The Gloriavale legal proceedings — were they employees?, 25 May 2022

Click to open document in a browser

By Stephanie Bode, Senior Solicitor, Kiely Thompson Caisley, a specialist employment law firm

In a recent judgment, the Employment Court has considered the interesting and significant issue of whether 3 former members of the Gloriavale Christian Community were employees or not: *Courage* v *The Attorney-General* [2022] NZEmpC 77.

The 3 former members and plaintiffs sought a declaration under s 6(5) of the Employment Relations Act that they had been employees since the age of 6 years old, from when they claim they started work within Gloriavale's businesses. Witnesses for the Gloriavale defendants denied that this was work, submitting instead that the plaintiffs initially carried out chores (age 6–14), then work experience (age 15), and later were contributing voluntarily to the Community by working in various endeavours (age 16 onwards).

Background Facts

Chief Judge Inglis set out the background facts in great detail, given that context is highly relevant to the assessment of employment status. Some of these key facts are summarised briefly below.

The Gloriavale Christian Community was founded in 1969 and is now based in an isolated location on the West Coast of the South Island. A key belief held in the community is that all things should be "held in common" — no one owns anything, and everyone is expected to contribute to the Community insofar as they are able.

Witnesses for the Gloriavale defendants emphasised the so-called "voluntary" nature of the way in which work is done within the Community, emphasising its consistency with community principles and the backdrop of residents agreeing to live within this unique framework.

The 3 plaintiffs, from age 6, began involvement in the Community's business ventures, including moss harvesting, honey making and food production. The plaintiffs claimed they were doing this work as employees while the defendants said these tasks were chores. The plaintiffs operated according to a roster and it was found that they had little to no say in where they were placed and what hours they spent there. The plaintiffs drew a picture of a highly controlled, authoritarian environment which did not permit dissenting voices, and which corralled obedience through fear.

At age 15, the plaintiffs underwent a “transitional year” whereby they became more heavily involved with the Community’s commercial operations, sometimes working in excess of 70 hours per week. The defendants called this a “transitional education/work experience programme” and claimed that the program had the approval of the New Zealand Qualifications Authority.

As part of this program, the 3 plaintiffs signed either a “Transitional Education Agreement” or “Work Experience Agreement”. By way of example of some of the content, the Transitional Education Agreement included statements that the signatory agreed that the program was for their own benefit and that they would not be an employee or partner, and that they would not be entitled to wages or payment; and agreed to follow all instructions and health and safety protocols, to respect the equipment and workmates, and to be punctual and tidy.

From age 16, the plaintiffs progressed to “Associate Partnership” whereby they signed a Deed of Adherence, and it was agreed that they would be bound by a Partnership Agreement. A key aspect of the Partnership was the provision of “labour hire” services to Gloriavale businesses under an “Agreement to Provide Services”, a detailed contract for services document. The Partners (and Associate Partners) recorded their hours on timesheets and their labour was then invoiced by the partnership to the relevant business. The money paid for these hours recorded would go into a bank account from which it would immediately be taken out and put into the Gloriavale sharing account.

The Legal Test

Section 6 of the Act provides that an employee means any person of any age employed by an employer to do any work for hire or reward under a contract of service. Volunteers are expressly excluded from the meaning of employee.

The essence of the Gloriavale defendants’ case was that no contract was entered into for the provision of services. Rather, the plaintiffs initially carried out chores, then work experience, and later were contributing to the Community by working in various endeavours. There was, on the Gloriavale defendants’ analysis, no intention to enter into contractual relations; no offer, acceptance or consideration — and accordingly no employment relationship.

However, s 6(2) of the Act provides that, in determining whether a person is employed by another person under a contract of service, the Court must determine the real nature of the relationship. In assessing the real nature of the relationship, the Court is directed to consider all relevant matters, including any matters that indicate the intention of the parties, and is not to treat as determinative any statement made by the persons describing the nature of their relationship.

The Court’s Judgment

The Court in this case did not accept the applicability of what might be called the “strict contractual approach” advanced on behalf of the Gloriavale defendants. It was emphasised that while s 6(1)(a) makes it clear that an employment relationship is founded on a contract of service, it is a relational contract involving a very different set of dynamics from an arm’s length business contract and requires a very fact specific inquiry.

The Court referred to the leading case on s 6, being *Bryson* v *Three Foot Six Ltd (No 2)* [2005] NZSC 34. While that Supreme Court judgment suggests that the written terms of the agreement (if there is one) should be examined first, there is no suggestion that this should be the end of the inquiry; “all relevant matters” should always be considered. And the Court said it is clear from both the statute and the case law that its attention (for the purposes of the s 6 inquiry) is to be properly focused on the real nature of the relationship, not on establishing the terms or basis of the parties’ agreement, or what one or the other or both parties might believe the relationship to be, or want it to be.

In applying the proper legal test to the present facts, the Court divided the plaintiffs’ claims into age brackets — 6 to 14 years (before and after school); 15 years of age (the “transitional” year) and 16 plus.

In relation to the first bracket, being 6 to 14 years, the Gloriavale defendants relied on a previous judgment of the Employment Court, where members of a family were held not to be in an employment relationship: *Dillon* v *Tullycrine Ltd* [2020] NZEmpC 52. The Court distinguished this case as it involved a close family relationship, consisting of a married couple, their son, and their daughter-in-law. As such, the Court held

that the same considerations that apply to such a familial relationship do not apply equally to a community organisation made up of almost 600 people.

The Gloriavale defendants' argument that the work undertaken was actually "chores" was also rejected. The Court noted at [162]:

> "*There is, as with anything involving questions of fact and degree, a spectrum. Cases sitting in the middle of the spectrum, in the grey area, are likely to pose difficulties. This case does not sit in the grey area. Pushing it towards the employee-conducted-work end of the spectrum, and away from the family/community chores/activities end of the spectrum, are a range of non-exhaustive factors such as: the commercial nature of the activities performed; the fact that the activities were undertaken to support a commercial purpose; Gloriavale's commercial businesses accrued the benefits of the plaintiffs' efforts; the activities were consistently performed over an extended period of time; and the fact that the activities were strenuous, difficult and sometimes dangerous.*"

The Court concluded that the evidence reflected a classic employment situation in the 6 to 14-year age group, for example, with workers being selected for jobs by Gloriavale management, attending work at times and for the hours selected by management and being under the direction and control of management generally, all for the benefit of the business endeavour.

The lack of written agreement and expectation for remuneration in the usual sense was not pivotal. The plaintiffs were not volunteers, as they were found to have been coerced into completing the work by a concern that they would lose access to their families, if they refused the work. The Court also held that the provision of food, the necessities of life and the ability to participate in the Community were a reward for work. Voluntary work requires no reward for service and there was clearly a reward here in that food, shelter and the security of community was provided in return.

In relation to the second 2 age groups (the transitional year and 16 plus), the plaintiffs were also found to be employees during these periods. While the labelling of the work changed from "chores", to "transitional work experience" to "Associate Partnership", nothing substantively changed, and these labels did not change the fundamental nature of the relationship.

Relevantly, the Court addressed questions about whether the claimed working conditions (if accepted) amounted to slavery or forced labour, and if so, whether the Court retained jurisdiction to make the declarations sought. The Court noted the fact that the criminal law provides an offence regime for those dealing in slaves or forced labour does not mean that the employment jurisdiction has no role to play and that it would be ironic if those suffering from the worst workplace abuses were unable to bring their claims to the Employment Court due to that level of abuse. In short, a person working in slave-like conditions may still fall within the definition of employee for the purposes of s 6.

In summary, the Court held that each of the 3 plaintiffs were employees in each relevant period. The Court did not make a finding as to the identity of the employer; that issue was reserved for determination later on the basis of further evidence.

Comment

The evidence of the plaintiffs presented and accepted in this judgment is very concerning for a number of reasons, raising issues of child labour, potential forced labour conditions and other human rights issues at the Gloriavale community.

Following this judgment being released, it has been confirmed that workplace inspectors will again visit Gloriavale, and the charities regulator has also launched a new investigation.