

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2019] NZERA 644
3061352

BETWEEN KAHU JACKSON
 Applicant

AND AUCKLAND DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: David Feist, Advocate for the Applicant
 Shan Wilson, Counsel for the Respondent

Investigation Meeting: On the papers

Additional documents : 29 October 2019 from Respondent
received:

Determination: 8 November 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Kahu Jackson alleges he was employed by Auckland District Health Board (ADHB) in the food services area as an Assistant. She claims that in or about January 2019 she was unjustifiably dismissed. ADHB deny that Ms Jackson was its employee.

The Authority's process

[2] The Authority has had no contact from the Applicant or her representative, David Feist, since the Statement of Problem was lodged. This is despite a number of emails being sent by the Authority to Mr Feist at the email address listed for service on the Statement of Problem that he lodged on Ms Jackson's behalf.

[3] By minute dated 4 October 2019 the Authority proposed that the issue as to whether Ms Jackson was employed by the ADHB be addressed as a preliminary matter on the papers. A proposed timetable provided that Ms Jackson was to provide

affidavit/s in response to the preliminary issue by 14 October 2019, with the ADHB filing its affidavits by 29 October 2019. Neither party objected to the proposal made by the Authority however Ms Jackson failed to provide any affidavit or supporting documentation. No explanation was provided.

[4] As permitted by 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 but has not recorded all evidence and submissions received.

The preliminary issue

[5] The preliminary issue requiring investigation and determination is whether there was an employment relationship between Ms Jackson and the ADHB?

[6] To determine this issue I must first decide whether or not Ms Jackson falls within the definition of employee under s 6(1) of the Act. This involves a consideration of the real nature of the relationship between the parties. This assessment includes considering all relevant matters, including any matters that indicate the intention of the persons.

[7] The Supreme Court in *Bryson v Three Foot Six Limited (No. 2)* addressed what “all relevant matters” in s 6(3) (a) of the Act means.¹ It said:

“All relevant matters’ certainly include 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 the 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 require the Court or 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 at common law ... ”

Analysis

[8] For reasons that will become apparent, I am satisfied that Ms Jackson was not employed by the ADHB.

¹ [2005] ERNZ 372.

[9] First, there was no evidence of any intention for Ms Jackson to be employed by the ADHB. The uncontested evidence was that Ms Jackson was employed by Compass Group New Zealand Limited (Compass). Compass contracts to ADHB to provide food services and has done so since 18 December 2014. Compass engages its own staff to undertake these services for the ADHB.

[10] In an email from Compass to the Authority dated 6 August 2019 its General Manager advised:

It has come to our attention that a personal grievance case (Kahu Jackson and Auckland District Health Board) which has been filed in the Authority may have cited the incorrect employer - although Compass Group NZ has no prior record of a PG being raised by or on behalf of this former employee.

[11] Thereafter, on 27 September 2019, Compass' General Manager confirmed in an email to the ADHB that Ms Kahu was an ex-employee of Compass and that he had "advised the ERA of that fact some weeks ago".

[12] Second, there was no evidence of any control or supervision exercised by the ADHB over Ms Jackson's daily work. The uncontested evidence was that ADHB did not exercise any control or supervision over Compass' employees including Ms Jackson. In an affidavit filed on the ADHB's behalf its Acting HR Director deposed:

Compass is entirely responsible for management of the employment relationships with its employees (including Ms Jackson). This includes being responsible for all aspects of Ms Jackson's pay and leave.

[13] Third, there was no evidence that the work performed by Ms Jackson was an integral part of the business or that she had effectively become "part and parcel" of the organisation.

Finding on Issue 1

[14] Standing back and looking at the matter overall I conclude, on the balance of probabilities, that Ms Jackson was not employed by the ADHB. The Authority does not therefore have jurisdiction to hear her claim against the ADHB.

Costs

[15] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[16] If they are not able to do so, and an Authority determination on costs is needed the ADHB may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms Jackson will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[17] The parties' attention is drawn to the separate notice of direction that includes information required by the Authority to determine the issue of costs.

Outcome

[18] The outcome that I have reached is:

- a. Kahu Jackson was not employed by the Auckland District Health Board. Her claim against this entity is dismissed.
- b. Costs are reserved.
- c. The parties' attention is drawn to the separate notice of direction that includes information required by the Authority to determine the issue of costs.

Jenni-Maree Trotman
Member of the Employment Relations Authority