

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Christopher Philpott (First Applicant)
AND Neil Philpott (Second Applicant)

AND Feral Strategies Limited (Respondent)

REPRESENTATIVES Applicants In person
Sharon Russell for Respondent

MEMBER OF AUTHORITY Alastair Dumbleton

INVESTIGATION MEETING 18 July 2005

DATE OF DETERMINATION 15 September 2005

DETERMINATION OF THE AUTHORITY

[1] The applicants Neil and Christopher Philpott, who are father and son, seek to resolve a contended employment relationship problem they have with the respondent company Feral Strategies Limited (referred to as "FSL").

[2] FSL, through its sole director Mrs Sharon Russell, has remained insistent throughout the Authority's investigation that no employment relationship existed at any time between her company and the Philpotts. FSL refused to comply with a formal direction of the Authority requiring the parties to attend mediation, as the Philpotts had requested from the outset. Despite the Authority writing and explaining to Mrs Russell that the nature of the relationship had been expressly made a question able to be resolved by mediation under the Employment Relations Act 2000, and also that the Act expressly enabled mediation to be provided even in cases where the relationship was not one of employment, Mrs Russell steadfastly refused mediation.

[3] By doing so she put FSL at risk of having further legal action commenced against it, possibly leading to the company being fined and/or having its property seized. Given my ultimate conclusion that the Philpotts were not employees as they had contended, the dispute seems destined to move to the Disputes Tribunal, which had apparently referred the Philpotts to the Authority in the first place. More time and money will now probably be wasted by Mrs Russell as a result of her not taking the opportunity to at least try and sort matters out with the Philpotts through the process of mediation.

[4] Moving to the matters in dispute, I find that FSL entered into an Animal Pest Control contract in December 2002 with the Auckland Regional Council. The pests to be destroyed under the contract were possums and the control area was farmland on the South Kaipara Peninsula. The contract period was for one year and payment was to be a lump sum which also covered the cost of

labour and materials. The contract document refers to the control area as being 39,000 hectares, but a second stage apparently brought the total up to about 53,000 hectares.

[5] In its general conditions the written head contract was neutral as to whether FSL was to carry out the work by employing workers or by engaging contractors. FSL could have sub-contracted the whole contract, provided it had permission from the Council. The contract also stipulated that FSL's "staff" were either to hold appropriate poisons licences or to work under the supervision of a qualified staff member. There was no inference reasonably able to be had from the head contract that FSL's staff would be employed workers. The kind of relationship between the head contractor and its workers was optional.

[6] I find that Mrs Russell contacted Mr Neil Philpott, a friend of her late husband, and asked him to find the workers needed to perform the pest control contract. There were two main aspects to that work. First, local farm owners were to be approached and asked to give consent to the poisoning operations being carried out on their land. The second phase of the job was for a small gang of workers to systematically visit the farms and lay traps and poisoned bait.

[7] Mr Neil Philpott carried out the work of obtaining consent. For this he was paid 50 cents per hectare, a rate he has no quarrel with. He also assembled the gang of workers who were to perform the second stage. His son Christopher was one of the three men he organised for this purpose.

[8] There is no dispute that payment for the second phase of work was agreed to by Mrs Russell at the rate of \$3 per hectare of farmland on which control work had been completed. Within the period stipulated in the head contract there were no particular time limits imposed by Mrs Russell or FSL on the performance of that work. The gang could do it when they pleased and it was up to the three members as to how many of them worked at any time.

[9] Mrs Russell supplied the cyanide poison and possum traps and she rented accommodation at Parakai for the gang to stay in. The gang paid for food and power, and they provided all their own clothing and farm bikes for transport. Some petrol was supplied by Mrs Russell.

[10] Mrs Russell exercised no particular control over how or when the work was done. When she visited the gang it was to see the workers rather than to inspect their work. The work itself was monitored under the head contract by the Council, which presumably if it found any fault would withhold payment due to FSL until the problem was rectified.

[11] Mrs Russell made regular payments to the workers and GST was applied to the payment in some cases where a worker was GST registered. No PAYE was deducted and no time, wage or holiday records were kept by FSL.

[12] Mr Christopher Philpott filled out an IR330 tax form. On the standard form there is printed a statement saying that it is the appropriate form for contract work where withholding payments are received. I note that the IR330 form lists "vermin destruction" as a work in respect of which withholding payments may be made to "people who are not employees but who are employed under a contract-for-service." However as Mr Christopher Philpott's age was about 15 at the time, it is unlikely that he understood or was even interested in the difference between employees and contractors.

[13] Mr Christopher Philpott's youth it seems may have been at the heart of his contended employment problem, which is his claim that he was not paid the same as other members of the work gang. He claims to recover \$6,224 he says was withheld from him by FSL. He contends

that the arrangement with FSL was that the gang as a unit would receive payment at the rate of \$3 per hectare. He contends that the members of the group had come to their own arrangement, which was to split this payment evenly three ways. He said that how the pay was apportioned, and in respect of what day or hours any individual worked, had been a matter for the gang to decide and not FSL. Generally, this would be an unusual arrangement if made with an employer under a contract of service.

[14] Mrs Russell however claims that each member of the work gang was paid at \$3 per hectare, according to the area he personally had carried out the work on. Mrs Russell says that Mr Philpott was paid correctly and that differences in his pay simply reflect differences in the total area worked on by each member of the gang.

[15] Mr Neil Philpotts claim is different. He says \$550 of his pay was deducted and kept by Mrs Russell unlawfully. She claims he had a responsibility to reimburse FSL for a number of possum traps that went missing while he had custody of them. His actions she points to occurred prior to the South Kaipara contract being entered into by FSL and it appears she has simply set off a claimed historical debt against current earnings due to Mr Philpott, which she could not lawfully do if he was an employee. It is not even clear whether he was allegedly in debt to FSL or to the late Mr Russell personally. It is clear that Mrs Russell did not agonise over such fine distinctions before she withheld the payments Mr Philpott now seeks to recover.

[16] The above circumstances of engagement of the Philpotts must be taken into account when determining the nature of their working relationship with FSL. From them the Authority is required by s.6(2) of the Employment Relations Act 2000 to determine the “real nature” of that relationship. In doing so it must consider all “relevant matters,” including any indicators of the intention of the parties.

[17] An Employment Court decision dealing with the statutory “real nature” test, *Curlew v Harvey Norman Stores (NZ)* [2002] 1 ERNZ 114, has held that the relevant matters to be considered under s.6(2) and (3) of the Act may include the tests developed under common-law such as the control, integration and fundamental tests.

[18] In proceeding to follow the statute I note that the parties did not express in writing their intentions as to the nature of their relationship when it was formed. This was almost certainly because it was not a matter of any great significance to them at a time when no dispute had arisen over the amount of pay they were each to receive.

[19] Although the use of an IR 330 tax form is some indication of intention on the part of Christopher Philpott to be self employed, I do not attach much weight to this factor because of his likely lack of understanding of the differences between employed and contracted workers and the tax status of either.

[20] I find that FSL exercised virtually no control over the Philpotts in the work they did or the way they went about it. The lack of control and direction does not point directly towards an employment relationship, as contended to exist by the Philpotts.

[21] I find that the Philpotts were integrated into the business of FSL, but this was inevitable. FSL was a very small company consisting of a single director, Mrs Russell, and it clearly had to have human agents to carry out the physical work it had contracted to perform for the Council. This factor is neutral.

[22] The fundamental or economic reality test points strongly to the existence of an independent

contract relationship between FSL and both Philpotts, rather than to a relationship of employer-employee. The Philpotts were not paid wages on any conventional basis. They were not paid for time served but for results, and these they could produce as slowly or as quickly as they liked within the overall term of the head contract. They could profit by working harder and smarter, if they wanted to. The faster they completed the work the more time they had available for other income generating activities they might wish to carry on, such as working the Philpott farm at Atiamuri. I conclude under this test that the Philpotts were not employees but were self employed, or in business on their own account.

[23] I am satisfied that the real nature of the relationship was not one of employment. This conclusion is reached from an overall view and also from consideration of individual relevant matters such as control, integration and economic reality.

[24] During the meeting on 18 July 2005 it was discussed whether Mr Chris Sadlier, a member of the control work gang, might have some relevant information to assist the investigation, and his contact phone numbers were given to me. However upon subsequently reviewing the information and evidence already collected I considered it was not necessary to speak to Mr Sadlier. The strength of the evidence is enough to compel the determination now given.

[25] For the reasons given above, I find that both Mr Neil Philpott and Mr Christopher Philpott were not employed by FSL under a contract of service. The determination of the Authority must therefore be that the problems they have with FSL cannot be resolved by any orders made under the Employment Relations Act 2000.

[26] The investigation by the Authority is now concluded.

A Dumbleton

Member of Employment Relations Authority