

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

File Number 5038168
Determination Number
WA 137/07

**Note order prohibiting
certain information from
publication**

BETWEEN PHILIP WILLIAM DICKSON
(Applicant)

AND WESLEY COMMUNITY
ACTION TRUST
(Respondent)

Member of Authority: P R Stapp

Representatives: Barbara Buckett, Counsel for Applicant
Peter Cullen and Frances Lear Counsel for Respondent

Investigation Meeting: 21 August 2007 at Wellington

Determination: 15 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] There is a preliminary issue about the applicant's status under the employment arrangements with the Respondent. The parties agreed to an investigation meeting on the preliminary matter which I have proceeded to deal with, before resuming, if necessary, the investigation meeting on other matters in the employment relationship problem.

The Facts

[2] Mr Dickson commenced with the Wesley Community Action Trust (WCA or Wesley) in December 2002. The position was advertised and he was interviewed for the position. He was engaged to deliver foster care giving services under what is called the "*Youth Services Strategy One to One Foster Programme*". WCA is a provider of this service, through Child Youth and Family

Services (CYFS), for eight placements in specialist care givers' and relief care givers' homes. Under that programme young people are referred to the WCA through CYFS for intensive home based one to one care.

[3] WCA has a provider agreement with CYFS¹ (the provider agreement) that makes provision for the following terms:

2.8 **Staff**

2.8.1 *The **Service Provider** will ensure that appropriate numbers of suitably qualified and experienced staff are employed (emphasis added) to deliver the services taking into consideration the extremely challenging nature of the **young people's** behaviour.*

2.8.2 *Schedule 6 describes **child, youth and family's** expectations for the general level of skills and experience which **specialist caregivers** and the **support social worker** will demonstrate.*

2.8.3 *The **service provider** will ensure that the following aspects of the **services** are delivered by the personnel specified whose roles are described in clauses 6.5 and 6.5 of Schedule 6:*

- (a) *day-to-day care of young people is provided by specialist caregivers with the support of relief caregivers;*
- (b) *one full-time equivalent support social worker(s):*
 - (i) *develops and reviews each young person's individual care plan;*
 - (ii) *provides day-to-day support for specialist caregivers and relief caregivers; and*
 - (iii) *liaises with each CYF social worker in relation to each young person.*

[4] The provider agreement also makes provision for requirements for specialist caregivers:

6.6 **Specialist caregivers**

6.6.1 *The **service provider** will employ (emphasis added) **specialist caregivers** who*

- (a) *subject to clause 2.23.5, has successfully completed the **caregiver training** and such other ongoing training as may be required;*
- (b) *be prepared to care for **young people** in their own homes in accordance with the requirements of the services;*

¹ Produced during the Authority's investigation meeting, and except for the provisions quoted by me, has been suppressed from publication by consent.

- (c) *have the necessary skills to implement behaviour management techniques and exercise effective supervision of the **young person** in their care;*
- (d) *have a level of skill and the requisite knowledge of the issues involved in working with the target client group;*
- (e) *unless otherwise agreed with **Child, Youth and Family** on a case-by-case basis, do not have any children or young people living with them; and*
- (f) *have a current full driver's licence.*

[5] Under clause 6.7 (the relief caregiver's provision in the provider agreement) the following applied:

*6.7.1 The **service provider** will employ (emphasis added) **sufficient relief caregivers** to support the **specialist caregivers** in their role in providing the **services** in accordance with this clause 6.7*

[6] Under clause 5.18 of the provider agreement there is provision that prevents WCA sub contracting the services without permission from CYFS but it can engage personnel “*on contract*” to provide services provided there is supervision and control.

[7] Andrea McKenzie, the manager of youth services at WCA, told me that all the money WCA received from CYFS is paid to the caregivers. She says that WCA does not use any of the money allocated for caregivers to cover its administration costs. .

[8] WCA engages specialist care givers to provide care for the children or young people who are placed with WCA through the CYFS programme. The caregivers are required to provide a nurturing, supportive and therapeutic environment in their own homes. The caregivers are expected to be dedicated to looking after the child who is placed with them.

[9] Caregivers are required to meet certain prescribed commitments, obligations and responsibilities in their care giving role. They are required to attend training and supervision on an on-going basis including 24 hour on call support; that is they are required to be contactable in a 24 hour on call support role. The WCA facilitates the contact programme that is offered for caregivers. The contract programme primarily involves regular training and participation in group meetings. There are weekly meetings where caregivers can raise problems and receive feedback and support as well as training for issues previously identified. Seminars are also organised on average every three months on specialised topics. WCA requires its caregivers to participate in support and training programmes in order to continue to effectively manage challenging behaviours of young

people in their care. It is also important, WCA says, for the caregiver to have a sense of being part of a bigger team that can be called on and relied on when crises occur.

[10] Respite care is arranged to enable caregivers to have a break. These are arranged on a regular basis for a young person to be placed with a respite caregiver so that the main caregiver can have a respite period. These must be pre-approved by WCA.

[11] Mr Dickson and WCA signed off a contract for services in the role of a specialist care giver (the contract agreement). He received a letter of introduction upon commencing. Mr Dickson says he received income that he treated as pay. Ms McKenzie explained to me that each specialist caregiver received a service fee as a reimbursement for the costs associated with the provision of care. She says the caregivers receive the maximum funding possible as provided through CYFS. She also says that WCA decided to contract its caregivers as a consequence of legal advice sought independently (from its own solicitor), and also from the Department of Inland Revenue to treat the payment as comparable to receiving “board”, and tax free. Although Mr Dickson says that he was advised that the range for pay was \$28,000 to \$31,000, Ms McKenzie says that the payment for the role of full time caregiver was \$28,000 per annum. I accept her evidence because \$28,000 was consistent with what other care givers received and a service fee increment of \$1,000 was provided in WCA’s discretion that increased the rate to \$29,000 per annum.

[12] There are four types of payments: (1) the service fee also called the reimbursement of costs fee and an annual contract fee of \$79.45 per day, and (2) a daily allowance for the young person of \$7.78 per day. The daily allowance contributed to groceries, pocket money, outings, movies, McDonalds etc under the terms of a letter of introduction given by WCA to care givers. Services provided for only part of a day would be charged on a pro rata basis. There was a third method of payment for any additional expenses which were paid separately with receipts having to be provided for reimbursement such as medical, clothing, school trips and travel. The invoice documents were organised by WCA. Finally there is also a discrete payment that is called the “*budgeted day programme*” per young person for specialist activities.

[13] There was no written record of Mr Dickson’s claim for the start-up bonus in the contract agreement and the letter of introduction. His claim was not supported by other witnesses. One witness received a one off bonus for length of service and performance in addition to the service increment. It on its own is not sufficient proof that there was a start up bonus.

[14] Ms McKenzie says that advice was received that resulted in a decision that WCA could fund contractors engaged as caregivers on a tax exempt basis because the costs associated with the care giving service were comparable to that of “board payments”.

[15] She says that while there are clear expectations established for the role, there is a high level of discretion on how the role is carried out by each caregiver and that each caregiver is required to supply the necessary equipment, such as their own home.

[16] Mr Dickson’s and the WCA’s contract agreement provided for the following:

Contractual relationship

4. *The contractor is in all respects an independent contractor. The contractor agrees that at no stage either during this agreement or after it ends will she/he claim that she/he is or was an employee of the respondent.*

7. *As per advice received from Inland Revenue, under section CB9(h) of the Tax Administration Act 1997, payments received by caregivers are exempt of taxation as the caregiver is providing a standard-cost household service. The respondent has taken this advice in good faith however, the contractor is responsible for his/her income tax (if any), ACC levies, and/or any other government charges which may be levied now or in the future arising out of the provision of services under this agreement.*

[17] Their contract agreement also made provision for one month’s notice of the termination of the agreement by either party.

[18] In March 2005 Ms McKenzie had concerns raised with her about Mr Dickson. First, WCA found that Mr Dickson was running a café. It was considered this clearly impacted on his ability to participate in the contact programme and attend team meetings essential to the provision of care. This was raised in a letter dated 22 March 2005. Mr Dickson says he sold his café because Wesley had a problem with him continuing to run it while providing care giving services. There was no record of any discussion between Mr Dickson and any supervisor in regard to the WCA arrangements and his café. But it did become an issue for Ms McKenzie in regard to his availability.

[19] Another concern was also raised about a decision that Mr Dickson had made to allow an ex-child in care, a young teenager at the time, to reside at his home at the same time he was providing care for another child. It was alleged that Mr Dickson had made this decision unilaterally without permission from WCA. It was alleged that this was a breach of his contract with WCA, which says that during placements there can not be any other dependent children in the home.

[20] Another matter that was raised in the same letter was that Mr Dickson had arranged for current child in care to go to a respite placement without first obtaining WCA's permission or informing WCA of what he had done. It was considered that his decision could have placed the child at risk. Since WCA was not aware of it, social workers could not ensure that the transition from full-time placement to the respite placement was consistent with the risk management plan established for each individual young person and any person providing care for them.

[21] Ms McKenzie decided that Mr Dickson would be treated fairly and to hear his response before any decision was made in regard to the allegations. There was a meeting held on 17 May 2005 to discuss the allegations. Ms McKenzie made a decision and wrote to Mr Dickson, essentially clarifying his role and the limits of his authority (letter dated 17 May 2005).

[22] A similar issue arose in October 2005. Ms McKenzie sent a letter dated 18 October 2005 to Mr Dickson asking him to attend a meeting to explain why another young person in his care had been placed with an ex-caregiver. She says Mr Dickson did not notify WCA or seek WCA's permission to do this. Ms McKenzie believed that Mr Dickson was fully aware that he was not entitled to make those decisions, told him that, in the absence of a satisfactory explanation, his contract would be terminated.

[23] Requirements were placed on Mr Dickson to attend all supervision and team meetings and to negotiate with social worker staff if he wanted to be excused. Mr Dickson did not attend the team meeting on 7 November and did not advise WCA that he would not be attending. He was written to about his absence on 9 November 2005 and put on notice that if he was not able to provide a satisfactory response it might result in the termination of his contract. He was asked to attend a meeting. He did not attend, but instead wrote to WCA explaining that he believed he was on respite and should not be expected to attend meetings during the times of his respite.

[24] The parties met on 25 October 2005 where Ms McKenzie says Mr Dickson admitted that he had indeed organised the respite without any consultation with WCA. A decision was made that he had breached the terms and conditions of his contract and on 1 November 2005 he was given notice before any decision was made to terminate his contract.

[25] On 14 & 21 November 2005 Mr Dickson allegedly failed to attend two further team supervision meetings again. Both occasions did not involve respite.

[26] There was further correspondence between the parties and a decision was ultimately made to terminate Mr Dickson's contract on 22 November 2005.

The Issues

[27] Mr Dickson claimed that he was a “*homeworker*”, as defined under the Employment Relations Act, and in the alternative, failing a decision supporting that, he claimed he was an employee, and not a contractor. WCA have replied that Mr Dickson’s engagement with WCA was as an agent. Its fall back position is that he was not a “*homeworker*”, and was a contractor to provide services for WCA in the role of a specialist caregiver.

Determination

(1) Claim of Agency Relationship

[28] The existence of the provider agreement means that Mr Dickson can not be an agent of CYFS or that the relationship between WCA and CYFS is one of agency. There is a clear unambiguous provider agreement that places a responsibility on WCA to employ specialist care givers, social workers and respite care givers. Indeed WCA employs social workers and says it contracts specialist care givers and respite caregivers. There are contractual rights and obligations existing between all the parties in the arrangement and these are covered under the contract agreement.

(2) Homeworker

[29] The role clearly fits the category of a “*homeworker*” for the following reasons.

[30] S 5 of the Employment Relations Act (the Act) includes a provision for “*homeworker*”. As such Mr Dickson was employed by Wesley and he was required to carry out his duties and responsibilities in his own home (See *Cashman v Central Regional Health Authority* [1996] 2 ERNZ 156 (CA)).

[31] Applying *Cashman v Central Regional Health Authority* [1996] 2 ERNZ 156 (CA)) Mr Dickson comes within the ordinary and natural meaning of the words of the definition of the statutory context of a “*homeworker*” under s 5 of the Act.

[32] S 5 of the Act provides the meaning of a “*homeworker*”:

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

(b) (b) includes a person who is in substance so engaged, employed, or contracted even though the form of the contract between the parties is technically that of vendor and purchaser

[33] The applicant's contract required him to carry out the work in his own home, caring for young people at risk, in the role of a specialist caregiver that involved referrals. The CYFS provider agreement envisaged some form of employment.

[34] There is a susceptibility to exploitation by the employer because of the commitment required in the role, the on-call nature of the arrangement and the cap on pay. Although there was time available for other things the control in the role was significant enough to require a significant degree of exclusivity.

[35] Mr Dickson's position was one that was intended to come under the protection of the Act. He was described as a "full time specialist caregiver". Mr Dickson had to provide exclusive commitment to the role, including providing the use of his own home. He made his living primarily from the provision of care giving to Wesley. There was some impact on him working in his café as it interfered with him attending meetings or being able to be contacted, albeit that Ms McKenzie had no knowledge of any direction provided by his supervisor. Given that Mr Dickson could not convince me that he had a start up bonus I have found his evidence was not sufficient to conclude that he was actually required to sell his business.

[36] There was considerable control over him in the broader requirements of training, behaviour, responsibilities and supervision, and equipment that he needed to provide. I am further supported by the requirement under the specialist care givers' agreement that one month's notice of termination of the agreement was required to end the agreement. Any rights and obligations under the agreement could not be assigned.

[37] Finally, the payment, whilst it was described by WCA as a service fee or contract fee, was an entirely separate payment to any reimbursing payments- ie the daily allowance and the ability to claim other reimbursements and the daily programme budget per youth payment for specialist activities. Mr Dickson treated the service fee as if it was pay, although it is simply not plausible for him, and one of his witnesses, to claim that they were ignorant about the payment of tax when the letter of introduction and the specialist caregiver agreement covered the tax circumstances in some detail. The payment is a remuneration type payment despite Ms McKenzie's evidence of the daily service fee being cost related when a large and significant proportion of it related to what she called a payment for services performed.

[38] Further there was no information provided on any of the arrangements involving the Department of Inland Revenue and how it treated the payment.

(3) Employee/Contractor Argument

[39] I am satisfied that WCA is required to employ specialist caregivers under the provider agreement with CYFS. That agreement did not exclude the possibility of contracting arrangements and is ambiguous as to what the requirement to “*employ*” means, having regard to clauses 2.8.1, 6.6 and 6.7 and 5.18 of the provider agreement. Also, I am supported in this conclusion by Ms McKenzie’s evidence of the advice that she says she received that involved contracting arrangements to be entered into for tax purposes. Further I am also supported in my conclusion by the contract agreement that was signed off by the parties with particular regard to the contracting arrangement clauses.

[40] Mr Dickson says he believed he was an employee despite the contract agreement and its terms that he signed. He and a number of his colleagues were concerned about their employment arrangements including pay and tax and set about to get some changes. The label the parties put on the arrangement is not necessarily determinative of the real nature of the relationship.

[41] S 6 (1) of the Act makes provision for an employee to include a homemaker. If I am wrong about Mr Dickson being a “*homeworker*” I would determine that he was an employee for the following reasons.

[42] The real nature of his position (applying s6 of the Employment Relations Act) involved control by WCA over the essential elements of his position, including functional relationships, although he was permitted to exercise judgement in his professional undertaking of the role. He was also integrated in the business in as much as he was required to attend meetings and training and supervision and had to be on call for a significant amount of time. He was required to use and provide his own home that was integral for WCA to deliver under the provider agreement with CYFS. The business relied on the use of his home and equipment for care giving purposes. Mr Dickson was paid a retainer and what was called a service fee, and he was reimbursed for expenses. He was required to be on call. He was not in business on his own account. He was not trading under any name, company or other entity. He was not GST registered. He did not pay ACC levies. WCA has relied upon advice it says it received from its lawyer and the Department of Inland Revenue in regard to how it should treat its specialist care givers and respite caregivers. I conclude that the decision on how specialist care givers and respite care givers would be treated was in regard

to tax, and not employment. I have given greater weight to these factors than the contractor label under the specialist care givers agreement signed off by the parties.

[43] The following factors further support my conclusion:

- Mr Dickson's function was integral to the business of supplying care for children in need of a care giver.
- He was limited in his ability to enter into arrangements to use his skills with anyone else other than Wesley.
- He had to avoid conflicts and was required to obtain permission to engage in other activities.
- He was required to work full time and be available and contactable on call.
- His respite breaks were specified by and were taken with permission of Wesley.
- He was provided with respite leave that was a substitute for sick leave and holidays.
- Relief for time off was provided by Wesley. He was not able to delegate any arrangements without permission and had to meet guidelines.
- He was paid regularly. The invoicing arrangements were put in place by WCA.
- Training within CYFS and Wesley guidelines was a requirement of his role and position with Wesley.
- He was required to attend training, meetings and supervision.
- There was no financial risk to him.
- He could not profit by carrying out his tasks.

[44] Although there was a high level of discretion in the professional undertaking of his duties Wesley required Mr Dickson:

- To be available most of the time and certainly be contactable 24 hours.
- He could not engage in employment or undertake any activity without permission and approval.

- Had to inform specialist social workers of any changes to agreed living circumstances involving clients.
- Could not have any responsibility for other dependent children.
- To participate in on going training, supervision and meetings.

[45] The termination of the contract for cause and fairness are consistent features of an employment relationship, albeit I consider that Ms McKenzie was acting prudently and cautiously at a fundamental level to be fair to the applicant, as undoubtedly she would for any contractor. He was treated in other words like an employee.

(4) The Volunteer Defence

[46] The last argument related to whether or not Mr Dickson was a volunteer. I entirely reject that proposition from the Respondent. My reason is that the definition of a volunteer under s 6 of the Act does not reflect the arrangement between the applicant and Wesley. Mr Dickson expected to be paid. Payment was a key subject of ongoing discussions between the parties in their relationship. He was not engaged as a volunteer. He was never referred to as a volunteer. His income was not supplemented despite his attempt to run a café and then get rid of it. The intention of the parties was to create a contractual relationship. This was supported by the existence of a contract. It was further supported by Wesley's provider agreement with CYFS. How the payments were made, the method of payment and the nature of the payment fell short of providing a payment for board. Also it was called a service fee and an increment was provided. A discretionary bonus was paid to another care giver for service and being a "top caregiver".

Conclusion

[47] I conclude Mr Dickson was a "*homeworker*". Further I am satisfied that as a "*homeworker*" he was an employee, and was not a contractor. He was not a volunteer and there was no agency arrangement.

[48] The parties can now move to the next step in the process and a telephone conference will be organised for the arrangements.

[49] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority