

What are business internships, and do they offer opportunities for a symbiotic relationship?

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Abstract

What is a business internship in the 21st century? The common understanding indicates that it is a way for people to gain experience within an industry. However, the range of opportunities available creates difficulty in defining internships, particularly as available places are marketed variously for course credit, overseas experience, general industry experience and summer work.

In the current business environment, there is room for relationships within internships to include similarities to those involved in modern apprenticeships. However, any comparisons with the reciprocal association involved in apprenticeships may ignore emerging difficulties. Many available internships are unpaid, and while they still offer opportunities to gain industry experience, such experiences are subject to economic and other pressures.

This paper considers the New Zealand context, poses questions around the symbiotic and exploitative aspects of the relationship, and includes the influence of New Zealand labour law. Finally, it proposes possible options to assist interns and employers to develop an appropriate, symbiotic relationship that includes reciprocal benefits.

Key words

Business internships, work experience, voluntary work, exploitation, regulation, symbiotic relationships.

Introduction

The concept of gaining work experience through various forms of paid and unpaid work has been around for centuries. Apprentices in the middle ages were often unpaid and bound to their Master for many years. However, the concept was always accompanied by some symbiosis in the relationship, as the Master was also bound to provide the apprentice with appropriate development and usually also kept the worker within their household. There are now differences in interpretation of this term – perhaps the early concept of interns being junior medical staff members is now obsolete and the word now has a meaning which is more uncertain than in the past.¹

In the 21st century, the term ‘intern’ is changing to include a largely voluntary or part-time group of positions, including such roles as summer temps.² The concept of symbiosis in the

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¹ Andrew Stewart and Rosemary Owens *Experience or Exploitation? The nature, prevalence and regulation of unpaid work experience, internships and trial periods in Australia* (The University of Adelaide, Report for the Fair Work Ombudsman, January 2013).

² Stewart and Owens, above n 1.

relationship appears to have broadened, with many organisations advertising their opportunities simply on the basis of providing work experience.

Understanding internships

There appears to be broad understanding of the position of business internships, except when you start to ask exactly what these are. While any definition of this practice is fluid, there appears to be general acceptance that business internships represent a trial. Sometimes it is referred to as a “period of training” or a period of time to get experience of a particular type of work.³

Why and when they are offered

A short survey of the available business internship websites indicates that there are a considerable number of opportunities available in the international sphere. Including student and graduate opportunities, these internships can be work experience or transition to full-time work. Most emphasise the value of experience, which can be gained through such programme placements. Hergert has noted the importance of connecting students into the business world to expand their studies from the theoretical aspects often covered in business schools.⁴

For New Zealand students, Otago Business School has an internship programme which is part of their Bachelor of Commerce programme. They offer a practicum in this internship which is worth 18 points at level seven on the New Zealand Qualifications Framework. Students complete reflective field notes, a scholarly case study and a consultant’s report. Christchurch Polytechnic Institute of Technology has a similar opportunity, whereby the students have to complete a research project based on their major with the internship provider. Other education providers appear to have internship programmes, but these are fully student focussed – they may be holiday programmes, or part of a single course. Otago Business School indicates that the internship can be for one semester or up to one year, depending on the opportunity. There is no indication as to how the opportunities will be found.

New Zealand Internships, a private intern placement organisation, has a strong focus on overseas students, highlighting how the successful intern can experience holidays in New Zealand alongside their work.⁵ They provide considerable information on budgeting requirements while in New Zealand and also include information that the work experience internships are for a minimum of four weeks. Applicants have to pay the organisation for their placement.

The internship experience

Referring to the building of experience as being paramount, Perlin considers how people feel when they need to constantly work for free – interns often perform quite important work for

³ Cambridge English Dictionary “Internship” <<http://dictionary.cambridge.org>>.

⁴ Michael Hergert *Student Perception of the Value of Internships in Business Education* (2009) 2(8) American Journal of Business Education 9.

⁵ New Zealand Internships “New Zealand Internships Programs and Prices – New Zealand Candidate” <www.internships.co.nz>. Stewart and Owens, above n 1, suggest that overseas students might see such unpaid work as a path to residency.

no pay and even undertake multiple internships.⁶ Since the publication of Perlin's book, anecdotal information has surfaced which indicates that young people in particular may not be getting full advantage from internships.⁷

Stewart and Owens refer to potential problem areas in relation to unpaid work: a systematic use of unpaid interns to do work that would be performed by paid employers undermines employment legislation, and the vulnerability of younger workers is concerning, although these workers generally agree to such arrangements to improve their chances of gaining future paid employment.⁸

There appears to be little research into the value of internships in the New Zealand environment. Particular research of the value of unpaid workers in the New Zealand film industry focussed on the position of volunteers obtaining work experience with a view to ultimately gaining paid employment.⁹ It noted that work experience gained through this type of approach can be valuable as part of ongoing career management. However, there is also an essence of exploitation, although this may be specific to the type of industry, where work is often project-based rather than permanent.¹⁰

Overseas research has been undertaken into the value of student internships and some of the outcomes have changed over time. Earlier in the research, there was a clear agreement as to the efficacy of internship programmes, particularly when they led to full-time work. Undergraduates who participated in internships gained considerably more full-time opportunities.¹¹ When interns performed well, there was also a spinoff that the employers were more satisfied with the programmes.¹² Internships could assist students to become better connected to the world of business, particularly where their study could be enhanced.¹³ Graduates who had internships, in their experience, had greater success in the job market.¹⁴ Limited empirical research undertaken to gauge the success rate for undergraduates who had completed internships showed good potential for these types of programme.¹⁵

Yet, writing from a Malaysian perspective, Jusoh, Simun and Chong noted that there was a gap between the expectations of students and employers when it came to the workplace.¹⁶ While students were expecting well-paid positions, employers were looking for performance,

⁶ Ross Perlin *Intern Nation: How to earn nothing and learn little in the brave new economy*. (Verso, United Kingdom, 2012).

⁷ Richard Venturi "Meet the new forever interns" (8 April 2015) BBC Capital <www.bbc.com>; Paul Charman "Unpaid Kiwi Internships on the rise" *The New Zealand Herald* (online ed, Auckland, 30 August 2014).

⁸ Stewart and Owens, above n .1.

⁹ Lewis Tennant "Finding work in the New Zealand film industry. The creative industries volunteer ten years on: emancipated or exploited?" (MPhil thesis, Auckland University of Technology, 2012).

¹⁰ Tennant, above n 9.

¹¹ Jack Gault, Evan Leach and Marc Duey *Effects of Business Internships on Job Marketability: The Employers' Perspective* (2010) 52(1) Education & Training 76.

¹² Gault, Leach and Duey, above n 11.

¹³ Hergert, above n 4.

¹⁴ Stephen Knouse and Gwen Fontenot *Benefits of the business college internship: a research review* (2008) 45(2) J Employ Couns 61.

¹⁵ Jack Gault, John Redington and Tammy Schlager *Undergraduate Business Internships and Career Success: Are they related?* (2000) 22(1) JME 45.

¹⁶ Mazuki Jusoh, Maimun Simun and Siong Choy Chong *Expectation gaps, job satisfaction, and organizational commitment of fresh graduates* (2011) 53(6) Education & Training 515.

even in entry level workers. Knouse and Fontenot also talked about expectations, particularly the creation of ‘realistic’ expectations for students entering internships.¹⁷

There is increasingly more information about internships in relation to what happens when economic conditions are poor. Venturi considered the importance of internships not being a permanent situation. He noted that the difficulty in getting employment, particularly amongst younger workers, has led to an increase in unpaid internships being a requirement.¹⁸ This is confirmed by the Council of European Union Committee, which noted the importance of making sure that internships are not given in place of proper employment.¹⁹ Internships should be a way into employment, not a way of keeping people out of employment.

The legal position in New Zealand

This section will look at the definition of an employee and then move into understanding the crossover from volunteer and/or intern into an employee relationship. It then briefly considers overseas law, which provides insight into the current New Zealand law.

Definition of employee

An employee is defined by statute²⁰ as a person of any age employed by an employer to do any work for hire or reward²¹ under a “contract of service” (the latter term deriving from the historical Master and servant concept). A worker who comes within the meaning of ‘employee’ has protection under minimum code legislation.²²

The Court in *MacGillivray v Jones* stated that the approach required to determine if an employment contract existed was not whether the work was for hire or reward, but whether the contract was one of employment and whether the contract of employment was for hire or reward.²³ The appellant worked in a shop for a reward, but this did not mean there was an employment contract. There was a lack of intention to create legal relations and a lack of certainty about the terms of any contract.

The meaning of ‘employee’ focusses on the real nature of the employment relationship. The Supreme Court in *Bryson v Three Foot Six Ltd* noted that all relevant matters include the written and oral terms of the contract, since that will usually include an indication of any common intention concerning the status of the relationship.²⁴ It is important for the Court or Authority to consider the way in which the parties actually operated in implementing their

¹⁷ Knouse and Fontenot, above n 14.

¹⁸ Venturi, above n 7.

¹⁹ Recommendation on a Quality Framework for Traineeships [2014] OJ 2014/C 88/01.

²⁰ Employment Relations Act 2000, s 6.

²¹ The phrase “hire or reward” was discussed in *MacGillivray v Jones (t/a Tahuna Camp Store)* [1992] 2 ERNZ 382. The Court referred to Lord Pearson’s judgment in *Albert v Motor Insurers Bureau* [1971] 3 WLR 291, which stated that “hire” was (historically) remuneration for carriage in some vehicles, and “reward” was wider and covered other forms of remuneration. The term “reward” can comprise benefits such as accommodation, lodgings or groceries. In *Edmonds v Lawson* [2002] 2 WLR 1091, a trainee pupil barrister was found to have provided consideration to a contract (but ultimately not an employment contract) by agreeing to a close and “potentially” very productive relationship, which pupillage involves.

²² For example, the Minimum Wage Act 1983, Wages Protection Act 1983 and Holidays Act 2003.

²³ *MacGillivray*, above n 21.

²⁴ [2005] NZSC 34.

contract. All relevant matters includes the intention of the parties, although intention and labels attached to the agreement are not decisive.²⁵ Intention is objectively, not subjectively, determined.²⁶

Volunteer, intern or employee

The term ‘employee’ excludes volunteers who do not expect to be rewarded for certain work performed and who in fact are not rewarded for such work.²⁷ An intern may be a volunteer, but neither term is defined by statute.

A volunteer arrangement will usually be one that is flexible; the volunteer decides what, where and how to do the agreed work. They can refuse to make themselves available for voluntary work if they so desire for any reason. Receipt of an honorarium does not on its own convert an arrangement to one of employment.²⁸

To come under the volunteer exemption, the voluntary work performed must be linked to the lack of an expectation of a reward. This is a matter of fact dependent on the actual arrangement between the volunteer and employer. The fact that a volunteer may have significant responsibilities together with a title such as “Collections Manager” may not be conclusive evidence that the volunteer is an employee.²⁹

If a worker is not found to be a volunteer, they are not necessarily an employee. This will depend upon the applicability of the statutory criteria, including the common law tests, to the particular arrangement.³⁰ Certainly internships or work experience arrangements that are in fact testing the work suitability of the intern for a specific job are likely to be found to constitute a work trial requiring compliance with the statutory trial period requirements.³¹

From intern to employee

The judicial approach to identifying an employer/employee relationship is well established. A stumbling block for an intern intent on being recognised as an employee is likely to be establishing an intention to create contractual relations and mutuality of obligations. This is illustrated in *Strachan v Moodie*.³² Ms Strachan was an observer and occasional legal assistant who wanted to gain experience and skill as a barrister. She initially agreed to undertake some ‘work’, although it was unpaid. The Court found that this was a “volunteer” arrangement, as there was a willing but unpaid person, who was more an observer of and occasional assistant in the practice. There was no mutuality of obligations to respectively provide or undertake observation or have input into cases run by the practice.³³ The Court observed that there was an understanding the practice would reimburse her for out of pocket costs, but this did not create an employment relationship.³⁴

²⁵ *Koia v Carlyon Holdings* [2001] ERNZ 585.

²⁶ *Muollo v Rotaru* [1995] 2 ERNZ 414.

²⁷ Employment Relations Act 2000, s 6(1)(c).

²⁸ *Hambly and others v Museum of Transport and Technology Board* [2011] NZERA Auckland 33.

²⁹ *Hambly*, above n 28.

³⁰ *Brook v Macown* [2014] NZEmpC 79.

³¹ *The Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152.

³² *Strachan v Moodie* [2012] NZEmpC 95.

³³ The Court did not directly refer to an intention to create legal relations. This has to be inferred from the context of the judgment at [41]–[44].

³⁴ *Strachan v Moodie*, above n 32.

This reasoning has been criticised for assuming the initial agreement that any work would be unpaid was the end of the matter without assessing the real nature of the relationship.³⁵ The Court had, however, concluded on the facts that at this earlier stage of the arrangement there was no mutuality of obligations.

The arrangement changed when Ms Strachan discovered Mr Moodie was not doing pro bono work, but was invoicing clients. She then insisted upon being remunerated for her work.³⁶ The Court concluded that this had the effect of changing her status to that of an employee. Ms Strachan had been given responsible legal work and was also undertaking the role of administrative manager of the practice.³⁷ The Court, in applying the common law tests, had no hesitation in finding that Ms Strachan was an employee.

This approach seems to diverge from some Australian and United Kingdom case law, where an employment contract can be found to exist where a claimant is undertaking full time work (usually) with the payment of some expenses.³⁸ The apparent narrow construction adopted in *Strachan v Moodie* that requires the claimant to have requested remuneration should not be seen as a conclusive factor.³⁹

It is suggested in the New Zealand context that there is an employment contract where an intern is undertaking what can be shown to be productive work for the business that is expected by the business operator,⁴⁰ and is working a significant number of hours within the business operation over a significant period of time.

Future intern environment and reform of the law

The ideal for all parties to internships is to develop an appropriate, symbiotic relationship, which includes reciprocal benefits. How might this be achieved? There are a number of suggestions which might be of assistance, including the following proposals.

³⁵ Stewart and Owens, above n 1, at [8.59].

³⁶ *Strachan v Moodie*, above n 32, at [41].

³⁷ Mr Moodie subsequently claimed that a proposed equal sharing of profits with Ms Strachan was to be at his sole discretion. That claim caused the matter to come before the Employment Court.

³⁸ In *Vetta v London Dreams Motion Pictures* ET/2703377/2008, the claimant responded to an advertisement that described a “great opportunity to get experience”, and referred to the payment of expenses only undertook fulltime work. The company unsuccessfully argued she was employed by a contractor to the company. She was found to be an employee. In another case, a claimant worked eight hours a day for six weeks although there had been an earlier discussion about her being paid: see *Keri Hudson v TPG Webb Publishing* ET/2200565/11. The United Kingdom Government website states that an intern who does regular paid work may qualify as an employee and an intern will be entitled to the minimum wage if counted as a worker. A person will not be entitled to the minimum wage if they are a student doing work experience as part of a higher or further education course or are “work shadowing” (observing): see “Employment rights and pay for interns” (23 November 2015) United Kingdom Government <www.gov.uk>. See also the Australian case of *Cossich v G Rossetto and Co Pty Ltd* [2001] SAIRC 37, where a work experience participant worked on for eight months after a limited and certified period of work experience. She was paid a flat rate of \$50 a week, allegedly for travel expenses, and was found to be an employee.

³⁹ It may be that the context of the Court’s reference to the effect of the request for remuneration being to change her status to that of an employee can be read to be a factor that merely confirmed the “real nature of the relationship”.

⁴⁰ This assumes that the characteristics of the arrangement are not that of a volunteer where there will be no intention to create legal relations and no mutuality of obligations.

The first step may be the development of an internship code of practice. The current draft Code of Practice for New Zealand Apprenticeships would provide assistance to everyone, particularly in relation to clarifying expectations. It appears that there is confusion about what exactly a business internship involves, and more clarity around this would be beneficial.

Another stage in the development of an appropriate internship model might be the defining of 'ethical business internships' in the New Zealand environment. Alongside the proposed Code of Practice, this grouping could include providers who fully define what they offer, including the benefits that future interns could expect from their service. There might be a 'star' rating for internships, which would also give all parties clarity about work expectations.

In conjunction with the development of a Code of Practice and introduction of 'ethical business internships', there might also be more public competitions for internship opportunities. Similar to the apprentice-type selections, interns should be able to see a clear pathway to jobs through performance.

Realistic expectations and recording of achievement may be next on the list of improvements. This is an interesting area as, while 'work experience' might be beneficial, there should be more detail available around what might be expected for an internship. For example, would a business intern really benefit from being part of an office clean up? Would working at reception or in a contact centre be more beneficial, or is any work experience enough?

Braun suggested in the United States context that a legislative standard to regulate internships might be developed.⁴¹ This would recognise the dynamics between student, employer and institution and improve allocation. Students, and interns in general, need to be more informed about the nature and legal status of 'intern'. Institutions should educate students, with the government playing an intermediary role. For employers, there should be a synergy that benefits both participants and a structured system that engages with interns. The educational institution should provide oversight of the business internship to prevent exploitation.

Australia has attempted to deal with internships and work experience through a limited statutory unpaid vocational placement exception to employment. This must be as a requirement of an education or training course authorised under law, or as an administrative arrangement of the Commonwealth, a State, or a Territory. The Fair Work Ombudsman advises that, if an internship is for a short period where the intern is not required to undertake productive work (not defined) and is an arrangement mainly for the benefit of the intern, then it is a vocational placement. However, it is unlikely to be a vocational placement if the arrangement is for the significant commercial gain of the business.⁴²

Anecdotal evidence suggests that unpaid internships may be increasing in New Zealand. The introduction in New Zealand of a vocational placement exception to the definition of employee would, in theory, focus employers' attention on the status of interns, particularly with regards to unpaid interns.⁴³

Regulation and registration can be considered a last resort suggestion, should this type of approach stifle innovative responses. The lack of certainty in terminology in the Australian

⁴¹ Sarah Braun *The Obama "Crackdown": Another failed attempt to regulate the exploitation of unpaid internships* (2012) 41(2) SW L Rev 281.

⁴² Fair Work Ombudsman *Unpaid Work fact sheet* (Australian Government, February 2014).

⁴³ Modelled on the Australian exception.

context has been criticised for lacking clear statutory definitions of “vocational placement” and “training course”.⁴⁴

However, there may be an argument that all employers who wish to use interns should need to be registered, and all business internships should be classified. This may be more important in light of the new health and safety provisions, as all employers and interns will need to be fully acquainted with their responsibilities in this area.

What if internships required the payment of a minimum wage, but with a reasonable vocational placement exception? The probable concern would be that this would result in a reduction of internship opportunities, because of the minimum wage cost to businesses of internships that fall outside the exception.

The research of Card and Krueger is to the effect that a minimum wage has little or no effect on employment (in the United States context),⁴⁵ although there are some contrary views.⁴⁶ Perlin suggests an initial reduction of internships resulting from paying the minimum wage to unpaid interns would be countered by (again in the United States context) the wide distribution of internships across businesses.⁴⁷

Business New Zealand considers an increase in the minimum wage would reduce job and training opportunities for youth.⁴⁸ In contrast, the Ministry of Business, Innovation and Employment claims a constraint on employment growth would occur only where there is an increase in the ratio of the minimum wage to the average wage.⁴⁹

In principle then, an option is to institute a vocational placement exception, and signal to businesses that any period greater than the specified period of internship may trigger an obligation to pay the minimum wage. Admittedly, this could be abused by a churning effect with new interns being regularly brought through by businesses. However, this exception could be complemented by robust regulatory oversight that is well resourced with a non-binding Code of Practice for internships along the lines of the Quality Traineeships framework initiated by the European Union.⁵⁰ The acceptance of such an environment could be encouraged through an extensive educational programme for interns and businesses that included the use of social media.

Conclusion

If both interns and employers wish to achieve the most from their internship experiences, it is likely that more work needs to be done to improve the current model. Interns who are forced

⁴⁴ Stewart and Owens, above n 1.

⁴⁵ David Card and Alan Krueger *Myth and Measurement: The New Economics of the Minimum Wage* (Princeton University Press, Princeton, 1995).

⁴⁶ Tim Worstall “Seattle’s \$15 An Hour: Measure The Unemployment Effects And There They Are” (10 August 2015) Forbes <www.forbes.com>; Daniel Aaronson, Eric French and Isaac Sorkin “The minimum Wage – will job losses be minimal?” (24 August 2015) Institute of Economic Affairs <www.iea.org.uk>.

⁴⁷ Perlin, above n 6.

⁴⁸ Ministry of Business, Innovation and Employment *Minimum Wage Review 2015: Officials’ Report* (2015) at [136].

⁴⁹ At [109].

⁵⁰ Recommendation on a Quality Framework for Traineeships, above n 19.

into poverty simply to participate in work experience may not achieve the positive response that they intended. Conversely, employers who use interns without understanding their personal situations may create an international impression which they neither need nor actually deserve.

It is hoped that more understanding of the issues around internships will be gained through recent international publicity. However, without a change in how we understand the needs of both employers and business interns, it seems that the overall concept will continue to be regarded differently by each group.

Where an employer might see the opportunity to gain free assistance while providing some work experience and an intern may see the proposal as a stepping stone to full-time work, perception issues remain. The introduction of more clarity around the whole area of business internships would provide considerable assistance to all parties as they seek to attain symbiotic relationships which would be most beneficial to all.