MGZ | employment law

THE ADVOCATE

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a regular newsletter for clients of
mcphail gibson & zwart ltd

A Family Affair

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
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In May 2022, the Employment Court issued its' judgment in ***Courage & Ors v Attorney-General & Ors*** [2022] NZEmpC 77, determining the issue as to whether three former residents of the Gloriavale Christian Community had been employees from the age of six until they left Gloriavale.

We do not intend to address the entirety of the 58-page judgment. However, one particular aspect highlighted an interesting issue: where family members are doing "*chores*", or helping out with the family business, can the real nature of the relationship actually be one of employer and employee?

The argument was posed that children from the age of six to twelve at Gloriavale were carrying out "*chores*", and therefore should not be determined to be employees.

So, is it just chores – or is it covered by employment laws?

Taking this back to basics, the first point is, a person of any age may be covered by the Employment Relations Act 2000 ("*the Act*"). Therefore, the "*you're not old enough*" argument won't cut it here.

Next, the Court considered whether what the children were doing was *chores* or actually *work*. Whether an activity is "*work*" will depend on:

(a) The constraints on the person – *"the greater the degree of constraint, the more likely it is that the period of constraint ought to be regarded as 'work'".*

(b) The nature and extent of responsibility on the employee – *"the greater and more extensive the responsibilities, the more likely it is that the period in question ought to be regarded as 'work'".*

(c) The benefit to the employer of having the person assume the role in question – *"the greater the importance to the employer and the more critical the role is to the employer, the more likely it is that the period in question ought to be regarded as 'work'".*

In *Glorivale*, the Court found that what was required in this case was "work as work is commonly understood". Chief Judge Christina Inglis stated –

> *"It was laborious, often dangerous, required physical exertion over extended periods of time and it was for commercial benefit. The work was not assigned by the plaintiffs' parents, but by the Gloriavale leadership. The plaintiffs' parents were not involved in any meaningful way in decisions about whether the work took place, how long it took place for, where it took place, or when their children would be required to work.*
>
> *Each of the plaintiffs was subjected to rigorous, sometimes violent, supervision in their work…"*

Next, the Court considered s 6 of the Act which sets out the meaning of "*employee*", and states "*employee means any person of any age employed by an employer to do any work for hire or reward under a contract of service*". This inquiry is complicated by the "*family affair*" factor.

Whether or not someone is an employee requires consideration of what the "*real nature of the relationship"* is. This requires consideration of all relevant matters, including the intention of the parties. Any statement or "*label*" the parties have used to describe the relationship will not be determinative. The Act also expressly excludes from the definition of employee, volunteers. This is where someone carries out work but does not receive any reward for the work performed, and does not expect to receive reward for the work performed.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor, Deborah Hendry or Jane Jarman.**

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The "*family affair*" factor has only been canvassed a small number of times in the Authority and the Court. Recently, in *Dillon v Tullycrine Ltd* [2020] NZEmpC 52, the Employment Court considered a family arrangement where a father carried out work for his daughter and son-in-law. Mr Dillon had carried out work for the company, and was provided with housing, amenities, food, and a vehicle.

However, the Court found that Mr Dillon was not an employee. The Court reached this conclusion on the basis that the evidence did not support a finding of employment. In fact, the arrangement was based on their familial ties, and was seen as a way in which they would all contribute and benefit. For Mr Dillon, this provided the benefit of a home and close ties to family.

The Court observed at [32]:

> *"… in circumstances where there is a personal connection between the parties, whether familial, neighbourly or through friendship, and there are tasks undertaken for which some recognition is given, the Court must be careful not to find there is employment where that was not intended and does not reflect the true basis upon which the exchange between the parties occurred. Each case will need to be carefully considered and determined, in context and on its own facts".*

The Court recognised that there is a long-standing presumption of fact against an intention to create legal relations in the context of family arrangements. At [30], they stated:

> *"this presumption derives from experience of life and human nature which shows that, in such circumstances, men and women usually do not intend to create legal rights and obligations but intend to rely solely on family ties of mutual trust and affection."*

Another recent case that has considered a family arrangement is the Authority's decision in ***McKay v Wanaka Pharmacy Limited*** [2020] NZERA 230. This involved that of a former husband and wife and a pharmacy business. Ms McKay had worked for her former husband's pharmacy business over a number of years, and continued to do so after their marriage ended. She was paid a salary and had taken a period of parental leave through the company, although this was submitted to be used as a tax device aimed at income splitting.

The Authority found that Ms McKay was an employee. In finding this they noted that, in using an employment relationship for tax advantage, a company may have to abide by the consequence of that initial classification should they later try to deny it. Further, they considered the employee declaration required for the paid parental leave application, the work was not minimal and was of value to the company, there was some control and supervision of Ms McKay, and Ms McKay was paid salary, all pointed towards the real nature of the relationship being that of employer and employee.

In *Gloriavale*, the Court found that the children between six and twelve carrying out chores were employees. Although the considerations from *Dillon* and *McKay* would apply in a familial relationship, they did not apply equally to a community organisation made up of almost 600 people. Although the community was likened to "*an extended family*", Chief Judge Inglis stated "*that does not support the existence of a literal family relationship in a legally significant sense*" (at [161]).

Each case will be different and will turn on its own facts as to whether the real nature of the relationship is one of employment. However, it may be high time to start considering what contractual and employment relations we have with our children who bring us coffee in the morning and help with the dishes in the evening…

New Whistleblowers Legislation

The Government has passed the Protected Disclosures (Protection of Whistleblowers) Act 2022, which replaces the Protected Disclosures Act 2000. The new Act will come into force on 1 July 2022.

The key changes are to:

- extend the definition of "*serious wrongdoing*" to include private sector use of public funds and authority, as well as behaviour that is a serious risk to the health and safety of any individual;
- enable a discloser to report serious wrongdoing to an appropriate authority at any time, rather than requiring they go to their organisation first;
- specify what a receiver of a disclosure should do;
- clarify internal procedural requirements for public sector organisations and requiring them to state how they will provide support to disclosers; and
- clarify the potential forms of adverse conduct that disclosers may face.

The changes are intended to be more *"people-focused and to make the rules easier to access, understand and use"*. If you have any questions about these changes, or would like to discuss your obligations or Policy for Protected Disclosures, please contact our Team.

UPDATE: When an employee is on ACC, who pays for public holidays?

As outlined in our May issue, MBIE was reviewing its guidance on this issue. They have now updated the information provided online – https://www.employment.govt.nz/leave-and-holidays/public-holidays/public-holiday-falls-within-leave-period/#scrollto-public-holiday-entitlements-while-receiving-acc-weekly-compensation