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Houkamau v Tango (Auckland) [2016] NZERA 274; [2016] NZERA Auckland 236 (8 July 2016)

Last Updated: 30 November 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 236
5599681

BETWEEN MOANA HOUKAMAU Applicant

A N D JOANNE TANGO Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Thuzar Henry-Win, Advocate for Applicant

Paul Blair, Advocate for Respondent

Investigation Meeting: On the papers

Submissions Received: 4 May 2016 from Applicant

17 May 2016 from Respondent

Date of Determination: 8 July 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Moana Houkamau, claims that she was unjustifiably dismissed by the respondent, Ms Joanne Tango, on 28 September 2015.

[2] Ms Tango accepts she terminated the relationship with Ms Houkamau but denies that this termination amounted to a dismissal as there was no employment relationship in existence.

The Authority's investigation

[3] With the consent of both parties, the Authority was requested to investigate and determine the employment relationship problem "*on the papers*".

[4] Ms Houkamau filed sworn affidavits in the Authority on 24 May and 22 June

2016. Ms Tango filed sworn affidavits on 16 May and 13 June 2016. Following a request by the Authority, Ms Houkamau filed details from the Inland Revenue Department (IRD) of her earnings during the relevant period.

[5] Representatives for both parties filed helpful submissions in the Authority.

[6] As permitted under [s.174E](#) of the [Employment Relations Act 2000](#) (the Act), this determination does not set out all the evidence. The determination states findings and relevant facts and legal issues and makes conclusions in order to deliver speedy, informal and practical justice.

The issue

Was there an employment relationship between Ms Tango and Ms Houkamau?

[7] The issue for the Authority to determine is whether Ms Houkamau and Ms Tango were parties to an employment relationship.

Ms Tango's car accident

[8] Ms Tango was involved in a serious car accident on 13 December 2005 (the accident). Prior to the accident, Ms Tango was a registered nurse. Following the accident, Ms Tango's mobility was severely impaired and she was no longer able to work. Ms Tango also required assistance with her personal care.

Personal care

[9] Ms Tango received an entitlement under the social rehabilitation provisions (s.81) of the [Accident Compensation Act 2001](#) (ACC Act). This entitlement included "attendant care" commonly known as caregiving services.

[10] Upon receipt of payment by ACC for caregiving services, Ms Tango passed on payments to her caregivers.

Ms Houkamau's engagement as a caregiver

[11] Ms Houkamau was introduced to Ms Tango through her mother who had previously provided personal caregiving services to Ms Tango. Ms Houkamau was one of Ms Tango's carers from 15 March 2014 to 28 September 2015.

[12] Ms Houkamau was one of approximately 5 or 6 carers who provided personal caregiving services to Ms Tango.

[13] Ms Houkamau normally provided services to Ms Tango at her home on Mondays, Tuesdays and Thursdays from 4pm to 11pm and on Fridays from 11pm until 8am weekly. Ms Houkamau also volunteered at the Rotorua Baptist Church.

[14] Personal care included toileting, cleaning, changing clothes and giving Ms Tango her medication. Ms Houkamau also did housework including vacuuming, emptying rubbish, cleaning and any errands which were required to be done.

Termination

[15] On 28 September 2015, Ms Houkamau says she saw Ms Tango's daughter hit Ms Tango's granddaughter. Ms Houkamau telephoned the Police about the incident. Following the phone call, Ms Tango says she could no longer have Ms Houkamau as one of her personal carers.

[16] Ms Houkamau says Ms Tango's decision not to continue using her as one of her personal carers was action that amounted to a dismissal. Ms Houkamau says the dismissal was both procedurally and substantively unjustified.

[17] Ms Tango says there was no dismissal because Ms Houkamau was an independent contractor.

ACC documentation

[18] Ms Tango has attached to her affidavits, relevant documentation regarding ACC payments and PAYE deductions.

[19] Appendix A to Ms Tango's affidavit of 16 May 2016, is information from ACC to its clients such as Ms Tango and to those who provide personal care to ACC clients, such as Ms Houkamau.

[20] The introductory paragraphs to the ACC documentation state:

Tax and payment information for clients and carers

Although we can either pay you or your carer directly, there are a few things you will both need to know about tax and ACC levies. ...

Getting paid

There are two things you need to do to get paid:

- Complete and return the ACC 84 how would you like us to pay for your care? form to let us know who you would like to pay. We will need this form for each carer looking after you or any time you change carers if they are being paid directly.*
- Each week, complete and return an ACC 86 weekly care summary form.*

[21] ACC's information in Appendix A, goes on to explain a client's responsibilities if ACC pays the client first. Information provided includes that the client (Ms Tango) is to keep accurate records for 7 years:

- of how much the client received for each ACC payment and on what date,
- the name of each caregiver (Ms Houkamau) the client paid, when and how much was paid,

The client is also informed of the requirement at the end of the financial year to fill out and return an IR3 form to the IRD attaching payments made to the carers. Notably, the form states:

Carers are not employees

It is important to remember that family/whanau members and private individuals who provide Home and Community Support Services are not 'employees' of you or ACC. Instead of being an 'employee' your

carer is working under what's called a 'contract for services' and receives 'scheduler payments' that have the tax code WT. This means

they are responsible for managing their own leave or sick leave and accountable for their own income tax and ACC levies.

[22] ACC is responsible for the deduction of tax on payments before payments are made either to the client or directly to the carer. There is also information about GST payments for carers who are GST registered.

[23] In addition to this information from ACC, Ms Tango has attached to her affidavit a number of weekly care summary forms (ACC 86 forms) which set out the weekly care received by her from Ms Houkamau during the relevant period.

[24] In practical terms, Ms Tango fills out an ACC 86 form each week detailing the type of personal care she has received, the hourly rate payable and the total amount payable to Ms Houkaumau for the whole week.

[25] Upon receipt by ACC of the ACC 86, Ms Tango is paid directly by ACC in respect of the personal care she has received from Ms Houkamau and other

caregivers. Ms Tango then pays the entire entitlement from ACC to Ms Houkamau and other caregivers.

[26] Ms Tango has attached her bank statements recording payments received by her from ACC and payments made by her to caregivers. Ms Tango has a number of caregivers at any one time.

Was there an employment agreement between the parties?

[27] There was no employment agreement entered into between the parties. Ms Houkamau says that she worked solely for Ms Tango and other work was of a voluntary nature.

Financial considerations

[28] Ms Tango says that she was aware that ACC took deductions out of payments before they were paid to Ms Tango and understood that her tax liability was accordingly met.

[29] The records from IRD provided by Ms Houkamau to the Authority detail Ms Houkamau's "employer or payer" at the relevant times to be "Work & Income Benefits" and "ACC". Ms Tango is not listed as an employer or payer.

Ms Houkamau's claims

[30] Ms Houkamau's representative submits that Ms Houkamau was an employee because:

- (a) She had to complete tasks that a homecare worker would be required to do;
- (b) She played an integral part in supporting and assisting Ms Tango with homecare duties as well as personal duties;
- (c) She worked set days and set hours weekly;
- (d) She was unable to work elsewhere, she had to work at Ms Tango's house;
- (e) She did not supply her own tools; and
- (f) She fully believed that she was entering into an employment relationship when she began homecare work for Ms Tango.

Ms Tango's response

[31] Ms Tango says she understood that Ms Houkamau was at all times an independent contractor, there was no employer/employee relationship between Ms Tango and Ms Houkamau and that upon receipt of ACC entitlement payments from which ACC had deducted PAYE, she simply passed them on to Ms Houkamau.

Determination

[32] I have considered the law that applies to determine the status of an arrangement, the parties' positions and the evidence filed. Having done so, I conclude that Ms Houkamau was, as claimed by Ms Tango, a contractor¹.

[33] I reach this conclusion for a variety of reasons.

[34] Ms Houkamau provided personal care services to Ms Tango who required the services because of her disability from a serious car accident.

[35] The rehabilitation entitlement under the ACC Act payable to Ms Tango was transferred by her in full to Ms Houkamau. The ACC rules and its forms, make it clear that carers are not employees of clients or of ACC. Rather, carers are contractors responsible for their own annual leave, sick leave and are accountable for their own income tax and ACC levies.

[36] ACC payments were made by ACC to Ms Tango who then passed those ACC payments on directly to Ms Houkamau. Ms Houkamau was not paid holiday pay or sick pay and there is no evidence she asked to be paid as such. The IRD records confirm payments were made by ACC to Ms Houkamau, not by Ms Tango.

[37] The intention of the parties in my view was that there was no employment relationship, rather Ms Houkamau was one of a number of personal carers who

provided personal care services to Ms Tango pursuant to a contract for services.

¹ *Three Foot Six Ltd v. Bryson* [2005] NZSC 34

[38] The ACC documentation makes it clear that the personal carer is not an employee of either ACC or ACC's client (such as Ms Tango), rather they are contractors responsible for their own holidays and sick days.

[39] As submitted on behalf of Ms Tango, participants are informed by the ACC that people who provide personal care services are not employees. This information is publicly available and confirms that Ms Houkamau was in fact a contractor and not an employee. That was the intention of the parties in my view.

[40] It is my conclusion that Ms Houkamau was engaged as a contractor by Ms Tango. Her claim of unjustified dismissal must therefore fail and she is not entitled to bring a personal grievance.

Costs

[41] Costs are reserved.

Anna Fitzgibbon

Member of the Employment Relations Authority

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