

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 114
3017131

BETWEEN JAMES McKENZIE
Applicant

A N D CHRIS AND DONNA HARVEY
Respondent

Member of Authority: Rachel Larmer

Representatives: David Balfour, Advocate for Applicant
Hamish Burdon, Advocate for Respondents

Investigation Meeting: 17 November 2017 at New Plymouth

Written Record of Oral 22 November 2017
Determination:

**WRITTEN RECORD OF ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] There is a dispute between the parties over who actually employed Mr McKenzie. This investigation meeting is to determine the preliminary issue of the correct legal identity of Mr McKenzie's employer.

[2] Mr McKenzie was engaged on a fixed term basis as a Milk Harvester under a Federated Farmers individual employment agreement which was signed on 06 November 2016.

[3] Mr McKenzie worked from 21 November 2016 until he was dismissed on 28 January 2017 under the 90 day trial period provision in his employment agreement. Mr McKenzie has raised dismissal and disadvantage grievance claims and an alleged breach of good faith claim.

[4] The substantive investigation of Mr McKenzie's claims is on hold pending resolution of the 'identity of his employer' issue.

[5] The Harveys say they have been incorrectly personally named as the respondent in these proceedings because they did not employ Mr McKenzie in their personal capacity.

[6] The Harveys say that Mr McKenzie was employed by "*The Cow Trust*" (the Trust) so he should have named the Trust's three trustees as the respondent. They produced the Trust Deed at the investigation meeting.

[7] The Harveys say they made it clear to Mr McKenzie during a meeting held on 06 November 2016 that he was being employed by the Trust. They say that they not only explained that to him but also recorded the Trust in the employment agreement he signed as the named employer.

[8] The Harvey's produced to the Authority a signed copy of the employment agreement which does identify the Trust as the employer.

[9] Mr McKenzie disputes that evidence. He claims he was employed by Christopher (Chris) Harvey and his wife Donna Harvey in their personal capacity because he did not hear about the Trust until after his Authority proceedings were issued.

[10] I have to resolve this conflict in the evidence on the balance of probabilities by assessing which version of the 06 November 2016 meeting is more likely to be correct.

[11] After hearing from and closely questioning the attendees of the 06 November meeting, reviewing the signed employment agreement and the payslips which record the Trust as the employer I have preferred the evidence given by the Harveys.

[12] I consider that the identity of the employer was an issue that was specifically discussed and agreed on at the 06 November meeting because it was recorded in the signed employment agreement.

[13] I consider it likely that the Harveys followed their usual process (which they say they used for all employees) explaining the structure of the farm ownership, sharemilking arrangement and that the Trust was the employer. These

were important matters for the Harveys so I consider it unlikely they would have departed from the norm.

[14] However I consider that the identity of the employer was unlikely to have been of such significance to Mr McKenzie who was likely to be more focused on the practicalities of the offer of employment in terms of his pay and hours of work.

[15] I therefore consider it more likely than not that although Mr McKenzie was advised that his employer was the Trust, and he signed an employment agreement which had that recorded in it, he did not appreciate the significance of that at the time.

[16] I find on the balance of probabilities that Mr McKenzie was employed by the Trust so the correct respondent is the Trustees of The Cow Trust.

[17] I am not satisfied on the balance of probabilities that Chris and Donna Harvey personally employed Mr McKenzie.

[18] Because the named parties in this matter AEA 3017131 cannot establish they were in an employment relationship the Authority does not have jurisdiction under the Employment Relations Act 2000 to investigate Mr McKenzie's substantive claims against the respondent.

[19] On that basis, the claims against the respondent named in this matter do not succeed.

Costs

[20] The Harveys as the successful party are entitled to a reasonable contribution towards their actual legal costs. However costs are reserved pending the outcome of the substantive proceedings.

Rachel Larmer
Member of the Employment Relations Authority