

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 470
5334589

BETWEEN ADRIANNA PENNEY
Applicant

AND DEBORAH JEANNE
HAMBLBY
Respondent

Member of Authority: R A Monaghan
Representatives: A Penney in person
D Hambly in person
Investigation Meeting: 25 July and 24 August 2011
Submissions received: 31 August and 20 September 2011 from applicant
7 September 2011 from respondent
Determination: 31 October 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Adrianna Penney says her former employer, Deborah Hambly, dismissed her unjustifiably and owes wages and holiday pay to her.

[2] Ms Hambly says she and Ms Penney were not in an employment relationship, rather Ms Penney was self-employed.

[3] The Employment Relations Authority can hear and determine only matters arising out of an employment relationship. Accordingly this determination addresses as a preliminary issue whether Ms Hambly and Ms Penney were in such a relationship.

Background

1. Introduction

[4] In August 2010 Ms Hambly began seeking someone to care for her two-year old daughter Marama while she was at work.

[5] At the suggestion of a solicitor, who was acting in Marama's interests in another matter, she approached WINZ regarding the possibility of obtaining subsidised assistance. WINZ in turn referred her to BJ's Homebased Childcare Services Limited (BJs).

[6] BJs is a private provider of educational and childcare services. It provides these services by arranging for educators or carers to work at private homes, being the educator's - or as happened here the child's - own home. Services of this kind are regulated by the Education (Home Based Care) Order 1992, which contains a code of practice, as well as being subject to early childhood regulations and licensing criteria. Home based services are eligible for Ministry of Education funding provided they comply with the Ministry's requirements, and are subject to review by the Education Review Office. Educators or carers must be supervised by a qualified co-ordinator.

[7] BJs obtains its income in the form of funding, being funded at a rate per hour per child cared for. The funding rate is not the rate paid to the educator or carer, which in effect (and subject to applicable subsidies) the parent pays.

[8] Ms Hambly duly approached BJs. At or about the same time she encountered Ms Penney, whom she knew because both worked at the same school. Ms Hambly told Ms Penney she was looking for someone to care for Marama. A few days later Ms Penney contacted Ms Hambly to suggest that she care for Marama, and the women agreed to meet to discuss the matter.

2. The 24 August meeting

[9] The meeting went ahead at Ms Hambly's home on 24 August 2010. Ms Penney was introduced to Marama and shown around the house. Because Ms Hambly

started work early, and Ms Penney lived some distance away and was considering a move, the two agreed that it would be convenient if Ms Penney lived-in. Ms Penney would have the use of a vehicle, and be provided with food and accommodation.

[10] The rate of pay was discussed, although the agreed rate is now in dispute.

[11] The parties are also in dispute about whether rent was payable for the accommodation.

[12] Thirdly, although Ms Penney says the agreement was that she work for 50 hours per week, from Sunday to Friday afternoon, Ms Hambly says that was the arrangement recorded with BJs in the course of the subsequent attempts to clarify payment arrangements but does not reflect the hours Ms Penney actually worked. In particular Ms Hambly says Ms Penney's hours were less than 50 per week and were irregular. She also says Ms Penney engaged in personal activities during the day, and had other income streams.

[13] Ms Penney denied that her personal activities were as extensive as Ms Hambly described. For my part I find Ms Penney did engage in personal activities from time to time, but the nature of her duties meant that there was no general prohibition on her doing so. Accordingly the point is of limited assistance in determining the true nature of the legal relationship between the parties, although whether Ms Penney exceeded acceptable boundaries in the context of the performance of her contract or employment agreement (as the case may be) is a different question.

[14] Ms Penney said Ms Hambly undertook to prepare an employment agreement which was never provided. Ms Hambly denied undertaking to prepare a written employment agreement, but I consider it likely that she made at least generalised references to the provision of a written agreement. An agreement was subsequently provided by BJs, as I discuss later in this determination.

[15] A few days later Ms Penney moved into Ms Hambly's home and began caring for Marama.

2. Ms Hambly's arrangements with BJs

[16] Ms Hambly proceeded to confirm her arrangements as a parent with BJs, and completed an application form for registration as a parent on 7 September 2010. The start date was backdated to 31 August 2010.

[17] The form indicated that educators were usually paid by BJs who in turn charged the parent. In practice educators would provide a timesheet to BJs, who would then invoice the parents. Subject to arrangements regarding any subsidy the parents would pay BJs the agreed fee, which BJs would remit to the educator. BJs would also collect the applicable subsidy and pass it on to the educator as part of the payment remitted to the educator.

[18] BJs' and WINZ' administrative procedures meant there would be a time lag before Ms Penney was paid. Ms Hambly arranged with BJs to pay Ms Penney directly until the procedures were in place and payment could be made according to them. Unfortunately that led to confusion later, with double payments occurring as well as a lack of clarity over the mechanism by which Ms Hambly would obtain the benefit of the childcare subsidy. That confusion is relevant in Ms Penney's claim for unpaid wages.

[19] In general the application form addressed a number of matters, including:

- . contact details of the parent, guardian and an emergency contact;
- . medical information about the child;
- . access to early childhood education, not applicable here because of Marama's age;
- . optional charges, not applicable here because the associated service was not sought; and
- . numerous provisions giving permission for BJs or the educator to act in the absence of the parent in specified circumstances, which are consistent with BJs obligations as a provider of childcare services;
- . the fee agreement with BJs, which included a provision that BJs would attempt to find a replacement educator in the event the educator was unavailable; and
- . the parent's obligations in respect of the payment of BJs' accounts.

[20] In addition BJs conducted police checks of new educators, although in a note dated 15 September 2010 Ms Hambly waived that requirement on the ground that Ms Penney was 'already employed'.

[21] Pursuant to BJs' obligations to the Ministry of Education as a provider of educational and childcare services, a co-ordinator employed by BJs conducted a health and safety check of Ms Hambly's home on 7 September 2010.

4. Ms Penney's arrangements with BJs

[22] At the same time as she completed the health and safety check the co-ordinator, Sandy Rankilor, interviewed Ms Penney for engagement as an educator with BJs. Ms Penney said that was when she first became aware of BJs' involvement, and I accept that as likely. According to Ms Penney, Ms Rankilor told her that the information being sought was necessary so Ms Hambly could obtain a childcare subsidy. Ms Rankilor explained that subsidies were available through WINZ, and told Ms Penney that these matters were between BJs and Ms Hambly. She said in evidence that Ms Penney was employed by Ms Hambly, and while that may have been her understanding it is not determinative of the matter now before the Authority.

[23] Ms Penney said at the investigation meeting that Ms Rankilor also provided her with copies of 'BJs Homebased Childcare Services Policies' and an 'Educator Pamphlet'.

[24] Both of these documents set out BJs' requirements and obligations in some detail. The policy document included reference to: the completion of an Open Polytechnic course; a performance appraisal procedure; a complaints procedure; several policies concerned with standards for and practical aspects of the care of a child; and information about procedures for the payment of fees by parents. The educator pamphlet was briefer and contained a summary of BJs' services, the benefits of being an educator, remuneration arrangements (which included the statement *Educators do not pay any PAYE*), and a summary of administration requirements.

[25] Ms Rankilor also gave Ms Penney a copy of the 'BJs Homebased Childcare Services Ltd Educator's Contract' to take away and read.

[26] Finally, Ms Rankilor had with her an 'educator application form', which she went through with Ms Penney as part of the interview on 7 September.

[27] The form included the following question:

27 If your application is accepted you will be contracted to BJs and will be classed as 'self employed' by the Inland Revenue Department. Therefore there will be no PAYE/Remuneration for Public Holidays/Annual Leave and Sick Leave. Public liability insurance will be deducted at \$10 a week for the first 6 weeks and every year after that. Are you ok with this? Yes No

[28] The answer, 'No' was circled. Ms Penney did not recall why but Ms Rankilor said the answer related to the deduction of the payment for public liability insurance. Holding such insurance is a feature of self-employment. Ms Penney queried the deduction in respect of the insurance, and as Ms Rankilor was uncertain of the answer she was to follow up with BJs. Ms Rankilor said further in evidence that it was her understanding Ms Penney and Ms Hambly would make their own leave arrangements so she did not discuss the rest of the question with Ms Penney.

[29] Further to the matter of public liability insurance, Ms Rankilor said she was told Ms Hambly would pay it. Although Ms Rankilor was not certain of who told her that, there was no suggestion that it was Ms Hambly. Ms Hambly herself was unaware of the associated exchanges and did not make any representation to anyone to the effect that she would make the payment.

[30] This series of events is most unfortunate. Ms Penney has relied heavily on her understanding that the arrangement with BJs was made in order simply to facilitate Ms Hambly's access to a subsidy. If any representation to that effect was made to Ms Penney, then it was made by Ms Rankilor and not by Ms Hambly. Ms Rankilor did not make the representation on the basis of anything Ms Hambly had said or represented to her. The representation, if made, did not determine the legal nature of the relationship between Ms Penney and Ms Hambly.

[31] After the meeting Ms Rankilor wrote to Ms Penney to say her application had been successful.

[32] On 27 September 2010 Ms Rankilor visited again in order to complete the health and safety check of Ms Hambly's property, as some minor matters required attention.

[33] The written BJs 'educator's contract' which Ms Rankilor had provided to Ms Penney was signed by Ms Penney and BJs' representatives on 20 October 2010. The contract began:

BJs Homebased Childcare Services is your subcontractor and you are guided and required to maintain your role within BJs Homebased Childcare Services Ltd Policies and Procedures and the Ministry of Education.

[34] The parties to the document were expressed to be BJs Homebased Childcare Services Ltd and Ms Penney. The document set out various obligations under the headings: accountability (including the preparation and forwarding of timesheets, and provisions relating to the termination of the agreement); performance and professional practice; learning and development (including attendance at certain courses); health and safety; and toy library. Public liability insurance and attendance at an early childhood education course were also requirements. The contract also recognised that the educator could collect payment directly from a parent, as Ms Penney did, in which case BJs would reimburse only the subsidy.

[35] Despite signing the contract, Ms Penney said she understood throughout that the arrangement between Ms Hambly and BJs was for the purpose of obtaining a childcare subsidy and did not concern her.

5. Subsequent events

[36] In November 2010 BJs paid an Open Polytech fee for a course in early childhood education which Ms Penney was obliged under her contract with BJs to undertake. Ms Penney did not undertake the course because she was no longer caring for Marama when the course commenced.

[37] Also in or about November the confusion about payment, as well as uncertainty about Ms Penney's liability to pay rent, crystallised. One aspect of the confusion concerned deductions in respect of tax. BJs' managed its educators' tax

liabilities on the basis of the IRD's 'Determination SET 09/02 Standard cost household service for childcare providers'. The determination assumes that the educator is self-employed. There was some uncertainty over the application of the determination when the educator lived in the child's home, although BJs was able to confirm with the IRD that Ms Penney's tax position would be addressed under the determination.

[38] Accordingly for tax purposes Ms Penney was not treated as Ms Hambly's employee. Determinations of the Commissioner of Inland Revenue are not binding on the Employment Relations Authority for employment law purposes, although taxation arrangements are relevant to this employment relationship problem as part of the overall factual matrix.

Determination

[39] Section 6 of the Employment Relations Act 2000 provides in part:

(2) In deciding ... whether a person is employed by another person under a contract of service, the ... Authority ... must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2) the ... Authority –

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as determining any matter any statement by the persons that describes the nature of their relationship.

[40] Ms Penney's assertions that she and Ms Hambly agreed to enter into an employment relationship are not determinative, particularly as I find there was no express agreement to that effect. Because the nature of the agreement is in dispute, the question of whether the parties agreed to enter into an employment agreement is for the Authority to determine on the basis of all of the information available to it.

[41] Further to that matter, as I have said, Ms Penney's understanding is either based on or reinforced by a representation apparently made by Ms Rankilor regarding the role of BJs. If I assume the representation was made it is understandable up to a point in that Ms Rankilor was a new employee and not fully familiar with BJs' procedures, and more importantly engaging an educator who lived in the child's home

was new for BJs itself. It was also unusual for the child's parent to be paying the educator directly as Ms Hambly was doing at the time, although that arrangement was recognised in the contract and was in any event intended to be temporary. Finally, that the parent and the educator would make their own arrangements regarding leave would be sensible from a practical point of view if the educator lived-in, although it amounted again to an unusual arrangement from BJs' perspective.

[42] For her part Ms Penney said she did not understand the arrangement with BJs. In the circumstances that confusion is understandable. However Ms Penney was at least given the background and explanatory material in respect of BJs which I have described, and was given time to read and consider the educator's contract. Because the document was expressly and clearly stated to be a contract to which she was to be a party, if she did not wish to be a party to such a contract or to agree to some or all of the contents she should have considered her position more carefully before signing it.

[43] In argument in the Authority Ms Penney focussed on the arrangements she said were made with Ms Hambly on 24 August in particular. Even if she thought the later involvement of BJs was simply for the purpose of Ms Hambly's obtaining a subsidy, there was more to the matter than that. The documents she was given were too detailed, and too specific about the nature of her relationship with BJs, and the parties' obligations to each other under the educators' contract, to support a view that obtaining a subsidy for Ms Hambly was their sole or substantial purpose. Again I find Ms Penney should have taken notice of their contents.

[44] Similarly BJs did not act simply as the conduit through which Ms Hambly obtained subsidised childcare. Ms Hambly and BJs, too, entered into a series of obligations to each other, and they were acted on. Save for the waiver of the police check BJs initiated its procedures - including having its co-ordinator make the initial health and safety check and subsequent routine visits, attempting to initiate its administrative procedures regarding fees, making deductions in respect of public liability insurance for Ms Penney in reliance on the educators' contract, and enrolling her in the Open Polytechnic course. In addition, according to the documents, BJs took responsibility for performance management and disciplinary issues.

[45] In summary, the contract documents embodied binding legal agreements. In the circumstances as I have described, Ms Penney's conclusion that Ms Hambly's arrangement with BJs did not concern her was one she reached without any input from Ms Hambly, and her understanding of the arrangement was not sufficient to warrant setting the contract documents aside. On the face of the documents, and despite her construction of what occurred on 24 August, Ms Penney subsequently contracted with BJs. The arrangement was not a sham and not a mere conduit for a subsidy.

[46] For the above reasons I find that Ms Penney entered into a binding relationship with BJs through which her services were supplied to Ms Hambly.

[47] Accordingly I conclude the relationship was not one of employment by Ms Hambly. The Employment Relations Authority cannot hear and determine the merits of Ms Penney's claims.

Costs

[48] Costs are reserved.

[49] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority