

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 16
5349813

BETWEEN FIONA KATHRYN
 WALLACE
 Applicant

A N D G P AND S L GLAISTER
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Ben Nevell, Counsel for Applicant
 No appearance on behalf of the Respondent
 David Polson, appearing as Counsel for Sonia Lee
 Harris

Investigation Meeting: 18 August 2011 at Dunedin

Submissions Received: At the investigation meeting

Date of Determination: 30 January 2012

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Fiona Wallace, seeks the payment of wages earned, but withheld, since she allegedly entered into an employment relationship with the respondent, G P and S L Glaister Ltd, on or about 1 November 2010.

[2] The claim was originally brought against Ms Sonia Harris (previously known as Mrs Sonia Glaister) personally but it was obvious from the papers filed in the Authority that Ms Harris was not, and could not have been, Ms Wallace's employer. The citation of the respondent was changed with the consent of those involved but at both an administrative teleconference to plan the conduct of the investigation meeting and again at the commencement of the meeting the parties discussed the fact another possibility existed; namely that Mr Peter Glaister was Ms Wallace's employer.

Background

[3] G P and S L Glaister Limited is a farming operation situated in the Otago localities of Paretai and Kakapuaka. It had its origins in a partnership between Mr Glaister and Ms Harris and was formed in April 2000. While the partnership still owns some of the property, all trading is now performed under the company name and it purchases any new property.

[4] The company is jointly owned and directed on a 50/50 basis by Mr Glaister and Ms Harris and that is behind the respondent's lack of representation. Mr Glaister, as a director and shareholder of the respondent, made it clear that he would not permit Mr Poulson to represent the company or its interests.

[5] In 2007 Mr Glaister and Ms Harris separated but remain engaged in a protracted and antagonistic matrimonial property dispute. Since the separation Mr Glaister has formed a relationship with the applicant, Ms Fiona Wallace, and they initially lived in a Milton residence owned personally by Mr Glaister and Ms Harris.

[6] Due to dissatisfaction with the way the farms were being managed by the resident contract milkers, Mr Glaister subsequently decided to relocate to one of the farms and manage them himself. Ms Wallace chose to accompany him and the two moved on Labour Weekend 2010.

[7] Ms Wallace says

Prior to moving into the Koau property in October 2010 I had already done a significant amount of unpaid gardening work at the Milton residence and I was not willing to do more unpaid gardening at Koau which was not at that time my primary place of residence.

I am not Peter's wife, I have no legal or equitable interest in the farm property. The gardening and farm work I was undertaking was for the sole benefit of the company shareholders (Peter and Sonia) not myself.

[8] The evidence shows that Ms Wallace's contribution was not limited to gardening and she performed a range of tasks. She goes on to say

When I moved to Koau with Peter it was a very busy time with Peter fighting to get the farm and animal health levels up to standard, deal with a disgruntled contract milker, organise employees and deal with the situations which arose after the contract milker and other employees left. On top of that Peter was having shared care of his children (then aged 7 & 9) on a week about basis.

With Peter being so busy it made sense for me to help him wherever I could. As a result of helping Peter I naturally also did work for the company, and Peter and I agreed very early on that any work I undertook for the company would be paid at \$15 per hour.

[9] Ms Wallace does however go on to advise:

When Peter and I reached the verbal agreement that I would be paid for any work which directly benefited the company, we also agreed that I would not receive such payment until after Peter's relationship property settlement was concluded. The reason for this was because Peter did not believe that Sonia would accept the payment to me as being legitimate, and because he was expecting the relationship property division to be settled within a few weeks he was willing to pay my wages (for just those few weeks) out of his share of the relationship property after division and not to claim it my wages as a cost to the company to be divided equally (it was anticipated that after division Peter would retain ownership of the company).

[10] Ms Wallace says that the above conversation occurred on or about 1 November 2010.

[11] Unfortunately the envisaged settlement did not occur and the matrimonial property dispute dragged on.

[12] Mr Glaister's evidence essentially supports that of Ms Wallace, while Ms Harris takes issue with the arrangement. She states that there was no discussion about Ms Wallace's employment contrary to previous practice which would see her involved in employment decisions and she believes a number of the tasks for which remuneration is being sought are those that would normally be undertaken free of charge by a farmer's partner.

[13] Mr Glaister disagrees that Ms Harris participated in the engagement of staff and says:

I did not have to seek Sonia's consent to the company employing Fiona, I had always undertaken the employment of staff on the farm without requiring Sonia's consent. If we were employing a new manager Sonia would sit in on the interview and have input into the final decision, but for minor staff (of which the company had employed many over the years) I would employ them myself without reference to Sonia.

[14] On 11 November 2010 Ms Harris and Mr Glaister met with various advisors to discuss a range of matters. This included a discussion concerning the farms ongoing operation. Mr Glaister says *it was decided that I should terminate the contract milker's contract and take over full management of the farm.* Ms Harris essentially

accepts that as correct, but contends she was forced/bullied into agreeing. A memo recording the meetings outcomes contains, amidst other things, advice that:

In relation to operational matters, the following agreements were reached:

- (a) *Peter and Sonia will meet with Abacus [a farm consultancy business] over the next week to clarify and resolve their role going forward;*
- (b) *Peter will have management responsibility for the farming operation for the balance of this season;*
- (c) *...;*
- (d) *If there are issues which the Directors are not able to agree upon in relation to management issues, Abacus will be engaged as an adviser to resolve those issues.*

[15] The inability to reach a property relationship settlement was of increasing concern to the farm's bank and led to another meeting between the two on 21 February 2011. The meeting resulted in what is described as a 'report' to the bank prepared by Mr Glaister. It was dated 23 February but forwarded with a covering letter from the company's solicitor on 25 February and contains two passages which have been emphasised by Ms Harris. They read:

... As agreed with Sonia and with the full support of my partner Fiona, my full-time management on the farm has provided ...

And under the heading *Other Staff* which précis the attributes and skills of various people helping on the farm is a passage which commences

Office Administrator and Human Resources Manager

Fiona Wallace (51). Fiona is my partner and an unpaid staff member and actively supports in my overall Managerial role.

[16] Another outcome of the meeting of 21 February is that Ms Harris was now required to co-sign all payments. This arrangement arose as a result of Ms Harris's belief that Mr Glaister was using company funds for personal purposes.

[17] Ms Wallace's employment relationship was the subject of written confirmation in an agreement prepared late March and signed by herself and Mr Glaister in the presence of a third party witness on 30 March 2011. It purports to have come into effect on 1 November 2010 and has a stated expiry date of 31 May 2012. It cites G P and S L Glaister Limited as the employer.

[18] Ms Wallace puts the delay down to the fact that she was becoming increasingly upset as a result of the failure to resolve the matrimonial property dispute. She says she wanted some certainty about the employment relationship and started grumbling. In her written brief Ms Wallace says:

By 30 March 2011, it was clear that Sonia was not going to pay my wages and that there may be a dispute over the terms of our verbal agreement, so Peter printed off the casual employment agreement and we both signed it.

[19] She goes on to say:

Shortly after signing that agreement, on or around 10th April I asked Peter (acting on behalf of the company) if the terms of my employment agreement could be amended to make it a salaried position rather than a casual position paid by the hour. Peter agreed.

[20] Again Mr Glaister agrees. The written agreement which purports to confirm the new arrangement is said to have come into effect on the 1st of April but there is debate about when it was prepared and signed. 11 April 2011 was initially entered as the date of signature but this was crossed out and replaced with 12 June. There is a conflict in the evidence about which of the two is correct. Ms Wallace says, in her written brief, that signature occurred shortly after agreeing, on or around 10 April. Mr Glaister says it occurred on 12 June when *it had become clear that Sonia was not going to authorise further payment of Fiona's wages.*

[21] In the interim, and on 8 April 2011, Mr Glaister and Ms Harris agreed that each would take drawings of \$5,000 from the company. They did though Mr Glaister took only \$4,500 and forwarded the remaining \$500 to Ms Wallace as an advance on wages. Mr Glaister now says *the payment was recorded as payment of wages to Fiona and Sonia did authorise that payment.* Ms Harris simply says that she did not take any notice of it at the time and was only interested in the total - \$5,000 each. How Mr Glaister spent his share was over to him.

[22] That, as it transpired, was the only payment Ms Wallace received and she now seeks what she claims is the residue.

Determination

[23] The claim was initially brought against Ms Harris on the grounds that it was she, as a bitter ex-wife, who was refusing to acknowledge the employment agreement

and, given the requirement she co-authorise all payments, was instrumental in preventing payment properly owing. As said earlier though, the claim against Ms Harris personally is no longer being pursued.

[24] By consent the identity of the respondent was changed to the company, if only because it was identified as the employer in the employment agreement(s). That said, and as identified in opening, the possibility that Mr Glaister was the employer was canvassed in both a preparatory telephone discussion and at the commencement of the investigation meetings.

[25] Notwithstanding Ms Harris's misgivings about the arrangement and the duties performed, the evidence must lead me to a conclusion that Mr Glaister and Ms Wallace entered into an arrangement under which she would be paid. The issue is who would be responsible for making those payments – G P and S L Glaister Ltd or Mr Glaister personally.

[26] It is my conclusion that Mr Glaister was the employer. I reach that conclusion for the following reasons.

[27] First, and perhaps most importantly, there is the evidence of Ms Wallace. When giving oral evidence and specifically asked who the employer was, she initially answered that she did not know and had not really thought about it. During subsequent questioning she never once identified the company as her employer but instead gave answers such as *I just agreed Peter would pay me – how he was going to pay me was up to Peter.*

[28] The issue was pursued at some length with both myself and Mr Polson asking various questions about who she thought she was performing work for and why. Again the company was never once identified as the employer or beneficiary. Again the consistent answer was that the arrangement was to help and assist Peter (Mr Glaister).

[29] There was also the evidence that the initial arrangement was one under which Mr Glaister would pay and payment would wait until he was in sole control and be made from the assets that accrued to him (9 above supported by various oral answers). There is no suggestion that Ms Harris or any entity in which she had ownership or (partial) control would be responsible. Add to this strong evidence that from Ms Wallace's perspective the arrangement changed or, more correctly, had reason to

change. Whilst consistently answering that her arrangement was with, or to benefit, Mr Glaister (27 and 28 above) she also said on more than one occasion that she came to the conclusion that the failure to settle the property dispute meant it was unfair that Mr Glaister continue to be responsible for the mounting wage bill as her (Ms Wallace's) efforts had contributed to an increase in the companies value in which Ms Harris would share. An example of this was her observation that *Sonia must understand that the work I do is for her benefit so she should share the cost.*

[30] In other words the arrangement changed to one under which Ms Harris takes some responsibility. Therefore it must initially have been different and the only possibility, given the evidence, is that the earlier arrangement had responsibility with Mr Glaister.

[31] Indeed, the only person who consistently said the company was the employer was Mr Glaister. During the investigation meeting he developed an unfortunate and inappropriate habit of interjecting when others were giving evidence or counsel (particularly Mr Polson) speaking. It would be hard to consider these comments, which were frequently punctuated with obscenities and appeared reactionary as opposed to considered, as evidence but some were enlightening. It became apparent that Mr Glaister is of the view that both partnership and company property should, in its entirety, be his. If that goal should prove unobtainable Mr Glaister appears to want the satisfaction of knowing that he has done all in his power to reduce the proportion that Ms Harris might receive. One measure that may assist the attainment of that goal is the diversion of funds from the company to his personal household and that goal could, quite clearly, be assisted by paying a member of that household such as the applicant.

[32] There were also some glaring contradictions in his evidence with the most obvious example being his assertion to me that he entered into an agreement that the company would pay and employ Ms Wallace which is at total odds with his representation to the bank that Ms Wallace was unpaid and actively supporting him on the farm as his partner. The impression that Mr Glaister would do and say anything that advanced his self interest was overbearing – he was not a credible witness.

[33] There is also the matter of authority to employ. The evidence is that the first agreement was entered into on or about 1 November 2010 and the second on or about 10 April 2011. The period during which Mr Glaister had sole operational control was

11 November 2010 to 21 February 2011. Here I must digress and comment on what is probably the sole evidential conflict between Ms Harris and Mr Glaister and that is the extent to which Ms Harris participated in staffing decisions. I have already expressed negative views about Mr Glaister's credibility. I do not have the same qualms about Ms Harris. In other words I accept Ms Harris's assertion that she was an integral part of the normal recruitment process. When these arrangements were entered into Mr Glaister did not have authority to act alone and Ms Wallace would appear to have known that given her evidence about Ms Harris's likely reaction and the decision that payment would be withheld until a point in time at which it could be addressed by Mr Glaister alone.

[34] Lastly I must comment on the fact the company is identified in the written agreements as the employer. This I discount given the evidence about the initial arrangement and the fact Mr Glaister would be responsible for payment; the fact the agreements were prepared by Mr Glaister (whose apparent promotion of self interest I have already commented on) and the delay (which, I must say, was not convincingly explained) combined with the evidence that Ms Wallace's views about who should be responsible for payment appears to have altered in the interim.

[35] For these reasons I conclude Mr Glaister was Ms Wallace's employer and the claim against G P and S L Glaister Ltd therefore fails.

Costs

[36] I reserve the issue of costs. Notwithstanding Mr Glaister's assertions that the company be unrepresented, I note that Ms Harris was forced to participate in this matter given the initial citation identifying her as the respondent. She is also entitled to defend her interests including those of an entity in which she is a Director and Shareholder. She has been successful and given the normal principle that costs follow the event she is entitled to seek costs. If chooses to do so, she is required to lodge and serve an application within 28 days of this determination. Ms Wallace is to file any response within 14 days of the application.