

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 529
3264699

BETWEEN DOUGLAS FURSDON
Applicant

AND PAMELA PAUL
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in Person
 Michele Fyfe for the Respondent

Investigation Meeting: 3 September 2024 in Auckland

Submissions and/or further 3 September 2024 from the Applicant and from the
evidence Respondent

Determination: 04 September 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Douglas Fursdon, claims he was an employee whilst working for Pamela Paul, the Respondent, and that he is owed monies by Ms Paul.

[2] It is denied on behalf of Ms Paul that Mr Fursdon was an employee when working for her, or that he is owed any monies by her.

The Authority's investigation

[3] The Respondent Ms Paul is an elderly woman who was not able to attend the investigation in person due to her age, and was represented in this matter by her daughter, Michele Fyfe, who has authority to represent Ms Paul under an Enduring Power of Attorney.

[4] The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Mr Fursdon, and from Mr Robert Wati.

[5] The Authority received under oath or affirmation, oral evidence from Mr Gerald Hampton, an accountant (retired) and Mr Michael Fyfe, Ms Paul's son, on behalf of the Respondent, Ms Paul.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[7] The issues requiring investigation are whether or not Mr Fursdon:

- Was an employee or an independent contractor when working for Ms Paul?
If determined to be an employee:
- is owed any monies by Ms Paul?

Background

[8] Mr Fursdon established a sole trader carpentry and building business in 1995, although he said that business deregistered in 2017 and has been in the process of down-sizing since that time.

[9] Mr Fursdon first met Ms Paul on or about 2004. In the following years he was engaged by Ms Paul and her husband to carry out some building work on their property. The work Mr Fursdon undertook was quoted and invoiced, and the invoices were paid when they fell due for payment.

[10] In December 2018 Mr Fursdon said Ms Paul asked him to assist her by undertaking some lawn mowing. He said Ms Paul was applying for financial assistance from WINZ at that time and asked him to provide an invoice for the lawn mowing. As a result Mr Fursdon provided a quotation to mow four acres of lawn at \$400.00 per month and for weed trimming in the sum of \$50.00 per month.

[11] Mr Fursdon said Ms Paul provided him with an employment agreement, providing to the Authority a one page unsigned typed agreement which stated:

On Wed 30th January 2019 we entered into a contract whereby Doug is to mow the approx 3 acres of lawn and do gardening at the low clay embankment/retainer wall using the ride on mower and his own other lawn mower and helper slave Doug supplies all transport and fuel for the mowers and keeps the blades sharp.

In return for his services we agreed over the phone at the rate of \$600 per month.

OTHER LABOURHOUSE WORK: _

Doug will work for Pam at the rate of \$25 /hour and other person(s) will be paid \$18/hour.

[12] Mr Fursdon said he provided the lawn mowing services from December 2018 until November 2019. In addition to the lawn-mowing, Mr Fursdon said Ms Paul also asked him to undertake some ad hoc tasks including taking her to medical appointments and collecting items from stores.

[13] He said he issued invoices for all the tasks he performed, some were paid and some were not. The payments were always made in cash.

[14] Mr Fursdon said in carrying out the lawn mowing tasks he decided the days and the hours on which the work would be performed. He said he used Ms Paul's equipment; however I observe that the typed agreement set out that Mr Fursdon would use his own mower in addition to Ms Paul's ride on mower, and he would provide all transport and fuel for the mowers and be responsible for maintaining the equipment.

[15] Mr Wati appeared as a witness for Mr Fursdon. Mr Wati said he was also an employee of Ms Paul but did not have a written employment agreement.

[16] When questioned about what had been verbally agreed with Ms Paul, Mr Wati said he had never spoken to her. It was Mr Fursdon who informed him of the work he was to be carry out and who told him he would be paid at the rate of \$18.00 per hour.

[17] He said he worked for Ms Paul for a period of four months, however he did not receive any payment for the work he performed. When asked if he had spoken to Ms Paul about the non-payment, Mr Wati said all the arrangements and business discussions were between Mr Fursdon and Ms Paul, he had not spoken to Ms Paul directly.

[18] Mr Fursdon said the lawn mowing for Ms Paul came to an end in November 2019 when arrangements were made for her nephew to undertake that work. However he continued to perform the occasional ad-hoc task for Ms Paul for which he issued invoices for payment, the last occasion being 16 July 2021.

[19] In December 2021 Mr Fursdon brought a claim in the Disputes Tribunal for non-payment of invoices by Ms Paul. He was partially successful in his claim and was awarded a sum of money based on the unpaid invoices.

Was Mr Fursdon an employee or an independent contractor whilst working for Ms Paul?

[20] In proceeding to determine whether Mr Fursdon was employed by Ms Paul as an employee or engaged as an independent contractor I apply s.6 of the Employment Relations Act 2000 (the Act) which provides:

6 Meaning of employee:

- (1) In this Act, unless the context otherwise requires, **employee** –
 - (a) Means a person of any age employed by an employee to do any work for hire or reward under a contract of service ...
- (2) In deciding ... whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2)... or the Authority-
 - (a) must consider any relevant matters, including any matters that indicate the intention of the parties
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[21] In *Bryson v Three Foot Six Limited (No2)*¹ the Supreme Court stated the following:

All relevant' matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. "All relevant matters' equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test".

Contractual basis and common intention

[22] In *Cunningham v TNT Express Worldwide (NZ) Ltd*² the Court of Appeal established that the terms of a written contract must be placed at the forefront of consideration of the working relationship.

[23] While a written employment agreement is indicative of an employment relationship, the piece of paper which Mr Fursdon said was the employment agreement was unsigned by

¹ [2005] 1 ERNZ 372

² *Cunningham v TNT Express Worldwide (NZ) Ltd* [1993] 1 ERNZ 695

either party. It also does not meet the mandatory requirements set out in s 65 (2) of the Act regarding the terms a written employment agreement must contain.

[24] However there is no disagreement that Mr Fursdon was to provide regular lawn mowing services to Ms Paul. Whilst I take into consideration the written terms, I must also look at how the parties set out implementing their agreement to ascertain their intentions regarding the nature of their relationship.

[25] Mr Fursdon's evidence was that he had performed some building and maintenance jobs for Ms Paul and her husband prior to 2018. These had been invoiced and paid in accordance with the invoices. Mr Fursdon is not claiming he was an employee of Ms Paul's during that period prior to lawn mowing being undertaken.

[26] I understand Mr Paul was either very ill or had died by 2018 and Ms Paul was hoping to receive some financial assistance from WINZ. It was for this purpose that she asked Mr Fursdon to provide an invoice for her to provide in her application to WINZ.

[27] By 2018 Ms Paul was in her mid- to late- 80s and it is unclear whether or not she would have understood that Mr Fursdon was discussing a fundamental change in their relationship from that of an independent contractor providing services to her on the same basis as previously whereby he provided invoices for work he carried out, or that they were entering into an employment agreement whereby he provided her with service to be remunerated at an hourly rate of \$25.00.

[28] For that reason I am not convinced that there was a common intention to enter into an employment relationship in 2018.

[29] Looking at how the relationship operated in practice, Mr Fursdon was not paid wages into his bank account but continued to be paid upon production of an invoice, he paid his own ACC contribution and continued to have his accounts and tax return professionally prepared on the same basis as previously.

[30] In regard to the work performed, Mr Fursdon's evidence was that he had flexibility to decide the hours and days on which he would perform the gardening and other ad hoc services. This degree of flexibility is more indicative of a contractor arrangement. He also instructed Mr Wati what work was to be carried out by him and when.

[31] While Mr Fursdon used a piece of equipment owned by Ms Paul, it is clear from the evidence of the written agreement that he supplied other equipment and his own transport. I find this equipment supply factor is therefore not indeterminate of the relationship. I consider

it more strongly indicates an independent contractor relationship than an employment relationship.

[32] Considering all the circumstances, I find the manner in which the relationship operated to indicate a contractor relationship rather than an employment relationship.

Control and Integration

[33] In examining whether Mr Fursdon was an employee or an independent contractor whilst working for Ms Paul I have found that the evidence establishes that Mr Fursdon had flexibility in carrying out the gardening services for Ms Paul. There were no set parameters to a working day or week, and it was for Mr Fursdon to determine these and he would invoice Ms Paul for the work performed.

[34] It does not appear that Ms Paul issued instructions as to the manner of Mr Fursdon performing the lawn mowing work, nor is there any evidence that she supervised him.

[35] In respect of the control by Ms Paul, the evidence is that Ms Paul required lawn mowing services, but Mr Fursdon operated in an autonomous manner, engaging the services of Mr Wati to assist him.

[36] I find that these circumstances are indicative of a contractor relationship. However they have to be balanced against considerations of contractual intention between the parties and examination of the question of whether Mr Fursdon was in business on his own account, the fundamental test.

The Fundamental Test

[37] During the time he was engaged by Ms Paul, Mr Fursdon provided her with invoices for which he received cash payment.

[38] Mr Fursdon denied having or receiving monies from other clients during the time he was working for Ms Paul. However I note that his evidence was that Ms Paul paid him in cash, and it is possible that other clients did so also.

[39] Whether that is the case or not, an annual report produced by Mr Fursdon's accountants for the financial year ended 31 March 2019 shows trading income of \$2,769.00 from carpentry. There is no income from lawn mowing or other gardening services shown. This would support the conjecture that Mr Fursdon did perform work for other clients during the period he was working for Ms Paul.

[40] An invoice provided by Mr Fursdon to Ms Paul notes a “blue van’ as a credit against the invoice total. Mr Fursdon’s evidence was that this was a van he acquired from Ms Paul and he then deducted the purchase price as part payment against the invoice total. Employees do not receive or usually accept goods as part payment against their wages.

[41] Mr Fursdon’s bank statements show as a deposit payment of Covid subsidy made by the Ministry of Social Development (MSD) on 9 April 2020. The payment was received by Mr Fursdon. An independent contractor could make a claim for a Covid subsidy payment. Whilst this payment post-dates the lawn mowing employment period with Ms Paul, I find it to indicate that Mr Fursdon was still operating as an independent, self-employed person at that date as he had prior to the alleged employment with Ms Paul.

[42] Mr Wati claimed he also was employed by Ms Paul, however I find his evidence confirmed that he was engaged by Mr Fursdon in the nature of a sub-contractor to assist Mr Fursdon in the contract he (Mr Fursdon) had accepted for provision of lawn mowing services for Ms Paul.

[43] It was Mr Wati’s evidence that Mr Fursdon made all the arrangements for his working on her property with Ms Paul, Mr Fursdon who issued instructions to him, and it was Mr Fursdon he expected to raise the issue of his non-payment with Ms Paul.

[44] Having considered all the circumstances, I determine that Mr Fursdon was in business on his own account and working an independent contractor whilst working for Ms Paul.

[45] As such, I am unable to assist him further.

Costs

[46] Costs are reserved. While costs are reserved, I note here that, subject to submissions, Ms Paul was represented by her daughter, and it is therefore unlikely there are grounds to claim a contribution to any fair and reasonable costs.

[47] However if Ms Fyfe incurred any legal or professional assistance in preparing the case for the Authority, a contribution to those costs may be awarded upon production of an invoice.

[48] Mr Fursdon will have 14 days from the date of any application by Ms Fyfe to file a submission in response