

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 334
3024833**

BETWEEN	CHRISTOPHER DILLON Applicant
AND	HAYDEN DILLON First Respondent
	TULLYCRINE LIMITED Second Respondent
	LISA DILLON Third Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Scott McKenna & Jemma Alchin-Boller, Counsel for Applicant Hayden Dillon, Representing the Respondent
Investigation Meeting:	18 September 2018 at Hamilton
Submissions received:	24 September 2018 from Applicant 1 October 2018 from Respondent
Determination:	31 October 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Christopher Dillon (Mr Dillon), claims that he is owed wages and holiday pay by the First Respondent, Tullycrine Limited (Tullycrine).

[2] Mr Dillon also claims that the First Respondent, Hayden Dillon (Hayden), and the Third Respondent, Lisa Dillon (Lisa), have been involved in breaches of the Minimum Wages Act 1983 and the Holidays Act 2003 carried out by Tullycrine.

[3] Tullycrine denies that Mr Dillon was an employee and claims that the relationship between it and Mr Dillon was in fact a family relationship and essentially a partnership.

[4] Hayden and Lisa deny that they were Mr Dillon's employer and should be removed from the action.

Issues

[5] The issues for determination are whether or not:

- Mr Dillon was an employee during the periods when he performed certain tasks for Tullycrine;
- Mr Dillon is owed any monies in respect of unpaid wages and holiday pay entitlement by Tullycrine;
- Penalties should be awarded against Hayden and Lisa in respect of breaches of the Minimum Wages Act 1983 and the Holidays Act 2003.

Note

[6] During the course of the Investigation Meeting, the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties' representatives. The parties have also submitted closing submissions on the facts and law.

[7] I have considered those submissions and the evidence, including relevant documents provided by the parties but, as permitted by s.174 of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on each of the issues necessary to dispose of the matter and specified orders made as a result.

Background Facts

[8] Tullycrine is a horse agistment and trading business. Horse agistment involves a service being provided whereby horses owned by other persons are kept, or agisted, on the service provider's property for a fee. Hayden is the current sole director of Tullycrine. Lisa Dillon was a director of Tullycrine but ceased to be a director on 7 July 2017.

[9] During 2003 Mr Dillon (who is the father of Hayden) faced some financial difficulties following the failure of the bed and breakfast business he and his wife Mrs Glen Dillon (Mrs Dillon) were operating in Auckland. At that time they moved to Melbourne where Hayden and Lisa were living and moved into their rented house.

[10] During that time Hayden said he and Lisa had assisted Mr Dillon financially to address his creditor payments, and to provide him and Mrs Dillon with assistance to meet their household expenses.

[11] After a period of time, Mr Dillon obtained employment as the manager of a rest home and Mrs Dillon also obtained employment, following which they rented their own house in Melbourne. Mr Dillon said his employment provided him with a good salary, prospects and superannuation.

[12] Hayden and Lisa moved back to New Zealand in 2008 with their two children. Hayden worked in banking and Lisa worked part-time in order that she could provide care to the children.

[13] During a visit by Mr Dillon and Mrs Glen Dillon to Hayden and Lisa in New Zealand, Hayden said there had been discussion about the purchase of a lifestyle farm and establishing a horse agistment business with a view to Mr and Mrs Dillon living together with Hayden and Lisa and their children.

[14] Mr Dillon said he had experience of farming and of racing and breeding horses and had been attracted to the prospect of being with the grandchildren of whom he and his wife had become fond when living in Melbourne, and returning to outside work.

[15] There was the additional consideration in that Mr Dillon and Mrs Glen Dillon were in adverse financial circumstances and the business proposal included an agreement for provision to be made for their retirement.

[16] It had been decided to start a horse agistment business called Tullycrine Limited, and the financial budgets for Tullycrine had been discussed between Mr Dillon and Hayden.

[17] The premise of the business venture was that Mr Dillon was to provide some child care (in respect of his grandchildren), maintain the Tullycrine farm and provide equine care. There was no specification as to the quantum of work to be provided by him.

[18] Hayden and Lisa were to contribute capital to the business by a combination of savings and their salaries until such time as Tullycrine became profitable. Hayden would become a Director of Tullycrine and be responsible for providing connections and potential clients for agistment whom he would introduce to Mr Dillon. Given his financial background and experience, Hayden would act in a fiduciary responsible manner regarding the discharging of Tullycrine's financial obligations.

[19] Tullycrine was established with Hayden and Lisa as directors. Due to Mr Dillon's poor reputation and creditor history it was decided not to appoint him as a director of Tullycrine.

[20] Mr Dillon said there had been a provision for monies to be paid to him in the Tullycrine budget based on profitability, but agreed when questioned that he had accepted that there was an element of risk in establishing an equine business.

[21] The budget included provision for Tullycrine to meet Mr and Mrs Glen Dillon's living costs, including accommodation to be provided at no cost to them, phone, Sky TV, power gas insurance and a fully maintained vehicle. In addition vegetables and meat would be provided by Tullycrine.

2010 to December 2011

[22] Mr Dillon relocated back to New Zealand and commenced working at Tullycrine in August 2010 with Hayden and Lisa contributing their salaries to Tullycrine.

[23] Hayden and Lisa purchased a farm on which Tullycrine was to operate and it was agreed by the parties that Tullycrine would fund the cost of building a new house on the farm which would be occupied by Hayden and Lisa and their children, and the upgrading an existing property on the farm to be occupied by Mr and Mrs Dillon. However it was subsequently agreed to build a second new house for Mr and Mrs Dillon to occupy.

[24] Mr Dillon requested an alteration in the second house design to provide more floor area than had been budgeted. The additional space required attracted a development fee which Mr and Mrs Dillon agreed to pay personally. However they did not do so and Hayden said he and Lisa funded the additional cost by the insertion of further personal funds into the Tullycrine account.

[25] During this period Mr Dillon purchased three weanlings which were kept on the farm and their care and feed costs were covered by Tullycrine.

[26] Mr Dillon said he regarded this arrangement as a joint venture between himself and Hayden, with Tullycrine owning the weanlings.

[27] Hayden said that Mr Dillon informed him that his intention was to sell the weanlings at a profit, and to personally retain any profit.

[28] This resulted in friction between the parties and placed pressure on the relationship between Mr Dillon and Hayden and Lisa. As a result mediation was arranged in December

2011 with the assistance of the legal firm Tompkins Wake, and a partner of Tompkins Wake facilitated the mediation which was attended by Mr Dillon, Mrs Dillon, and Hayden and Lisa.

[29] An agreement was reached by the parties during the mediation (the December 2011 Agreement). The agreement was handwritten and in three sections. The first section was headed 'Horse Agreement', signed by Mr Dillon and Hayden, and stated:

Upon sale of yearling, deduct:

1. Cost of sale (selling costs)/ (*illegible*)
2. Direct external costs of sale and preparation, eg feed, vet, over, farrier, insurance, transport etc.
3. Chris and Glen's capital relating to that horse.
- 4.

Then – Agree to reinvest in a new horse etc for the future – amount to be mutually agreed

- Any surplus divided equally especially with each party responsible for own tax.

If sale price is not sufficient to (*deleted*) cost, costs of sale and capital and costs of sale (*illegible*) proportionately.

[30] The second section was headed '\$17,000 WDC Payment', signed by Mr Dillon, Mrs Glen Dillon, Hayden and Lisa, and stated:

If property is sold, and no acceptable arrangements made for Chris and Glen, then payment will be made on sale. Otherwise the payment will not be required to be made by Hayden and Lisa.

[31] The third section was not headed. It was signed by Mr Dillon, Mrs Glen Dillon, Hayden and Lisa, and stated:

If the circumstances of the farm permit, Hayden and Lisa will look to increase the level of remuneration paid to Chris and Glen for their work.

Events December 2011 until 6 April 2018

(i) *Horse Purchase*

[32] Following the mediation in December 2011 Tullycrine continued to operate.

Mr Dillon purchased a mare at the Karaka horse sales called 'Stella Dora'. In doing so he acted unilaterally without discussing the proposed purchase with Hayden or Lisa and without formalising agreement to do so by Tullycrine.

(ii) Tullycrine daily operations

[33] Tullycrine engaged various contractors including Mr Nick Downes, horse trainer/breaker. Mr Downes said Mr Dillon managed the operational aspects of Tullycrine and he provided invoices in respect of his work to Tullycrine, marked for the attention of Hayden, who arranged for payment to be made from the Tullycrine accounts.

[34] In or about 2013 Mr Downes said that he had initiated the idea of having a round yard to assist with safely breaking the horses in. Hayden said he had not agreed with the proposal when it was discussed with him.

[35] Mr Dillon acted unilaterally and arranged for the round yard construction, which was a cost incurred by Tullycrine. He said he had believed it to be a good investment which would increase the Tullycrine profits.

[36] Mr Timothy Welch worked as an equine contractor. He said that he liaised with Mr Dillon about the amount of work he had undertaken and who also agreed to help him prepare the invoices which were addressed to Tullycrine for payment.

[37] Mr Welch said his understanding was that Mr Dillon was the property and business owner.

[38] Mr Dillon undertook the principle responsibility for liaison with the various contractors engaged by Tullycrine, including vets and farriers.

(iii) Holiday arrangements

[39] Mr Dillon said that he was required to confirm his holiday arrangements with Hayden for authorisation. Hayden denied this, and said that there were family discussions about holiday dates between Mr and Mrs Dillon, himself and Lisa.

[40] The discussions were necessary in order to provide childcare for the grandchildren during periods of leave by the parties, and for the operation of Tullycrine which Hayden and Lisa covered whilst Mr and Mrs Dillon were on holiday.

[41] Mr Dillon confirmed that he had taken several periods of leave during the period from 2010 up to April 2016, to visit Melbourne and Sydney.

[42] An email exchange between Mr Dillon and Hayden dated 28 August 2012 is relevant to this issue. In the initial email Mr Dillon states:

Have found another possibility

If we could get organised soon we could go on Wed 19th Sep and return Monday 8 October – Emirates for \$948.

They have cheap airfares on Monday, Tuesdays and Wednesdays

This would mean:

* Dad gets to the Turnbull Stakes

* You only have kids for School Holidays for 1 week

* We get a cheap airfare

We would be back in time to look after the Fast and Furious colt

[43] Hayden replied that same day:

The colt will be fine. Sales are not till the end of Nov.

Either option is fine. But can you be back by the 19th October at latest.

Also your preferred option is 2 and a half weeks – lucky for some ...

Either way can you please book a set of dates that we can work at as we need to make arrangements.

(iv) Time Off and Sick Leave

[44] Mr Dillon had periods of sick leave away from the operation of Tullycrine which related to personal medical problems, one of which involved an eight week period. During the periods he was absent, Lisa and her son (Mr Dillon's grandson) would undertake the Tullycrine operation tasks.

[45] In addition Mrs Glen Dillon had some health related issues and in addition to his own visits to the doctor accompanied Mrs Dillon on her visits. There was no permission sought or expected from Tullycrine for these visits.

(v) Tullycrine managerial control

[46] Hayden said he had often taken leave from his full-time employment to assist with the Tullycrine operation. He had considerable expertise in the equine industry and had attempted to provide Mr Dillon with advice on equine care issues; however he (Mr Dillon) had refused to listen to him and made the decisions he believed to be correct.

[47] This evidence was supported by Ms Prudence Dillon, daughter to Mr Dillon and sister of Hayden who had visited Tullycrine on several occasions.

[48] Mr Dillon made purchases for the benefit and use of Tullycrine using the Tullycrine Farmlands credit card.

[49] He also used the Tullycrine credit card to pay for a holiday in Tauranga without discussion or knowledge of Tullycrine.

Events 2017 - 2018

[50] During 2017 Hayden said that Tullycrine had failed to sell a yearling at the Karaka horse sales. Tullycrine had no committed agisters, and he had been advised by the bank that it would not fund any further losses because Tullycrine had fully committed its equity.

[51] As a result he had consulted Mr Dillon about other options. Hayden said he had received no response from him and had discussed the issue further in December 2017, providing his opinion that the sale of Tullycrine was the most viable solution.

[52] On or about that time Mr Dillon said he had sought legal advice in order to ensure his future would be protected, and that he and Mrs Glen Dillon would: *“always have a roof over our heads”*.

[53] During 2018 the relationship between Mr Dillon and Hayden and Lisa fractured when Mr Dillon advised them that he would be placing a claim for wages.

[54] At that point Hayden said he regarded their partnership at an end. The familial relationship had also broken down and communications between the parties was acrimonious.

[55] On 6 April 2018 Mr Dillon and Mrs Glen Dillon were served with an eviction notice by Tullycrine.

Determination

Was Mr Dillon an employee during the periods when he performed certain tasks for Tullycrine?

[56] In deciding whether Mr Dillon was an employee of Tullycrine, I apply s.6 of the Act which provides:

s.6 Meaning of employee:

(2) In deciding ... whether a person is employed by another person under a contract of service, the ... Authority-... must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2)... or the Authority-

(a) must consider any relevant matters, including any matters that indicate the intention of the parties

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[57] In *Bryson v Three Foot Six Limited (No2)*¹ the Supreme Court stated the following:

All relevant' matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship ... It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. "All relevant matters' equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. ...

[58] The fundamental relationship between Mr Dillon and Hayden and Lisa was that of a family relationship. Whilst Mr Dillon claims that there was an employment relationship, Hayden and Lisa claim that the relationship was akin to a partnership having its genesis in the family relationship and not that of employment. Accordingly I must determine the real nature of the relationship between the parties.

[59] It was on the basis of the familial relationship that Tullycrine was established as a business which would provide a benefit to both parties. The benefit to Mr Dillon was that he and Mrs Dillon would have provision made for their daily living expenses and there would be future provision for their retirement to be funded by Tullycrine. The benefit to Hayden and Lisa was that Tullycrine would provide income to fund the costs of the farm they had purchased. Additionally profitability by Tullycrine would diminish the reliance for capital on their personal salaries.

[60] Both parties acknowledged at the outset that the establishment of Tullycrine was a risky business, and both accepted that risk at the outset.

Contractual basis

¹ [2005] 1 ERNZ 372

[61] In *Cunningham v TNT Express Worldwide (NZ) Ltd*² the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship.

[62] There is no written employment agreement between the parties. The only written agreement between the parties is the December 2011 Agreement which provides that:

- The cost of the yearling purchased by Mr Dillon would be sold and the monies from the sale reinvested in a new horse, any surplus funds from the transaction to be shared equally between each party with each party responsible for making their own provision for tax;
- Payment to Hayden and Lisa of the cost of the property development fee from the property sale unless “*no acceptable arrangements were made for Chris and Glen*” whereupon no payment would be required by Hayden and Lisa; and
- An increase in the “*level of remuneration paid to Chris and Glen*” in the event that: “*the circumstances of the farm permit*”.

[63] Examining that agreement I note as significant:

- i. The reinvestment of the yearling sale profit would be paid into Tullycrine;
- ii. The sharing of surplus funds between Mr Dillon and Hayden who would each make their own tax arrangements;
- iii. The arrangements concerning personal payments related to the property development fee for the Tullycrine owned property;
- iv. The increase in the remuneration for Mr Dillon;
- v. Any increase to be made only if the Tullycrine financial circumstances permitted;
- vi. the omission of any reference to the existence of an employment relationship;
- vii. the omission of any reference to agreed terms and conditions of employment for Mr Dillon; and

² [1993] 1 ERNZ 695

viii. the omission of any reference to the provision of a written employment agreement

[64] In that situation supplementary documentation setting out clearly the nature of the relationship at the outset would have precluded any later confusion.

[65] I do not find that the December 2011 Agreement establishes the existence of an employment relationship between Mr Dillon and Tullycrine. The first section notes that Mr Dillon (i) agreed to the reinvestment of funds from the sale of the yearling in Tullycrine, (ii) was to share in any profit made by the sale of the yearling, and (iii) be responsible for his own tax arrangements. This is not an arrangement an employee would make with an employer.

[66] The second section relates to personal expenditure by Mr Dillon on a property owned by Tullycrine. I consider it would be most unusual for an employee to incur personal costs on a property owned by an employer.

[67] The third section mentions 'remuneration' which is a term associated with employment. In that section Mr Dillon agreed that any increase in what had been agreed as the terms upon which Mr Dillon entered into the establishment of Tullycrine was to be based solely on the financial circumstances of Tullycrine. Whilst not determinative, I consider basing an employee's remuneration, or increase thereof, upon the financial circumstances of the company to be an unusual agreement between an employer and an employee.

[68] More significantly, at no time during the years Mr Dillon was involved in Tullycrine is there any evidence that he requested a payslip or made enquiries of Hayden and Lisa, or of the IRD as to the status of PAYE payments which would be related to his alleged employment by Tullycrine, whether in cash terms or by the provision of any benefits such as accommodation, food, telephone costs etc..

[69] I now turn to the way in which the relationship operated in practice by having regard to the features of control and integration.

Control and Integration

[70] There is no doubt that Mr Dillon was integrated into the operation of Tullycrine.

[71] Mr Dillon had entered into the establishment of Tullycrine on the basis that Hayden and Lisa would provide the capital and financial management and he would contribute his expertise and management skills.

[72] There is no evidence relating to the hours Mr Dillon was expected to work or actually did work in the Tullycrine business. Employees agree to work certain hours upon which their remuneration is based.

[73] I note that Hayden also carried out horse agistment work for Tullycrine. Apart from his financial acumen, Hayden also had equine experience, both of which he used to the benefit of Tullycrine from which Mr Dillon derived a benefit.

[74] I find that to be relevant to the nature of the relationship in that it is a characteristic of a partnership that there is a combination of talent, judgment and skill.

[75] In addition other family members carried out horse agistment work for Tullycrine including Lisa, the grandson, Mrs Dillon and Ms Prue Dillon (Hayden's sister). I find this underlines the familial imperative driving the establishment of Tullycrine which was to be used as a vehicle (i) to provide daily living expenses for Mr and Mrs Dillon, (ii) long time provision for their retirement needs and (iii) as a profitable business from which Hayden, Lisa and their children would benefit.

[76] Whilst Mr Dillon's evidence was that he had to have his holiday leave authorised, this was denied by Hayden whose evidence was that any leave was mutually agreed by the parties to ensure personal requirements for leave could be organised so that Tullycrine continued to operate smoothly.

[77] I find that the email exchange between Mr Dillon and Hayden on 28 August 2012 underlines the familial and partnership nature of the relationship in which there was discussion about how the requirements of each party could be accommodated within the needs of the Tullycrine operation.

[78] I note that Mr Dillon was not issued a list of tasks to be carried out by Hayden, he (Mr Dillon) decided what contracting and other horse care tasks needed to be undertaken, engaged contractors as he deemed necessary. He did not consult Hayden or Lisa in these matters, and in fact disregarded any experience offered by Hayden as regards the horse management.

[79] Mr Dillon made financial commitments on behalf of Tullycrine relating to house construction and design, bought horses without the agreement of Hayden or Lisa and established a round yard which he regarded as necessary for the future profitability of Tullycrine.

[80] Mr Dillon used the Tullycrine Farmlands and credit card as of right, not seeking authorisation or approval to make expenditure.

[81] I do not find that Mr Dillon was subject to the control of Tullycrine although he was integrated into its operation.

The Fundamental Test

[82] In considering the fundamental question of whether Mr Dillon was in business on his own account I find the following facts to be significant. Mr Dillon:

- received no salary for the work he carried out at Tullycrine over an approximately 8 year period. He agreed in the December 2011 Agreement to any 'increase in remuneration' only occurring if the financial circumstances of Tullycrine permitted;
- did not have a written employment agreement and there is no reference to him making such a request in the December 2011 Agreement;
- did not query whether or not Tullycrine was making tax provision for him. In fact the December 2011 Agreement states that Mr Dillon would be responsible for his own taxation arrangements in the event that the sale of the weanlings provided any surplus funds;
- agreed to the establishment of Tullycrine and having been consulted about the financial budgets, and entering into the arrangement with the expectation of a share of the Tullycrine profits represented by an initial benefit in the form of daily living expenses and a commitment of provision for his and Mrs Glen Dillon's retirement care;
- purchased weanlings and agreed to reinvest any profit from the sale of these into the purchase of a new horse for Tullycrine;
- gave instructions for the construction of a round yard on the basis that it would benefit the Tullycrine operation; and
- unilaterally undertook decisions concerning equine care and horse for Tullycrine.

[83] I find the evidence to indicate that Mr Dillon was in business on his own account.

[84] In paragraph 68 above I commented that it was significant that at no time during the years Mr Dillon was involved in Tullycrine, did he request a payslip or make enquiries as to his PAYE status either from the IRD, Tullycrine or Hayden. In a letter dated 30 May 2018 Crowe Howarth a New Zealand Accounting firm stated that based on the information provided to them “*there are no salaries or wages in the operating expenditure.*”

[85] Also, the financial accounts, prepared in respect of taxation requirements do not show any accounting for ‘benefit in kind’ provisions made to Mr Dillon.

[86] In a letter dated 13 July 2018, Work and Income NZ addressed to Granthamlaw referred to benefit payments made to Mr Dillon who qualified for benefits due to his wife qualifying on medical grounds, stated, “*However our records showed that Mr Dillon did not work during the period shown above.*” (2011- 2018)

[87] Standing back and considering the true nature of the relationship between the parties I find that it was not an employment relationship but one more in the nature of a partnership based upon the familial relationship between Mr Dillon, Hayden and Lisa in which there would in the future be a sharing of the profitability of the Tullycrine operation.

[88] Whilst Hayden and Lisa evicted Mr Dillon and Mrs Glen Dillon I find that this arose as a result of the splintering of the family and partnership-type relationship, and not to be a hall mark of employment.

[89] I determine that Mr Dillon was not an employee of Tullycrine when carrying out work for his own future expectation and benefit in the profitability of Tullycrine.

Is Mr Dillon owed any monies for unpaid wages and holiday pay entitlement by Tullycrine?

[90] As I have not found Mr Dillon to be an employee of Tullycrine, I determine that he is not owed any monies for unpaid wages and/or holiday pay.

Should penalties be awarded against Hayden Dillon and Lisa Dillon in respect of the Minimum Wages Act 1983 and the Holidays Act 2003?

[91] As I have not found Mr Dillon to be an employee of Tullycrine, I determine that penalties should not be awarded against Hayden and Lisa Dillon.

Costs

[92] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[93] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority