

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 336
5340418

BETWEEN

ESTATE OF WAEPEKE
RUIHANA TUPAEA
Applicant

A N D

ANDREWS HOUSEMOVERS
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Joseph Tupaea, Advocate for the Applicant
Paul Wicks QC, Counsel for the Respondent

Investigation Meeting: On the papers

Date of Determination: 14 August 2014

DETERMINATION OF THE AUTHORITY

- A. The application for reopening the investigation is declined.**
- B. The parties are encouraged to agree costs. In the event costs cannot be agreed, the respondent has 14 days within which to file a memorandum as to costs and the applicant has 14 days within which to respond.**

Application for investigation to be reopened

[1] The original employment relationship problem was investigated by the Authority at a meeting on 12 October 2011. A determination by the Authority was issued on 21 October 2011¹(the 2011 determination).

¹ [2011] NZERA Auckland 459

[2] On 9 June 2014, the applicant, the Estate of Waepeke Ruihana Tupaea (the Tupaea Estate) filed a statement of problem in the Authority applying for the 2011 investigation to be reopened. The grounds relied on by the Tupaea Estate are that subsequent to the determination, Ms Rae Hemi also known as Rae Tupaea (Ms Hemi) was convicted in the Manukau District Court under the Crimes Act 1961 in relation to statements made by her to the Accident Compensation Corporation (ACC), including about her relationship with the late Mr Waepeke (Wai) Ruihana Tupaea in order to receive ACC payments.

[3] The Tupaea Estate claims that Ms Hemi was not in a *de facto* relationship with Mr Tupaea at the time of his death and that payments made to her by the respondent, Andrews Housemovers Limited (Andrews Housemovers) in respect of wages and holiday pay owed to Mr Tupaea at the date of his death should therefore have been paid to the Tupaea Estate.

[4] On 26 June 2014, Andrews Housemovers lodged its statement in reply claiming that there is no basis for the Authority to reopen its investigation. Andrews Housemovers claims the Authority in its determination held that Ms Hemi was in a *de facto* relationship with Mr Tupaea when he died, under s.2D of the Property (Relationships) Act 1976. Andrews Housemovers further claims that the subsequent prosecution and conviction of Ms Hemi for defrauding ACC involved a different statutory test as to a *de facto* relationship, namely that prescribed under s.18A of the Accident Compensation Act 2001.

[5] The parties were invited to provide the Authority with submissions on the matter but chose not to do so. The Authority has therefore determined the matter based on the papers currently before it.

[6] The parties attended mediation in relation to the Tupaea Estate's original application and the parties were of the view that mediation in respect of the application to reopen the investigation would not be of assistance.

[7] In the circumstances, the Authority accepts that further mediation would not be helpful.

[8] The facts leading up to the filing of the original statement of problem by the Tupaea Estate against Andrews Housemovers are set out in the 2011 determination².

Issue

[9] Andrews Housemovers owed Mr Tupaea wages and holiday pay at the time of his death in June 2009. Andrews Housemovers paid the sum owing to Ms Hemi. The issue before the Authority in October 2011 (and which was the subject of the 2011 determination) was whether such payment discharged the obligation of Andrews Housemovers to pay entitlements due to Mr Tupaea under the employment agreement.

[10] The Authority heard evidence during the investigation meeting in 2011, that Andrews Housemovers, when paying Mr Tupaea's entitlements to Ms Hemi, understood that she was his *de facto* partner. At paragraph [12] of the Authority's determination, Member Dumbleton stated:

The parties are agreed that in considering whether Mr Wai Tupaea and Ms Rae Hemi were in a de facto relationship in June 2009, when Mr Tupaea died, the meaning of de facto relationship at s.2D of the Property (Relationships) Act 1976 is applicable.

[11] Member Dumbleton set out in the determination the conflict of evidence in relation to Mr Tupaea and Ms Hemi's relationship. The Authority then weighed up the evidence including that Ms Hemi had left the house she shared with Mr Tupaea in 2004 for safety reasons, but continued to pay the mortgage, that Ms Hemi was given authority by Mr Tupaea to access his bank account and that when he went into hospital in 2008 she was named next of kin by him and described as his "*partner*". The Authority determined that there was a *de facto* relationship in existence between Mr Tupaea and Ms Hemi in June 2009 at the time of Mr Tupaea's death.

[12] Having reached that conclusion, the Authority determined that Andrews Housemovers had discharged its obligation to Mr Tupaea when it paid Ms Hemi the entitlements due under the employment agreement. The Authority stated further at para [22]:

I consider this is a case where the Authority could have exercised its jurisdiction in equity and good conscience to reach the same result,

² Supra, paras.[1], [2] and [5]

and without contravening the Employment Relations Act or Regulations or the relevant employment agreement.

[13] The Authority has a discretionary power to reopen an investigation pursuant to clause 4 of the Second Schedule of the Employment Relations Act 2000. While the power is discretionary it must be exercised in accordance with principle.

[14] The principal test for determining whether a matter ought to be reopened or not is whether a failure to do so would constitute a miscarriage of justice. The Authority must balance the risk of miscarriage of justice against the counter principle that certainty in litigation is important.

Determination

[15] Taking these factors into account, the application for the investigation to be reopened is declined.

[16] The issue as to whether or not there was a de facto relationship between Mr Tupaea and Ms Hemi at the date of Mr Tupaea's death was considered by the Authority during the course of its original investigation meeting in October 2011. The subsequent prosecution and conviction of Ms Hemi for defrauding ACC related to Ms Hemi obtaining ACC compensation for which she was not entitled.

[17] The statutory test as to a *de facto* relationship prescribed under s.18A of the Accident Compensation Act 2001 differs from that under s.2D of the Property (Relationships) Act 1976. Section 18A of the Accident Compensation Act 2001 states:

- 18A Partner (and partner in relation to deceased claimant)**
- (1) **Partner** means a person (**person A**) with whom the claimant is in a civil union or a *de facto* relationship.
 - (2) However, person A is not the partner of a claimant if—
 - (a) person A and the claimant are living apart; and
 - (b) the claimant is not contributing financially to person A's welfare.
 - (3) Subsection (2) does not apply if the circumstances set out in **the** subsection occurred principally because of the health, imprisonment, or employment obligations of either person A or the claimant.
 - (4) **Partner**, in relation to a deceased claimant, means a person (**person B**)—
 - (a) with whom the deceased claimant was in a civil union immediately before his or her death; or
 - (b) with whom the deceased claimant was in a *de facto* relationship immediately before his or her death.

- (5) *However, person B is not the partner of a deceased claimant if, at the time of the **deceased** claimant's death,—*
- (a) *person B and the deceased claimant were living apart; and*
 - (b) *the deceased claimant was not contributing financially to person B's welfare.*
- (6) *Subsection (5) does not apply if the circumstances set out in the subsection occurred principally because of the health, imprisonment, or employment obligations of either person B or the deceased claimant.*

[18] The Property (Relationships) Act 1976 was the applicable legislation in respect to the 2011 determination, not the Accident Compensation Act. Section 2D sets out the factors to be considered when determining whether 2 persons live together as a couple:

2D Meaning of de facto relationship

- (1) *For the purposes of this Act, a **de facto relationship** is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)—*
- (a) *who are both aged 18 years or older; and*
 - (b) *who live together as a couple; and*
 - (c) *who are not married to, or in a civil union with, one another.*
- (2) *In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:*
- (a) *the duration of the relationship;*
 - (b) *the nature and extent of common residence;*
 - (c) *whether or not a sexual relationship exists;*
 - (d) *the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;*
 - (e) *the ownership, use, and acquisition of property;*
 - (f) *the degree of mutual commitment to a shared life;*
 - (g) *the care and support of children;*
 - (h) *the performance of household duties;*
 - (i) *the reputation and public aspects of the relationship.*
- (3) *In determining whether 2 persons live together as a couple,—*
- (a) *no finding in respect of any of the matters stated in subsection (2), or in respect of any combination of them, is to be regarded as necessary; and*
 - (b) *a court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.*
- (4) *For the purposes of this Act, a de facto relationship ends if—*
- (a) *the de facto partners cease to live together as a couple; or*
 - (b) *one of the de facto partners dies.*

[19] These factors were considered and weighed up by the Authority when it determined that Mr Tupaea and Ms Hemi were in a *de facto* relationship at the date of Mr Tupaea's death.

[20] There is no basis therefore for the 2011 investigation to be reopened.

Costs

[21] The parties are encouraged to agree costs. However, in the event that this is not possible, Andrews Housemovers has 14 days within which to file a memorandum as to costs in the Authority and the Tupaea Estate has 14 days within which to respond.

Anna Fitzgibbon
Member of the Employment Relations Authority