

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 117
3095552

BETWEEN LA
 Applicant

AND RB
 Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Gary Tayler, advocate for the Applicant
 Maurice Casey, counsel for the Respondent

Investigation Meeting: 11 December 2020

Submissions [and further 11 December 2020 from the Applicant
Information] Received: 11 December 2020 from the Respondent

Date of Determination: 25 March 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] LA claims she was employed by the respondent for two seasons, 2015 and 2016, specifically for calf rearing. She says she received no payment during the course of that employment other than a sum of \$3,000 which was paid into her account. She says she is owed \$13,930 covering the work she completed in respect of rearing calves over the 2015 and 2016 seasons. She identifies RB as the employer.

[2] RB denies ever having employed LA. He acknowledges that she did assist with rearing calves over 2015 and 2016 but said she did that as part of the “family” who all pitched in to assist him especially during a period of time his wife was sick and after her death. He denies that there was ever an employment relationship so says the Authority has no jurisdiction to

award her the sums claimed. RB also notes that LA had already unsuccessfully taken him to the Disputes Tribunal in respect of the same claims. She was not successful.

The Authority's investigation

[3] Immediately prior to the hearing, both parties asked that their names be anonymised. They also asked that all witnesses be treated similarly. The basis for this, was there had been a strong family connection and all parties including witnesses were involved in that relationship. Having considered the submissions made, I acceded to their request.

[4] The Authority heard from LA, RB and his daughters MW and EC. RB and his daughters were adamant that there was no employment relationship. The daughters gave evidence that everyone pitched in to assist as best they could. They also noted that LA was treated as a member of the family. The basis for this was that LA had been in a relationship with RB's son DH. In 2012 she had moved onto the property. She and her then partner resided rent free in accommodation on the farm. Although there was no formal basis for this, it was expected they would both help out where needed on the farm and carry out renovations.

[5] LA, in her case before the Disputes Tribunal, did not argue she was an employee. She argued however she did have a contract with RB which required her to pay the sum she now claims. The Disputes Tribunal held (para 11 of its decision). LA was part of the family and she along with others would in all likelihood have assisted RB on the farm after the passing of RB's wife ... and in paragraph 12 of its decision, the Authority noted that LA lived there rent free. The Disputes Tribunal did not uphold LA's claim that there was a contract between the parties.

[6] Although the Employment Relations Authority can take note of the Disputes Tribunal decision, it does not stop the Employment Relations Authority considering the true relationship between the parties. If for instance the Authority finds that LA was an employee, the Tribunal decision would be of no consequence.

[7] The primary issue for the Authority is whether or not the relationship between the parties was an employment relationship or something else.

The evidence

[8] LA faces some difficult or hurdles to overcome to show in this presence circumstance she was working as an employee and not simply as a member of the family pitching in to help out under difficult circumstances.

[9] When she was asked who gave her the call to help with the calf raising, her answer was her partner at the time, DH. She also confirmed that there was no individual employment agreement in place and it was apparent that no PAYE or other typical payments indicative of an employment relationship were made. There were no negotiations regarding wages and it was for that reason that LA said she had framed her claim as a minimum wage claim.

[10] She explained her stance before the Disputes Tribunal on the basis that she had simply gone to Citizens Advice who had suggested she file her claim there.

[11] In her evidence, she confirmed she had done other work on the farm, including driving tractors, but had not regarded that as an employment relationship. Her evidence confirmed that she had not kept a log of hours and there was no discussion regarding matters such as KiwiSaver, although LA said she felt she was controlled to the extent she would work seven days on the trot. She also said she would do this if the calves were hungry anyway.

[12] LA officially split with her partner in November 2017 when he moved to Blenheim. She stayed on the property for a further six months moving out in May 2018. She says over this period of time she did give RB cash for rent. When questioned why she would do that, if she felt RB owed her money, she said she felt it was the right thing to do. She says she would not have agreed to rear calves in the first place if she had known she was not going to be paid.

[13] This determination is being issued outside the time-frame set out in s 174C(3) of the Act in circumstances the Chief has decided, as he is permitted by s 174C(4) to do so, that exceptional circumstances exist.

[14] Pursuant to s 174E of the Act, I make findings of fact and law and outline conclusions but I do not record all evidence and submissions received. The discussion below and attributing recollections and assertions made by witnesses draws from their written statements, appearance at the investigation meeting and documentation provided.

Analysis

[15] I was referred to the case of *Dillon v Tullycrine Limited*.¹ This was a case decided by Judge Holden who noted that in the context of family arrangements the courts have recognised that there is a presumption of fact against an intention of creating legal relations. The Court noted in such issues the intention is to rely solely on family ties of mutual trust and affection. Although the Court noted a family context does not preclude a finding of employment, each case would need to be carefully considered and determined on its own facts.

[16] In the current case, it is significant that at the beginning of the relationship with RB's son, LA did not seek to claim she was not an employee. She says however the relationship changed sometime later but in respect of calf rearing only. During this period of time she was attending classes at the polytechnic and to that degree could come and go as she pleased. She was certainly not under the control of RB. Further, there was no written employment agreement as mentioned earlier. There was no obvious control being exercised. If LA was an employee during this period, it is surprising that she did not take steps to enforce payment for some considerable time.

[17] Although as I have mentioned earlier, it is open to the Authority to make a finding as to whether or not LA is an employee despite the existence of the Disputes Tribunal decision, nonetheless LA gave sworn evidence before that Tribunal and I do not see her as resiling from it in this present case.

[18] There are no hallmarks of an employment relationship present in this case. It seems to me that the defence put up by RB is to be preferred when it comes to the intention of the parties. There was no intention by RB to create any form of legal relationship. Indeed the Disputes Tribunal found, without considering whether or not there was an employment relationship, that there was no intention to create a contractual arrangement.

[19] I do not consider in this case there are any grounds to say an employment relationship existed. As mentioned earlier there was no written employment agreement, LA had come on to the farm as part of the family and the evidence indicates the relationship was one of mutual support. There was no requirement to undertake specific tasks and LA continued with her

¹ [2020] NZEmpC 52

course of study and assisted, at least initially, with other jobs relating to the contracting business she ran with DH.

[20] Although LA had pointed to a payment of \$3,000 made to her by RB as evidence of an employment relationship, RB's response had been he felt he was helping both her and DH when he made the payment. His evidence was that he treated the payment as his own drawings, and not as wages. No PAYE was deducted and his evidence was from an accounting perspective was the moneys were not deducted as a taxable expense as they were paid out of his own pocket.

Conclusion

[21] LA was not an employee of RB. It follows therefore that if indeed she was owed monies by RB, these were not pursuant to an employment agreement and the Authority has no jurisdiction in respect of such a claim. Having said that, the decision of the Disputes Tribunal is noted, especially as finding there was no contractual arrangement.

[22] LA's claims are dismissed because of a lack of jurisdiction.

Costs

[23] Costs are reserved. The parties are encouraged to resolve the issue of costs between themselves. The Authority operates generally on a tariff basis in respect of costs. Costs for a one day hearing in the Authority would be generally \$4,500 to the successful party. It is noted in this case, the hearing occupied approximately half a day and accordingly tariff costs would be \$2,250. If the parties cannot resolve the issue of costs between themselves, RB has 14 days from the date of this determination to file submissions with LA having a further 14 days within which to file submissions in reply.

Geoff O'Sullivan
Member of the Employment Relations Authority