

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 417
3080636

BETWEEN ABBEY CLAIRE PETTENGELL
Applicant

AND ANNA AND ANDREW ROUSE-
WYETH
Respondents

Member of Authority: Geoff O’Sullivan

Representatives: David Balfour, advocate for the Applicant
No appearance for the Respondents

Investigation Meeting: 4 February 2021

Submissions [and further 13 February and 19 February 2021 from the Applicant
Information] Received: None from the Respondents

Date of Determination: 27 September 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Abbey Claire Pettengell has lodged several personal grievances with the Authority claiming amongst other things, unjustified dismissal, unjustified disadvantage, breaches of good faith. Before those matters were to be progressed, there is a preliminary matter concerning Ms Pettengell’s status, i.e. were the services she provided to Mr and Mrs Rouse-Wyeth provided as an employee or as an independent contractor. This determination decides that matter only.

Absence of the respondents

[2] Neither Anna nor Andrew Rouse-Wyeth attended the investigation meeting. There had been communication with the respondents through the case management conference call and through emails. I am satisfied they had received the Notice of Investigation Meeting and were aware of the date on which it was to be held. After waiting 30 minutes, I arranged for the Authority Officer to attempt to contact the respondents first by phone and then by email. There was no answer to the phone calls and nor was there an answer to the emails. I considered the decision to continue with the investigation was appropriate.

Background

[3] Ms Pettengell says she made contact with Ms Rouse-Wyeth via text/phone and Facebook Messenger on 18 September 2019 regarding a rental property the Rouse-Wyeths had listed on Trademe. The parties then discussed Ms Pettengell's background in childcare and she says she was then asked to work as a nanny/house manager. Ms Pettengell says she started work on 30 September 2019 and although receiving some payments, says that as proper payment for her work was not forthcoming, she says the employment agreement ended because she could not continue working for no pay.

[4] The information filed by the Rouse-Wyeths, including in their statement in reply, makes it clear that their view was that at no time was Ms Pettengell an employee. They say Ms Pettengell had agreed to help them with home help forms and undertake some nanny duties. They say Ms Pettengell advised them of the entitlements they would be eligible for as this was the only way they could afford any future employment of Ms Pettengell. They say they were always clear that the arrangement was to be that of an independent contractor, not an employment agreement.

[5] They say further that at no stage did they ever therefore dismiss Ms Pettengell.

[6] A bundle of documents had been provided to the Authority. It is clear however the issues the Authority is required to determine are:

- (a) What was the relationship between the parties?
- (b) If the relationship was that of independent contractor and principal, did that change during the course of the relationship?

- (c) If Ms Pettengell was an employee of the Rouse-Wyeths, was she dismissed unjustifiably and if so what remedies flow from this?

[7] Pursuant to s 175E of the Employment Relations Act 2000 (the Act), I make findings of fact and law and outline conclusions to resolve disputed issues and make orders but I do not record all the evidence. I have however considered the submissions and information received, and refer to them where appropriate and relevant.

[8] As permitted by s 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

The law

[9] Section 6 of the Act provides:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, employee—

- (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

...

(2) In deciding for the purposes of subsection (1)(a) 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), the court or 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 a determining matter any statement by the persons that describes the nature of their relationship.

[10] Accordingly the Authority's initial enquiry must be focused on determining the real nature of the relationship between the parties. Also at issue is what was the real intention of the parties when they entered into the relationship.

Relevant matters*Entering into an agreement*

[11] The first issue to determine was the nature of the relationship between the parties when it started. As referred to in the background above, the initial contact between the parties related to a landlord and tenant relationship. After discussions with Ms Pettengell, discussions commenced regarding a different type of relationship, either an employment relationship or an independent contractor type relationship.

[12] Whatever the relationship was, it was very short lived. Ms Pettengell gave evidence she started work on 30 September 2019 and it ended no later than 18 October 2019.

[13] There were various texts between the parties regarding Ms Pettengell working as a nanny. This certainly wasn't Ms Pettengell's only position. Ms Pettengell had been registered with a nanny service, Rock My Baby. She wasn't an employee of that organisation and working through that agency generally, seemed to be as an independent contractor.

[14] On 4 October 2019, Ms Rouse-Wyeth texted Ms Pettengell stating:

... We're going with independent contractor (Andrew is happy and the profit).

The word profit was later corrected to preference.

[15] On 5 October 2019 Ms Pettengell texted Mr Rouse-Wyeth stating:

Hey Andrew, I had this convo with Anna yest via text from memory. Rock My Baby do all reference and Police checks, this is why I am registered with them (they access the subsidies not me personally as need to be under Ministry of Ed), I choose to go through an agency for peace of mind and so my references aren't contacted every time I go for a new job whether it be babysitting/temp/permanent, it also provides peace of mind for families with their extensive checks.

[16] Later in the text Ms Pettengell states:

As I said yest my preferred is to be an independent contractor as this is what I've done and been for the better half of 15 years, I hope this is in line with what you are both happy with.

[17] At this point in time, it is clear that both parties had a common intention i.e. they were not entering into an employment relationship but would be entering into an independent contractor relationship.

[18] Right from the beginning, the arrangements between the parties seemed very haphazard. What is clear though, on 3 October 2019, as evidenced by an email between the parties, Ms Pettengell borrowed \$2,000 from the Rouse-Wyeth's which was to be in the form of "pay in advance" (see email 3 October 2019). It was to be paid back at \$400 per week by way of deduction. Ms Pettengell advised that no repayment had been made. It does however seem clear that no deductions were made from the amount paid including PAYE, RWT, etc.

[19] Ms Pettengell's evidence was that she settled on hours with the family from 30 September 2019. She recorded working from 30 September to 3 October on the Monday, Tuesday, Wednesday and Thursday.

[20] Despite the email and texts between the parties being very clear that the relationship was to be that of a principal and independent contractor, two contracts were forwarded to the Rouse-Wyeth's. One, an independent contact (contract for service) and the other a sample employment agreement for an educator. It seems that Ms Rouse-Wyeth at least signed an employment agreement. In her untested evidence, Ms Rouse-Wyeth stated that she had no recollection of doing this but did recall being given documents to sign by Ms Pettengell which she did. Again her untested evidence, was that at all times she considered the relationship to be that of principal and independent contractor.

[21] Although the evidence was untested, there seems to be sufficient evidence from Ms Pettengell, to conclude:

- (a) The intention was always that the relationship was to be that of independent contractor and principal;
- (b) Despite this, inexplicably two forms of agreement were sent by Ms Pettengell to the Rouse-Wyeths; and
- (c) If Ms Rouse-Wyeth signed the wrong template, then it was in error.

[22] In reaching that conclusion, I note:

- (a) Ms Pettengell emailed Rock My Baby asking whether or not it had a template for contracts for nannies/families to follow;
- (b) Emails/texts referred to above in which Ms Pettengell states her preference to be an independent contractor with the Rouse-Wyeth's response that that was how they see the arrangement too.

[23] I conclude therefore that the intention of the parties was clear, they intended to enter into an independent contract relationship and not an employment relationship.

Did the relationship change during the course of the engagement?

[24] As indicated before, the relationship was of very short duration. Ms Pettengell's concerns were that she was not being paid and that this ultimately caused her to resign. That may well be true although I note Ms Pettengell had been given \$2,000 in advance by way of a loan to be set off by payments due to her for work performed in the future. The short period of the relationship together with the fraught nature of it, leads me to conclude there was no change in the contractual relationship.

[25] Further, it was clear from the evidence provided, that even if I were to apply the control test, it was clear the arrangement between the parties was quite haphazard with little control and supervision being exercised by Mr and Mrs Rouse-Wyeth.

Conclusion

[26] There was no intention by either party to enter into an employment relationship when that relationship commenced on or about 30 September 2019. Indeed all evidence points to the relationship being negotiated as being that of principal and independent contractor. The arrangement was of short duration lasting less than 18 days. I also note that the Rouse-Wyeths exercised very limited control over Ms Pettengell's work day.

[27] As Ms Pettengell was not in an employment relationship with the Rouse-Wyeths, it follows the Authority has no jurisdiction to decide whether or not there were breaches of the contract between the parties and whether or not Ms Pettengell is owed moneys. Such claims would need to be pursued in another forum.

Costs

[28] As Mr and Mrs Rouse-Wyeth did not attend the hearing despite the evidence before the Authority being clear they were aware of the hearing and the potential consequences of not appearing, I do not see this being a matter where costs would be awarded in their favour for successfully defending Ms Pettengell's claims. However costs are reserved. Should either party wish to file submissions in that regard they should do so within 21 days.

Geoff O'Sullivan
Member of the Employment Relations Authority