

**ORDER FOR NON-PUBLICATION OF INFORMATION  
CONTAINED AT [51] OF THIS JUDGMENT**

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 52  
EMPC 394/2018**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CHRISTOPHER DILLON Plaintiff
AND	TULLYCRINE LIMITED Defendant

Hearing: 30 September-2 October 2019  
(Heard at Hamilton)

Appearances: S McKenna and S-R Fraser, counsel for plaintiff  
A Twaddle and K Bell, counsel for defendant

Judgment: 28 April 2020

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**JUDGMENT OF JUDGE J C HOLDEN**

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[1] The plaintiff, Mr Dillon, challenges a determination of the Employment Relations Authority (the Authority) that found he was not an employee of the defendant, Tullycrine Ltd (Tullycrine) and, therefore, was unable to pursue claims for unpaid wages or for unjustifiable dismissal.<sup>1</sup>

[2] At the relevant times the directors and shareholders of Tullycrine were Mr Dillon's son, Mr Hayden Dillon, and daughter-in-law, Mrs Lisa Dillon.

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<sup>1</sup> *Dillon v Dillon* [2018] NZERA Auckland 334 (Member Robinson).

[3] The Authority found the relationship between Mr Dillon and Tullycrine was not an employment relationship. Rather, it said there was a relationship more in the nature of a partnership based upon the familial relationship between Mr Dillon, Hayden Dillon and Lisa Dillon.<sup>2</sup>

[4] For the reasons set out in this judgment, I too conclude that Mr Dillon was not an employee of Tullycrine. He is unable to pursue his claim for wages or for unjustifiable dismissal.

### **Arrangement had its genesis some years earlier**

[5] At one stage Mr Dillon and his wife Mrs Glen Dillon (Mrs Dillon) had a farm in Otago. By 2002 they had moved from the farm and had taken a lease on a bed and breakfast business in Auckland.

[6] They embarked on a building programme for that business that went beyond the funding available and, as a result, ended up in financial difficulty, with creditors wanting to be paid. Hayden and Lisa Dillon helped out, in particular by gifting Lisa Dillon's savings of \$12,000 to pay some of Mr and Mrs Dillon's debts and by taking on some of Mr and Mrs Dillon's other debts.

[7] By 2004 Mr and Mrs Dillon were living with Hayden and Lisa Dillon and their baby son in Hayden and Lisa Dillon's rented home in Melbourne. Then Mr and Mrs Dillon found work and moved to their own rented home in Melbourne. Mr Dillon's work was as a manager of a retirement village with a salary of \$73,000 per annum plus superannuation. During this time in Melbourne, Mr Dillon formed a particularly strong relationship with his young grandson.

[8] Hayden and Lisa and their, by then, two small children, returned to New Zealand in 2008. In 2010, when Hayden and Lisa Dillon were living in Hamilton and Mr and Mrs Dillon were visiting from Melbourne, the four of them discussed purchasing a farm to run as an agistment business, to which they would all contribute.

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<sup>2</sup> At [87].

[9] Broadly, the plan was that Hayden and Lisa Dillon would provide the funding and the management expertise, and Mr Dillon would care for the horses and be principally responsible for the day-to-day running of the farm.

[10] The family would live together, and Mr and Mrs Dillon would share in some childcare responsibilities, for example picking up the children from school. Lisa Dillon would continue with her podiatry business and Hayden Dillon with his financial advisor roles, but both would work on the farm as time allowed, in particular on the weekends.

[11] Hayden and Lisa Dillon sold their property in Hamilton and rented a five-bedroom home in Rototuna to accommodate the extended family. Mr and Mrs Dillon came home from Australia in September 2010 and moved in with Hayden and Lisa Dillon in the house at Rototuna.

[12] Tullycrine was incorporated with Hayden and Lisa Dillon as directors and shareholders. It bought a farm which had a cottage on it.

[13] After a few months Mr and Mrs Dillon decided to move into the cottage on the farm, leaving Hayden and Lisa Dillon in the rented house. It then was agreed that Hayden and Lisa Dillon would give up the Rototuna house and that they and their two children would move into the cottage, with Mr and Mrs Dillon moving to a portable house on the farm. This was the arrangement until a farmhouse was built, with two living spaces, one for Hayden and Lisa Dillon and their children and the other for Mr and Mrs Dillon. Mrs Dillon and Lisa Dillon took the primary responsibility for organising the design and furnishing of the house.

[14] The family hoped the agistment business would be successful so that Mr and Mrs Dillon could derive an income from it – \$500 per week was mentioned – and that all would benefit from the business' success. There also was an understanding that Mr and Mrs Dillon would have Hayden and Lisa Dillon's support after they retired.

[15] Hayden and Lisa Dillon (or Tullycrine) covered the accommodation costs for the family including housing, power, internet, phone and some farm food. There was

a vehicle available for both work and personal use by Mr and Mrs Dillon. Although Mr and Mrs Dillon had savings, there was no expectation that they would contribute financially to the purchase of the property. There initially was talk of Mrs Dillon having a paid employment role with Lisa Dillon's podiatry business, but that did not eventuate. Mrs Dillon did not look for other paid employment. This was a surprise to Hayden and Lisa Dillon, who had not realised that Mrs Dillon planned to stop paid work on her return to New Zealand.

[16] Difficulties started to arise with respect to the house. Mr and Mrs Dillon wanted the part in which they were to live to be larger than initially planned, with certain details that Hayden and Lisa Dillon had not anticipated. Hayden and Lisa Dillon were also concerned at commitments being made for expenses without their knowledge. The increased size of the house meant there was a development consent fee to be paid to the Waikato District Council. Mr and Mrs Dillon paid that fee.

[17] The agistment business was still developing and not making money. Mr Dillon says, before Christmas 2010, he made enquiries of Hayden Dillon about wage payments, but that Hayden responded that Tullycrine could not afford to pay wages and suggested that Mrs Dillon apply for a WINZ benefit "to take the financial pressure off." Mrs Dillon applied for a benefit, which she started to receive in January 2011. Mr Dillon says, once Hayden Dillon knew his mother was getting a benefit, he stopped promising that wages were coming and started asserting that Mr and Mrs Dillon "would get paid when Tullycrine could afford it."

[18] In 2011 Mr Dillon decided to buy some weanlings to pinhook.<sup>3</sup> It seems that although Mr Dillon used the Tullycrine account to buy the weanlings, and they were to be kept on the family farm, Hayden understood that Mr Dillon saw this venture as his, with he and Mrs Dillon receiving any profit. Hayden Dillon took issue with this arrangement. The combination of the issues with the house and with the purchases of the weanlings created tensions. This tension was apparent in an email exchange between Mr Dillon and Hayden Dillon in September 2011.

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<sup>3</sup> The practice of buying a young horse with the intention of re-selling it later for a profit.

[19] While the evidence of the email exchange before the Court was incomplete, it showed Hayden Dillon saying that the options, as he saw them, were (a) Mr Dillon being employed on \$500 a week and then paying the costs of grazing the yearlings, but retaining the sale proceeds, less a three per cent commission on any sale, or (b) things would “Remain as is” – “free rent, car, phone, internet, Sky, power etc. free grazing for [Mr Dillon’s] 3 yearlings”. It seems that Mr Dillon rejected option (a) and did not fully agree with option (b) either.

[20] Towards the end of 2011, Hayden and Lisa Dillon and Mr and Mrs Dillon agreed to attend a meeting at the offices of Hayden Dillon’s solicitors. That meeting was in the nature of a mediation and led to a handwritten agreement signed by the parties. The agreement covered arrangements for the sale of yearlings, and agreement that, if no other arrangement was made, the Waikato District Council payment, made by Mr and Mrs Dillon, would be reimbursed on any sale of the farm. Finally, the agreement records “If the circumstances of the farm permit Hayden & Lisa will look to increase the level of remuneration paid to Chris and Glen for their work”.

[21] As noted, Mrs Dillon was on a benefit from January 2011. This was because of health issues. Mr Dillon also received a benefit as her caregiver. At some stage both Mr Dillon and Mrs Dillon stopped receiving these benefits and started receiving national superannuation. The income received as benefits or superannuation was used by them for their living costs, over and above the items identified above and covered by Tullycrine or by Hayden and Lisa Dillon.

[22] While there still were issues between the parties in the period between the meeting at the lawyers at the end of 2011 and early 2017, some of which led to quite robust arguments, there was no fundamental disagreement about the arrangements between the family, including Tullycrine.

[23] However, by early to mid-2017 Lisa and Hayden Dillon were concerned at the financial position of the farm. Tullycrine had no committed agisters. Their bank had advised them that it would not fund any more losses and that Tullycrine had used up all of its equity.

[24] Hayden Dillon approached Mr and Mrs Dillon to discuss the situation and to look at other options for them, which did not involve the farm. Lisa Dillon approached her sister-in-law in Australia to ask her assistance in working out a plan for Mr and Mrs Dillon's future, which Lisa Dillon anticipated would continue to include financial support from Hayden and his siblings. By December 2017, Hayden and Lisa Dillon were attempting to outline an arrangement whereby the family (including Mr and Mrs Dillon's other children) would come together to provide Mr and Mrs Dillon support in their retirement.

[25] Mr Hayden Dillon said that he saw the options at the time as being that Mr and Mrs Dillon:

- (a) would stay on the farm and find alternative employment to boost their savings, and Hayden and Lisa would still cover the living costs; or
- (b) would look to move and find a job, with the family assisting with their rent.

[26] However, by that stage, Mr Dillon had taken legal advice and was suggesting that he was owed wages for the period during which the agistment business had been operating. Mr Dillon notified Hayden Dillon that he would be receiving a claim for wages.

[27] At that stage the relationship broke down. Mr Dillon lodged a claim for wages in the Authority and Tullycrine formally evicted Mr and Mrs Dillon from the family house.

[28] As at the time of hearing this matter, Mr and Mrs Dillon were living in Paraparaumu and, regrettably, they and Hayden and Lisa Dillon were estranged.

## Issue is the real nature of the relationship

[29] Determining whether Mr Dillon was an employee of Tullycrine, involves an analysis of whether he comes within the definition of “employee” in s 6 of the Employment Relations Act 2000 (the Act). That section relevantly 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.
  - ...

[30] This case arises in the context of a family arrangement. In such a context, the Courts have recognised that there is a presumption of fact against an intention of creating legal relations. 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.<sup>4</sup>

[31] However, I acknowledge the point made by Mr McKenna, counsel for Mr Dillon, that a family context does not preclude a finding of employment, and that there are circumstances where one member of a family is vulnerable to exploitation by others by virtue of the family relationship. I also acknowledge that, while intention

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<sup>4</sup> *Jones v Padavatton* [1969] 1 WLR 318 (CA) at 332.

remains important, it is not the only matter that must be considered when determining whether the true nature of the parties' relationship was one of employment.

[32] Nevertheless, 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.

[33] The factors that Mr Dillon points to as evidence of an employment relationship include:

- (a) the activities undertaken by Mr Dillon for the benefit of Tullycrine;
- (b) business cards organised that have Hayden and Lisa Dillon described as "co-owners" and Mr Dillon described as "general manager";
- (c) the reference to \$500 a week, which Mr Dillon claims was a promise to pay wages at that level;
- (d) control that Mr Dillon says Hayden Dillon and Tullycrine exerted over him;
- (e) the requirement, he says, to get permission to take any leave from the farm; and
- (f) his lack of involvement in the financial arrangements of Tullycrine.

[34] In contrast, Tullycrine points to:

- (a) The benefits all members of the family saw in the arrangement between them, including the agistment business;

- (b) the context in which the financial arrangements arose, in particular Mr Dillon’s prior history with creditors;
- (c) the mixed arrangements in place for looking after the farm; and
- (d) what Hayden Dillon says was a lack of control over Mr Dillon’s activities, including Mr Dillon making decisions unilaterally regarding the business.

[35] There are well settled tests that the Court and Authority look to in order to determine whether the real nature of a relationship is that of employment. Usually these arise in a contest over whether a person is an employee or an independent contractor.<sup>5</sup> However, on occasion, the question is whether a person is an employee or a volunteer and there is a line of cases concerning religious organisations, in which the contest is between whether the person undertaking certain activities is an employee or whether there is a spiritual alignment between the parties that is not consistent with employment.<sup>6</sup> There are surprisingly few cases in which a family arrangement is examined, and none since s 6 of the Act was enacted in its current form.<sup>7</sup>

[36] It is not, however, necessary to define what the relationship is if it is not an employment relationship; the issue for the Court is whether the true nature of the relationship is one of employment. There is no question that Mr Dillon performed “work” in the general sense of the word. He cared for the horses on Tullycrine’s farm and attended to other farm work. In evidence, he also sought to include picking up his grandchildren from school, but that was not pursued in submissions.

[37] Part of the agreed arrangement included provision of housing, amenities, and some food, and the use of a vehicle.

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<sup>5</sup> See, for example, *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372; and *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 61, [2010] ERNZ 61.

<sup>6</sup> See, for example, *Kirby v New Zealand China Friendship Society* [2015] NZEmpC 189 (volunteer); and *Mabon v Conference of the Methodist Church of New Zealand* [1997] ERNZ 690 (EC) (religious organisation).

<sup>7</sup> In *MacGillivray v Jones (t/a Tahuna Camp Store)* [1992] 2 ERNZ 382 (EC) the Employment Court found that, as there was no agreement for employment or contract of employment between the plaintiff and her prospective parents-in-law, she was not a “worker” as defined by the Labour Relations Act 1987.

[38] The issue for this case is whether that work and those rewards arose under a contract of service – was the true nature of the relationship employment?

### **Evidence does not support a finding of employment**

[39] As the Authority also commented, the arrangement between the parties was always based on their familial relationship.<sup>8</sup> The context was that Mr and Mrs Dillon were approaching the end of their working lives with little in the way of assets or income. Hayden and Lisa Dillon were working and raising their two children. The children had a close relationship with their grandparents. The agistment business and shared accommodation was seen as a way in which all the family would contribute and benefit. Mr Dillon's contribution largely was through caring for the horses on the farm. Mrs Dillon assisted with setting up the household and caring for the grandchildren. In return, they had a home and close ties to their son and his family, including their grandchildren. Further, they had expectations that Hayden and Lisa Dillon would support them once they retired, which also was Hayden and Lisa's intention. They all hoped that the agistment business would be successful to everyone's benefit.

[40] The arrangement was looked at holistically, with the family wanting each member to have what they needed for their lifestyle. While there was an understanding that Mr and Mrs Dillon would, through the family, have assistance in their retirement, the form of that assistance was never crystallised. While I have no doubt Mr Dillon performed valuable tasks in the agistment business, and that he and Mrs Dillon assisted with their grandchildren, Hayden and Lisa Dillon also supported Mr and Mrs Dillon both before and during the arrangements that are the focus of these proceedings.

[41] When the agistment business was not the success that was hoped, Lisa Dillon took steps to engage with other members of the family to discuss how the intended support would happen. There was never any suggestion that Mr and Mrs Dillon would be without support, at least until these proceedings were initiated.

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<sup>8</sup> *Dillon*, above n 1, at [87].

[42] The arrangement between the Dillons principally involved Mr Dillon carrying out physical work on the farm with Hayden and Lisa Dillon providing the financial backing and expertise for the business. Although those were the general arrangements, the evidence showed that Mr Dillon did enter into some financial arrangements on behalf of the farm without obtaining prior agreement from Hayden Dillon and that Hayden and Lisa Dillon and their children were involved in some of the physical work of the farm. Nevertheless, the recognised division in responsibilities explains the general lack of involvement in the financial arrangements and management of Tullycrine by Mr Dillon.

[43] I do not consider the business cards to be significant; they were prepared to provide to potential customers using descriptions that would be understandable in the market.

[44] I do not accept that Hayden Dillon exercised control over Mr Dillon in the way that an employer would do over an employee. While emails that Mr Dillon pointed to as demonstrating control certainly include comment and discussion on financial aspects of the business, that was understandable in the context that Hayden Dillon was primarily dealing with the financial matters and also was concerned over his father's involvement in those matters, given his business history. The evidence also demonstrated that Mr Dillon did not feel that he needed to get Hayden's agreement before he undertook various work on the farm and that he carried out the work of the farm in the way he thought appropriate.

[45] Further, Mr Dillon did not need to "seek permission" to take leave from the farm. Discussions about time away, when they did occur, were about ensuring that there was coverage on the farm and amongst the family members for the care of the children.

[46] Mr Dillon was not a vulnerable person. He has experience in management and ownership roles, including employing staff. He expressed himself quite strongly, in the email correspondence, including commenting that he was "not the hired hand".

[47] Mr Dillon understood that he was not employed by Tullycrine at least from Christmas 2010. The email correspondence of September 2011 then demonstrates that Mr Dillon expressly did not wish to enter into an employment arrangement with Tullycrine or Hayden Dillon. There were discussions about the way the farm operated, and about how the family members interacted, leading up to the meeting at the lawyer's offices in December 2011, and the agreement that eventuated. Between the beginning of 2011 and the end of 2017 no suggestion was made that the arrangement was anything other than a family arrangement. The disputes that arose during that period were not about matters that usually come with employment but more interpersonal disputes between strong-minded members of a family, including about the way in which the agistment business was being run. The suggestion of employment only arose after Hayden and Lisa Dillon realised that the business of Tullycrine was unsustainable and that the existing arrangements needed to be revisited. That was in 2018 and led to Mr Dillon's claim now before the Court.

[48] The outcome then is that Mr Dillon was not an employee of Tullycrine. The Court and Authority have no jurisdiction to deal with any legal issues between him and Tullycrine.<sup>9</sup> It is clear, however, that any perceived legal issues are secondary to the family issues that have arisen within the Dillon family and which hopefully in time can be repaired, at least to the extent that there is a reestablishment of a relationship between Mr and Mrs Dillon and their son and his family.

### **Non-publication ordered**

[49] Tullycrine applies for non-publication orders over financial information in documents provided in discovery and included in the common bundle before the Court. These documents originally were provided after Mr McKenna signed a confidentiality undertaking on behalf of Mr Dillon. I have not found it necessary to refer to the documents in this judgment but Tullycrine remains concerned that Mr Dillon may disclose them to the detriment of Tullycrine and/or Hayden Dillon.

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<sup>9</sup> Employment Relations Act 2000, ss 161 and 187.

[50] The Court may make non-publication orders over all or any part of evidence given in a case.<sup>10</sup> The principle of open justice is the starting point in considering non-publication.<sup>11</sup> However, here there is no discernible public interest in the details of the financial records being available, and the risk of adverse consequences to Tullycrine and to Hayden Dillon mean it is in the interests of justice that non-publication is ordered.

[51] Accordingly, there is a permanent order for non-publication of the information contained in:

- a. Tullycrine financial budgets across 2010-2012;
- b. Tullycrine financial statements for the 2011 financial year;
- c. Tullycrine Annual Report ending 31 July 2014;
- d. Tullycrine Special Purpose Financial Report ending 31 July 2015; and
- e. Tullycrine Special Purpose Financial Report ending 31 July 2016.

### **Costs are reserved**

[52] If Tullycrine seeks costs and cannot agree them with Mr Dillon, an application may be made to the Court within 20 working days of the date of this judgment. Mr Dillon then has 15 working days within which to respond and if Tullycrine wishes to reply, that reply is to be filed and served within a further five working days.

J C Holden  
Judge

Judgment signed at 4 pm on 28 April 2020

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<sup>10</sup> Employment Relations Act 2000, sch 3 cl 12(1).

<sup>11</sup> *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at[44] and [76].