



New Zealand Employment Relations Authority Decisions

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Chalmers v Donovan and anor (Christchurch) [2011] NZERA 480; [2011] NZERA Christchurch 102 (13 July 2011)

Last Updated: 23 August 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 102
5324337

BETWEEN DAWN CHALMERS

Applicant

AND CANDACE DONOVAN and

ALAN DONOVAN

Respondents

Member of Authority: Representatives:

Investigation Meeting: Determination:

Philip Cheyne

Graeme Downing, Counsel for Applicant John Levenbach, Counsel for Respondent

1 July 2011 at Nelson

13 July 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dawn Chalmers worked for a business in Nelson known as Sports Therapy from July 2007 until the employment ended in October 2010. Ms Chalmers has personal grievance claims of unjustified disadvantage and unjustified dismissal against her former employer.

[2] The statement of problem identified Candace Donovan and Alan Donovan as the respondents. However, in their statement in reply, Mr and Mrs Donovan say that the employer of Ms Chalmers at the time the alleged grievances arose was a company called Physical Therapy Nelson Limited, not them personally.

[3] The difficulty arises because Mr and Mrs Donovan in partnership initially owned and operated Sports Therapy and Ms Chalmers' only written employment agreement (dated 5 July 2007) identifies them as the employers. In September 2007 Mr & Mrs Donovan incorporated the company (Physical Therapy Nelson Limited) and they say that they transferred the business to the company in October 2007 which from 26 October 2007 began employing all the staff including Ms Chalmers. Mr and Mrs Donovan say that this was done with the full knowledge and agreement of staff including Ms Chalmers. Ms Chalmers denies such knowledge or agreement. To resolve this problem I must assess the evidence about events in October 2007 and subsequently to determine the identity of Ms Chalmers' employer as at October 2010.

2007 changes

[4] It is common ground that Mr and Mrs Donovan employed Ms Chalmers in

July 2007.

[5] Some time after then, Mr and Mrs Donovan received advice from their accountant that it would be better for a company rather than their partnership to own and operate the business. They incorporated a company in September 2007 with themselves as directors and equal shareholders. Later, in 2009, they seem to have transferred most of their shares into a trust arrangement. I do not mean to imply anything irregular in this. I have already referred to the evidence that the business was transferred to the company from about 26 October 2007. I should note that I have seen GST and PAYE deduction returns for both the company and Mr and Mrs Donovan that support the contention that the company simply assumed financial and legal responsibility for the business. However, no formal steps were taken such as a sale and purchase arrangement.

[6] On the issue of whether there was any agreed change to the employment, witnesses are recalling old events that they might not have seen as significant at the time. I also note Mrs Donovan's evidence, which I accept, that she and Mr Donovan conveyed the change to the staff in a "no change - business as usual" fashion because they were concerned not to affect their personal relationships with staff. Mrs Donovan dealt with these communications to staff and she played down the significance of the change.

[7] There are notes from a staff meeting held on 20 November 2007. Ms Chalmers is recorded as being present. The notes read: *Candace told the staff that a company (Physical Therapy Nelson) has been formed by her and Allan to run the clinic.* Mrs Donovan's evidence is more detailed. She says that she told those at the meeting that their accountant had advised the change to a company owning and operating the business, that she and Mr Donovan would be managing directors and that staff would be paid by Physical Therapy Nelson Limited instead of the partnership. Mrs Donovan also says that she brought an updated organisational chart to the meeting to help explain the changes. I have been given a copy of an organisational chart that clearly shows the company as the owner of the business. However, this cannot be the same chart referred to by Mrs Donovan because it lists an employee who commenced employment in May 2008. I therefore do not know what was written on the chart that Mrs Donovan says she took to the 20 November 2007 meeting. Overall, I find that Mrs Donovan was probably somewhat less detailed in her explanation in November 2007 than is conveyed by her evidence now. The note recorded above probably accurately encapsulates what was said to and understood by those present.

[8] Ms Chalmers does not necessarily accept that she was present for the relevant exchange at the November 2007 meeting. Her evidence is that she does not (but would if she had been present) recall any discussion about items of general business before and after the note about the company. However, Mrs Donovan's evidence is that Ms Chalmers must have been present at least after the company discussion because the notes record her delegating a task to Ms Chalmers which she would only have done if Ms Chalmers was present. There is also evidence from another staff member who says that she probably took the meeting notes. Her evidence is that Ms Chalmers would have been there at or near the start of the meeting because her name appears early in the list of attendees. From this evidence I find that Ms Chalmers probably was present at the staff meeting on 20 November 2007 for the mention that was made about the company being formed to *run the clinic*, which was a reference to the business Sports Therapy. Because Mrs Donovan downplayed the significance of the change, Ms Chalmers does not now recall Mrs Donovan talking about the change.

[9] No steps other than this mention at a staff meeting were taken by either the partnership or the company to secure the agreement of staff (including Ms Chalmers) to the changed employment arrangements.

Other indications

[10] It is common ground that Ms Chalmers was paid her salary by direct credit into her bank account each fortnight in accordance with a clause in the written employment agreement dated July 2007.

[11] Prior to November 2007 Ms Donovan's bank statements showed the payment as *Donovan AJ & C Sports Thy Contract Pay*. The payment was shown as *Physical Therap Sports Thy Contract Pay* from 9 November 2007. Ms Chalmers' evidence, which I accept, is that she did not notice this change. It is common ground that the reference *Contract Pay* is an incorrect description. Other physiotherapists were engaged as contractors but Ms Chalmers was always an employee. However, the same reference line was used for the payments to them all.

[12] Ms Chalmers gave evidence, which I accept, about receiving payslips with each salary payment. Prior to about June 2008 she received handwritten payslips. I have not been given any copies of these and there is no evidence that they identified the payer. Ms Chalmers also told me that she received computer generated payslips after about June 2008. I have been given copies of such payslips dated 14 January 2009, 16 December 2009 and 7 September 2010. They record the payer as *Physical Therapy Nelson LTD*. Ms Chalmers' evidence, which I accept, is that all her computer payslips include that same information.

[13] There is another point about Ms Chalmers' salary to note. The written employment agreement set a rate of salary. About a year later (perhaps July 2008) the salary was increased as a result of some discussions between Ms Chalmers and Mr Donovan. That change was formally recorded in writing by crossing out the typed figures in the employment agreement, writing in the new figures and initialling the change. This occurred some time after the company had taken over the business but no change in the employer's identity was recorded.

[14] Generally throughout the whole of Ms Chalmers' engagement the business styled itself as *Sports Therapy* with minimal reference to the company. Mrs Donovan told me, and I accept, that the letterhead at one point included reference to the company name but they dropped that quickly because it caused some confusion with a similarly named previous business. I also accept Mrs Donovan's evidence that the part of the business dealings with ACC that Ms Chalmers' had responsibility for were in the name *Sports Therapy* rather than the company.

[15] There is some conflict in the evidence about whether Ms Chalmers was part of the management of the business (the respondent's position) or dealt with some administrative matters (Ms Chalmers' position). The dispute has assumed some significance because it is argued that Ms Chalmers must have known that the company was her employer if she was involved in the management of the company's business. On balance I tend to think that Ms Chalmers' involvement in the management of the business was not such as to lead to a conclusion that she must or should have been aware that the company owned and operated the business and employed her and other staff. As will become apparent it is not necessary to fully canvass the evidence about this.

Reasoning

[16] I am referred to commentary in Brookers Employment Law which mentions *Colosimo v Parker* (2007) 8 NZELC 98,622. In discussing the relevant principles that case cites *Mehta v Elliot (Labour Inspector)* [2003] NZEmpC 110; [2003] 1 ERNZ 451 where the Employment Court said:

[22] The question of who was the employer must be determined as at the outset of the employment. If that changed during the course of the employment, there must be evidence of mutual agreement to that change. ...it is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties. Put another way, who would an independent but knowledgeable observer have said was [the] employer .

[17] Adopting the approach indicated in *Mehta* the issue for determination here is whether there is evidence of mutual agreement, assessed objectively, for a change to employment with the company rather than with Mr and Mrs Donovan.

[18] Viewed objectively, the combination of Mrs Donovan's announcement to Ms Chalmers in November 2007 that a company had been formed to run the clinic, the associated change in the description in Mrs Chalmers' bank statements of the source of the salary payments, the later computer payslips that included the company name and Mrs Chalmers' continued employment in the business is sufficient to establish employment between Mrs Chalmers and the company, at least as at the date of the grievances arising.

[19] As at the time Ms Chalmers' grievance arose her employer was the company Physical Therapy Nelson Limited.

Disposition

[20] There is a submission for Ms Chalmers that if I find that the company was her employer I should amend these proceedings by substituting the name of the company for that of Mr and Mrs Donovan. That is opposed by Mr and Mrs Donovan.

[21] Ms Chalmers could have initiated these proceedings against both Mr and Mrs Donovan and the company but she elected not to. There was a further opportunity during the phone conference to include the company. However, Ms Chalmers' position was that she was not employed by the company. Given that approach I think the best course now is to simply bring the current proceedings to an end on the basis that the respondents did not employ Ms Chalmers at the relevant time.

[22] I will reserve costs. If a new statement of problem is lodged I will deal with these costs at the same time as any later costs issues. If no new statement of problem is lodged in a reasonable time counsel may lodge and serve a memorandum and the other party may then have 14 days to lodge and serve a reply.

Philip Cheyne
Member of the Employment Relations Authority