

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 92  
5466462

BETWEEN            MARTIN FOOTE  
                                 Applicant

AND                    CHUI LEUNG  
                                 Respondent

Member of Authority:    Trish MacKinnon

Representatives:        Applicant in person  
                                 Respondent in person

Investigation Meeting:    14 August 2014

Determination:            23 September 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Martin Foote raised a personal grievance with Chui Leung by letter dated 20 June 2014. In the letter Mr Foote claimed to have been unjustifiably dismissed. He referred to a contract for services agreement he had entered into with Ms Leung in September 2010 whereby he would live in the flat attached to Ms Leung's house and provide on-site security for the property and some lawn mowing and gardening work. He and Ms Leung signed a second contract for services in October 2012.

[2]     Mr Foote says the agreement with Ms Leung worked well until October 2012 when she wanted changes to the services initially agreed. He says this changed the nature of his work from a contract for services to an employment relationship. In the investigation meeting he modified his original claim regarding the date of the change to the relationship which he now asserted became one of employment from 1 April 2013. He seeks acknowledgement of his employee status, reimbursement of wages, and compensation.

[3] Ms Leung denies that she employs, or has ever employed Mr Foote. She says their relationship is that of landlord and tenant. She had informed Mr Foote in writing in August 2013 she no longer required him to undertake caretaking duties. In accordance with clause 8 of the agreement they had signed in October 2012 she required him to vacate the flat he occupied in her house by 19 September 2013, which was six weeks from the date of her letter. Mr Foote refused to accept the termination of his services and the termination of his tenancy. He remained living on site and continued to provide some services to Ms Leung for several months.

[4] A Tenancy Tribunal decision found in Ms Leung's favour, finding the notice she had given to be valid.<sup>1</sup> The District Court upheld that decision dismissing Mr Foote's appeal in its decision of 16 June 2014<sup>2</sup>. The Court found Ms Leung's arrangement with Mr Foote to be a tenancy arrangement with work carried out in lieu of rent, rather than an employment relationship with tenancy as part of the package.<sup>3</sup>

[5] Although Ms Leung had the right to evict Mr Foote, she had not done so at the date of the Authority's investigation into Mr Foote's personal grievance. In his words he was "*squatting*" on the property and was not providing any services in exchange for his accommodation.

### **The agreements between the parties**

[6] The September 2010 agreement was a one page handwritten document which commenced:

*"The purpose of free rental to one bedroom flat at [Ms Leung's address] is:*

1. *To secure the main house*
2. *Look after the front garden and driveway as first priority & also the ground."*

[7] A list of conditions followed, relating to rubbish, parking, use of the verandah outside Mr Foote's flat, and personal items. The agreement noted that all land continued to be for the sole use of the owner and, if the tenant wished to use the land for any purpose, the benefit/outcome/profit would be split on a 50/50 basis between the landlord and the tenant.

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<sup>1</sup> Foote v Leung [2013] NZTT

<sup>2</sup> Foote v Leung [2014] CIV-2014-091-000189

<sup>3</sup> Ibid at [22]

[8] The final paragraph of the handwritten agreement is replicated below:

*“If thing not work out with expectation among both parties, we can terminate the agreement.”*

[9] The next agreement dated 17 October 2012 stated that the present arrangement would continue if certain conditions were adhered to. These related to contingencies should the owner not be in residence at the time of certain events occurring, and to the watering of plants in the owner’s absence. Clause 3 of the agreement stated:

*“Mow the lawns and driveway as discussed and identified or such other odd jobs if the lawns are too wet to mow. To be mutually agreed by all parties and no reasonable job request shall be refused. This should be up to 7 hours per week in total.”*

[10] A subsequent clause concerned the cultivation of tobacco plants on the property and allowed Mr Foote to grow 20 tobacco plants on certain conditions. These were that he would remove all the stumps in the event the tobacco plants died or on termination of the arrangement and his exiting the property; that none of the 20 tobacco plants would be replaced if they died for whatever reason; and that there would be no more tobacco planted on the land after the harvesting of the existing 20 plants.

[11] The agreement provided that Mr Foote would relinquish his right to occupy the flat in the event he was away from the property for a prolonged period. This was defined as 7 days or more than 3 days a week for more than 2 weeks concurrently.

[12] There was a further clause regarding an alarm system in the caretaker’s flat and the agreement concluded with the two clauses reproduced below:

*“8. If either party caretaker/owner becomes dissatisfied with the terms of this agreement, they may terminate with six (6) weeks notice. Such notice will not be served by either party prior to 1st January ~~2012~~ 2013 (2012 was crossed out and 2013 written in and initialled)*

*9. If any new tobacco plants apart from the 20 already planted are found growing on the property the six weeks notice will take effect immediately and this agreement will terminate.”*

### **Issues**

[13] The issues for determination are:

- (i) Whether Mr Foote was an employee; and

- (ii) If so, when he became an employee;
- (iii) If he was an employee, whether he was dismissed; and
- (iv) If so, whether that dismissal was justifiable.

[14] Mr Foote's claim initially included the seeking of reinstatement to his position. During the course of the investigation meeting he revised his position on that, acknowledging that the current relationship between the parties had "*gone beyond the point of redemption*" and that reinstatement was no longer feasible.

### **The law and its application to the relationship between Mr Foote and Ms Leung**

[15] Section 6 of the Employment Relations Act 2000 (the Act) concerns the meaning of Employee and provides, at s.6(2):

*In deciding for the purposes of sub-section (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 decide the real nature of the relationship between them.*

[16] In order to determine the real nature of the relationship, the Court or 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.*

[17] An important case in determining the real nature of the relationship is the Supreme Court judgment in *Bryson v. Three Foot Six*.<sup>4</sup> The Court held (at para.[32]) that all relevant matters included the written and oral terms of the contract between the parties as well the way it operated in practice including any divergences from, or supplementation of, the written terms. The written intention of the parties was relevant, but not decisive, in determining the real nature of the relationship.

[18] How the relationship operated in practice was held to be crucial to a determination of its real nature. This could be determined by considering the elements of control and integration and whether the person contracted had in effect been working on his or her own account. The Employment Court (Full Court) in *Koia*

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<sup>4</sup> [2005] ERNZ 372

*v Carlyon Holdings Ltd*<sup>5</sup> observed that the real nature of the relationship could evolve to something quite different from that originally formed.

### **Was Mr Foote an employee?**

#### *The contract and the intention of the parties*

[19] Mr Foote said in the investigation meeting that neither the 2010 nor the 2012 agreement he signed with Ms Leung was, or was intended to be, an employment agreement. He viewed both contracts as contracts for service and had been content for the relationship to continue on that basis, if it had not been for what he perceived to be increased demands by Ms Leung. As previously noted, Ms Leung viewed the nature of the contract as a tenancy arrangement with work carried out in lieu of rent.

[20] I am satisfied from the evidence that neither party intended the relationship between them to be one of employment, or viewed it that way, until April 2013 when Mr Foote changed his view as a result of what he perceived as changes sought by Ms Leung to the nature of the relationship.

#### *Supplementary term to the parties' agreement*

[21] Mr Foote notes the weekly payment he received for his services as an indication of employment. Part of his claim is that the discrepancy between the payment he received and the value of the accommodation he enjoyed resulted in his being paid less than the minimum wage. This forms part of his wage arrears claim.

[22] Although the parties had a provision for free rental in their 2010 and 2012 agreements, they had a separate verbal arrangement whereby Mr Foote was paid \$30 a week for his services and he would pay \$30 a week for his accommodation. Each party had a different explanation for the payments, which effectively cancelled each other out. After questioning the parties about the arrangement I found Ms Leung's reasoning more compelling. She said that, because the property was held in the name of the Leung Family Trust, she needed to account to the Trust for activity relating to it. That required documentation regarding any use of the flat. She explained the dollar amount was not relevant as long as the incoming balanced the outgoing. It could have been \$100 per week coming in and \$100 per week going out, or even

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<sup>5</sup> [2001] ERNZ 585

\$500. The object was simply to record transactions between the parties for accountability purposes.

[23] I am satisfied this variation to the agreement was for purposes of achieving the accountability sought by Ms Leung and does not materially affect either the intention of the parties regarding the relationship between them or impact on the nature of the relationship.

*The nature of the relationship in practice*

[24] Mr Foote considers he was running his own business at the start of the relationship and for its first two years. He supplied equipment for the mowing of grass and other gardening work. He initially told the Authority the relationship had changed in October 2012 when he signed a new agreement with Ms Leung. During the course of the investigation meeting, however, he modified his position and said he continued to run his own business until 1 April 2013 when the relationship changed.

[25] He says Ms Leung demanded he work seven hours per week from 1 April 2013 in return for his low rental and she required him to account for the time he spent maintaining the grass and gardens on her property. Mr Foote says those demands were more related to an employment relationship than to a contract for services. He also claims Ms Leung wanted to change his duties as it suited her without having regard to the original agreement they had signed.

[26] Mr Foote's resistance to many of Ms Leung's demands led to the relationship between them deteriorating. This was evident from a series of recordings Ms Leung made of conversations between them, and emails from Mr Foote to Ms Leung regarding those conversations. It is not necessary for me to canvas those matters in detail but I note the involvement of Police on at least one occasion, as well as the Privacy Commissioner, the Tenancy Tribunal and, on appeal, the District Court in relation to tenancy matters.

[27] From 2010 to 2012 Ms Leung did not live on the property. She and her father lived in Wellington and would visit the property on Ms Leung's days off work, normally for two days at a time. Mr Foote's evidence suggests he enjoyed the company of Mr Leung with whom he discussed rose growing and tobacco cultivation.

[28] After Ms Leung's father moved overseas she began residing at the Otaki property. It was clear from the evidence of both parties that the breakdown of their relationship, which was obvious during the investigation meeting, began after Ms Leung's return around March 2013 from an extended trip overseas. She says she was concerned at the state in which she found her property and complained to Mr Foote about the knee-length grass that confronted her. She had other concerns which also adversely affected their relationship relating to the cutting and removal of hay in her absence which I do not find necessary to pursue further. Ms Leung was also concerned about the extent of Mr Foote's tobacco planting and the state of her vegetable gardens.

[29] Mr Foote's main concern over the change in the nature of their relationship appeared to be that Ms Leung wanted him to work seven hours per week. He thought this was unreasonable and impractical in view of the changing requirements of the work depending on the weather and the seasons. He claims that in the first two years of the 2010 contract he would frequently work far longer hours at some times of the year, for example in spring when grass and weeds were growing quickly. This would be balanced by shorter hours during the winter months when the grass did not grow as rapidly and the weather often did not permit mowing and gardening activities.

[30] From 1 April 2013 Ms Leung asked Mr Foote to note in her diary on a daily basis the work he had performed on the property. From June 2013 those details were recorded in a note book which both parties signed. Although Mr Foote initially welcomed the recording of time worked, the note book became a source of discontent for him and contention between the parties. He says it shows Ms Leung asserted control over the work he performed, including not only what work he did, but when he did it.

[31] Ms Leung disagrees and says the reason for introducing the diary, which was later superseded by the note book, was her dissatisfaction with the state of her property. She thought Mr Foote was not fulfilling his part of their agreement to mow the grass on the property in exchange for rental. Ms Leung denies this changed the nature of their relationship to one of employment and says she has the right to tell any contractor she engages to do work for her what she needs and when she needs it to be done.

[32] The terms of their contract were that she could expect up to seven hours per week on mowing and gardening, and garden-related activity. She said she was not concerned over the actual number of hours per week Mr Foote worked, and the seven hours was simply a guideline. She sought consistency in the way Mr Foote undertook work so there was an even standard of maintenance on her property.

[33] That was not happening while Mr Foote was doing a spurt of work followed by none over subsequent days or weeks. This sporadic activity was unsatisfactory because at times it resulted in her property being unkempt. Mr Foote was adamant he should decide when to do work on the property and Ms Leung was changing the nature of their agreement by insisting otherwise.

[34] With this background to the relationship in mind I now turn to the tests of control, integration, and the fundamental test to ascertain whether the relationship between Mr Foote and Ms Leung was one of employment.

#### *Control test*

[35] It seems their relationship gradually worsened after Ms Leung began living on the property. Mr Foote had enjoyed two years of living there with Ms Leung staying for only a short time each week. He was to a large extent autonomous in the mowing/maintenance work he did and the timing of doing it. After Ms Leung made the property her primary residence he was faced with her requests for greater consistency in the way he carried out that work. Mr Foote's evidence suggests he argued with her over her requests for work to be performed and refused to carry out some of those requests. Ms Leung's evidence confirms that.

[36] Ms Leung also had other concerns relating to matters that were either outside the agreement with Mr Foote, such as his use of a garage on the property, or not strictly in accordance with their agreement, such as the extent of his tobacco cultivation and drying. I find these were not relevant to the nature of their relationship although they undoubtedly caused friction in their relationship as property owner and tenant. It was apparent from Mr Foote's evidence that he considered Ms Leung's requests relating to these matters to be unreasonable and this affected his attitude towards her. These factors contributed to the increasing tension between the parties and to some unfortunate behaviour by them both. I find the main cause of the tension to be Ms Leung's dissatisfaction with the inconsistent state of her

property and Mr Foote's steadfast insistence on maintaining routines he had established since 2010.

[37] However, I am not persuaded by Mr Foote's assertion that Ms Leung's introduction of a diary/notebook for recording the property maintenance work he undertook signalled a change in the nature of the relationship between them. Nor am I convinced she required him to work seven hours each week as he asserts.

[38] I accept Ms Leung's evidence that the number of hours he spent on the property were not of major concern to her. What was of interest to her was the consistency with which he undertook his maintenance duties so that the grass was always reasonably short and neat. I find this does not indicate the element of control one would expect if the relationship were one of employment.

#### *Integration*

[39] Mr Foote was the only person (apart from Ms Leung) living on the property and undertaking work in exchange for rent. This is a situation similar to that considered by Judge Perkins in *Clark v Northland Hunt Inc*<sup>6</sup> where he noted at [46] that "*..with a single employee like this the integration test is not all that suitable as a test to be applied.*" I do not consider the integration to be helpful in this instance and will not consider it further.

#### *Fundamental test*

[40] The issue here is whether Mr Foote engaged himself to perform services for Ms Foote as a person in business on his own account. By his own acknowledgement he entered the relationship on that basis. He supplied the lawn-mowing and gardening tools necessary to fulfil his part of the agreement with Ms Leung. He paid for the repairs to that equipment.

[41] While there was no evidence Mr Foote used his tools on any property other than Ms Leung's, I find there was nothing to prevent him from doing so. By Mr Foote's evidence he has been engaged in lobbying activity for a specific cause during the years he has lived on the Leung property. His situation there has allowed him to devote time and energy to that cause without seeking remuneration from pursuing other work opportunities.

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<sup>6</sup> (2006) 4 NZELR 23 (EmpC)

[42] I agree with Mr Foote's assessment that he entered into a contractual relationship with Ms Leung as a person in business on his own account. I disagree with him that this changed. I find no evidence to support his claim that their relationship transformed to one of employment from 1 April 2013. In my view Mr Foote adopted the position that he was in an employment relationship with Ms Leung as a response to the increasing acrimony between them, much of which was due to tenancy issues.

[43] That strategy has proved successful in thwarting Ms Leung's attempts to move him off the property for the past year. From Mr Foote's evidence he has paid no rent to Ms Leung for several months and is performing no mowing or gardening services. In his words he is "squatting" on the property.

### **Conclusion**

[44] Mr Foote is not an employee and I have no jurisdiction to consider his claims further.

### **Costs**

[45] No issue of costs arises as neither party was represented.

Trish MacKinnon  
Member of the Employment Relations Authority