

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 674  
3168983

BETWEEN            STEVEN JOHN LEES  
                                 Applicant  
  
AND                    ADRIANNE POWELL  
                                 Respondent

Member of Authority:    Geoff O’Sullivan  
  
Representatives:        Keith Jefferies, counsel for the Applicant  
                                 Nathaniel Brown, counsel for the Respondent  
  
Investigation Meeting:    17 November 2022  
  
Submissions Received:    On the day from the Applicant  
                                 On the day from the Respondent  
  
Date of Determination:    19 December 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Steven Lees, claims that Adrienne Powell offered him six months’ work at \$210 a week. He says that makes him an employee and Mrs Powell has not honoured her commitment. As a result he claims he has lost wages of \$27,300 and also claims what he calls “exemplary damages” of \$25,000 together with costs.

[2]     Mrs Powell rejects the claim and says she never offered Mr Lees any work and in any event, she never employed him and accordingly there is no proper claim before the Authority. She says her late husband suggested to Mr Lees that he could give him some odd jobs, however there was no intention to create any relationship, let alone an employment relationship.

### **The Authority's investigation**

[3] All evidence was given by oath or affirmation. For the Applicant, evidence was given by Mr Lees, Paul Bewick and Michael Melhuish. For the Respondent, Mrs Powell gave evidence through AVL, supported by her counsel. Prior to the investigation, these witnesses had all filed affidavits.

### **The issues**

[4] The issues the Authority needs to determine are as follows:

- (a) Was there a commercial arrangement between Mr Lees and Mrs Powell? And if so;
- (b) Was Mr Lees an employee of Mrs Powell?
- (c) If Mr Lees was Mrs Powell's employee, was he unjustifiably dismissed?
- (d) What remedies should flow.

[5] As permitted by s 174E of the Employment Relations Act 2000 ("the Act"), this determination has stated findings of fact and law, express conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Background**

[6] Mr and Mrs Powell owned a rental property at Waikawa Beach. Mr Paul Bewick had been a friend of the couple and received an email from Mr Powell indicating they were looking for a tenant for the rental property. It was common ground that in July 2021 Mr Bewick, Mr Lees and Mr and Mrs Powell met to discuss tenancy matters. There were discussions regarding the term of the tenancy although the precise state of the property at this stage was in dispute. Mr Lees knew Mr Bewick through doing general maintenance, painting, and gardening for him. Both gave evidence there was no employment relationship between them with Mr Lees being responsible for his own tax affairs.

[7] Mr Lees says he was a solo dad with two teenage daughters and that it was Mrs Powell who had made the offer of work. Mr Powell had unfortunately passed away by the time the second affidavit was received. Mr Lees says that the work offered included repair, painting of

the rental property, maintenance of other properties Mrs Powell owned including gardening and landscaping.

[8] It is worth noting that Mr Lees signed a tenancy agreement and that relationship suffered significant difficulty requiring matters to be determined in the Tenancy Tribunal. Mrs Powell said she had no discussions with Mr Lees regarding work although she was aware her husband talked about some odd jobs. As Mr Powell unfortunately passed away in September 2021, his view on the matter is unavailable. Mrs Powell said that the notion of her paying Mr Lees \$35 an hour for six months' work was a nonsense. She said when the couple met with him, they could see that he was desperate for a property. She added the discussion concerned a tenancy and when Mr Lees was asked whether he could afford the rent, he said welfare would pay. He also said he was getting a job. She said engaging tenants for work was a mix she would never entertain.

[9] Mrs Powell stated it would never have made sense for her at 85 years of age to have committed to an employment relationship whereby she was to pay her tenant \$35 an hour, six hours a day for six months. She said her late husband's intention, if it existed, would only ever have been to offer Mr Lees the occasional, odd job. Indeed, the couple took Mr Lees to Ōtaki Beach where a builder was working on one of their properties. The builder however was unimpressed with Mr Lees' work and Mrs Powell says her late husband paid Mr Lees the sum they thought was due, namely \$120. This was the only payment made to him.

### **Evidence and analysis**

[10] There was evidence regarding the breakdown in the relationship between Mr Bewick and Mr and Mrs Powell. Mr Bewick believed a promise had been made by the Powells to Mr Lees and it was not being honoured. From Mrs Powell's perspective, she said she could not understand why Mr Bewick was claiming an employment relationship existed and that she had been part of the conversation when she had not been.

[11] An employment relationship means any of the employment relationship specified in s 4(2) of the Act. An employment relationship is between an employer and an employee employed by the employer. If there is no employment relationship between Mr Lees and Mrs Powell, then the Authority has no jurisdiction in any dispute between the parties.

[12] Section 6 of the Act sets out the meaning of an employee. An employee is:

Any person of any age employed by an employer to do work for hire or reward under a contract of service.<sup>1</sup>

[13] Where there is a working relationship between the parties, I must determine the real nature of that relationship. This means I must consider all relevant matters including anything that indicates the intentions of the parties. Any statement made by the parties describing the nature of their relationship is not determinative.

[14] However, in respect of this present case, the issue is not whether the relationship was one of a contract for services (independent contractor) or a contract of service (an employment agreement), rather it is about whether there was any genuine commercial relationship between the parties at all.

[15] Accordingly, the first question is whether Mr Lees was engaged or employed to perform any work in exchange for hire or reward and if so, whether there was a shared intention to enter into an employment agreement.

*Was Mr Lees employed by Mrs Powell to undertake any work?*

[16] Mr Lees' evidence did not strongly indicate the intention of entering into an employment relationship. In answering questions, Mr Lees said the parties talked about painting work and various other jobs. They did not talk about the nature of the relationship. He said he took the tenancy because of the offer of work and would not have taken it otherwise. He accepted that throughout his evidence he was talking about an offer of work and not about an unequivocal offer of employment. It was clear Mr Lees' focus was on a fact he believed he had been promised work and that promise had not been actioned. Evidence as to whether or not there was an intention to create an employment relationship was equivocal. It seemed to Mr Lees it was the promise of work he was focussing on, not the nature of the relationship.

[17] Both sides agreed that there was only one work engagement and that was when Mr and Mrs Powell took Mr Lees to Ōtaki Beach where he did some work under the supervision of a builder engaged by Mr and Mrs Powell.

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<sup>1</sup> Section 6(1)(a) Employment Relations Act 2000.

[18] The fact that there was no written employment agreement, Mr Lees was not asked to provide his IRD number to Mrs Powell, no PAYE was deducted, leads to a conclusion that if there was a working relationship between the parties, it was not an employment relationship.

[19] The only real evidence proffered on Mr Lees' behalf, that an employment relationship was contemplated and offered, came from Mr Bewick. Mr Bewick is a qualified quantity surveyor with a degree in economics and a post-graduate qualification in finance. He is a retired chartered accountant. He had known the Powells for some ten years but had fallen out with them as a result of this litigation. He felt that to differentiate between the word "work" being used as opposed to the word "employment" being used in any discussions between the parties was simply splitting hairs. He said the property in question needed a complete makeover which could well have taken six months to complete.

[20] Mr Melhuish who gave evidence could not really throw any light on the subject. The nature of the relationship between the parties was not something he felt he needed to turn his mind to but he did make it clear, that when Mr Lees undertook any tasks for him, it was not as an employee.

*Was there hire or reward?*

[21] Both parties agreed that Mr Lees was paid only once. This was after the trip to Ōtaki Beach and he was paid \$120 for work he undertook under the supervision of Mr and Mrs Powell's builder. No tax was deducted and no further work was undertaken by Mr Lees. The nature of the work carried out cannot be said under the circumstances to be evidence of an employment relationship.

[22] There is no written evidence of employment. There is no correspondence or emails between the parties evidencing any work arrangement. As I have noted above, I do not find the evidence in relation to work undertaken for the Powell's builder to be persuasive in the sense of evidencing an employment relationship. Whilst the lack of any correspondence between the parties is not fatal to a finding that an employment relationship may have existed, it is most unusual under these circumstances for there to be no correspondence at all. There is nothing to indicate a shared intention to form an employment relationship. Indeed, I am persuaded by Mrs Powell's view when she posed the question as to why would she enter into an employment relationship with Mr Lees. There is sufficient evidence before me to conclude that there was no employment relationship between the parties. It is possible that there may

have been a different arrangement, however it is not necessary for me to consider that or determine the balance of Mr Lees claims.

[23] Mr Lees was asked about his claim for exemplary damages and responded that it seems to be linked to a complaint that Mrs Powell had taken too long to respond to his notification of a personal grievance. Even if I had found that Mrs Powell was Mr Lees employer, I would not have entertained such a claim.

### **Conclusion**

[24] Mr Lees was not employed by Mrs Powell. Whether or not there was some other arrangement in place is not something I need to determine. Mr Lees claims against Mrs Powell are therefore unsuccessful.

### **Costs**

[25] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination is needed, Mrs Powell may lodge and then should serve a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum, Mr Lees would have 14 days within which to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[26] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>2</sup> In that regard it is noted that the investigation meeting took some two hours which would normally result in a cost award of \$1,100.

**Geoff O'Sullivan**  
**Member of the Employment Relations Authority**

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<sup>2</sup> [www.era.govt.nz/determinations/awarding-costs-remedies/awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/awarding-and-paying-costs-1)