# Employment Court of New Zealand



## Fuimaono v Houia [2017] NZEmpC 63 (19 May 2017)

Last Updated: 23 May 2017

**IN THE EMPLOYMENT COURT WELLINGTON**

**[2017] NZEmpC 63**

**EMPC 283/2016**

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN HEATHER FUIMAONO First Plaintiff

AND MAHIA FUIMAONO Second Plaintiff

AND LEEANNE HOUIA Defendant

Hearing: 30 March 2017

(heard at Wellington)

Appearances: F Handy, counsel for the plaintiffs

A Knowsley, counsel for the defendant

Judgment: 19 May 2017

**JUDGMENT OF JUDGE B A CORKILL**

### Introduction

[1] Who is the correct employer? That is the question posed by a challenge brought by two persons who the Employment Relations Authority (the Authority) determined were the relevant employers, rather than a company of which they were the directors and shareholders.1

[2] Ms Houia was contacted by a former colleague, Heather Fuimaono, to work as a visiting teacher for an Early Childhood Education Service (ECES). Although Heather Fuimaono and her sister, Mahia Fuimaono, had incorporated a company

known as Kare-Fui Ltd (KFL), the Authority found that Ms Houia was unaware of

1 *Houia v Fuimaono* [2016] NZERA Wellington 126.



its identity.2 In those circumstances it was concluded that the two sisters were the employers rather than the company.3

[3] They were held to be liable for financial remedies arising from a constructive dismissal grievance which the Authority was satisfied had been made out.4

[4] Heather Fuimaono and Mahia Fuimaono brought a non de novo challenge to

the Authority's finding, limited to the question of the identity of the employer.

*The Authority's determination*

[5] The background to the relationship problem was described by the Authority in this way:5

[3] Ms Houia was engaged as Kaiako Tautoko – Visiting Teacher in November 2013. Her employer operated a home based early child education service. The employment was subject to a written agreement which, amidst other things contained the following clauses relevant to this claim. The employer was identified as Nga Taonga Tuku Iho i te wa Kainga (NTTI). Ms Houia was *Full Time* and was to work 37.5 hours a week. She would be paid a salary of $45,000 a year and be reimbursed for employment related expenses.

[4] It would be fair to say NTTI faced various difficulties and this resulted in some irregularity in the payment of Ms Houia's salary and instances of underpayment. This included a [six-week period] during which Ms Houia was not paid in April and May 2015 though there were promises this would be addressed at a later date.

[5] On 26 November 2015 Heather Fuimaono approached Ms Houia and advised the financial situation was such her hours were to be cut to 20 a week though this would be reviewed when the next [years'] funding was known in March 2016. The two also discussed continued failures regarding salary payments without resolution.

[6] Ms Houia was then given a form and asked to sign an acknowledgment she accepted the change to her hours. She refused and advised Ms Fuimaono accordingly.

[7] Ms Fuimaono accepts her response was *we are doing it anyway* though nothing further was said and Ms Houia was not aware the change had been actioned till she received a reduced pay at the end of December.

2 At [13] – [14].

3 At [15].

4 At [16] – [28].

5 (Footnotes omitted).

[8] Her response was to tender her resignation which she did by letter dated 9 January 2016. In it she gave notice and advised her last day would be 25 January though she did not say why she was leaving.

[9] Her departure had the effect of meaning NTTI could no longer fulfil various [obligations] to the Ministry of Education and as a result it no longer trades.

[6] Dealing with the issue of identity, the Authority found that although Nga Taonga Tuku Iho I te wa Kainga (NTTI) was identified as the employer in the written employment agreement, it was not a legal entity.6

[7] Ms Houia had described this as a trading name, whilst Heather Fuimaono and

Mahia Fuimaono considered that the label was a "service name".7

[8] Ms Houia had told the Authority she believed she was employed by Heather Fuimaono, who taught her during her early childhood teacher training and who approached her about the job.8

[9] Initially, Heather Fuimaono and Mahia Fuimaono disagreed, stating that they both employed Ms Houia. They later amended that assertion to say they employed Ms Houia in their capacity as shareholders and directors of KFL.9

[10] The Authority recorded that Ms Houia had stated that she had not heard of the company until it was mentioned at the investigation meeting, and had no idea it could possibly be her employer.10 Heather Fuimaono and Mahia Fuimaono had told the Authority that this evidence may not be correct, as they thought Ms Houia received some payslips which identified KFL. They also said that she had given teachers a document which identified KFL as a holder of an ECES licence from the Ministry of Education (the Ministry).

[11] They could not, however, provide either document to the Authority at the investigation meeting, and accepted in questioning that they could not guarantee that

6 At [10].

Ms Houia should have known of KFL's existence; nor could Heather Fuimaono say the issue was discussed during the interview process.11

[12] The Authority concluded that both Heather Fuimaono and Mahia Fuimaono employed Ms Houia. This finding was made having regard to their initial response that they were the employers, and their inability to provide any evidence that KFL was the employer.12 They were accordingly jointly and severally liable for the awards which the Authority went on to make.

[13] After considering the circumstances pertaining to the dismissal, the Authority determined that Heather Fuimaono and

i. $11,250 gross as recompense for wages lost as a result of the dismissal;

ii. $7,500 as compensation for humiliation, loss of dignity and injury to feelings;

iii. A further $18,726.82 gross being unpaid wages and holiday pay; and

iv. A further $2,385.20 being reimbursement of expenses payable pursuant

to Ms Houia's employment agreement.

[14] The Authority concluded that there was insufficient evidence to support the making of an order under s 131(1A) of the Employment Relations Act 2000 (the Act).14 This provision permits the Authority to order payment of wages or other money to an employee by instalments, but only if the financial position of the employer requires it.

*The pleadings*

[15] In the statement of claim which Heather Fuimaono and Mahia Fuimaono filed in this Court, it was asserted that the Authority's decision was wrong because Ms Houia's employer was KFL.

[16] In support of this assertion, they pleaded that KFL was a duly incorporated company, having its registered office at Porirua, and carrying on business as a childcare service. It held a licence from the Ministry, issued under the Education (Early Childhood Services) Regulations 2008 to run a childcare service and to receive government funding. The licence noted that the service provider was KFL and that the name of the service was NTTI.

[17] They alleged that Ms Houia was paid from a bank account operated by KFL. They also stated that it became liable to the Ministry to repay monies advanced to KFL when it closed the service. They said that KFL traded as NTTI and that each of them were directors of KFL.

[18] They pleaded that when Ms Houia was interviewed and when she signed an employment agreement in the name of NTTI, they were acting as agents of KFL.

[19] The statement of defence which was filed for Ms Houia pleaded that the

Authority reached the correct conclusion.

[20] It was denied that KFL carried on business as a childcare service and that KFL was Ms Houia's employer. Her pleading also stated that she had insufficient knowledge as to whether KFL was funded by the Ministry to operate a childcare service; she accordingly denied this allegation. She also denied that when interviewed, and when she signed the employment agreement in the name of NTTI, Heather Fuimaono and Mahia Fuimaono were acting as agents of the company.

[21] At the hearing, Mr Knowsley, counsel for Ms Houia, sought and obtained leave to amend the statement of claim so that alternative defences could also be raised.

[22] The first of these was to the effect that if KFL was found to be Ms Houia's employer (an allegation which was of course denied), Heather Fuimaono and Mahia Fuimaono were liable to pay as undisclosed agents of that company the awards made by the Authority in its determination.

[23] It was pleaded that this was because Heather Fuimaono and Mahia Fuimaono had held themselves out as contracting with Ms Houia, they had failed to disclose to her before she entered into the employment agreement that the employer was to be a company, or that the company was called KFL; they had failed to disclose to her after her employment commenced that her employer was KFL, and they failed to disclose their agency for the company.

[24] The second alternative ground of defence was based on s 25 of the Companies Act 1993 (the CA). This provision prescribes the manner and form by which a company must publish its name. It can also result in the imposition of civil liability on persons who issue or sign documents of obligation on behalf of a company which incorrectly states the company name or fails to state it altogether.

[25] In support of this assertion, it was pleaded that the employment agreement had failed to name KFL as a contracting party; that Heather Fuimaono and Mahia Fuimaono had written certain letters regarding the financial performance of their business to Ms Houia and on each occasion failed to refer to KFL; that they had issued information to Inland Revenue naming NTTI as Ms Houia's employer; and that they were thereby personally liable for the obligations of the company under s

25 of the CA, as they had failed to use the full, or any, name of the company in contractual and other documents issued and/or signed by them.

[26] The additional grounds of defence were, as I have mentioned, the subject of leave granted in the course of the hearing. It was regrettable that the applications made for Ms Houia were advanced at such a late stage, although informal notice of the s 25 contention had been given. However, an opportunity was offered and taken for additional evidence to be called on behalf of the plaintiffs before Ms Houia's case was opened. An opportunity was also provided for submissions to be given in

writing so that both parties had an opportunity to advance considered arguments on the basis of the legal points raised in the amended statement of defence.

*Evidence*

[27] In her evidence, Heather Fuimaono explained how she and her sister, Mahia Fuimaono, came to establish NTTI. She said the home-based childcare service was provided through KFL which was incorporated in July 2013. They were both directors and shareholders of that company. It held the ECES licence from the Ministry, who funded the service.

[28] The service needed a visiting teacher and Heather Fuimaono discussed this with Ms Houia, whom she already knew. She spoke Te Reo, which was relevant to the potential role. Heather Fuimaono said she told Ms Houia that the service had educators who worked from homes where groups of no more than four children were gathered. As a visiting teacher, Ms Houia would visit the homes, supervise the educators, recruit educators and children, and report on progress. The job required her to be registered as an early childhood teacher, a qualification which she duly obtained.

[29] Heather Fuimaono said that the form of Ms Houia's employment agreement had been sourced from another home-based ECES. The company name was not used in the agreement, as it was a Ministry requirement that they use a separate service name. Ms Houia was paid by KFL, as was evidenced by relevant bank statements and those payslips which were available.

[30] She went on to explain the financial difficulties which were encountered in operating the service. Because of low enrolments, funding which had been received from the Ministry had to be repaid. These circumstances had resulted in her and her sister having to borrow money in order to meet KFL wage expenses, including Ms Houia's salary. Ultimately, Ms Houia resigned.

[31] Heather Fuimaono said that she had used the word "tumaki" to describe herself, which was the Maori word for "director". She also said that Ms Houia herself had, in evidence, referred to the fact that after she had left NTTI due to non

payment of wages, she had sought advice and that her representative had begun looking into the nature of "the company". She also noted that Ms Houia had, when filing her relationship problem in the Authority, referred to her employer as being Heather Fuimaono and Mahia Fuimaono trading as NTTI, and not KFL, despite the reference to KFL on her payslips and bank statements.

[32] In cross-examination, Heather Fuimaono agreed that she had not told Ms Houia that her employer would be a company, prior to the employment. Later, she said that she may have used the word "company", but she may also have used the word "service", because she did not see the difference between these terms. However, she had not referred to KFL as such.

[33] Mahia Fuimaono gave evidence to similar effect. She did not think she told Ms Houia before she was employed that her employer would be a company; and to her knowledge no one else did either. She thought the name KFL might have come up in conversation after Ms Houia was employed, but she could not pinpoint when this might have occurred. Nor could she provide any detail as to what might have been said. She agreed that this was not evidence she had given to the Authority.

[34] Ms Houia, in her evidence, explained the commencement of her role at NTTI. She emphasised that at the meetings which occurred prior to her employment, no reference was made to KFL. She said that her understanding was that Heather Fuimaono and Mahia Fuimaono were her employers, using the trading name of NTTI. She said that was the name on the employment agreement which she signed. She also said that Heather Fuimaono and Mahia Fuimaono worked from their home.

[35] Originally, Heather Fuimaono was the manager and Mahia Fuimaono was the administrator although over time Mahia Fuimaono's role changed from administrator to director. Ms Houia said the two always referred to NTTI as being their business; at no time did either of them say to her that her employer was KFL. In correspondence which was sent to her regarding the financial difficulties of the business, the name KFL was not mentioned. She did, on occasion, notice that payslips referred to KFL, but this did not register with her as an issue. She said she

received most of her payslips after her employment ended. She also received from Inland Revenue a statement summarising her wages; this document identified NTTI as her employer.

[36] In cross-examination, she was taken to a formal document issued by the Ministry confirming that KFL was licensed to provide the home-based ECES. She was asked questions which focused on the legal proposition that KFL was licensed to

provide the home-based service, but she was not asked whether she saw the document when employed as a visiting teacher.

[37] She repeated her understanding that Heather Fuimaono and Mahia Fuimaono were her employers under the umbrella of NTTI.

[38] Asked about the references in her bank statements which showed KFL as having credited her wages, she said that this did not suggest to her that the company was her employer. Nor did she think the references to KFL on her payslips were significant. She confirmed that she had received about 12 payslips during the course of her employment, the first of which was received on 8 December 2013, which was some six days after she had signed her employment agreement.

**Submissions**

[39] Mr Handy, counsel for Heather Fuimaono and Mahia Fuimaono, submitted:

i. The Authority had correctly identified that NTTI was not a legal entity. ii. The formal documentation clearly established that NTTI was the

trading name of KFL.

iii. Although it may be the case that KFL was not mentioned to Ms Houia in the course of preliminary discussions or at any time by Heather Fuimaono or Mahia Fuimaono, it did not follow that they must therefore have been Ms Houia's employers. Nor did it follow that they were not acting as the directors and agents of the company.

iv. They were innocently unaware of the legal requirements for what they were doing. They acted without legal advice. Had such advice been received, the relevant documentation would have been clear.

v. They had no means of providing the ECES without funds from the

Ministry, who advanced the relevant monies to KFL.

vi. Ms Houia's evidence that she was unaware of the identity of KFL was unlikely, considering the payslips that she received, the name of the company as it appeared on her bank statements, and having regard to RS7, an "early childhood funding claim form". All of these documents bore the name KFL.

vii. The issue was not what Ms Houia believed but what constituted the correct facts; all the relevant information before the Court clearly established that KFL was in reality Ms Houia's employer.

viii. The employment agreement named NTTI as the employer, and it was signed by one of the plaintiffs on behalf of that entity. It was the trading name of KFL.

ix. This was not a situation where the law of undisclosed agency should apply or where s 25 of the CA should apply, since there had been no disadvantage caused by any apparent lack of awareness at the time the individual employment agreement was entered into.

[40] On behalf of Ms Houia, Mr Knowsley submitted:

i. The Authority had reached the correct conclusion.

ii. No evidence had been provided that Ms Houia knew KFL was her employer before her employment commenced.

iii. The only documents given to her which made reference to that name were her payslips and her bank statements; all that could mean to her was that KFL was the payer of her wages.

iv. The few payslips that were received during the term of employment –

12 only over two years – did not identify that entity as "employer", and payment of wages could not be determinative as to the identity of the employer. The individual employment agreement and all correspondence between Heather and Mahia Fuimaono on the one hand, and Ms Houia on the other, was in the name of NTTI; the existence of a company as the employer was never mentioned in relevant correspondence, nor named as such on any documents that were made available to Ms Houia.

v. If the Court were to conclude that KFL was indeed the employer, then the plaintiffs would be liable as principals who had not disclosed the fact of agency: *Kingi v Joseph (trading as) Grandview Builders*.15

Alternatively, s 25 of the CA should apply because the existence of the company had not been disclosed, and nor was the company name used in any material form: *Wilson v Bruce Wilson Painting & Decorating Ltd*.16

**Principles**

[41] There are many cases which have considered issues as to the correct identity of an employer. It will suffice to mention four of them.

[42] First, in *Hutton v Provencocadmus Ltd,* the Court stated:17

[78] Section 5 of the Employment Relations Act 2000 (the Act) defines an

"employer" as "a person employing any employee or employees". Section

6(1)(a) defines an "employee" as "any person of any age employed by an

employer to do any work for hire or reward under a contract of service. In

15. *Kingi v Joseph (trading as) Grandview Builders* EmpC Auckland ARC 73/03, 25 February 2004 at [11].
16. *Wilson v Bruce Wilson Painting & Decorating Ltd* [2014] NZEmpC 83, (2014) 11 NZELR 712, at [55].

17 *Hutton v Provencocadmus Ltd* (in rec) [2012] NZEmpC 207, [2012] ERNZ 566.

determining whether a person is employed by another person under a contract of service, the Court is required to determine "the real nature of the relationship between them".18 The Court must consider "all relevant matters, including any matters that indicate the intention of the persons" and is not to treat as a determining matter" any statement by the parties describing the "nature of their relationship" in making this assessment.19

[43] Secondly, in *McDonald v Ontrack Infrastructure Ltd*, the full Court confirmed that s 6 of the Act is not limited to determining issues of status (that is, whether a person is a contractor or an employee) but may be referred to in circumstances where the identity of an employer is in issue.20

[44] Thirdly, in *Mehta v Elliott (Labour Inspector)*, Chief Judge Colgan observed that the nature of the inquiry to be made in deciding who is an employer is as follows:21

[22] The question of who was the employer must be determined as at the outset of the employment. If that changed during the course of the employment, there must be evidence of mutual agreement to that change. Because Messrs Sheikh and Mehta give different accounts of who they believed employed Mr Sheikh, it is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties. Put another way, who would an independent but knowledgeable observer have said was Mr Sheikh's employer when he commenced employment?

[45] Finally, I refer to the dicta of former Chief Judge Goddard in *Xu v*

*McIntosh.*22 There, the Court stated:

[32] The law is quite straightforward. It is no doubt possible for directors and other agents to contract on behalf of companies or other principals without disclosing the identity of their principal. But it is necessary in all such cases that the fact of the agency should at least exist. There was no evidence to show that Naenae Auto Service Station Limited had authorised Mr Xu to enter into an employment agreement with the defendant on the company's behalf or that it had formed an intention to do so. It would not have required much evidence to establish this because the company was entirely controlled by Mr Xu. But there is a considerable difference between demonstrating that such an intention existed in August 2001 and asserting

3 years later that it had then existed. There is simply no evidence of it, and no evidence it was ever made clear to the defendant that she was contracting with a company called Naenae Auto Service Station Limited.

18 Employment Relations Act 2000, s 6(2).

19 Employment Relations Act 2000, s 6(3).

20 *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132, [2010] ERNZ 223 at [52].

21 *Mehta v Elliott (Labour Inspector)* [2003] NZEmpC 110; [2003] 1 ERNZ 451.

22 *Xu v McIntosh* [2004] NZEmpC 125; [2004] 2 ERNZ 448.

[46] These principles are of assistance when considering the present challenge.

**Analysis**

[47] I am satisfied that Ms Houia was not informed at the time she entered into her individual employment agreement that Heather Fuimaono and Mahia Fuimaono were agents for a company; or that KFL was to be her employer; or that the

proposed ECES, to be known as NTTI, was to be licensed under a company name and operated by that company.

[48] Not only was it the case that Ms Houia was not told that the employer would be KFL, but that entity was not referred to in the individual employment agreement which was presented to Ms Houia. It was signed by Ms Houia and Heather Fuimaono, with the employer being described as NTTI.

[49] Mr Handy submitted that NTTI was plainly a trading name for KFL. Whilst that may have been the case as far as the Ministry was concerned, no representation to this effect was made to Ms Houia.

[50] I find that the real nature of the relationship at its outset, as represented to Ms Houia, was that NTTI was the trading name of Heather Fuimaono and Mahia Fuimaono.

[51] I also observe, in terms of the dicta in *Xu*,23 that there is no evidence to show that KFL authorised Heather Fuimaono and Mahia Fuimaono to enter into an employment agreement with Ms Houia on the company's behalf or that the company had formed an intention to do so. As in that case, there is a considerable difference between an assertion now that this was intended to be the position and the circumstances as they existed in late 2013. No evidence has been presented to prove

that such an agency existed at the time.

23 *Xu v McIntosh*, above n 22, at [32].

[52] Reliance is placed by Heather Fuimaono and Mahia Fuimaono on the references to KFL, as contained in Ms Houia's bank statements and in the relatively few payslips which were presented to her.

[53] It was open to Ms Houia to conclude that a company known as KFL was the payer of her wages. However, having regard to all the information that had been given to her, the information on her bank statement and bank slips did not mean that she should have realised, and indeed agreed, that KFL was in fact her employer.

[54] The issue of the weight which should be attributed to the fact that KFL was paying her wages has to be assessed in the light of other important documents which were conveyed to Ms Houia. Inland Revenue recorded NTTI as being the employer which had made PAYE deductions for the duration of her employment. That was consistent with the description of employer in her individual employment agreement.

[55] There is no evidence that other documents that were referred to by Mr Handy were ever seen by Ms Houia. This applies, for instance, to the licence which was issued by the Ministry to KFL. A further document which was relied on was the early childhood funding claim form, as submitted to the Ministry, (a RS7 form); it did show KFL as being the relevant organisation for funding purposes. However, there is no evidence that Ms Houia ever saw this document, and indeed it was not put to her that she did.

[56] That Heather Fuimaono described herself as tumaki is not determinative either. I find that the term was consistent with Ms Houia's understanding that she was one of the two persons who were operating and directing the home-based childcare service.

[57] Also relevant is the informal nature and small scale of the business operation. The service was run by two individuals who were working from their home. This factor alone was consistent with the impression that the service was informal in nature and operated by two family members, rather than one which was underpinned by a formal legal structure such as a company.

[58] An objective assessment of all the circumstances of the employment relationship at its outset, undertaken with knowledge of all relevant communications between the parties, can only lead to the conclusion that Heather Fuimaono and Mahia Fuimaono were Ms Houia's employers for the purposes of the service they were operating under the trading name of NTTI.

[59] Alternatively, were it to be held that KFL was, as a mixed question of fact and law, the actual employer of Ms Houia because the company authorised Heather Fuimaono and Mahia Fuimaono to enter into the employment agreement, I would have considered this to be an appropriate case to apply the principles of undisclosed agency. These are conveniently summarised in Law of Contract in New Zealand as follows:24

Where an agent, having authority to contract on behalf of another, makes the contract in his or her own name, concealing the fact that he or she is a mere representative, the doctrine of the undisclosed principal comes into play. By this doctrine either the agent, or the principal when discovered, may be sued.

...

[60] An example of the application of this doctrine in this jurisdiction is found in the *Kingi* decision, referred to by Mr Knowsley.25

[61] At the relevant time, neither Heather Fuimaono nor Mahia Fuimaono referred to themselves as agents for KFL.

[62] Having regard to all the circumstances I have already summarised, I would have held that Heather Fuimaono and Mahia Fuimaono are liable under the doctrine of undisclosed agency.

[63] Given these findings, it is unnecessary to consider the application of s 25 of the CA.

24. John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at 605.

25 *Kingi v Joseph (trading as) Grandview Build*ers, above n 15, at [11].

**Conclusion**

[64] Although the Court has been presented with more information than was available to the Authority at the investigation meeting, I agree with its conclusion. Accordingly, the challenge is dismissed.

[65] The orders of the Authority therefore stand.

[66] I have received brief evidence as to the financial difficulties which arose following the collapse of NTTI. I reserve leave to Heather Fuimaono and Mahia Fuimaono to make an application under s 131(1A) of the Act. Any such application should be made, supported by appropriate evidence, within 14 days of the date of this judgment. If such an application is made, I shall timetable it for disposition.

[67] Costs are reserved. Counsel should attempt to resolve this issue informally. In the absence of an agreement, the defendant is to file submissions within 21 days, and the plaintiffs are to file submissions in reply within 14 days thereafter. Submissions should refer to the Court's Cost Guidelines, on a Category 2, Band B basis.

B A Corkill

Judge

Judgment signed on 19 May 2017 at 1.05 pm