

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 64
5470896

BETWEEN ANTHONY and IRENE KIDD
Applicants

A N D GAIL ELIZABETH
BEAUMONT and ROY
BEAUMONT
First Respondents

A N D GAIL ELIZABETH
BEAUMONT and ROY
BEAUMONT and DIPROSE
MILLER TRUSTEES
LIMITED as TRUSTEES OF
THE BEAUMONT FAMILY
TRUST
Second Respondents

Member of Authority: T G Tetitaha

Representatives: W Reid, Advocate for Applicants
Respondents in person

Investigation Meeting: 28 and 29 July 2015 at Tauranga

Submissions Received: 29 July, 3 August and 20 October 2015 from Applicants
29 July, 12 August, 24 November 2015 and 26 February
2016 from Respondents

Date of Determination: 29 February 2016

DETERMINATION OF THE AUTHORITY

- A. The application for personal grievance is dismissed.**
- B. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment Relationship Problem

[1] Volunteers are the lifeblood of many communities. Organisations such as schools, museums and hospitals rely upon voluntary labour to provide various services. The provision of services without any expectation of remuneration commonly falls within the lot of a volunteer. It is when workers are termed *volunteers* and receive remuneration that the possibility of an employment relationship arises. This is at the heart of the case here.

Facts leading to dispute

[2] In November 2011 the applicants, Anthony and Irene Kidd moved to the Omokoroa Caravan and Motorhome Park at 468 Omokoroa Road, RD2, Tauranga.

[3] The Kidds had opted for a change of lifestyle. They had previously rented accommodation but determined it was cheaper to purchase a caravan and reside in a caravan park. At the time the Kidds moved to the Omokoroa Caravan Motorhome and Caravan Park they were paying \$160.00 per week for their powered site. This was a special offer at the time. The usual fee for a couple at a powered caravan site was \$210 per week.

[4] The Beaumont Family Trust owned the property where the Omokoroa Caravan and Motorhome Park was situated. The trustees of the Beaumont Family Trust were Gail Elizabeth Beaumont, Roy Beaumont and Diprose Miller Trustees Limited. Mr and Mrs Beaumont lived offsite in a home 2 kilometres away. They had purchased the land for the purpose of a retirement project to build and sell. Gail and Roy Beaumont ran the business at the Caravan Park. The Caravan Park income and expenses were deposited and paid from the Beaumont Family Trust bank accounts.

[5] In February 2012 the Kidds learned of a possible management job at the caravan park through the then manager, Elizabeth (Liz) Akehurst. An advertisement had been placed in the local newspaper stating:

CAMPING GROUND

HELP WANTED

For a free power site in lieu of light cleaning, office computer, reception. Management skills an advantage. Must live on site in your own caravan or motor home. Shared duties for days off.

Phone: xx-xx-xxxx

[6] The Kidds expressed an interest in the position. On 23 February 2012 they met Mr and Mrs Beaumont and started undertaking their duties shortly thereafter working 2 days per week.

[7] On 1 July 2012 their days increased. The Kidd's were rostered four days on, four days off shared with another couple, Beverley and David Gourlay. In addition they were paid \$100 cash tax free. This payment came from the Beaumont's personal funds.

[8] At all material times the Kidd's continued to receive their shared superannuation pension without deduction.

[9] In March 2014 an altercation occurred between the parties. This resulted in the Kidds leaving the park on 14 March 2014. They subsequently raised a personal grievance of unjustified dismissal and wage arrears on 14 May 2014.

Issues

[10] The parties agreed the following issues were for hearing:

- (a) Were the Kidds employees?
- (b) If so, who was their employer?
- (c) If they were employed, what wage arrears are payable (if any)?

Were the Kidds employees?

[11] The Kidds may only bring personal grievance and wage arrears applications before the Authority if they are in an employment relationship. If they are not, there is no legal basis to consider the application and it shall be dismissed.

[12] To be an employee, the Kidds must meet the definition of an "employee" contained in s.6(1) of the Employment Relations Act 2000 (the Act). An employee is "any person ... employed by an employer to do any work for hire or reward under a

contract of service.” A “reward” may include non-monetary recognition of services provided.¹

[13] Section 6(1)(c) of the Act excludes from the definition of employee “a volunteer”. A volunteer does not expect to be rewarded and receives no reward for work performed as a volunteer. Whether the applicants are volunteers is a factual assessment requiring consideration of all matters, including material from which the intention of the parties can be gleaned.²

[14] Even if the applicants are not volunteers s 6(1)(a) of the Act requires consideration of whether the Kidds were employed to do any work for hire or reward under a contract of service. Such an enquiry requires a consideration of the real nature of the relationship between the parties.³ The real nature of the relationship between parties requires consideration of “all relevant matters, including any matters that indicate the intention of the persons” and the Authority is “not to treat as a determining matter any statement by the parties describing the nature of their relationship”.⁴

[15] The assessment of the real nature of the relationship requires having regard to a range of factors summarised as follows:⁵

- the written and oral terms of any contract, usually containing an indication of common intention;
- any divergences from those terms and conditions in practice;
- the way in which the parties have actually behaved in implementing their contract; and
- the levels of control and integration.

[16] The onus is upon the applicants to prove the existence of an employment relationship on the balance of probabilities.

¹ *The Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152 where Chief Judge Colgan found provision of a lunch at the end of a work trial as sufficient to show the expectation of a reward to establish an employment relationship.

² *Brook v. McCowan & Ors* [2014] NZEmpC 79 at [18] to [19].

³ *Kirby v New Zealand China Friendship Society* [2015] NZEmpC 189 at [16].

⁴ Section 6(2) and (3) of the Act.

⁵ *Brook v. McCowan & Ors* [2014] NZEmpC 79 at [31] referring to *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 271 at [32].

The agreement

[17] Although there is no written agreement between the parties, it is common ground the Kidds' agreed duties were staffing the park office between 9 am to 5 pm (increasing to 8.30 am to 8 pm in high season) and cleaning the amenities block, rental cabins and caravans. If the Kidds were not in the office, they were to ensure they had the mobile phone. They received free accommodation, wash tokens for the washing machine and dryer as well as use of the other amenities at the Caravan Park. From 23 February to 30 June 2012 they initially undertook their duties two days per week, increasing from 1 July 2012 to four days and \$100 cash tax free.

[18] There was evidence this was a new venture with low numbers of campers and very little cleaning required.⁶ The amount of work undertaken during the relevant period would also have been low even during the high season.

How did the parties conduct themselves under their contract?

[19] The parties did not discuss their status until termination of their relationship. I do not accept Mrs Beaumont told the Kidds at the outset they were volunteers. The evidence of previous 'volunteers' was that their status was never discussed. There was no reason for Mrs Beaumont to specifically tell the Kidds they were volunteers or to treat them any differently from their predecessors. I prefer Anthony Kidd's evidence that their status was never discussed with the Beaumonts.

[20] However there is equally no evidence either party intended this to be an employment relationship. Anthony Kidd's evidence showed he was well aware of what constituted an employment relationship from his previous employment and independent contractor work. He knew he would be required to fill in IRD forms and to have a written employment agreement. He was aware of the need to deduct PAYE from wages. He accepted none of those incidences of employment were applied or sought by him to apply here.

[21] His personal grievance letter stated the Kidds were ignorant of the need for employment contracts, sick pay and their general entitlements.⁷ That was clearly not

⁶ Sworn brief of evidence B Gourlay.

⁷ Attachment I Statement in reply Letter Baywide Community Law Service to Omokoroa Caravan Park dated 14 May 2014.

the case. His accepted knowledge and experience of employment included periods when he ran his own businesses.

[22] There was evidence the Kidds may have been motivated to intentionally avoid any employment relationship. They received a combined superannuation which was means tested and required them to disclose any changes in circumstances such as employment. In 2012 their combined pension with one non-qualifying partner would have been \$572.58 (gross) or \$510.18 (net) per week or \$1,020.36 (net) per fortnight.⁸

[23] Anthony Kidd's explanation was naivety as opposed to an intention to avoid any employment relationship. He accepted they were aware of their obligation to disclose changes in circumstances such as employment. However he believed he did not have to advise WINZ because he was able to earn \$100 without it affecting his benefit. He gave no thought to the added value of the "free" caravan site worth \$160 to \$210 per week. He did not check their personal situation with WINZ at the time. He produced a letter from Work and Income New Zealand that now requires they disclose their earnings for this period.⁹

[24] His alleged naivety also did not sit well with his presumed knowledge of the Gourlay's situation. The Gourlays shared the four day roster with the Kidds from July 2012. They were also in receipt of a similar benefit or pension. They did disclose their earnings to WINZ from the campground resulting in a reduced pension.¹⁰ Mr Kidd should have been aware of the Gourlays' situation because it was mentioned in a report Mrs Beaumont gave to them in December/January 2013/14. He would have read the report because he alleges it contained their "instructions" for work.¹¹ Despite this he took no action until after the parties had terminated their relationship.

[25] Beverley Gourlay's evidence was that she did not believe they were employed during the period they undertook those duties with the Kidds. She believed the payment was a token gesture gift of appreciation for their work as opposed to wages. She understood they were assisting the Beaumonts in return for reduced living expenses i.e. the free campsite.

⁸ New Zealand Superannuation and Veterans Pension rates: At 1 April 2012 <http://www.workandincome.govt.nz/map/deskfile/nz-superannuation-and-veterans-pension-tables/at-1-april-2012-05.html>.

⁹ Bundle of Documents p81 Letter WINZ to Kidds dated 11 April 2014.

¹⁰ Applicants Bundle of Documents (ABD) at p54.

¹¹ Sworn brief of evidence of A Kidd at para 53.

[26] The free campsite and \$100 cash was not recorded anywhere as a business expense because Mrs Beaumont took the money from her personal savings. The respondents did not deduct or withhold any taxes on their behalf. The payment arrangements were not consistent with an employment relationship.

[27] The Kidds submit they were employees because the campground was a commercial venture. The definition of “employee” under the Act does not refer to the commercial nature of an organisation. Whether an alleged employer is a commercial business or not cannot affect whether someone is an employee. Voluntary organisations are able to employ people. There is no restriction upon commercial organisations using voluntary labour.

[28] Mrs Beaumont produced evidence of other camping ground owners using “volunteers” including the Department of Conservation. She stated this was the basis for her belief that she was able to use voluntary labour.

[29] Although there were concerns raised by the labour inspector about the use of ‘volunteers’ in camping grounds generally, there was nothing in the evidence to suggest any improper pressure or that this arrangement had not been negotiated at arms length between the parties. This is especially having regard to Mr Kidd’s employment experience. There was some evidence from other ‘volunteers’ that this type of arrangement was a lifestyle choice as opposed to any imposition. Some gave evidence it was always expected to be temporary until they moved to another camping ground or sought permanent residency elsewhere. There was evidence of conversations between the parties indicating the Kidds had similar intentions.

[30] Perhaps Mr Kidd’s statement at hearing was the clearest indicator that this was never intended to be an employment relationship. He told me that the Beaumonts “would not have given him the position if he raised employment.”

Were the Kidds under the control of the respondents?

[31] The ‘control’ test depends upon whether the alleged employer had the right to control the person alleged to be the employee.¹²

¹² *Chief of Defence Force v Ross-Taylor* [2010] ERNZ 61 at [33].

[32] Mr Kidd alleged he was given written instructions by way of various reports Mrs Beaumont issued from time to time.¹³ These reports contain a mix of cleaning tips, information on bookings and tariffs, Beaumont's availability and general news. The reports appear to be more in the form of informative newsletters as opposed to work instructions.

[33] From the evidence there was little or no supervision of the Kidds. A list of duties was provided at the beginning which they were expected to undertake at their own pace. The Beaumonts did not live on site and there was little to indicate any oversight. There were no performance reviews or training provided. The Kidds were not required to keep a timesheet. When the parties' agreement ended, no notice was required and the Kidds simply left the campground.

[34] Although the work was allocated by a rostering system, the evidence of a labour inspector, Erin Spence, showed that the Kidds did not always work 4 days per week. Ms Spence provided a table showing the days allegedly worked by the Kidds.¹⁴ These varied from nil days and one occasion up to 6 days per week. It appeared the Kidds managed when and how much they would work from week to week. This did not affect the \$100 remuneration they received because their remuneration did not appear to be linked to the number of hours worked.

[35] When asked how they managed their leave Mr Kidd told me he did not need any because he met any personal obligations when he wasn't working. From Ms Spence's evidence there were periods of time the Kidds were not at work because nil working days are recorded. Any time off by the Kidds was organised without reference to the Beaumonts. The Kidds' duties could be split between themselves and the Gourlays as they saw fit without reference to the Beaumonts.

[36] Most importantly was Mr Kidd's evidence about the lack of legal obligation between the parties. When asked if the respondents would have had any legal redress against the Kidds if they did not turn up to work one day or do the duties required, he did not believe there would be any legal consequence.

¹³ ABD at p51 – 56.

¹⁴ Sworn Brief of evidence of E Spence Schedule Minimum Wage Act, Labour Inspector Investigation Report.

Were the Kidds an integral part of the business?

[37] This test focuses on whether the worker was genuinely in business on his own account or “part and parcel” or integrated into the enterprise of the person for whom the work is performed.

[38] The Kidds’ work was of great value to the operation of the respondents’ business. They were the initial contact for customers and provided cleaning services. However they were not necessarily part and parcel of the respondents’ business.

[39] I do not accept the Kidds managed the campground. They may have been on site without the Beaumonts at times but that did not equate to having full control of the campground. They had little (if any) input into decision making about the running of the campground. They performed no management tasks at the campground. Their role was helpful but not necessary to the running of the campground.

[40] I also accept Mrs Beaumont’s evidence she was available to attend to any issue if required. There was evidence the Beaumonts’ daughter and son in-law would take over responsibility for the campground in their absence as well.¹⁵

[41] The evidence shows this was never intended to be an employment relationship in terms of any contract for services. There is no need to consider the remaining issues. The application for personal grievance is dismissed.

[42] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority

¹⁵ ABD at p53.