

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 339
5397525

BETWEEN

GLENN WARWICK
WICKMAN
Applicant

A N D

PETER SMALL AS
EXECUTOR OF THE ESTATE
OF HENRY LESTER SMALL
First Respondent

PETER SMALL
Second respondent

Member of Authority: James Crichton

Representatives: Greg Bennett, Advocate for Applicant
Matthew McGoldrick, Counsel for Respondent

Investigation Meeting: 10 July 2013 at Auckland

Date of Determination: 6 August 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Wickman) alleges that he was a permanent employee or an employee employed on a fixed term engagement by Henry Small who died at Auckland on 11 September 2012. Mr Wickman alleges that he was unjustifiably dismissed from his employment by letter dated 5 October 2012 and he seeks compensation for the alleged wrong done.

[2] The first respondent (the estate) resists Mr Wickman's claim on the basis first that the employment relationship between the late Mr Henry Small and Mr Wickman was a personal one and therefore was severed on Mr Henry Small's death and further that there was no employment relationship between the parties at the date of

Mr Henry Small's death and had not been one for some 20 years, Mr Wickman being in a contractual relationship with the late Mr Small.

[3] The second respondent (Mr Peter Small) contends that he has no legal relationship with Mr Wickman at all and thus has nothing to answer in the present proceedings.

[4] By agreement between the parties, the only issues for determination now are the preliminary questions of whether any relationship enured after the death of Mr Henry Small and if there was a continuing relationship after his death, whether that relationship was one of employment or not.

[5] Mr Wickman had had a longstanding relationship with the late Mr Small and clearly was fond of the deceased. Mr Wickman had a rather less satisfactory relationship with Mr Small's son, Mr Peter Small, who was his father's executor.

[6] In the early part of the relationship between Mr Wickman and Mr Henry Small, it is common ground that the relationship was one of employment. For the avoidance of doubt, the Authority is satisfied that on the evidence it heard, Mr Wickman was an employee of Mr Henry Small until 31 May 1992. That date, of course, is over 20 years ago and the relationship between Mr Wickman and the late Mr Small continued from that date although the nature of that relationship is in dispute. The estate says that the relationship was a contractual one while Mr Wickman maintains that it continued to be one of employment.

[7] Without deciding the issue at this juncture, the Authority does comment that from the beginning of the 1993 financial year (and because this was a dairy farming operation the financial year began on 1 June), the way in which the relationship was managed by the parties changed.

[8] In particular, Mr Wickman began furnishing invoices, some in his own name and some in the name of a business entity of his own which was registered for GST. Indeed, Mr Wickman told the Authority that he had been registered for GST from the commencement of the goods and services tax and had maintained the same GST number throughout.

[9] The Authority heard evidence that as Mr Henry Small aged, his health became more uncertain and he was eventually taken into care towards the very end of his life.

[10] While in care, the evidence is that Mr Henry Small was visited by two of his neighbours, Mr and Mrs Leggatt, and with Mr and Mrs Leggatt as witnesses, Mr Henry Small signed a letter, the effects of which are in dispute between the parties. What is clear is that the letter was drafted by Mr Wickman, typed by a person who undertook that work on his behalf, and then provided to Mr and Mrs Leggatt to take and attend on Mr Henry Small.

[11] Mr Henry Small died on 11 September 2012 and the longstanding relationship between Mr Wickman and the Small farm property that he had worked on for many years came to an end by letter dated 5 October 2012, such letter being signed by Mr Peter Small.

[12] Because the question of whether Mr Wickman can sue given Mr Henry Small's death, is in issue as a preliminary point, together with the second preliminary issue of whether there was in truth an employment relationship or not, the parties have agreed that the Authority should determine the preliminary questions first and in the event that those questions are determined in favour of Mr Wickman, then the Authority will conduct further investigations into the nature and extent of the relationship between Mr Wickman and the late Mr Small. In particular, the Authority will want to consider further evidence and submissions in respect of the status of the 27 May 2012 letter and Mr Henry Small's capacity to sign that letter given his health status.

Issues

[13] It follows from the foregoing analysis that the questions that the Authority must determine at this point are whether any relationship survived Mr Henry Small's death and if the Authority answers that question in the affirmative, then the next question is whether that surviving relationship is one of employment, or not.

Does Mr Wickman's relationship survive Mr Henry Small's death?

[14] The Authority has concluded that the particular nature of the relationship between Mr Henry Small and Mr Wickman was a personal one and that as a consequence that relationship cannot survive Mr Henry Small's death and whatever its terms, is not justiciable on Mr Henry Small's passing: *Farrow v. Wilson* (1869) LR 5 CP 744 applied.

[15] It will be apparent on the face of the proceedings in the Authority that Mr Wickman has brought his claim against the estate of Mr Henry Small and against Mr Peter Small personally. The estate says that that proceeding is misconceived and that the relationship that Mr Wickman had with the late Mr Small, whatever its nature, came to an end on Mr Henry Small's death.

[16] The only gloss on that is that Mr Wickman continued to perform duties immediately after Mr Henry Small's death on 11 September 2012 and the relationship was not brought to an end until Mr Wickman's receipt of a letter dated 5 October 2012 signed by Mr Peter Small, his father's executor.

[17] The Authority is satisfied that the relationship between Mr Wickman and the late Mr Henry Small, whatever its legal status, was personally performed by Mr Wickman even although it is apparent on the evidence that Mr Wickman rendered invoices to Mr Henry Small for the services provided, and some of those invoices anyway were not in Mr Wickman's personal name. However, whatever the payment arrangements, the Authority is satisfied that Mr Wickman himself personally provided the services that were the subject of those invoices. On Mr Wickman's side then, the contract was personally performed.

[18] The position is the same in respect of the late Mr Henry Small's involvement; his engagement with Mr Wickman was also a personal engagement. Mr Henry Small never operated his farm in anything other than his own name and the arrangements between the two men were of the most personal kind.

[19] The evidence the Authority heard was that Mr Wickman and Mr Henry Small would habitually have morning tea together on the farm where Mr Henry Small would give Mr Wickman the instructions for the day. It was apparent also on the evidence the Authority heard that there was a strong personal friendship between the two men which really underlines the personal nature of the relationship.

[20] Conversely, Mr Wickman had no abiding relationship with Mr Peter Small, Henry Small's son. It was plain that the relationship between those two men was not strong and it seems if anything to have been fuelled more by mutual distrust than by any other emotion. For the avoidance of doubt, the Authority is satisfied that Mr Wickman had no legal relationship at all with Mr Peter Small.

[21] The Authority has been directed to s.3 of the Law Reform Act 1936 which effectively provides that causes of action against a deceased person survive their passing as claims against their estate.

[22] However, when a contract is performed personally, as the Authority is satisfied is the case here, “*the death of either party puts an end to the relation; and in respect of service after the death, the contract is dissolved, unless there is a stipulation express or implied to the contrary*”: *Farrow v. Wilson* (supra).

[23] That position is reiterated in the House of Lords case of *Nokes v. Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 where Viscount Simon LC stated:

If the contract is between the individuals on both sides and X dies, the contract is immediately dissolved ... for A never promised to serve X's personal representative and X could only act as employer when alive.

[24] It is plain then that where, as in the present case, there is a personal relationship between two individuals, unless the agreement between them specifically provides for something different, the relationship comes to an end with the passing of one of the contracting parties.

[25] There is nothing in the arrangement between Mr Henry Small and Mr Wickman which would justify the conclusion that the parties had agreed that the relationship would enure after Mr Henry Small's death. Indeed, the only indication of the parties' intentions after Mr Henry Small's passing is the comment from Mr Wickman that he was not going anywhere until he turned 65 or Mr Henry Small died. This comment was attributed to Mr Wickman by Mr Peter Small in the latter's evidence to the Authority and not denied by Mr Wickman at the time. The comment was made at a meeting at which both Mr Peter Small and Mr Henry Small and Mr Wickman were present.

[26] It follows from the foregoing analysis that the Authority is satisfied that the relationship between Mr Wickman and Mr Henry Small was personal in nature and that it expired with Mr Henry Small's passing. It is true that Mr Wickman continued to work for a short period after the death but the Authority is satisfied that it would have been available to Mr Peter Small, as Mr Henry Small's personal representative, to terminate the arrangement at any time after Mr Henry Small's passing and that Mr Wickman could have had no legitimate expectation of continuing employment

once Mr Henry Small had died. Indeed, as the Authority has already noted in the remark the Authority is satisfied Mr Wickman made at the April 2012 meeting, he himself had it in his mind that the relationship would come to an end when Mr Henry Small died.

[27] For the avoidance of doubt, the Authority reiterates its earlier conclusion that there was no relationship at all of a legal nature between Mr Peter Small and Mr Wickman and therefore there can be no claim by Mr Wickman against Mr Peter Small, either in his personal capacity or indeed as the personal representative of his late father.

Determination

[28] Given the Authority's conclusion that there is no ability for Mr Wickman to bring any proceedings because the nature of the employment was personal and that personal relationship must come to an end on the demise of one of the parties, it is unnecessary for the Authority to consider the other question before it. This is because the answer to the question whether Mr Wickman was a contractor or an employee is entirely academic, the Authority having decided that Mr Wickman has no justiciable basis for bringing any claim because of the personal nature of the contract between Mr Wickman and the late Mr Small.

[29] It follows from the foregoing that Mr Wickman's claim is dismissed against both the estate of Mr Henry Small and against Mr Peter Small personally.

Costs

[30] Costs are reserved.

James Crichton
Member of the Employment Relations Authority