

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 202
3026413

BETWEEN MARIANNE ANDREWS
 Applicant

AND HOME CARE SERVICES
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 No appearance for Respondent

Investigation Meeting: 22 June 2018

Oral Determination: 22 June 2018

Record of Oral
Determination: 25 June 2018

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. Mrs Andrews was not an employee, therefore the Authority does not have jurisdiction to investigate Mrs Andrews's claims.**
- B. Costs will lie where they fall.**

Employment relationship problem

[1] Mr Hori Jason Andrews is the sole director and shareholder of Home Care Services Limited. In 1999 Mr Andrews was involved in a serious motor vehicle accident which left him paralysed from the neck down. Following the accident Mr Andrews required assistance with his personal care.

[2] From October 1999 through to January 2007 Mrs Marianne Andrews (the ex-wife of Mr Andrews) provided caregiving services to Mr Andrews through an Agency engaged by ACC to provide personal care services to Mr Andrews and which employed her. Personal care included toileting, cleaning, changing clothes and giving Mr Andrews his medication.

[3] Mrs Andrews left the Agency in 2007 and returned to work with Mr Andrews in October 2012 when she was employed by a different Agency. Between 2012 and 2016 Mr Andrews' care services were provided in part by Mrs Andrews as an employee of first one then another Agency.

[4] In April 2016 the Agency that had been managing Mr Andrews' care for approximately 12 months notified ACC that it would no longer be providing care to Mr Andrews.

[5] Mr Andrews' ACC Case Manager met with him and offered him two options:

- a) Move into residential care; or
- b) Manage his package by engaging private individuals to provide care services.

[6] Mr Andrews' "package" included payment of 168 hours per week for personal care services. Mr Andrews opted to engage private individuals to provide his personal care. Mrs Andrews, who was already providing the personal care through the agency agreed to resign from her employment at the agency and be engaged by Mr Andrews as one of his carers.

[7] Mr Andrews was able to choose whether the payments for the care hours were made to him directly or to the carer. Mr Andrews opted to receive payments from ACC and he undertook to pay the money to the carers. Initially the payments were made by cheque made out to Mr Andrews personally. Mr Andrews then banked the cheques and would pay the carers when the funds were cleared by the bank. This process took up to 9 working days and was unsatisfactory.

[8] On 9 May 2016 Mr Andrews set up his company Home Care Services Limited and the payments from ACC were then paid into his business bank account.

[9] In May Mr Andrews arranged for his accountant to meet with his carers. The accountant advised the carers that they were engaged as independent contractors. As a result of that discussion Mrs Andrews engaged her own accountant and incorporated her own company called Marianne Andrews Enterprises Limited.

[10] Mrs Andrews has asked the Authority to find the relationship between her and Home Care Services Limited was in fact an employment relationship and not that of independent contractor.

Procedural history

[11] Mrs Andrews lodged her statement of problem in the Authority on 20 March 2018. Home Care Services Limited has received three copies of the statement of problem. The first was served on the registered address for service at 9.09 am on 23 March 2018. The second and third copies were sent via email to the director of Home Care Services, Mr Andrews on 12 and 26 April 2018. Email is Home Care Services Limited's preferred method of communication. No statement in reply was received.

[12] On 1 May 2018 I proposed to the parties that this matter be progressed to an investigation meeting and made directions accordingly. The Notice of Direction together with a Notice of Investigation Meeting was served on the registered address for service for Home Care Services at 9.24 am on Thursday, 12 April. The Notices were also emailed to Mr Andrews on 1 May.

[13] Included in the Notice of Direction was a direction to Home Care Services that any correspondence to the Authority must include an application for leave to respond to the matter.¹

[14] To date no statement in reply has been received from Home Care Services and it has not engaged in the Authority's process.

[15] On 14 June a further copy of the Notices of Direction and Investigation Meeting were forwarded to Mr Andrews at Home Care Services via email together

¹ See Employment Relations Regulations 2000, Regulation 8(3).

with an invitation to participate in some other manner other than in person at the investigation meeting. This offer was extended to take into account Mr Andrews' personal situation and the possibility that it may hinder his ability to attend the Investigation Meeting in person. No response has been received from Mr Andrews.

[16] At the start time of the investigation meeting no representative from Home Care Services was in attendance. The investigation meeting was delayed 15 minutes to allow Home Care Services time to attend at the Authority. No representative attended.

[17] As provided for in clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) I have proceeded to act fully in the matter as if Home Care Services had engaged in the process or was represented.

Issue

[18] Mrs Andrews has asked the Authority to make a declaration that she was an employee and not a contractor when she provided personal care services to Mr Andrews.

[19] If I find Mrs Andrews was an employee she has asked for:

- a) a compliance order that Mr Andrews to provide her with a written employment agreement in accordance with s 65 of the Employment Relations Act 2000; and
- b) that all minimum employment standards be backdated to 19 April 2016 including holiday pay and kiwisaver.

[20] As permitted by s 174E of the Act this determination has not recorded all the evidence received from Mrs Andrews but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Was Mrs Andrews an employee?

[21] The onus of establishing whether Ms Andrews was an employee rests with her on the balance of probabilities. The starting point for the Authority is Section 6(1) of the Employment Relations Act (“the Act”) which states:

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.

[22] Section 6(1)(b)(i) of the Act includes in its definition of employee, a homemaker.

[23] The term “homemaker” is defined in s 5 of the Act as including a person who:

...is engaged, employed or contracted by any other person (in the course of that other person’s trade or business) to do work for that other person in a dwellinghouse (not being work on that dwellinghouse or fixtures, fittings, or furniture in it)...

[24] The definition of homemaker requires me to determine whether Mrs Andrews:

- a) was engaged, employed, or contracted by Home Care Services;
- b) in the course of its “trade or business”;
- c) to do work for it.

[25] I have concluded that at the time Mrs Andrews began as Mr Andrews’ personal carer in April 2016 she was engaged by Mr Andrews personally and he was not in trade or business. I have reached this conclusion because at the time Mrs Andrews was engaged as carer, Home Care Services did not exist.

[26] Mrs Andrews told me that since 9 May she has been paid by Home Care Services and at that point she should have been treated as an employee and not as an independent contractor.

[27] This is not a straightforward case. While at the time Mrs Andrews was engaged she would not have been considered an employee that situation changed on 9

May when Mr Andrews incorporated his company and changed the vehicle through which he received and paid for his care.

[28] I am satisfied that Home Care Services Limited was in the business of engaging and paying carers to provide care to Mr Andrews. In that case Mrs Andrews fell under the definition of Homeworker.

[29] I will now consider the usual tests that apply to questions of whether a person is an employee.

[30] The leading case in New Zealand which sets out the tests for determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd.*²

[31] The Employment Court in *Poulter v Antipodean Growers Limited* summarised the following applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:³

- 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.

[32] As held in *Bryson*, the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice, then to apply the three tests known as the control, integration and fundamental or economic reality test.

² [2005] ERNZ 372.

³ [2010] NZEmpC 77 at [20].

[33] In *Poulter* the Court concluded that ultimately it is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.⁴

[34] The Court in *Atkinson v Phoenix Commercial Cleaners Ltd* noted:⁵

Section 6 of the Act is broader and requires more than simply determining the common law contractual question of the parties' common intention. It focuses on the nature of the relationship in law for the purposes of determining whether the rights and obligations of employer and employee arose from that relationship. In circumstances such as these, a s 6 analysis can and must be made of the relationship between the parties to determine whether Mrs Atkinson was Phoenix's employee.

Terms and conditions of the agreement

[35] In May 2016 Mr Andrews contacted a retired accountant for assistance and advice. Mr Andrews was advised to engage his care workers as independent contractors.

[36] While Mrs Andrews did not agree with this approach, at Mr Andrews insistence, she engaged an accountant and incorporated her own company through which she received payments for her work with Mr Andrews.

[37] No documents have been signed by the parties setting out the terms and conditions of their arrangement.

Intention of the parties

[38] There was no written documentation between the parties to demonstrate their intention about whether Mrs Andrews was to be an independent contractor or an employee at the time arrangements were entered into.

[39] Based on the information I have to hand I have concluded that it was Mr Andrews' intention that Mrs Andrews be engaged as a contractor and while Mrs Andrews wanted to be an employee she also operated under the intention that she be an independent contractor.

⁴ Ibid at [21].

⁵ [2015] NZEmpC 19 at [58].

The control test

[40] This test examines the extent to which the activities of Mrs Andrews were controlled by Home Care Services. Mrs Andrews told me Mr Andrews directed her duties. She worked two concurrent shifts seven days a week.

[41] Mrs Andrews has been provided with her own room in Mr Andrews' house but does not contribute to its cost. Mrs Andrews told me she also maintains her own home but does not spend much time there.

[42] The control test is more indicative of an employee/employer relationship than that of an independent contractor.

Integration test

[43] This test examines the extent to which Mrs Andrews was integrated into Home Care Services business. That is whether the work undertaken by Mrs Andrews was integral to the business and whether Mrs Andrews had become part and parcel of the business.

[44] I have concluded the work undertaken by Mrs Andrews was integral to the business of Home Care Services.

Fundamental test

[45] This test examines the extent to which Mrs Andrews took on financial risk herself in providing her services to Home Care Services including whether she was in business for herself.

[46] Mrs Andrews did not take on any financial risk in providing her services. However, she was operating her own business and benefited from this by being able to claim expenses an employee would not normally be able to claim and which reduced her tax liability on the income she received from Home Care Services.

[47] Mrs Andrews was also able to undertake other work which she did. The work Mrs Andrews undertook was as an employee of several providers of care services. Mrs Andrews paid a combination of PAYE and business tax.

[48] The fundamental test has strong elements of a contracting relationship in that Mrs Andrews accounted for her own tax for the income she derived from Home Care Services and she was free to pursue other job opportunities.

Industry practice

[49] Mrs Andrews told me that when other companies provide care services they engage the carers as employees. When an individual ACC client opts to receive attendant care payments directly the money is paid to the client personally and the client pays the money on to the carer.

[50] The attendance care payments are not considered to be income but are made by way of schedular payments. Withholding tax is deducted from the payment by ACC before the payment is made to the client. Schedular payments do not include wages or salary payments. In those situations the carers are considered to be independent contractors and not employees.

[51] I have concluded the arrangement used in the industry for engaging carers largely depends on the arrangements between ACC, the provider of services or the client.

Overall impression

[52] The overall impression from all of the information available to me is that the underlying and true nature of the relationship between Mrs Andrews and Home Care Services is not that of employer and employee but rather a contracting relationship.

[53] There is no evidence to support a finding that there was any mutual intention to enter into a wage/work bargain.

[54] In the ACC documentation and Inland Revenue documentation I viewed as part of my investigation into Mrs Andrews' application, the payments made to Mr Andrews by ACC are referred to as "schedular payments". The schedular payments are subject to withholding tax deducted prior to the payment being passed onto Mr Andrews.

[55] I am unable to be of any further assistance to Mrs Andrews and her application is declined as the Authority does not have any jurisdiction to investigate her claims.

[56] I am aware this is not the outcome Mrs Andrews was seeking. My conclusion has been informed by the fact that Mrs Andrews operated her own business and benefitted from that in a way an employee would not usually benefit. My findings may have been different had that not been the case.

Costs

[57] Mrs Andrews was not represented at the investigation meeting and has not been successful in her application. This is an appropriate case for costs to lie where they fall.

Vicki Campbell
Member of the Employment Relations Authority