



arrangements for providing the care and support, and payment to Ms Sharp for providing it, were initially made directly between Ms Sharp and Mr Campion.

[3] However on 6 November 2020 a doctor certified Mr Campion as mentally incapable of making decisions about his property, personal care and welfare due to hallucinations and worsening memory. An enduring power of attorney held by a long-standing friend, Clarinda Franklin, was activated.

[4] From that time on Ms Franklin was responsible for decisions about Mr Campion's personal care, welfare and property. This included Ms Franklin taking control of his bank accounts in January 2021 and making arrangements for automatic payments of household bills. Previously his household expenses and payments made to Ms Sharp were paid through eftpos transactions Mr Campion made with Ms Sharp's assistance.

[5] On 26 January 2021 Mr Campion called a meeting at his house to talk about arrangements for his care. The meeting was attended by his accountant, Paul Singleton, Ms Franklin, Ms Sharp and Ms Sharp's partner at the time, Jack (referred to in the evidence only by his first name). Jack did some maintenance and repair work at the house and sometimes helped with care of Mr Campion.

[6] Accounts differ on the extent and nature of the arrangements agreed at that meeting. Ms Sharp's evidence was that Ms Franklin had agreed she would be formally recognised as an employee and arrangements were made for Mr Singleton to draft the written employment agreement. Ms Franklin, however, said they were "tossing ideas around" in that discussion and she did not recall any "promises" that Ms Sharp would be an employee. Mr Singleton said Ms Sharp and Ms Franklin had agreed a rate of pay and he had agreed to draft an employment agreement. He did then draft such an agreement. In the following days, however, he and Ms Franklin talked about costs for KiwiSaver and annual holidays and came to the view that it would be better if Ms Sharp worked on a contractor basis. Mr Singleton subsequently prepared and sent Ms Sharp a draft contractor agreement. Ms Sharp did not sign it. She regarded the draft agreement sent to her as contrary to what was agreed on 26 January being, in her view, that she would be recognised as an employee.

[7] Although not specified in the contractor agreement sent to Ms Sharp or the draft employment agreement Mr Singleton had prepared but not sent to her, the arrangements

discussed were made on the basis that Ms Sharp would continue to live in Mr Champion's house without paying rent or board. The services listed in the proposed contactor agreement included "assistance with day-to-day care ... as needed on a 24/7 basis". In the draft employment agreement that Mr Singleton had prepared, the hours of work were said to be "as required" each day from "Monday to Sunday, including through the night".

[8] Although there was no signed agreement for the basis of Ms Sharp's ongoing work, Ms Franklin set up an automatic payment of \$1,600 a week to Ms Sharp's bank account. The payments started from 3 February 2021. A further \$400 a week was also paid for household expenses and groceries.

[9] The \$1,600 payment was the amount Ms Franklin had proposed in the contractor agreement offered to Ms Sharp in February 2021. She regarded it as the payment for Ms Sharp's services, along with whatever assistance Jack also provided in the care of Mr Champion. The payment was a gross amount. Ms Sharp was told she was liable to pay her own taxes and ACC levy.

[10] In the following months Ms Sharp continued to live in Mr Champion's house and provide care services to him in conjunction with various staff rostered by a health care agency that had been arranged by Ms Franklin. Ms Sharp's son, Matt, also lived at the property during some of this period. From time to time he and Jack helped provide care to Mr Champion, including sometimes attending to him during the night.

[11] Ms Sharp and Ms Franklin had strongly different accounts of how satisfactory those arrangements were during that time. Ms Sharp described the demands of caring for Mr Champion, including during the night, as increasingly difficult as his physical and mental condition was more severely affected by progress of the disease. Ms Franklin described concerns being expressed to her by agency carers that Mr Champion was unhappy with Ms Sharp's care and reporting to her that the house was not kept as clean or ordered as they thought it should be.

[12] By early May 2022 Ms Sharp said the stress of caring for Mr Champion had affected her own health so severely her doctor advised her to leave the premises and take two weeks' sick leave. Ms Franklin had difficulty arranging agency cover at short notice.

[13] While Ms Sharp was on sick leave Ms Franklin posted the following website job advertisement seeking possible replacements for her. The role was listed as a full-time caregiver with this description:

Person requires 24/7 care but this could be split between two people. Free board and living expenses, plus competitive payment and holidays. Terms and conditions negotiable. Support workers already provided to assist three times a day. Job would involve ensuring medication is taken, cooking meals, light household duties, taking patient to appointments occasionally. Good interpersonal skills needed. Some experience preferred but not essential.

[14] On 14 May Ms Sharp advised Ms Franklin by text message that she intended to return to work in the following week but could not “continue working 24/7”. She said she needed two days off a week and had arranged a place to rent so she could have “real breaks” away from Mr Campion’s house during her days off.

[15] On 16 May Ms Franklin advised Ms Sharp by text message to vacate the premises in which she lived at Mr Campion’s house “immediately and not return”. Ms Franklin said this was because concerns about Ms Sharp’s own health meant she was “unable to stay around someone who is unwell”, a reference to Mr Campion. Ms Franklin subsequently had locks to the house changed after a report from an agency carer that Ms Sharp had been at the house that day.

[16] In further messages exchanged in the following days Ms Franklin said she could not agree with the terms Ms Sharp had stated for continuing in her caring role for Mr Campion, referring to having two days off a week, and Ms Sharp said she would be raising a grievance for unjustified dismissal.

[17] In a letter sent to Ms Sharp dated 2 June 2022 Ms Franklin confirmed her conclusion that it was “no longer viable” for Ms Sharp to continue as a carer for Mr Campion. She said her letter should be treated as “notice of termination of your engagement”. The letter said Ms Sharp would be paid a further four weeks of the weekly \$1,600 amount she had been paid since February 2021.

### **The Authority’s investigation**

[18] The Authority’s investigation has concerned solely the issue of whether or not Ms Sharp was the employee of Mr Campion. It has not addressed the issue of whether the working relationship, if it was one of employment, had ended fairly.

[19] A question arose early in the investigation as to how Mr Campion could be represented as the respondent given the medical certification of mental incapacity and the activation of the enduring powers of attorney from 6 November 2020.

[20] Ms Franklin, through counsel for Mr Campion, advised the Authority that she had not informed Mr Campion of the dispute with Ms Sharp as Ms Franklin was concerned this would cause him distress and not be in his best interests. She sought authorisation, in her role as his attorney, to respond on Mr Campion's behalf to Ms Sharp's application to the Authority.

[21] Following submissions on the issue from the parties' counsel, the Authority member investigating the matter at the time issued a direction that Ms Franklin was to be recognised by the Authority as Mr Campion's "investigation friend" and to "stand in his stead" to give instructions to counsel to represent his interests.

[22] In making that direction, the member exercised the Authority's wide discretion to do what was necessary to address the substantive merits of an employment relationship problem and was guided by the analogy of the High Court's power to appoint a litigation guardian.<sup>1</sup> The written direction issued referred to a case where the High Court had appointed an attorney with general powers under the Protection of Personal and Property Rights Act 1988 (PPPR Act) to act as litigation guardian where the donor of those powers was incapacitated.

[23] The Authority member then held an investigation meeting on 21 October 2022. Ms Sharp, Mr Singleton and Ms Franklin answered questions at that meeting about written witness statements they had provided and the parties' counsel spoke to written submissions about the issues for resolution.

[24] The matter was subsequently allocated to me on 22 March 2023 for continuation of an investigation under clause 16 of Schedule 2 of the Employment Relations Act 2000 (the ER Act).

[25] Under directions agreed with counsel in a case management conference on 24 April 2023, this matter has now been determined 'on the papers'.

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<sup>1</sup> Employment Relations Act 2000, s 157.

[26] Those papers comprised Ms Sharp's statement of problem; the statement in reply lodged on Mr Champion's behalf; witness statements lodged earlier by Ms Sharp, Matthew Sharp, Paul Singleton and Ms Franklin; a Common Bundle of Documents lodged by the parties; notes taken by counsel of questions and answers at the 21 October 2022 meeting; written submissions provided by counsel in October 2022; affidavits lodged by Ms Sharp, Mr Singleton and Ms Franklin in May 2023 and, in answer to a query from the Authority, supplementary submissions lodged in June 2023.

[27] Disputed facts in the evidence available in those statements and documents have been assessed on the civil standard of the balance of probabilities, that is what is apparent as more likely than not.

[28] It is also appropriate to acknowledge the difficult situation that both Ms Sharp and Ms Franklin found themselves in as a result of the deterioration of Mr Champion's health and this legal dispute over the nature of the arrangements for his care. Ms Franklin had signed forms some ten years earlier agreeing to be his attorney, if needed. She had done so as a friend, not for professional reward, and had not expected the extent of what was subsequently required in dealing with his care arrangements and this dispute. Similarly Ms Sharp had not anticipated, when she moved into rooms at Mr Champion's house in 2019, that her involvement with his care would increase to the extent that it subsequently did or that she would be involved in a dispute of this type over the arrangements. Many of the relevant events also took place while they, along with the rest of the country, were dealing with the demands of the Covid-19 pandemic and emergency restrictions.

[29] As permitted by s 174E of the ER Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Nature of the relationship**

[30] The question of whether Ms Sharp was an employee had to be determined by application of the test under s 6 of the ER Act:

#### **6 Meaning of employee**

(1) In this Act, unless the context otherwise requires, employee—

- (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
  - (b) includes—
    - (i) a homeworker; or
    - (ii) a person intending to work; but
  - (c) excludes a volunteer who—
    - (i) does not expect to be rewarded for work to be performed as a volunteer; and
    - (ii) receives no reward for work performed as a volunteer.
- ...
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
  - (3) For the purposes of subsection (2), the court or the Authority—
    - (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
    - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[31] The parties' submissions carefully reviewed case law to consider whether the arrangements with Ms Sharp might have brought her within the ER Act's definition of a homeworker, one specific category of workers recognised as employees.<sup>2</sup> However, as submitted for Mr Champion, he was a consumer of her services and Ms Sharp was not working in his house in the course of his trade or business so she was not a homeworker. If Ms Sharp was found to be an employee, it would have to be because the circumstances and arrangements between the parties brought her work within the Act's general definition of being a person employed to work for hire or reward under a contract of service.

[32] This question could not be resolved solely by looking at whether an agreement about an employment relationship was reached in the meeting on 26 January 2021. Arrangements were already in place and work was being carried out by Ms Sharp before then. The initial inquiry had to be whether an employment relationship was already in existence up to that date. If so, the second question was whether any effective and enforceable change to whatever arrangement was in place up to 26 January was agreed in the meeting that day or apparent from the subsequent conduct of the parties.

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<sup>2</sup> Employment Relations Act 2000, s 5 definition of "homeworker".

[33] A related but not necessarily decisive question concerned what authority Ms Franklin may have had to enter into an employment relationship on Mr Champion's behalf, if that is what she did at any point.

[34] At each stage of this analysis the ER Act directs the Authority to consider the real nature of the relationship. Relevant factors for assessment are adjusted to take account of the nature of the work, that is Ms Sharp providing care services to an individual rather than to customers of an employer business. Those factors included what was apparent about the parties' intentions, the degree of control and integration of her work in meeting Mr Champion's needs and whether the arrangements showed Ms Sharp was in business on her own account.

*There was an existing employment relationship*

[35] When Ms Sharp moved into rooms in Mr Champion's house in October 2019 they agreed she would receive free board and \$100 a week in return for her giving what she described as "some help around the house". At the time she was also receiving a Work and Income benefit of \$125.

[36] The 'help' Ms Sharp provided included general housework, assisting Mr Champion with toileting and taking his medication, helping him get breakfast and dinner and driving him to visit friends. What she was asked or needed to do to help Mr Champion became more demanding in the period leading up to Mr Champion's certification and the activation of Ms Franklin's power of attorney. Although her involvement had been interrupted by a period where Mr Champion was in hospital and then a rest home and a period where Ms Sharp stayed elsewhere during a Covid-restrictions lockdown, her performance of those duties continued when she and Mr Champion were both in the house.

[37] It was clear from the outset of those arrangements in late 2019 that Mr Champion and Ms Sharp had intended a pay-for-work exchange, albeit some of the remuneration comprised the value to her of the free accommodation. The evidence did not establish the exchange, and the tasks Ms Sharp carried out, was founded only on a familial or friendship connection not intended to amount to employment.<sup>3</sup> Neither was it sufficiently akin to cases where a parent caring for a severely disabled family member

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<sup>3</sup> *Dillon v Tullycrine Limited* [2020] NZEmpC 52 at [32].

have been found not to be in an employment relationship with the family member.<sup>4</sup> In the facts of this particular case Ms Sharp had effectively become a permanent on-call carer integrated into Mr Champion's household by virtue of the arrangements he had made with her before the disease further diminished his capacity and by reasons of the demands that he made of her for assistance during the day and often for toileting during the night.

[38] The fact that Ms Sharp also received a WINZ benefit during some or all of that time does not negate that conclusion. It was possible the amount actually paid to her was within the amount that a beneficiary was permitted to earn as supplementary income. Even if it was not, any irregularity would be a matter for her to account to WINZ over and not a circumstance that made the arrangement any more or less likely to be some form of independent contracting rather than employment.

[39] Ms Sharp was not in business on her own account in this period. She did not invoice for her services. She used Mr Champion's own house and resources to provide care to him. The expectations for her availability meant she could not grow any business of her own or increase her remuneration by working elsewhere.

*No change in the nature of the relationship was agreed*

[40] The character of those arrangements did not change as a result of the 26 January meeting. A single fact, objectively put in Mr Singleton's affirmed written evidence, established that the agreed mutual intention by the end of the meeting was that Ms Sharp's work was to be recognised and better compensated as an employee:

The meeting was not overly long given all parties had previously discussed that formal employment appeared to be the logical step. The rate of pay was agreed as negotiated between Jo [Sharp] and Clarinda [Franklin]. I agreed to prepare a basic employment agreement ...

[41] It was only Ms Franklin and Mr Singleton who had a subsequent change of view on that intention once they understood annual leave, sick leave and KiwiSaver payments would have to be paid on top of the agreed weekly pay of \$1,600. Ms Sharp did not agree to a change of her existing employment status. Ms Franklin's decision to go ahead with the \$1,600 a week payments, which she considered was a fixed

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<sup>4</sup> *Fleming v Attorney-General* [2021] NZEmpC 77 and *Humphreys v Humphreys* [2021] NZEmpC 217.

contracting amount, did not change that situation because Ms Sharp received those amounts as what she considered was the agreed pay to her as an employee.

[42] The factors concerning control, integration and not being in business on her own account did not change for Ms Sharp in the following months. She continued to act on her own initiative in meeting Mr Campion's day-to-day needs, consistent with care work of that type. However decisions about payments, leave and relief staffing were properly referred to Ms Franklin for decision in her capacity as attorney acting on Mr Campion's behalf in relation to all matters of his personal care, welfare and property. Ms Sharp, therefore, remained under the direction and control of a representative of her employer.

[43] Assessed in its full context and under the relevant criteria of s 6 of the ER Act, the true nature of the relationship between Ms Sharp and Mr Campion, including through Ms Franklin as his representative, remained one of employment throughout.

*Ms Franklin had the necessary authority to hire, fire and direct employees*

[44] Contrary to submissions made on Mr Campion's behalf, Ms Franklin had the necessary authority to enter and conduct contractual relations on his behalf, for the following three reasons.

[45] Firstly, the standard forms which recorded her appointment by Mr Campion with enduring powers of attorney expressly authorised her to act on his behalf "in relation to **all** of my personal care and welfare matters" and "in relation to **all** of my property affairs" (bold emphasis added). Neither the appointment forms nor the provisions of the PPPR Act exclude or prohibit the attorney from entering an employment agreement on the donor's behalf or, for that matter, from entering an agreement for services to be provided by an independent contractor.

[46] Arranging for personal care by a carer and using the donor's property (in this case, some of his money) to pay for that care was clearly within the scope of the plain meaning of the authority given to the attorney. Those broad powers would be meaningless if an attorney, where the donor had expressed a wish to be supported to stay in their home as long as reasonably possible, was not able to make those care arrangements. The nature of the arrangements made – by employing carers or

contracting with individuals or through an agency to provide care – was part of the discretion open to Ms Franklin in her role as Mr Campion’s attorney.<sup>5</sup>

[47] Secondly, an attorney with those powers was clearly within the scope of s 236 of the ER Act. This allows an employer to choose any person to represent that employer for the purpose of doing anything and taking any action that the employer could take under various employment legislation. In the case of the ER Act, this includes the ability to bargain for and enter individual employment agreements.

[48] Thirdly, Ms Franklin was unambiguously acting as the agent of Mr Campion in the interactions she had with Ms Sharp. She clearly understood she had authority under her powers of attorney to do the best she could to make arrangements for his personal care and welfare, including using money from his bank accounts to make payments to Ms Sharp, agency staff and whatever other bills.

[49] The case advanced for the Respondent was that Ms Franklin had made an agreement with Ms Sharp to provide services as an independent contractor. There was no sound argument that she could have had authority to make an arrangement of that sort but not have had the same authority to arrange employment. Both would be instances of forming a contractual relationship for the principal as an agent.

[50] The personal nature of the employment relationship is not negated by its formation being carried out by an agent of the principal. The arrangements Ms Franklin made for what this determination has found to be continuation of an employment relationship did not assign the interests and obligations of Mr Campion to her. Rather, her actions as his agent were binding on him, as would be liability for lapses in whatever may have been done on his behalf. This is a different concept from the requirement for personal service of the employment agreement by the employee which was also touched on in the parties’ submissions. Such service cannot be rendered by another but, as provided by s 236 of the ER Act, making the arrangements for entering or continuing the employment relationship may be. While someone else may be the agent, the parties to that relationship remain the natural persons or, in the case of many employers, the relevant legal entity (such as a registered company or a trust).

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<sup>5</sup> Protection of Personal and Property Rights Act 1988, s 98(5).

[51] The circumstances in this particular case are that Mr Campion had both entered the employment relationship with Ms Sharp and authorised Ms Franklin, with very broad powers, before his capacity was diminished by the disease. It is not a scenario where an agent is forming an employment relationship, on the principal's behalf, with a person unknown to the principal and where the agent has not obtained meaningful directions from the principal. In Ms Franklin's case, the directions were the broad powers given by Mr Campion, at a time he was competent to do so, to act in all care and property matters for him if he lost that capacity.

[52] There was nothing to suggest Ms Franklin acted improperly or outside the scope of her powers in what she did in trying to make suitable arrangements, with Ms Sharp and the care agency, to best meet the welfare and care needs of Mr Campion.<sup>6</sup> The fact that there was a later dispute about the exact nature of what she arranged does not change the legitimacy of her taking that action on Mr Campion's behalf.

[53] It is correct that an incapacitated person who is genuinely the employer in a scenario such as the present one could, theoretically, be found liable for orders to pay shortfalls in wages or even penalties for failure to meet employment standards. A properly authorised agent, such as this determination has found Ms Franklin to be in her capacity as attorney, would be available to ensure minimum employment standards were met. Such an agent could be called upon to authorise and ensure breaks and leave, for example, were provided and taken. An employee would therefore not be left without a competent person to call upon to meet the employer's obligations and without someone who could be compelled, such as by compliance order, to make the arrangements necessary to meet those obligations.

## **Outcome**

[54] For the reasons given, this determination confirms Ms Sharp was an employee of Mr Campion for the period from 26 January 2021 to 16 May 2022.

## **Costs**

[55] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

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<sup>6</sup> Cynthia Hawes and Dale Lester *Laws of New Zealand – Agency* (online ed, ) at [29]-[32] and *Dollars & Sense Finance Limited v Nathan* [2008] NZSC 20 at [39]-[40].

[56] If they are not able to do so and an Authority determination on costs is needed Ms Sharp may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Campion, through his attorney, would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[57] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>7</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>7</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).