

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 419
5563995

BETWEEN

WILLIAM WILLIS
Applicant

AND

JANICE SOMMERVILLE
First Respondent

AND

TE HIHI FARMS LIMITED
Second Respondent

Member of Authority: Nicola Craig

Representatives: Robert Willis, Advocate for the Applicant
Matthew McGoldrick, Counsel for the Respondent

Investigation Meeting: 22 January 2016

Date of Determination: 23 December 2016

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. An employment agreement was entered into between William Willis and Te Hihi Farms Limited on 8 December 2014.**
- B. Costs are reserved.**

Employment relationship problem

[1] William Willis (Mr Willis) entered into discussions with Janice Sommerville (Ms Somerville) in late 2014 regarding the prospect of him working as a farm manager on a Karaka farm property referred to as Te Hihi.

[2] Mr Willis originally brought his claims, including unjustifiable dismissal, against Ms Sommerville.

[3] It then became apparent that there was a prospect that Mr Willis's claims should have been brought against Te Hihi Farms Limited (Te Hihi or the company). Ms Sommerville is the director and a joint trustee shareholder of Te Hihi.

[4] Mr Willis applied to join Te Hihi to this proceeding. Ms Sommerville had no objection and the company was joined to the proceeding as second respondent.

[5] The respondents say that there was never a concluded employment agreement between either of them and Mr Willis. They accept that discussion about employment occurred but not that a conclusion was reached.

[6] The parties agree that work was carried out by Mr Willis for Ms Sommerville and/or Te Hihi, but that this was billed by Mr Willis's family's company Matawhio Sports Horses Limited (Matawhio) to Te Hihi Farms Ltd. It is agreed that this did not amount to employment.

[7] An Investigation Meeting was held on 22 January 2016. I heard evidence from Mr Willis, Mary-Beth Sharp (Mr Willis's mother) and Ms Sommerville.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received but states findings of fact and law on issues necessary to dispose of the matter and specified orders made as a result.

[9] This determination has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as permitted by s 174C(4) of the Act, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the specified date in s 174C(3)(a) of the Act.

The issues

[10] The issues for investigation and determination are:

- (a) whether there was a concluded employment agreement, so that Mr Willis can bring claims as an employee; and
- (b) if there was an employment agreement, was it with Ms Sommerville personally or the company.

The parties' previous connection and the farm manager role

[11] Ms Sommerville had bought the Karaka farm property about ten years ago, and used it for a livery business ¹, looking after her family's, and other riders', competition horses.

[12] Prior to entering into discussions about work in 2014, Mr Willis and Ms Sommerville had some knowledge of each other through Mr Willis's extended family and the show jumping community.

[13] There is some dispute between the parties as to the degree of their previous involvement with each other. Mr Willis considered the connection to be closer than Ms Sommerville did.

[14] Mr Willis had spent several periods riding overseas. In late 2014 he had returned from overseas and was riding several horses for Matawhio. He was looking for something else to do. He was living at his parents' property, about ten minutes' drive from Ms Sommerville's farm. Matawhio operated from Mr Willis's parents' property.

[15] The farm manager role was not advertised. It had previously been undertaken by someone who had become unwell and unable to fully undertake the work anymore, but who was still living in the farm house.

[16] Mr Willis was informed of the possible farm manager vacancy by another horse trainer. That trainer was providing show jumping training for Ms Sommerville's daughter and knew both Mr Willis and Ms Sommerville. Ms Sommerville regarded the suggestion of Mr Willis by the trainer as a form of recommendation, from someone she respected.

¹ Place for horses to stay in return for payment.

Discussions commence

[17] Ms Sommerville called Mr Willis by phone on 23 November 2014 to discuss the farm manager's position. Ms Sommerville said that she had a vacant position which she needed to fill but that the house that went with the role would not be available until the New Year.

[18] Mr Willis was already somewhat familiar with the role having been friendly with a previous farm manager at Te Hihi. He indicated that he was keen to discuss the role and Ms Sommerville suggested that he come to the farm for an interview.

[19] The sick farm manager resigned effective from 28 November 2014, but she and her family remained living in the house. Discussions were occurring with Ms Sommerville about when they would leave, which seemed likely to be some time in January 2015.

29 November 2014 meeting

[20] Ms Sommerville and Mr Willis met at the farm on 29 November. She showed him around the property. The farm manager position was discussed more fully. It was a live in role, involving looking after the stock and horses on the property, developing and managing the livery yard, and promoting the livery business. There was also a component regarding Ms Sommerville's daughter's show jumping; caring for her horses, transporting them to lessons and competitions, and grooming or providing a groom for them at shows.

[21] The role was as an employee, but Mr Willis mentioned at this meeting that perhaps they could look at it as an independent contractor role. He thought it might serve both of their purposes to do it in that way. Mr Willis says that he was not firm in wanting that structure.

[22] Mr Willis's partner was overseas in her home country at this point. She was to return to New Zealand early the following year and Mr Willis was looking for a place for them to live. There was discussion between Ms Sommerville and Mr Willis about the availability of the farm house.

[23] There was some discussion about Mr Willis's other role or responsibilities with Matawhio. His plan was that his partner would assist on the Te Hihi farm on her

return. He says that he told Ms Sommerville that the Te Hihi work would be his priority.

[24] At the end of the meeting the parties agreed that Mr Willis would perform some outstanding farm tasks, which the previous manager had been unable to undertake. Ms Sommerville also said that she would send one of her horses to Matawhio for training. These arrangements were to be billed.

[25] Mr Willis's impression was that that Ms Sommerville wanted him to start (as an employee) once she had tidied up the situation with the previous manager. Ms Sommerville saw the two of them as only being in discussions.

Work undertaken

[26] After their meeting, Ms Sommerville emailed Mr Willis on 1 December 2014. She said that she will ask her accountant to look at the current employment agreement and put together a similar package on a contract (independent contractor) basis.

[27] After discussions with his parents who had some relevant expertise, Mr Willis emailed Ms Sommerville the same day to say that he now preferred to be an employee if he was offered the position.

[28] Ms Sommerville emailed back that she would contact her accountant "re contract". She provided the Te Hihi company name and a billing address for Mr Willis's contract work.

[29] Mr Willis began undertaking tasks around the farm, including arranging for the cutting and bailing of silage and fertilising, and transporting several of Ms Sommerville's daughter's horses. He did various tasks for about six weeks, some of which were part of the farm manager's role.

[30] This work was later billed through the Matawhio company to the Te Hihi company, in four invoices dated from 7 December 2014 to 1 February 2015. The first two invoices contain more work regarding the farm itself, whereas the latter two focus on riding and agistment² services for Ms Sommerville's horse which were with Matawhio during this period. Those invoices were paid. Ms Sommerville expressed her satisfaction with the work carried out by Mr Willis.

² Taking in and feeding of animals

[31] During the week beginning 1 December Ms Sommerville called Mr Willis and asked to meet with him again.

8 December meeting

[32] The evening meeting at Ms Sommerville's Auckland home lasted about an hour.

[33] Ms Sommerville says the meeting was to talk about how the position might work, given that Mr Willis now wanted to be an employee. Mr Willis says there had never been an independent contractor in the farm manager role, and so he could not see why having him an employee could have been such an issue for Ms Sommerville.

[34] Ms Sommerville told Mr Willis that she had not yet heard from her accountant and her business manager had been away for some time. The business manager worked for Ms Sommerville's other business, handling her paperwork, including employment agreements.

[35] Ms Sommerville gave Mr Willis an earlier farm manager's individual employment agreement from 2009 (the 2009 agreement), which had been drawn up by a lawyer. She says this was provided as an example of their usual expectations of an employee and for Mr Willis to review for questions or concerns regarding the role. She says the agreement provided was obviously out of date in regards to aspects of the current role.

[36] Mr Willis says that the agreement was provided so that he could be aware of expectations of hours, holidays and the like. His understanding was that once Ms Sommerville's accountant could get onto Mr Willis's employment agreement, a new one would be drafted. He says that a few minor differences, between the 2009 agreement and what was to be his agreement, were discussed and "nuttled out". He did not consider that a lot had changed about the role since the 2009 agreement.

[37] Mr Willis says that the two discussed the salary for the role of \$60,000 gross per annum.

[38] In her written statement Ms Sommerville states that she does not recall discussion in any particular detail about the key (employment) terms and responsibilities which Mr Willis listed in his statement as having been discussed and agreed verbally at the meeting. These included salary, standard Holidays Act

entitlements, ability to graze two of Mr Willis's own horses or alternatively use the farm's arena for teaching, and 40 hours per week at flexible times.

[39] However, in her verbal evidence Ms Sommerville agreed that some particular issues from that list were discussed, or at least raised. These included Mr Willis using the arena, and the role being full time equivalent, but not 9 to 5. Ms Sommerville agreed at the investigation meeting that there had been discussion on 8 December about the cost of the farm house being around \$300 a week for the house. Mr Willis and Ms Sommerville also discussed the fact that Te Hihi was so close to Matawhio's base, that he could continue to ride, and train his own horses even while living at Te Hihi farm.

[40] In light of Ms Sommerville's acknowledgment of rather more discussion in this crucial area, than had previously been suggested, I find that Mr Willis's evidence, regarding what was discussed at the meeting, is more reliable.

[41] There was discussion about how Mr Willis could continue with his current work for Matawhio and still manage the Te Hihi full time role. Mr Willis said that his partner was a qualified riding instructor, and would support him in the Te Hihi role. Matawhio had staff employed already. Ms Sommerville says that she understood the Matawhio commitment to be full time, whereas Mr Willis says that it was not and that he did not have an employment obligation to Matawhio. He tried to assure Ms Sommerville that Te Hihi would be his top priority.

[42] Ms Sommerville says that she had concerns about how it would work with Mr Willis being a man and accompanying her daughter to competitions and staying in the horse truck together. Mr Willis told her that his partner would accompany them.

[43] At the meeting Mr Willis presented a marketing strategy for the Te Hihi business, which he had worked on since the previous meeting.

[44] Mr Willis says that as he left the meeting Ms Sommerville asked, so are you good to start 1 January 2015, and Mr Willis confirmed that he was. Ms Sommerville accepts that she was looking to have someone from the end of the year. She agreed that she asked if he was available from 1 January.

[45] Mr Willis says that Ms Sommerville advised him that her accountant would draw up the agreement in written form and have it delivered to him. His view was

that an employment agreement was reached at the meeting and they shook hands on it. Ms Sommerville accepts that when Mr Willis was leaving they shook hands, but not that this indicated that a deal had been done.

[46] Later that night Ms Sommerville sent Mr Willis an email concerning one of her horses who was in foal and had to be transported to another farm on 10 January. The email states “Can you please diary this date”.

Discussions with others regarding employment

[47] Mr Willis says that he went home from the 8 December meeting all excited (at having a new job). His mother says that he came home elated and excited, saying to his parents that Ms Sommerville had offered him the job. He told them what the terms were, including the \$60,000 salary, \$300 to rent the farm house, and a full time role with a start date of 1 January. He also outlined the job responsibilities.

[48] Mr Willis says that he or other members of his family later heard from several people that he was the new farm manager, suggesting that Ms Sommerville told them this. This is denied by Ms Sommerville. None of the people who may have spoken to Mr Willis or his family in this regard were called to give evidence by either party.

[49] In early December 2014 Mr Willis was assisting Ms Sommerville with her farm manager work and with her daughter’s shows, although this work was billed though Matawhio. This involvement would have been known by a number of people, and without evidence of why particular people understood that Mr Willis had got the role, it is difficult to give this evidence much weight.

Subsequent events

[50] The events after 8 December are referred to briefly, as it is clear that if there was an agreement reached it was at that meeting, as the situation began unravelling after that.

[51] Ms Sommerville says that she later thought that it would be difficult to make the arrangement with Mr Willis’s other commitments work. She was having second thoughts.

[52] Two days after the meeting Ms Sommerville sent Mr Willis a lengthy email indicating various concerns she has about what she describes as “our proposed role”

and “our proposed contract”. The concerns were related to Mr Willis’s Matawhio commitments and the arrangements regarding her daughter’s show jumping. Ms Sommerville said:

...I have an enormous amount on right now, and with my business manager on sick leave at the busiest time of the year. I am struggling to give sufficient time to work this all through. ...

I feel badly that I have talked about a commitment, however I’m not sure that offering you a ‘full time’ employee role, with all the commitment that requires on both sides is not going to lead me feeling that, somehow, I am worse off...

I would be happy to discuss a farm role on a monthly contract basis, as we originally discussed...

I appreciate that this is disappointing...

[53] Mr Willis replied trying to assuage the concerns, and indicated that he and his partner have been very excited about taking on “this new position”. The email attempts to persuade Ms Sommerville, but does not specifically state that there is an agreement between them.

[54] On 15 December Mr Willis emailed Ms Sommerville about a show he had taken her horses and her daughter to. He concludes that perhaps she can give him a call, discuss a show and “finalise the written contract”.

[55] Ms Sommerville replied on 16 December, referring to the “suggested arrangements”, saying that she had many areas of concern and was “reluctant to enter into any formal arrangement at this time.” She notes that she is happy to continue on a contract basis for now.

[56] The two spoke on 17 December. During the call Ms Sommerville said that she would not have a chance to check the state of the farm house before leaving for the United States. She wanted to meet with Mr Willis upon her return on 6 January 2015.

[57] Mr Willis believes that Ms Sommerville’s actions in withdrawing were actually at least partly motivated by untrue rumours about him, rather than the concerns which she raised with him. However, there was little evidence presented to support this. In any event I find that Ms Sommerville’s motivations regarding her later conduct are of little relevance to this determination which is about whether an employment agreement was formed.

[58] Ms Somerville's email of 9 January 2015 to Mr Willis states:

Appreciate that I have backtracked somewhat on my initial overtures however failed to follow my usual employment protocol in this instance.

[59] Mr Willis continued to pursue starting work as the farm manager. His impression was that Ms Sommerville was avoiding him. Ms Sommerville's position was that this was a busy time for her professionally and personally. There seemed to remain some prospect of Mr Willis's role materialising, however, by late January or early February it was clear that that was not to happen.

[60] Ms Sommerville subsequently appointed another person as the farm manager.

Formation of employment agreement

[61] In order for Mr Willis to be able to bring a personal grievance claim for unjustified dismissal he must establish that he was an employee as defined by s 6 of the Act.

[62] "Employee" is defined as any person employed by an employer to do any work for hire or reward under a contract for service³ and includes a person intending to work.⁴

[63] Here the parties agree that although Mr Willis undertook work regarding the farm and Ms Sommerville's horses, that work was undertaken as a contractor on behalf of Matawhio, and was billed to the company.

[64] Mr Willis must therefore rely on coming within the definition of a "person intending to work" under s 6(1)(b)(ii) of the Act. That phrase is defined in s 5 of the Act to mean "a person who has been offered, and accepted, work as an employee".

[65] As with other contracts, for an employment contract or agreement to be formed certain requirements must be met. These are that there must be an offer, acceptance of that offer which is communicated, contractual intention, consideration and certainty of terms.⁵ The onus of proof is on the person alleging that a contract was established.⁶

³ S 6(1)(a) of the Act

⁴ S 6 (1)(b)(ii) of the Act

⁵ *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132 at [36]

⁶ *Ibid*

[66] A unilateral subjective intention by one of the parties cannot create an employment agreement for the purposes of the Act.⁷

[67] In *Baker v Armourguard Security Ltd* a distinction was drawn between the formation of an agreement and the negotiation of the detailed terms of that agreement.⁸ An employment agreement may be formed even though negotiation of detailed terms has yet to come.

Concluded employment agreement?

[68] Mr Willis believes that an employment agreement was entered into on 8 December. Ms Sommerville considers that there was quite a lot to still be resolved at that point and no agreement was reached due to lack of contractual intention and certainty of terms. The respondents submit that no employment was offered at any point, or alternatively, that if it was, the offer was withdrawn by Ms Sommerville's email of 10 December 2014.

[69] This is not a situation where there is a question about whether there was a job at all or what it involved. Here a farm manager had previously been employed at the property and Ms Sommerville was seeking a replacement. The previous farm managers had all been employees.

[70] It is clear that prior to 8 December there was no employment agreement concluded between the parties. At the 29 November meeting there was discussion about the prospect of Mr Willis being an independent contractor. Mr Willis subsequently stated his preference for employment but the subsequent email correspondence prior to 8 December does not evidence an offer of employment being made in those emails.

[71] I accept that this employment situation did not progress in the same way as other appointments by Ms Sommerville's businesses. Her business manager was away for some weeks. She was dealing with a somewhat uncertain situation with the previous manager and the farm house. She had previously used a recruitment agent for that farm manager's appointment, but that agent had since died.

⁷ *Tucker Wool Processes Ltd v Harrison* [1999] 1 ERNZ 894 (CA) at para 39

⁸ [1998] 1 ERNZ 424 at page 432

[72] It could be seen that there was some pressure to progress the appointment, as by now it was 8 December and Ms Sommerville wanted someone to start at the end of the year, so about three weeks away.

[73] The parties are in agreement that as at 8 December they met to discuss a possible employment agreement. The question is whether an agreement was reached at that time.

[74] Although there had only been one meeting prior to the 8 December meeting, Ms Sommerville had some previous knowledge of Mr Willis and regarded the suggestion of him by her daughter's trainer as a form of recommendation from the trainer.

[75] I am satisfied that the nature of the role and the responsibilities of the farm manager were sufficiently clear at this point.

[76] I accept that all the wording of a written agreement was not finalised at the 8 December meeting. However, it is not uncommon for an employment agreement to be reached with a written employment agreement yet being provided or signed. As was stated in the *Baker v Armourguard Security Ltd* case, there is a distinction between the formation of an agreement and the negotiation of the detailed terms of that agreement.

[77] A start time for Mr Willis in the role was requested and Mr Willis said that he was able to start when Ms Sommerville wanted. The salary was discussed.

[78] A previous employment agreement was looked at and discussed, although no written agreement specific to Mr Willis was provided. Clearly the parties could not have agreed simply to adopt the terms of the 2009 agreement holus-bolus as some things were different. However, significant terms from it, including salary, were discussed.

[79] The respondents relied on the fact that the 2009 agreement was full time whereas the discussion between Ms Sommerville and Mr Willis was that he could continue with some other interests. However, the parties did agree that 40 hours work a week, namely full time work, was expected.

[80] Mr Willis's evidence was that other farm managers, both before and after his time had had outside work. One previous manager he described as having an extensive client base. Ms Sommerville accepts that that manager undertook private weekend work, although only after he had been in the position for a few years. That manager's partner stepped in at Te Hihi when he was undertaking the private work.

[81] Ms Sommerville says that she expected that the agreement with Mr Willis would effectively make reference to Matawhio and how he would split his time between that work and Te Hihi. However, there was no evidence that arrangements regarding previous farm managers' other work were specified in their employment agreements.

[82] I am not satisfied that the absence of a written agreement specifying those things is determinative of there being no concluded employment agreement here. The parties agreed that, as would be expected for this type of role, it was not a 9 to 5 job. Forty hours' work was agreed. Employment agreements often require the employer's consent to be sought for additional work being undertaken by the employee, without the agreement, or a variation of it, specifying how time would be divided between the two roles.

[83] There was clearly some variation in arrangements with previous farm managers. Most had lived on the farm, but one had not. Several had done other work in their own time. Some had partners who had been involved in helping on the farm. The arrangement with Mr Willis discussed on 8 December was not outside of the realms of what had operated before.

[84] An objective view of whether a bargain was concluded is needed. Mr Willis's belief on 8 December that he had an agreement, and his communication of this to his parents that evening, are relevant but not determinative of that issue.

[85] Later that evening Ms Sommerville asked Mr Willis to diary 10 January for a horse transfer. Had Mr Willis been seen as a contractor at that point the approach is likely to have been rather more along the lines of enquiring as to his availability. Rather he was seen as being integrated in the business, as an employee would usually be.

[86] As outlined above, the parties' subsequent emails and discussions have indications from both parties in support of there being a concluded agreement and in support of there not being one.

[87] On balance I find that an employment agreement was reached by way of offer and acceptance with sufficient certainty of terms and objective contractual intention on 8 December.

[88] As I have concluded that the agreement was reached on 8 December, I do not need to consider the respondents' alternative argument that an unaccepted offer was withdrawn on 10 December.

Identity of the employer

[89] Having found that an employment agreement was entered into the question then becomes who the employer was. This is not an issue which Mr Willis initially raised, as he identified Ms Sommerville as the employer in his Statement of Problem. Rather the issue was raised by Ms Somerville, suggesting that if there was an employment agreement (which is denied) it may have been with the company and not her personally.

[90] In *Colosimo v Parker*⁹ the Employment Court held that in order to decide the identity of the employer an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties was needed. The question is who an independent, but knowledgeable, observer would have said was the employer.

[91] In some instances the Employment Court has used the Court of Appeal's approach in *Petherick v Wellfit Ltd*¹⁰. This involves looking at the extent, if any, that it was a material consideration from either party's point of view that they contracted with a particular person or entity.¹¹

[92] In the present case as Mr Willis did not undertake any work as an employee there is no guidance from the course of the parties' employment relationship.

⁹ (2007) 8 NZELC 98,622

¹⁰ CA 84/84, 1 October 1986

¹¹ *Service Workers Union of Aotearoa v Chan* [1991] 3 ERNZ 15 and *Kruesi v Hamua Holdings Ltd* [1992] 2 ERNZ 135

[93] Mr Willis knew Te Hihi Farms was the name of the farm. He initially assumed it was a business but could not be sure whether a company was involved. He was then told to bill his contracting work to Te Hihi Farms Limited.

[94] Mr Willis says it was not clear whether he was to be employed by the company or Ms Sommerville herself. In submissions on his behalf it was accepted that he knew that the livery business ran through the company, but not that he was to be employed by the company. However, some of the work which he had undertaken and billed, such as arranging for hay and fertiliser contractors, was usually farm manager work.

[95] Overall Mr Willis's his position was that Ms Sommerville was the employer although there was ambivalence regarding whether the issue of who the employer was, was significant.

[96] The respondents' case focused more on whether there was an employment agreement rather than the identity of any possible employer. No records were provided by the respondents to show the ownership of the farm property. No business records of the company were filed.

[97] Ms Sommerville in her witness statement refers frequently to herself as the owner of the farm, and as the employer of farm managers. For example she states "...there is a house where the Farm Manager that I would employ would live in". She makes little reference to the company. Her oral evidence was often to similar effect. However, she did say that previous farm managers were employed by the company. The 2009 employment agreement also refers to the company as the employer.

[98] From the documents filed, Ms Sommerville's emails mainly come from what appears to be her other business's email address. There is no indication of a Te Hihi email address or Ms Sommerville using an email signature referring to Te Hihi Farms or the full company name.

[99] On 1 December Ms Sommerville asked that the invoices from Matawhio for the farm work and horse training be addressed to Te Hihi Farms Limited. She also provided Mr Willis with the company's website address as he was looking at marketing issues.

[100] Ms Sommerville did not draw Mr Willis's attention to the company being the employer rather than herself.

[101] To summarise, although Mr Willis had been informed of the name of the company for the purposes of billing, many of the communications from Ms Sommerville make no reference to the company. The 2009 employment agreement referred to the company as the employer, and although there are references by Ms Sommerville suggesting that she is the employer, her evidence at the investigation meeting was that all the farm managers had been employed by the company. It did not appear to be of any significance to Mr Willis whether he would be employed by Ms Sommerville personally or the company.

[102] In conclusion, although the matter is finely balanced, I find that Te Hihi Farms Ltd was Mr Willis's employer.

Costs

[103] Costs are reserved and will be dealt with after the determination of the substantive claims.

Nicola Craig
Member of the Employment Relations Authority