AUTHORITY	Philip Cheyne
INVESTIGATION MEETING	28 November 2002
DATE OF DETERMINATION	9 January 2003

DETERMINATION OF THE AUTHORITY

Introduction

[1] Jamie MacGregor says he was employed by Les Mills Ferrymead Fitness Limited (Les Mills) as a trainee Gym Instructor and that he was summarily dismissed from that employment. His grievance is his claim that the dismissal was unjustified. Les Mills says that Mr MacGregor was not an employee, but rather was a volunteer preparing himself for possible engagement by Les Mills as a contractor.

Background

[2] Mr MacGregor operated his own business under the name Fitness Delivered. He supplied fitness equipment to people for use in their own homes. Les Mills advertised for *One-on-One Personal Trainers* and Mr MacGregor responded. The advertisement made it clear that engagement would be as a *self employed license holder*. For consideration, Les Mills grants licences to Personal Trainers that allows them to use the gym facilities to provide One-on-One training to gym members. The Personal Trainer charges the gym member for that service. At the investigation meeting, counsel for Mr MacGregor accepted that such an arrangement would not have been employment.

[3] Mr MacGregor provided a CV and attended two interviews[1] but was not offered engagement as a Personal Trainer. Rather, he was encouraged to think he would become suitable for appointment by undertaking some training such as that offered by the Christchurch Polytechnic. In addition, he was offered a position as an unpaid trainee as Les Mills. Thinking that he would in due course become a Personal Trainer, Mr MacGregor agreed to work on an unpaid basis as a trainee.

[1] Both with Namiko Hickson, the Service Director at Les Mills Ferrymead.

[4] Later, on 30 January 2002, Ms Hickson gave Mr MacGregor a standard form *Casual Employment Agreement*, which they both signed. They also agreed that he would work Monday, Tuesday and Wednesdays from 9.00am to 11.00am. There is some disagreement about whether Mr MacGregor always worked those times but it is not necessary to resolve that. It is enough to say that he attended Les Mills on most of those days/times between 4 February 2002 and 11 March 2002 inclusive. While at Les Mills, he assisted in various ways with their operation. He wore a Les Mills uniform and name badge. Consistent with the verbal agreement, Mr MacGregor was not paid for the work that he performed.

[5] Mr MacGregor continued to operate his business outside the times he worked at Les Mills. His business earnings apparently declined and it seems a reasonable inference that this was because of the time he devoted to Les Mills.

[6] Mr Michael White is the General Manager of Les Mills. He did not learn of Mr MacGregor's own business until late February. Mr MacGregor had clearly referred to that business in his CV and in discussions with Ms Hickson. Despite that, Mr White decided to terminate the relationship with Mr MacGregor and apparently sent Ms Hickson an email[2] instructing her to do so. However, on 11 March 2002, she told Mr MacGregor that Mr White *had a problem* with Mr MacGregor's own business, that Mr White was away for a few days but she would organise a meeting and that Mr MacGregor was not required to attend work in the meantime.

[7] Mr MacGregor heard nothing further but he eventually was able to contact Ms Hickson who told him to ring Mr White direct. Mr MacGregor rang but had to leave a message for Mr White. Mr White got the message but did not promptly return the call as it was not a priority for him. Mr MacGregor then phoned again on 27 March 2002 at which time Mr White told him that the other business created a *conflict of interest* so his position at Les Mills was no longer tenable. Mr White explained that if he had known earlier about the other business, Mr MacGregor would not have been offered any position with Les Mills.

Issues

[8] The first issue to determine is whether Mr MacGregor was an employee within the definition set out in section 6 of the Employment Relations Act 2000. In particular, was he employed to do work for hire or reward or was he a person intending to work and in either case not a volunteer?

[9] Mr MacGregor was not a person intending to work. The definition in section 5 makes it clear that the work that has been offered and accepted (but not actually commenced) must be as an employee[3]. The work Mr MacGregor was intending to do was as a Personal Trainer. He accepted that such work would not have been as an employee, given the licensing agreement involved. His situation therefore falls outside the statutory definition.

[10] As mentioned above, both parties signed a standard form *Casual Employment Agreement*. There was evidence that Mr MacGregor was not subject to all the respondent's usual administrative procedures relating to employment but Mr MacGregor would not have known that at the time. The respondent's evidence about the agreement was that its purpose was to bind Mr MacGregor to company policies such as health and safety. However, the agreement made provision for hours of work, duties, general obligations such as professional conduct at work, confidentiality regarding the

[2] The respondent was unable to produce a copy of the email.
[3] That would have been implicit in any event. Parliament could not have intended a person, having reached agreement about self-employment, would be able to claim the status of an employee during the period before actually commencing the self-employment.

respondent's business during and after employment, restrictions regarding other business interests and termination. It did not include anything about payment.

[11] Ordinarily, the existence of the written agreement would be enough to establish employment. However, there is the common evidence that the parties agreed that Mr MacGregor would work on an unpaid basis as a trainee. Consistent with that, Mr MacGregor was not paid for his efforts. Counsel for Mr MacGregor argued that the reward[4] was the prospective self-employment. The difficulty is that there was no settled agreement regarding the prospective self-employment. By undertaking the unpaid work[5], Mr MacGregor could have improved his chances of later selection but selection was for the future. The absence of any reward actually paid or owing means that Mr MacGregor was not an employee; rather, he was a volunteer: see *McCulloch v Director-General of the Department of Social Welfare* [2000] 1 ERNZ 467 at 474.

[12] If he had been an employee, Mr MacGregor would have been unjustifiably dismissed. Mr MacGregor is right to feel aggrieved about the way in which his unpaid position was terminated and the reason given. He did all that was required to advise Les Mills about his business interest and the fact that Mr White did not learn of it until some weeks after he started his unpaid work was due to poor communication within the respondent.

Conclusion

[13] In the circumstances, it is necessary to dismiss Mr MacGregor's claims. The parties might feel they should let costs lie where they fall but I will reserve costs to be dealt with by an exchange of memoranda if the parties cannot reach agreement.

Philip Cheyne
Member of Employment Relations Authority

[4] To bring Mr MacGregor within section 6 (1) (a) and outside section 6 (1) (c) of the Act.
[5] And the Polytech training.