

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 459  
5340418 & 5342946

BETWEEN

ESTATE OF WAEPEKE  
RUIHANA TUPAEA  
Applicant

AND

ANDREWS HOUSEMOVERS  
LIMITED  
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Joseph Tupaea, advocate for Applicant  
Guy Newlove, counsel for Respondent  
Leigh Langridge, counsel for Rae Hemi

Investigation Meeting: 12 October 2011

Determination: 21 October 2011

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**DETERMINATION OF THE AUTHORITY**

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**Application by administrator of employee's estate**

[1] The respondent Andrews Housemovers Ltd employed Mr Waepeke (Wai) Tupaea for over 25 years until his life was tragically taken in a work accident.

[2] Shortly afterwards, in June 2009, entitlements due to Mr Tupaea including wages and holiday pay were calculated by his employer and a cheque for \$5,301 was given to Ms Rae Hemi. She was also known as Rae Tupaea from a long relationship with Mr Tupaea.

[3] It is clear to the Authority that Andrews Housemovers paid her the entitlements as an act of compassion towards Ms Hemi and children she and Mr Tupaea had had during their relationship. There is no suggestion that the employer did not act otherwise than in good faith and with an honest belief that Ms Hemi was

entitled to receive the final payment due to Mr Tupaea under his employment agreement with Andrews Housemovers.

[4] As Mr Tupaea did not leave a will the administration of his estate was granted by the High Court in January 2011 to his son, Mr Joseph Tupaea, who was authorised by the Court to demand and recover debts belonging to the estate. He applied to the Authority for orders requiring Andrews Housemovers to pay to the estate the \$5,301 that the employer had paid to Ms Hemi. Mr Joseph Tupaea claims that payment to Ms Hemi did not discharge the employer's obligation to pay entitlements due under the employment agreement to Mr Wai Tupaea at the time of his death.

[5] There is no dispute in this case about the standing of the estate of an employee to bring to the Authority a claim to recover entitlements due under an employment agreement to the employee.

[6] The parties attended mediation but did not resolve their problem.

#### **An employment relationship problem?**

[7] When the application was made to it in April 2011 the Authority raised as a preliminary matter a question whether this was an employment relationship problem under the Employment Relations Act 2000, or whether it was more in the nature of an action by a creditor to enforce a debt where there was no dispute about the liability of the debtor or the amount owed. The dispute in this case is really about whether one person or the other was the correct payee of the amount Mr Wai Tupaea was due.

[8] The Authority invited submissions from the parties, drawing their attention to the following observation made by the High Court about the nature of employment relationship problems under the Act:

*It is important to distinguish between a claim which may have its origins in an employment relationship on the one hand, and a claim the essence of which is related to or arises from the employment relationship of the parties on the other.*

*Pain Management Systems (NZ) Ltd v. McCallum*

High Court, Christchurch, CP72/01, 14 August 2001, per Pankhurst J.

[9] After considering submissions received the Authority gave the following direction:

Given the definition at s 5 of the Employment Relations Act 2000 of “employment relationship problem” I accept that this matter is such, as it is a problem relating to or arising out of an employment relationship. As has been said by the Employment Court in *Waikato Rugby Union v. New Zealand Rugby Football Union* [2002] ERNZ 343, employment relationship problems are broadly defined and,

*..... it is possible for persons who are not direct parties to an employment agreement to file a statement of problem so long as the problems in it are related to or arise out of matters listed in s.161 [of the ER Act] – at para.[50];*

Matters about the recovery of wages or other money under s.131 of the Act are included under s.161.

Although this matter has the appearance of a civil dispute involving the exercise of creditor’s remedies it may be investigated and determined by the Authority.

[10] Andrews Housemovers in response to the application has sought to justify its action of paying Mr Wai Tupaea’s entitlements to Ms Rae Hemi by reference to the Administration Act 1969. At s 77 that Act provides that if a person dies intestate any personal estate of the deceased must be distributed by way of a charge against the residue of the estate, with payment to any surviving *de facto* partner of the prescribed amount plus interest.

[11] It is not suggested for Andrews Housemovers by Mr Gary Andrews, the owner and managing director of the company, that it had this legislation in mind when payment was made to Ms Hemi. The company is however deemed to know the law and it seems to me is entitled to rely on the legal position, whatever that may have been and whether it had knowledge of it at relevant times or not.

[12] 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.

[13] The Authority heard evidence from Ms Hemi, called on summons, who described a relationship she had had with Mr Wai Tupaea for some 34 years. They had four children from that relationship. One of them was Ms Amber Tupaea who also gave evidence, as did a close friend of hers, Ms Faye Mackey. Mr Andrews gave evidence on behalf of the respondent company employer.

[14] Family factions are quite evident in this dispute and the evidence of Ms Amber Tupaea has to be treated with particular caution. She, it is clear, was very close to Mr Wai Tupaea, her father, but in the last few years has become estranged from Ms Hemi her mother. This split between mother and daughter reached a point in 2010 when Ms Hemi applied to the Family Court and obtained against Ms Amber Tupaea a temporary protection order under the Domestic Violence Act 1995.

[15] The Authority heard evidence of a quite personal nature about the relationship between Mr Tupaea and Ms Hemi. I have placed particular reliance on the evidence of Ms Hemi who, as one of the partners in the relationship, could be expected to know more about it than other witnesses. In this regard I found her to be credible.

[16] A factor under the s 2D of the Property (Relationships) Act is the reputation and public aspects of the relationship under consideration and I attach some weight to other matters as listed. Under the Act no finding in respect of any of the matters or combination of them is to be regarded as “necessary” and there is a discretion to have regard to such matters, and to attach such weight to any matter, as may seem appropriate in the circumstances of the case.

[17] The evidence did not remove the Authority’s reservations as to whether the problematic relationship was one of employment or one of family in respect of which the claim has more to do with entitlement to personal relationship property.

[18] Upon weighing up the evidence and the matters put forward in evidence I find that there was a *de facto* relationship still in existence between Mr Wai Tupaea and Ms Rae Hemi in June 2009 at the time of Mr Tupaea’s death.

[19] Counter to that attention had been drawn in particular to the fact that they were living in separate houses, but in my view this, in the circumstances, does not indicate that they were not in a *de facto* relationship. As Ms Hemi said, up until he died she would stay with Mr Tupaea a couple of nights and he would stay with her a couple of nights, and as she put it, she ended up doing the housework of two houses instead of one. The arrangements might seem less usual than those of other couples but the circumstances explain them adequately to the Authority. A difficult and worsening relationship with their daughter had led Ms Hemi in 2004 to leave the house in which she had lived with Mr Tupaea for 6 years. This was for her safety. She continued helping pay the mortgage on the house.

[20] Ms Hemi was given authority by Mr Tupaea to access his bank account, and they were sharing an account in 2009. When he went into hospital in 2008 for an operation she as “partner” was named next of kin by him.

[21] I find against the applicant estate and hold that the respondent Andrews Housemovers Limited discharged its obligation to Mr Wai Tupaea when it paid to Ms Rae Hemi the entitlements due under the employment agreement.

[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, and without contravening the Employment Relations Act or Regulations or the relevant employment agreement. Although Mr Joseph Tupaea pointed to clause 12 of the agreement, which required Andrews Housemovers to pay wages by direct credit to a bank account operated by Mr Wai Tupaea, that provision could not have been intended to apply in the event of his death rendering him unable to “operate” the account.

### **Determination**

[23] For the above reasons, the Authority declines the orders sought by the administrator of Mr Tupaea’s estate Mr Joseph Tupaea and finds that Andrews Housemovers Limited has properly discharged its obligations with regard to the final pay due to the late Mr Wai Tupaea.

### **Costs**

[24] Mr Newlove sought a contribution to costs of \$700, being 2 hours of counsel’s time at \$350 per hour. I consider this reasonable and award that amount to be paid by the estate of Mr Wai Tupaea to Andrews Housemovers Limited, pursuant to clause 15 of Schedule 2 of the Employment Relations Act.