IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 158
EMPC 72/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ANTHONY KIDD Plaintiff
AND	GAIL ELIZABETH BEAUMONT AND ROY BEAUMONT First Defendants
AND	GAIL ELIZABETH BEAUMONT, ROY BEAUMONT AND DIPROSE MILLER TRUSTEES LIMITED AS TRUSTEES OF THE BEAUMONT FAMILY TRUST Second Defendants

Hearing:	6 and 7 October 2016 (Heard at Tauranga)
Appearances:	W Reid and R Rolston, advocates for plaintiff H Fulton, counsel for defendants
Judgment:	28 November 2016

JUDGMENT OF CHIEF JUDGE G L COLGAN

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Introduction

[1] At the heart of this case is the question whether a long-term resident of a holiday park or campground, who worked there part-time on a roster and in return for which he received money and a free licence to occupy a site and use the camp's facilities, was an employee of the business's owner. Flowing from this decision may or may not be an entitlement to minimum employment conditions including minimum wages and holidays.

[2] Anthony Kidd claims that he was employed by one or more of the defendants, but paid less than the minimum required under the Minimum Wage Act 1983. Mr Kidd also asserts that he was not allowed minimum holiday entitlements. He says that he was either disadvantaged in his employment by the unjustified acts or omissions of his employer (an unjustified disadvantage personal grievance) and/or that he was dismissed unjustifiably from his employment. He seeks remedies for all of these contended wrongs. Mr Kidd was unsuccessful in the Employment Relations Authority, the determination of which he challenges.

[3] Mr Kidd (then with his wife Irene Kidd who was also an applicant at first instance) brought proceedings for these remedies in the Authority. The Authority determined, as a preliminary point, that Mr Kidd was not an employee of any of the defendants. It said he was a "volunteer" and so not entitled to any relief. It dismissed his claims accordingly.[1]

[4] Mr Kidd now challenges that determination of the Authority by hearing de novo. All matters which were before the Authority are now before the Court for decision following that election under s 179 of the Employment Relations Act 2000 (the Act). Mrs Kidd is not now a plaintiff.

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1 *Kidd v Beaumont* [2016] NZERA Auckland 64.

The pleadings

[5] It is appropriate to refer to the pleadings (the latest statements of claim and defence) in the case because these determine the relevant issues between the parties. The Court was not provided with the statements of problem and reply which would have been before the Authority. At least until the commencement of the hearing, Mr Kidd's statement of claim was not comprehensive and was arguably insufficient, at least as regards his personal grievance claims.

[6] As the Court's oral ruling (delivered at the commencement of the hearing on 6 October 2016) confirms, Mr Kidd was permitted to amend his statement of claim by adding further particulars of his claims to relief under the Minimum Wage Act 1983 and the Holidays Act 2003. This was by specifying amounts claimed and their means of calculation. However, Mr Kidd's personal grievance claims remained nebulous. In his second amended statement of claim Mr Kidd elected to challenge the Authority's determination by hearing de novo. That determination dismissed Mr Kidd's "personal grievance" application although, even under a heading "Employment relationship problem", the Authority did not define what this was or these were; rather, the Authority limited the issues for decision by it to whether Mr and Mrs Kidd (the Kidds) were employees; the identity of the employer; and, if they were employed, what arrears of wages were payable to them, if any.[2] In a relatively brief determination, running to nine pages, the Authority confirmed that the Kidds' personal grievances were dismissed.

[7] At para 5 of his second amended statement of claim in this Court, Mr Kidd sought "Relief" including:

> …
> (c) Compensation in the sum of $10,000.00 for hurt and humiliation and injury to feelings pursuant to Section 123(1)(c)(i) of the Employment Relations Act 2000 …
>
> [and]
>
> (e) Payment of three months lost wages pursuant to Section 128(2) of the Act.

[2] At [10].

[8] These claims were in addition to relief setting aside the Authority's determination; seeking a determination of the identity of his employer; and seeking wage arrears of $44,019.02 under s 131(1) of the Act. Any remedies of compensation and lost wages under ss 123(1)(c)(i) and 128(2) of the Act must necessarily arise from the establishment of a personal grievance or grievances. In this case, these could only have been an unjustified dismissal and/or an unjustified disadvantage in employment. Mr Kidd's evidence appeared to assert that he was dismissed unjustifiably on 10 March 2014 and para 4(p) of the second amended statement of claim confirms that this was a claim for unjustified dismissal. It is open on the evidence for the Court to conclude that, if Mr Kidd was dismissed, then this may have been either actually or constructively. I will return to this issue later in the judgment if Mr Kidd is found to have had the status of an employee at the time his employment ended.

A jurisdictional issue (pleaded but not pursued)

[9] The defendants' statement of defence to the plaintiff's second amended statement of claim asserts, as a preliminary point, that the plaintiff could not elect to change the nature of his challenge to one by hearing de novo as occurred. The defendants say that Mr Kidd's challenge under s 179 of the Act elected what is colloquially known as a non-de novo challenge and, the time for challenging a determination under s 179 having long expired, he was not subsequently able to alter the nature of that challenge.

[10] This point was not taken up by counsel for the defendants at the hearing and so I assume it has been abandoned. However, if not, I will express the following views about it.

[11] I would find against that submission for a number of reasons. First, the alteration to the particular nature of the plaintiff's election to challenge (made within time) from a hearing only on certain identified issues (a so-called non-de novo hearing) to a rehearing of all matters that were before the Authority (a de novo hearing), was not made by the plaintiff. It was directed by the Court of its own motion after considering the nature of the defendants' pleaded defence. That was a

direction that Judges make from time to time in such cases. More importantly, it was the exercise by the Court of its express and inherent powers to conduct a hearing in a manner most likely to best deal with the matter according to its equities and merits. That change was signalled to the parties in the Court's Minute of 8 August 2016. The Court's express powers to do so are several. They include under s 189(1) of the Act:

> In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.

[12] The Court's powers also include those under s 221 which are as follows:

> **221 Joinder, waiver, and extension of time**
> In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—
> …
> (d) generally give such directions as are necessary or expedient in the circumstances.

[13] Even if this change had been made at the plaintiff's instigation, I consider that the plaintiff would also have been entitled to this alteration to the nature of his case. Section 179(1) allows a party dissatisfied with an Authority determination to elect to have "the matter" heard by the Court. Subsection (2) requires such an election to be made in the prescribed manner and sets a time limit of 28 days after the Authority's determination to file such an election. Further detail of the election is required by subs (3). The election must specify the determination or the part of the determination to which the election relates and state whether or not the electing party is seeking "a full hearing of the entire matter (in this Part referred to as a **hearing de novo**)." (original emphasis by use of bold typeface)

[14] There is nothing in the legislative scheme that commits irrevocably a plaintiff in the circumstances of Mr Kidd to the type of election first made. What is important is that *an* election is made within the prescribed time, as this was. When, as in this case, the pleadings of both parties indicate that all, or at least all of the

significant, matters decided by the Authority are the subject of claim and defence, then it is open to the Court, either on the application of a party or of its own motion, to elect to treat the hearing accordingly: that is, in this case, a challenge by hearing de novo in which all matters before the Authority are in issue.

[15] That is particularly appropriate where, as here, the legislation is arguably deficient in relation to a case which has been determined by the Authority only on a preliminary jurisdictional issue as this was. Mr Kidd challenged the Authority's preliminary conclusion that he was not an employee and its dismissal of his grievances and other claims. In the absence of a statutory power to refer the matter back to the Authority, established case law is that the Court is seized of the substantive issue that was before the Authority (if the jurisdictional challenge is dismissed) when the Authority has not decided this substantive issue.[3] So, in practical terms in this case, Mr Kidd's first statement of claim was insufficient if he was successful in establishing that he was an employee. It did not deal with the subsequent questions which were put before, but not decided by, the Authority: whether he had been underpaid, deprived of holidays and/or unjustifiably disadvantaged or dismissed. By adding those two further questions to the matters for hearing in the Court, a non-de novo challenge was effectively turned into a challenge by hearing de novo.

[16] In these circumstances, there is no doubt in my view that the Court was entitled in law to hear and decide the merits of Mr Kidd's claims that were before the Authority but, because of its decision on the preliminary jurisdictional issue, were not decided by it. That is not precluded by any time limitation as the defendants claimed in their statement of defence.

The relevant facts

[17] There is a measure of agreement between the parties on relevant facts but there are also strongly contested ones. Because determinations of law must be applied to factual findings, the following are the relevant circumstances to which those conclusions of law will be applied. To the extent that the Court's findings

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3 *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC) at [58]-[60].

prefer either the plaintiff's or the defendants' account of relevant events to the other's, I will set out those which I have found to be more probably correct. Where it is unclear which account should be preferred or the accounts of the parties are finely balanced, the onus of establishing that he was an employee rests with Mr Kidd on the balance of probabilities.

[18] Gail and Roy Beaumont (the Beaumonts) operate a campground known as the Omokoroa Caravan and Motorhome Park near Tauranga. The registered proprietor of the land on which the campground is situated is the Beaumont Family Trust (the Trust), of which the trustees are the Beaumonts and Diprose Miller Trustees Ltd.

[19] The campground includes 40 powered sites for tents, caravans or mobile homes (including provision for extra-large vehicles), four cabins and three caravans for rent. There are also amenities blocks, an office premises and associated managerial accommodation. As such, the campground is essentially no different from many others throughout New Zealand that provide a combination of long-term or permanent, and holiday accommodation.

[20] At times material to this case, the Beaumonts lived about two kilometres away from the campground. The campground was established and operated under a resource consent granted by the Western Bay District Council which required, among other things, that a manager was to reside permanently on the site and was to be available there at all times.

[21] The Trust purchased the campground in a relatively primitive state. It had few accommodation units, sites and facilities and a large part of the land was an orchard. As ex-farmers looking to build a new business, the Beaumonts worked to develop the size and standard of the campground, including by reducing substantially the size of the orchard and increasing correspondingly the accommodation units and sites. Much of this work was undertaken by Mr Beaumont himself, whilst Mrs Beaumont attended to running the campground operationally at the same time as it was being expanded. At first the Beaumonts themselves fulfilled the resource consent requirement of constant managerial presence but soon

considered that they required some assistance with the day-to-day management and operation of the campground.

[22] Accordingly, they engaged persons who were, or became, residents, to assist them with office administration, cleaning, rubbish disposal and the myriad of other small but essential daily tasks required of a campground operator. The persons who fulfilled this role of "helper", as it was described in evidence by the Beaumonts, were not paid time-related money as such but, instead, were provided with low-cost or no-cost accommodation at the site. Eventually, for a variety of reasons, these workers moved away from the campground, the last of them after the Kidds' arrival as long-term residents.

[23] In late November 2011 the Kidds moved to live permanently at the campground in a caravan owned by them. Their caravan and the campground then became their residence. They paid a weekly sum ($160) to occupy a powered site at the campground and use its facilities. Although the caravan site rental was normally $180 per week, the lower figure of $160 was charged initially as a promotional incentive to attract custom in the campground's early days.

[24] About three months later and with the pending departure of a "helper" in late February 2012, the Kidds agreed with the Beaumonts to undertake some work at the campground, initially on a twice-weekly basis. This work involved a variety of duties and, in return, the Kidds paid no site rental for their caravan or for the use of associated ablutions and laundry facilities.

[25] The campground office was open and staffed between about 8.30 am and 8.30 pm on all days of the week. Winter hours were shorter; summer hours longer. Office duties included dealing with customers, their visitors and other members of the public in relation to bookings and inquiries and other similar administrative tasks. The Beaumonts exercised overall control of the campground and its office. Immediate daily supervision and management of the business was undertaken by persons at the office who included, from time to time and on a regular basis, Mr and/or Mrs Kidd. Mr Beaumont (and from time to time, also, Mrs Beaumont) worked on-site principally to develop and maintain the grounds and the facilities.

[26] The Kidds' non-office duties also included the daily cleaning of the amenities block and the rental cabins and caravans. Specific and detailed directions for these duties were given by Mrs Beaumont who also provided the Kidds with initial training in those tasks. In consideration for undertaking those duties, the Kidds were provided with free occupation of their caravan site and associated benefits such as the provision of electric power and the use of toilets and showers. The value of these rewards was reflected in the waiver by the Beaumonts of the usual charges for occupation by the Kidds, more latterly $210 per week.

[27] The arrangements to which the Kidds and the Beaumonts agreed and which were in place when Mr Kidd ceased working and departed from the campground were as follows. The Beaumonts had an eight-day working roster, with one other couple (also residents) responsible for the campground for four days and the Kidds for the other four days of that cycle. The Beaumonts were largely agnostic as to which of the couples was on duty at any particular time and allowed them to choose their four-day cycles to suit themselves and, if necessary, to work on fewer than their four days so long as the other couple covered for them and they made up the time later. The roster was evidenced by a calendar maintained in the campground's office which showed, by a series of coloured dots and handwritten notations, which of the couples was scheduled to be working on any particular day for each forthcoming calendar month. The on-duty couple were expected to live in the accommodation adjacent to the office for their four working days and were responsible for the security of the site and its residents outside office hours.

[28] Irrespective of how many days the Kidds worked during that eight-day cycle, they received a monetary credit valued, finally, at $210 net as outlined previously. In addition, when the couples worked for four days in an eight-day cycle, they received the sum of $100 in cash from Mrs Beaumont, contained in an envelope left for them in the office. On those occasions when a couple worked fewer than four days in a cycle, that amount was reduced by $25 for each day not worked.

[29] The source of those cash payments was Mrs Beaumont's personal bank account. Those payments did not come directly from the Trust's financial resources; they came from Mrs Beaumont's own income which consisted of National

Superannuation payments and what she described as "wages" paid to her and Mr Beaumont by the Trust. It is unclear whether these latter payments were treated by the Trust as beneficiary distributions or whether, on the other hand, there was a formal arrangement that the Beaumonts were employed by their Trust. Either way, whilst these cash payments were made from Mrs Beaumont's own funds, they came, at least indirectly, from the Trust.

[30] In January 2014 the Beaumonts became aware that Mr Kidd was planning to have some elective but necessary surgery, although he did not tell them this and did not wish them to know that then. At that time there were some tensions between the Beaumonts and the Kidds. The Beaumonts say that they were less than satisfied with the Kidds' standards of work at the campground and especially in their dealings with prospective customers who thereafter elected not to stay there. The Beaumonts did not, however, raise their concerns with the Kidds as might have been expected and, indeed, wished them to continue to work in those same managerial capacities, including after what the Beaumonts intended would be an appropriate period of recuperation by Mr Kidd following his surgery.

[31] There then occurred an unusual but significant event. Mr Kidd was concerned at the manner in which he felt he was being dealt with by the Beaumonts, and Mrs Beaumont in particular. He took his complaint up with a Labour Inspector from the Ministry of Business, Innovation and Employment. The Labour Inspector investigated the background to these events of which Mr Kidd complained and, although unable to take further Mr Kidd's complaint that may have amounted to a personal grievance, the Labour Inspector nevertheless concluded both that the Kidds were employees and that, as such, they had not been paid minimum wages or provided with minimum holiday entitlements.

[32] Those were not Mr Kidd's initial concerns, but when the Labour Inspector reported her conclusions to him, Mr Kidd confronted Mrs Beaumont with them. Mrs Beaumont, understandably in the circumstances and in turn, became very defensive and upset about what she considered was a breach by Mr Kidd of their understanding that he would not be working for remuneration and about the liability of her and her husband and/or their Trust if the Labour Inspector's conclusions about the Kidds'

employment status, and the Beaumonts' liabilities to them, were correct. The combination of these two responses by Mrs Beaumont to Mr Kidd's dissatisfaction with their working arrangements coloured, and in many ways triggered, the events which followed.

[33] There are disputed and confusing accounts of how Mr Kidd's working relationship with the Beaumonts ceased. I conclude, as a matter of probabilities, that in the course of a heated and antagonistic discussion between Mr Kidd and Mrs Beaumont, both of whom were upset and angry but for different reasons, Mrs Beaumont indicated to Mr Kidd that she and her husband had someone who would be able to take over Mr Kidd's work. I am satisfied that although Mrs Beaumont intended this to refer to the period when Mr Kidd would be indisposed recovering from surgery, she did not make that clear in her advice to him. He assumed that Mrs Beaumont meant that there was someone who would take over his and his wife's duties at the park thereafter and, therefore, that the Beaumonts did not wish them to continue working there. Neither party was in a mood, or took the trouble, to clarify what was said and understood. After their confrontation Mr Kidd arranged for the removal of his and his wife's caravan to another caravan park and did not return to the campground, but subsequently claimed that he had been dismissed unjustifiably.

An incentive not to be an employee?

[34] At the time of these events, Mr Kidd was in his early 70s. He was thus entitled to, and did, receive National Superannuation. Mrs Kidd was then aged under 65 but because of a long-term physical disability she was entitled to, and did, receive a state benefit in addition to Mr Kidd's National Superannuation. There was no evidence, nor were there any submissions, about the effects of income other than his National Superannuation on Mr Kidd's ability to work and earn. Although it seemed to be common ground that Mr Kidd's remuneration would not alone have affected the amount of his National Superannuation, it may have affected any additional benefits he received for medical or dental subsidies although these benefits were very modest. Although Mrs Kidd's financial position may have been more complex, she is not a claimant in this proceeding and was not a witness.

[35] The only asserted relevance of these considerations to Mr Kidd's claim is the Beaumonts' assertion that Mr Kidd's agreement to work as a volunteer helper, and not as an employee, was influenced and evidenced by his concerns that he should not have additional income that would have been disclosed to the tax and benefit authorities.

[36] Documentary or income disclosure informalities do not determine, certainly decisively, whether there was an employment relationship or agreement between parties. Such factors may go into the mix in determining whether there was an employment relationship intended by both parties but they are not determinative of it nor, in this case I conclude, strongly influential in deciding it.[4]

Statutory definitions of employment

[37] The first port of call in determining whether Mr Kidd was an employee, is s 6 of the Act. Relevant parts of s 6 include subs (1)(a) which says that, unless the context otherwise requires, employee "means any person of any age employed by an employer to do any work for hire or reward under a contract of service …". Section 6(1)(c) excludes from the definition of "employee" "a volunteer who … does not expect to be rewarded for work to be performed as a volunteer; and … receives no reward for work performed as a volunteer …".

[38] This exclusion from employees as a class raises a question of interpretation of the definition. Is a "volunteer" someone who works but does not expect to be rewarded for doing so and receives no reward for the work performed? That is, do the dual factors of expectation and non-receipt define a volunteer, who is therefore not an employee? Alternatively, is a volunteer (not otherwise defined) nevertheless an employee if that volunteer does expect to be rewarded for the work to be performed and/or receives a reward therefor? This dichotomy has been identified in previous judgments of this Court and the former interpretation generally adopted.[5]

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4 *Davis v Canwest Radioworks Ltd* (2007) 4 NZELR 355 (EmpC) at [5]-[8].

5 See *Brook v Macown* [2014] NZEmpC 79, [2014] ERNZ 639 at [22]-[26].

[39] Despite the ambiguous words and phrases used by Parliament, I consider that it intended the former meaning. That is, that a "volunteer" (as defined by reference to reward expectations and receipt) is not an employee for the purposes of this Act.

[40] Ultimately, however, this interpretation does not determine the case because, irrespective of the defendants' categorisation of Mr Kidd as a volunteer, he both expected to be rewarded for his work and received reward for performing it. So, put shortly, whatever is the interpretation of the exclusory reference to a volunteer in s 6(1)(c), Mr Kidd was not excluded from being an employee.

[41] The particular facts of this case do not engage the interesting and potentially problematic question of whether contributions towards costs incurred in performing volunteer work constitute a reward under s 6. That is because Mr Kidd did not incur any out-of-pocket expenses in performing the work for the defendants. He lived on the site where the work was performed. He was not required to purchase or otherwise himself provide any tools, protective clothing or the like. These were all made available to him by the defendants. His 'rewards' were not in the nature of a reimbursement of expenses incurred in the performance of his work: they were solely reward for work performed.

[42] Other relevant parts of s 6 also include the requirement under subs (2) that the Court "must determine the real nature of the relationship …". This is expanded on in subs (3), which requires the Court to consider all relevant matters including ones that indicate the intention of the parties, and that it is not to treat, as a determining matter, any statement by those persons that describes the nature of their relationship. That requires the Court to stand back from the minutiae of the detail of the relationship between the parties and of the work performed, and to consider objectively and realistically whether that relationship was one of employer and employee. As has been said before and authoritatively, this is an intensely factual and often case-specific application of informed and knowledgeable commonsense.[6]

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6 *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC).

[43] Further, as the Court noted in the *Atkinson v Phoenix Commercial Cleaners Ltd*:[7]

> Section 6 of the Act is broader and requires more than simply determining the common law contractual question of the parties' common intention. It focuses on the nature of the relationship in law for the purposes of determining whether the rights and obligations of employer and employee arose from that relationship. In circumstances such as these, a s 6 analysis can and must be made of the relationship between the parties to determine whether Mrs Atkinson was Phoenix's employee.

"Volunteers"?

[44] The Authority Member began her determination by stating generally that "Volunteers are the lifeblood of many communities". While that may be true in one sense, it is not a universal or absolute truth and it must, in any event, yield to the application of the law (and employment law in this case). In a number of enterprises, volunteers (people who work without payment in the nature of wages or salary or other reward) do enable such enterprises to be established and continue. It is not difficult to find examples: small local museums, religious communities, amateur sporting organisations, theatrical societies, the provision of some companionship services to the elderly and the like are just some examples of where volunteering is a longstanding, admirable and indeed often essential practice. There are many other similar examples where what are commonly called "volunteers" work from a commitment to a cause, to pursue an interest, or to stay active and engaged with others.

[45] Indeed, in some spheres of activity, "volunteers" perform both essential community and intensively regulated roles. Volunteer firefighters and ambulance personnel, for example, undertake work where they can be expected to be directed, sometimes quite prescriptively, but yet receive no reward or, except in exceptional circumstances, reimbursement of expenses paid by them to perform this work. The hallmark of such volunteering is, however, that it is not performed for a commercial organisation but, rather, out of a sense of duty to the community or a commitment to a particular cause.

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[7] *Atkinson v Phoenix Commercial Cleaners Ltd* [2015] NZEmpC 19 at [58].

[46] In a military sense, a volunteer may be contrasted with a conscript. The former decides for himself or herself to join a military force whereas the latter is required to join by government edict. Thereafter, however, both volunteers and conscripts are required to perform their duties and work required of them: status as a volunteer in this sense does not make performance of duties optional. Both volunteers and conscripts are usually paid for their military service.

[47] Many jobs can be and are undertaken by either volunteers or employees. Relatives working in a family business may be another example of where there is no mutual intention to enter into a wage/work bargain.[8] There is generally no expectation of employment law applying to such relationships although others in the same fields or enterprises may well be employees, even those working immediately alongside the volunteers and apparently doing similar work.

[48] General dictionary definitions of "volunteer" include the following.

[49] The *Shorter Oxford Dictionary* (6th ed) defines a volunteer as: "A person who voluntarily offers his or her services in any capacity; a person who voluntarily takes part in an enterprise." The transitive or intransitive verb "to volunteer" is to: "Offer (oneself, one's services) for a particular purpose or enterprise; offer of one's own accord to do."[9]

[50] The online Merriam-Webster dictionary defines a volunteer as: "A person who voluntarily undertakes or expresses a willingness to undertake a service … and … one who renders a service or takes part in a transaction while having no legal concern or interest."[10]

[51] The *Shorter Oxford English Dictionary* defines "voluntarily" as: "Freely or spontaneously bestowed or made; contributed from personal choice or impulse or from generous or charitable motives."

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8 See, for example, *MacGillivray v Jones (t/a Tahuna Camp Store)* [1992] 2 ERNZ 382 (EmpC).

9 *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, New York, 2007).

10 Merriam-Webster (online) Dictionary <www.merriam-webster.com/dictionary/volunteer>.

[52] Legal dictionaries offer the following contributions. First, Spiller's *Butterworth's New Zealand Law Dictionary* defines "volunteer": "A person who acts without any legal obligation to do so".[11]

[53] Garner's *Black's Law Dictionary* says: "Someone who gratuitously and freely confers a benefit on another."[12]

[54] The free online edition of *Black's Law Dictionary* (2nd ed) describes a volunteer (among other definitions) as: "A person who gives his services without any express or implied promise of remuneration in return …".[13]

[55] Finally, it should be noted that the definition of "volunteer" in the book version of *Black's Law Dictionary* includes an "officious intermeddler" in relation to the term "mere volunteer". In turn, an officious intermeddler is: "Someone who confers a benefit on another without being requested or having a legal duty to do so, and who therefore has no legal grounds to demand restitution for the benefit conferred": hence, I imagine, the equitable principle that 'equity will not assist a volunteer'.

[56] Usual, if not universal, features of such volunteering arrangements include that the organisation is not engaged in commerce, at least as a profit-making or capital gain-making enterprise, and that the enterprise would not be sustainable but for the commitment of such volunteers.

[57] Legislation provides little assistance in defining "volunteer". There is no definition of "volunteer", for example, in the employment-related Volunteers Employment Protection Act 1973, one of the so-called minimum employment code statutes.

[58] Even in non-employment-related New Zealand legislation there are few statutory definitions of "volunteer". Section 2 of the Smoke-free Environments Act

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11 Peter Spiller *Butterworths New Zealand Law Dictionary* (7th ed, LexisNexis NZ Ltd, Wellington, 2011).

12 Bryan A Garner (ed) *Black's Law Dictionary* (10th ed, Thomson Reuters, USA, 2009).

13 http://thelawdictionary.org/volunteer.

1990 defines a volunteer as a person of any age who performs for an employer, otherwise than for hire or reward, any work arranged by or on behalf of the employer. The Health and Safety at Work Act 2015 provides, under s 16, that a volunteer is a person who is acting on a voluntary basis (whether or not the person receives out-of-pocket expenses). Also under that Act, s 19(3) defines the phrase "volunteer worker":

> (a) means a volunteer who carries out work in any capacity for a PCBU—
> (i) with the knowledge or consent of the PCBU; and
> (ii) on an ongoing and regular basis; and
> (iii) that is an integral part of the business or undertaking; but
> (b) does not include a volunteer undertaking any of the following voluntary work activities:
> (i) participating in a fund-raising activity:
> (ii) assisting with sports or recreation for an educational institute, sports club, or recreation club:
> (iii) assisting with activities for an educational institute outside the premises of the educational institution:
> (iv) providing care for another person in the volunteer's home.

[59] The subs (3)(b) definition assists in excluding from that definition of a volunteer the sorts of activities that I have distinguished from involvement in commercial activities including, for example, fund-raising; assisting with sports or recreation activities; assisting with extramural educational institution activities; and providing care for another in the volunteer's home.

[60] In the United Kingdom, as with many equivalent minimum code provisions, there is a more detailed definition of the phrase "voluntary workers" under s 44 of the National Minimum Wage Act 1988. That provides:

> (1) A worker employed by a charity, a voluntary organisation, an associated fund-raising body or a statutory body does not qualify for the national minimum wage in respect of that employment if he receives, and under the terms of his employment (apart from this Act) is entitled to,—
> (a) no monetary payments of any description, or no monetary payments except in respect of expenses—
> (i) actually incurred in the performance of his duties; or
> (ii) reasonably estimated as likely to be or to have been so incurred; and
> (b) no benefits in kind of any description, or no benefits in kind other than the provision of some or all of his subsistence or of such accommodation as is reasonable in the circumstances of the employment.

> (2) A person who would satisfy the conditions in subsection (1) above but for receiving monetary payments made solely for the purpose of providing him with means of subsistence shall be taken to satisfy those conditions if—
>
> (a) he is employed to do the work in question as a result of arrangements made between a charity acting in pursuance of its charitable purposes and the body for which the work is done; and
>
> (b) the work is done for a charity, a voluntary organisation, an associated fund-raising body or a statutory body.

[61] As is noted in *Halsbury's Laws of England*,[14] the stated parliamentary intention that the s 44 exclusions "do not apply to volunteering in non-charitable commercial enterprises."

[62] Finally, in relation to the UK legislation, I note the reference in s 44(1)(b) that someone is not excluded from volunteer status because of the provision of some or all "of his subsistence or of such accommodation as is reasonable in the circumstances of the employment." In this case, of course, and on one view of it, Mr Kidd had what would otherwise have been his accommodation costs at the campground met by the Beaumonts. I do not consider, however, that rewarding Mr Kidd by waiving what would otherwise have been his private accommodation costs at his usual place of residence would change the position in New Zealand.

[63] So, whilst other statutory material about volunteers is helpful, it is not determinative of the issue of whether Mr Kidd was a volunteer and, therefore, not an employee.

[64] Was the defendants' business such an enterprise that one might expect people such as Mr Kidd working for it to be volunteers? The campground was purchased, developed and maintained as a business both to provide an income to the Beaumonts and/or their trust, and as an asset for eventual sale and capital gain. As a family trust, it operated for the ultimate benefit of its beneficiaries, the Beaumonts and their adult daughters. In common with many similar enterprises, it ran as a business charging occupiers (by selling temporary licences to occupy sites) and offsetting costs of operation against revenue received. The campground required an on-site presence by a person or persons responsible for its operation and to deal with all of

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[14] *Halsbury's Laws of England* (2014, online ed) vol 39 Employment at [188, note 3].

the issues that arise as a landlord of multiple long- and short-term licences to occupy. The Beaumonts had their home off-site but the business required an on-site manager available at all times. Those are not features of an enterprise that one would usually expect to be staffed by unpaid volunteers.

[65] In reality, also, the plaintiff was not a volunteer in the sense of working for no or minimal reimbursement of out-of-pocket expenses, or other reward. In return for performing work around the campground, he received the not insubstantial benefit of not having to pay for his caravan to occupy a site, or for the electricity used in it. In addition, he had free use of many of the campground's facilities. As he did when he began living there, the plaintiff would have had to pay the going rate for these had he not performed work for the defendants. Taking account of the envelope containing cash, he (and Mrs Kidd) received the equivalent of $310 for four days' work per week. I conclude that Mr Kidd was not a volunteer (and therefore not excluded from being an employee) as that word is defined in s 6. There remain, however, further analyses before it can be said if he was an employee.

Other common law tests of employment[15]

[66] Although arguably better suited to determine the more frequently asked question whether someone was an employee or an independent contractor, I will deal nevertheless with what are recognised generally as being the subsidiary but longstanding common law tests applied by the courts now under s 6 of the Act.

[67] The first is usually referred to as the 'control test'. This determines, in this case, whether how Mr Kidd's work was performed, was controlled by him or by the Beaumonts. There are strong indicia that primary and ultimate control over what was done, when, and how, rested with the Beaumonts although there were some secondary flexibilities which allowed Mr Kidd a degree of autonomy.

[68] What was to be done at the campground each day, and when and how those jobs were to be performed, remained within the complete and firm control of the Beaumonts. That was illustrated, as much as anything else, by the formal list of jobs

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15 *Bryson*, above n 6, at [19].

to be done and quite detailed instructions about how they were to be performed, given to the Kidds. All tools and other equipment required for the performance of these jobs were provided by the Beaumonts. Some of those items had to be used and could not be substituted by the Kidds. The defendants were responsible to customers, and potential customers, to present a high standard of order and cleanliness and there was really no scope for Mr Kidd to deviate from this unilaterally. Even the requirement that only a male person was to empty the toilet cassettes indicates a significant degree of prescriptive control on the part of the Beaumonts.

[69] The secondary flexibility, indicative of a looser control, included the ability of the two couples responsible for the management of the campground on four-day roster cycles to exchange days between them; this counter-balances somewhat this otherwise high level of control by the Beaumonts. But even then, they exercised control by insisting that the work was to be performed every day and as required by them. There was a significant degree of control of his work, and of Mr Kidd as a worker, by the Beaumonts. This is strongly indicative of a relationship of employment.

[70] Next is what has been called 'the integration test'. This considers the degree to which the person alleging employment was integrated into the business or, alternatively, maintained his or her independence of it.

[71] Mr Kidd, when performing managerial duties in particular, was the 'face' of the campground to licence holders, potential licence holders, visitors and others dealing with it on site. His work was performed either in the campground office or around its grounds. Mr Kidd used the business's facilities (booking records, telephones and the like) when performing his duties and was required to use cleaning facilities and supplies determined by the Beaumonts in the performance of his out-of-office duties. An introductory sheet handed to new campers, welcoming them and summarising the rules of the campground, was signed off by the given names of both the Beaumonts and the Kidds without qualification or reference to their roles. The Kidds were held out by the Beaumonts as equal partners in the management of the campground. Mr Kidd had no separate legal personality, such as a company, to

provide those services. For the performance of his work, I conclude he was integrated substantially into the business of the campground. Application of this test, too, favours finding an employment relationship.

[72] Finally, in this regard, what has been called the 'fundamental' test determines whether Mr Kidd performed the services that he did at the campground as a person in business on his own account, as opposed to an employee. There can be no suggestion that this test points towards anything other than employment. There is no argument to the contrary and Mr Kidd was not engaged in any other sort of work, whether in cleaning and managing campgrounds, motels or other accommodations, or otherwise. Application of this third test likewise favours a conclusion that he was an employee.

A common intention?

[73] It is correct, as the defendants submit, that for Mr Kidd to have been an employee of one or more of the defendants, the parties must have held common intentions: first, to enter into a legal arrangement between themselves and, if so, that such an arrangement was to be one in the nature of employment.

[74] There is little, if any, evidence of those intentions being exhibited expressly at relevant times, even by one side, let alone mutually. Their intentions may, however, be gleaned inferentially and from their conduct in the performance of whatever arrangements were reached between them.

[75] There was no agreement in writing between the parties or, at least put in evidence, or any similar written record (other than the roster dots on the calendar) which might have confirmed a mutual intention. It is, in the circumstances, as unhelpful (although understandable) that the Beaumonts now insist that they always regarded Mr Kidd as a volunteer helper and so described him orally from time to time, as it is for Mr Kidd to say that he considered that he was, from the outset, an employee at the campground. Nor is it helpful to the Court for the Beaumonts now to say that neither they nor Mr Kidd could ever have intended that he be their employee because they simply had insufficient funds coming into the business to

have afforded to pay an employee, even the minimum wage, for the hours that he worked. Subjectively assessed opinions of their status, especially in the knowledge of the litigation and its potential consequences, are unhelpful and of little or no weight, in deciding this question.

[76] At the outset of the parties' working relationship, I conclude that Mr (and Mrs) Kidd became aware that another licence holder or occupier at the ground who did some work for the Beaumonts in return for not paying or paying in full a licence fee, was to leave. Mr (and Mrs) Kidd raised with the Beaumonts the possibility that they (the Kidds) might take over the incumbent's role: that is to perform some administrative and cleaning duties in return for a reduced occupancy licence fee. After discussions about the nature of this work which were conducted in a very informal and friendly manner, agreement to do so was reached. I am satisfied that there was no discussion, or probably even critical thought, either way, about the legal status of this arrangement. After all, at the outset, it did not involve the payment of any money to the Kidds; rather and initially, there was the payment of a lesser than the market rate sum by the Kidds for their occupancy licence, but which obviously resulted in a net benefit to them and, in the form of work performed, to the Beaumonts.

[77] Even when these arrangements were enlarged and put on a more certain footing involving the fixing of shifts and the preparation in advance of a roster, the elimination of any occupation licence fee and the payment of cash to the Kidds, the evidence satisfies me that there was still no discussion about the legal status of these arrangements between the parties. They were, in a sense, a natural development of the initial arrangements between them although involving longer hours of work, increased rewards/remuneration and the greater formalisation of duties to be performed by the workers. In particular, there was not ever any discussion between the parties about whether the Kidds were "employees" or "volunteers". Although the Beaumonts referred to the Kidds (and others) in evidence a "helpers", there is no evidence that this term was used in discussions between the parties about the legal nature of their working arrangements.

[78] I am, however, satisfied that at least from the commencement of the Kidds' work at times at which the Beaumonts expected them to be present at the campground and working or available to work, the parties by then intended to formalise their working arrangements sufficiently that these were intended to be legal relations. That was as opposed, for example, to friends helping other friends out, or any other similarly informal arrangement that was devoid of any legal status, or without a mutual intention to create legal relations. There was a mutual intention, albeit implied, to create legal relations in the nature of employment.

Case law on "volunteers/employees"

[79] There is a body of case law relating to s 6, although most judgments address whether someone is an employee as opposed to an independent contractor rather than a volunteer as in this case. There are, however, a few cases on issues related more closely to this case.

[80] The most recent judgment on volunteers is *Brook v Macown*, a case which involved a person holding the position of registrar of a cultural association which, as the Court described it, "… (like many sporting and other endeavours) relies on the commitment and enthusiasm of many volunteer workers."[16] The council of which Mr Brook was registrar was a not-for-profit administrative body representing professional and amateur dancers, having the purpose of fostering that activity and co-ordinating member associations. The position of registrar was subject to an annual appointment process and had a job description. Responsibilities included maintaining a register, banking registration fees and dealing with inquiries. The registrar was required to hold the registration records at his home and was expected to devote his time to between four hours per day during the registration period, but otherwise, four hours per week. An expense allowance was provided as determined annually and, at the relevant time, was $1,500 per year.

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16 *Brook v Macown*, above n 5, at [2].

[81] As to the interpretation of s 6 of the Act and the lack of clarity identified earlier in this judgment, Judge Inglis (in *Brook*) wrote:[17]

> Read literally, s 6(1)(c) may be taken as excluding only a sub-group of volunteers (those not expecting or receiving a reward) rather than volunteers more generally. However, as the essence of volunteering is the gratuitous provision of services it can safely be assumed that the provision defines "volunteer" in juxtaposition to those who fall into the category of employee.

[82] The Judge continued:[18]

> It is clear that the inquiry does not start and stop with an assessment of whether a person is a volunteer. If the requirements of s 6(1)(c)(i) and (ii) are met it follows that they are not an employee. However, it does not follow that they are an employee if these requirements are not met. That is because subsections (2) and (3) require a more expansive enquiry. The assessment is an intensely factual one, requiring consideration of all relevant matters, including material from which the intention of the parties can be gleaned.

[83] At [21] the Judge posed the question:[19]

> What constitutes a "reward" for the purposes of s 6(1)(c)? The term is not defined in the Act. It is arguable that it includes non-monetary recognition of services provided. This was the approach recently adopted in The Salad Bowl Ltd v Howe-Thornley. In that case Chief Judge Colgan considered that the plaintiff who completed a three hour work trial was not a volunteer because she had expected to be rewarded (by way of monetary payment) for the trial period and was in fact rewarded by receiving a free salad at the end of the day.

[84] Drawing on a number of United Kingdom cases, at [26] her Honour concluded:[20]

> While in everyday usage the concept of "reward" is broad, and can include intangible or non-monetary benefits, I doubt that this is so for the purposes of s 6(1)(c). After all, many people carry out voluntary work for the personal satisfaction they receive and accordingly expect to be, and are, "rewarded" in a broad sense. It is doubtful that something in the nature of a handshake or a bunch of flowers was within Parliament's contemplation when enacting the volunteers' exception to s 6. Rather, it appears that s 6(1)(c) was inserted as a "belts and braces" measure to make it clear that volunteers did not fall within the definition of "employee".

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17 At [18].
18 At [19].
19 Footnote omitted.
20 Footnote omitted.

[85] The issue of an intangible or similar reward does not arise in this case because Mr Kidd's 'rewards' were both tangible and monetarily quantifiable. Unlike Judge Inglis's conclusion in Mr Brook's case that he "… took on the role because he, like many others, wished to make a positive contribution to the dance community",[21] Mr Kidd's motivation was to earn and save some money at the campground at which he lived. His 'reward(s)' having a monetary value to him of $155 per four-day work week, were not in the nature of personal satisfaction or community contribution. This was not an intangible or non-monetary benefit of the sort referred to by her Honour in *Brook*. It was not, for example, the proverbial "bunch of flowers" given to him but that Mr Kidd would not otherwise have purchased. Rather, his reward was monetary (in part a waiver of a monetary payment that he himself would have had to have made to the Beaumonts) and which was linked, at least in part, to the number of days that he worked when this was fewer than those to which he had been rostered. Mr Kidd's motivation in working for the Beaumonts was financial, to both save accommodation costs and to make some income.

[86] Another distinguishing factor is the Judge's conclusion in *Brook* that the payment received by the plaintiff in that case was an "expense allowance" to reimburse the costs incurred by Mr Brook associated with the registrar's position including his maintenance of a home office, record storage space and computer use. There was no such expense compensatory element of the rewards received by Mr Kidd.

[87] Further, the Judge concluded in *Brook* that:[22]

> … I do not consider that it could sensibly be suggested that the defendants would have had any legal remedy against Mr Brook if at any stage during the eight years at issue he had declined to perform any work as Registrar. While the services he provided were of considerable value, they were performed without contractual or legal obligation.

[88] Again by contrast with this case, the Beaumonts did have a remedy in law if Mr Kidd declined to perform his work or performed it so unsatisfactorily that his position became untenable. That remedy was to terminate his working arrangements as is open to employers generally under employment law.

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[21] At [27].
[22] At [31].

[89] Although concluding the case against Mr Brook by finding that he was a "volunteer", Judge Inglis went on to conclude that even if he had not been a volunteer, he would not have been an employee. There were four elements that the Judge used to determine employment status.

[90] The first was the written and oral terms of any contract, especially containing any indication of common intention; the second was any divergences from those terms and conditions in practice; third, the way in which the parties had actually behaved in implementing their contract; and, fourth, the levels of control and integration of Mr Brook into the Dance and Dancesport Council.[23]

[91] Pertinently for this case, the Judge in *Brook* concluded at [47]:

> The nature and extent of any payments made to a person will be relevant to an assessment of whether he or she is an employee. For example, a lump sum payment generally points away from a contract of service, whereas regular payments may weigh in favour of such a relationship. Additionally, payments that are designed to reimburse a person for expenses tell against an employment relationship and payments that do not relate to expenses actually incurred can amount to wages and so be indicative of employee status.

[92] I agree with the foregoing general statements of the interpretation and application of s 6 in *Brook.* This is, however, a very different case factually, in which application of the principles identified by Judge Inglis points strongly to an employment relationship.

[93] In 2000 this Court dealt with a case of foster parents in a managed family home, *McCulloch v Director General of the Department of Social Welfare*.[24] Although decided by reference to definitions under the Employment Contracts Act 1991, the case is authority on the more general and unchanged question of a mutual intention to create legal relations. The claim turned, primarily, on whether the appellants in that case were "homeworkers". That is not an element of the assertion to employee status at issue in this case.

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[23] At [34].

[24] *McCulloch v Director General of the Department of Social Welfare* [2000] 1 ERNZ 467 (EmpC).

[94] Judge Travis wrote in *McCulloch*:[25]

> In some respects, the situation is analogous to *Mabon v Conference of the Methodist Church of NZ* where the Court of Appeal upheld the Employment Court's decision that the parties did not intend to create legal relations and therefore had not entered into any form of a contract of employment. In *Mabon*, the Conference had considered changing the relationship between itself and its ministers to one of employer-employee but expressly elected not to do so. Here the department [the defendant] declined to alter its policy that caregivers were not employees [but were, rather, volunteers] in spite of representations by the Caregivers' Association.
>
> (citation omitted)

[95] This case of Mr Kidd lacks those elements identified by Judge Travis in *McCulloch* of one party clearly signalling to the other, especially after representations had been made to it seeking to persuade the Department to enter into employment agreements with such staff, that this would not be done. In these circumstances, *McCulloch* does not embody principles which are applicable to this case.

[96] Nor is the judgment of this Court in *MacGillivray v Jones* helpful in determining this case.[26] *MacGillivray* was an instance of family members working in a shop with a view to receiving a share in the business. The claimant was engaged (to be married) to the business owners' son and although she received no wages, she had food, board and access to trade discounts provided. The decision that Ms MacGillivray was not an employee was based on a finding that the necessary ingredients of a contract of employment (including particularly an intention to create legal relations and certainty of terms) were not made out.

[97] Finally, counsel cited the relatively recent judgment of this Court in *The Salad Bowl Ltd v Howe-Thornley*.[27] The relevance of this case is that a job applicant who had undergone a brief work trial was held not to have been a volunteer, having expected to be rewarded for her time worked and who was in fact rewarded with a free lunch. Not insignificant among the Court's findings in *The Salad Bowl* case was

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25 At 474.
26 *MacGillivray v Jones*, above n 8.
27 *The Salad Bowl v Howe-Thornley* [2013] NZEmpC 152, [2013] ERNZ 326.

that, as in Mr Kidd's case, the work performed for the business contributed to its operations as a commercial enterprise.

An "employee"? Decision

[98] This is the preliminary legal question to be decided by the case. That question reflecting s 6 is not whether Mr Kidd was a volunteer, as the Authority appears to have approached it, but, rather, whether he was an employee.

[99] Relevant factors pointing towards Mr Kidd being an employee outweigh both numerically and substantially the indications that he did not have that status. Indicia of Mr Kidd's status as an employee include the following.

[100] At least for the latter part of his work at the campground, Mr Kidd was rewarded in two ways. First, he received a benefit in return for performing work, in that he was not required to pay the weekly occupation licence fee as a resident of the campground, which also entitled him to the use of its facilities, electric power, washrooms and laundry. During the later part of that period, the net benefit to Mr Kidd was one-half of $210 per week, that is $105. In addition to that standard payment, Mr Kidd was the beneficiary of a cash sum calculated by reference to each day that he worked. When this was (usually) on the four-day roster, the Kidds received cash of $100. On those occasions when three days were worked in a week, the cash payment was of $75. This represented, therefore, $25 for the Kidds for each day worked. Mr Kidd was an equal beneficiary in that sum, that is of a net $12.50 per day. So, for most four-day weeks, Mr Kidd himself received money or money's-worth of $155.

[101] Next is the nature of the enterprise for which Mr Kidd worked. This was not a charitable or community enterprise but was a private business which was an investment and income-producing vehicle for the Beaumonts' Trust. It was purchased by the Trust, which had at least one other income-producing asset (a commercial property in Tirau), with a view to providing the Beaumonts both additional retirement income and the accumulation of value as an asset for eventual sale and distribution of the proceeds in accordance with the Trust Deed under which

the Beaumonts and their daughters were the beneficiaries. The asset was purchased in a run-down condition and it was intended to increase the capital value of it by making major improvements to it as the Beaumonts did. It now has an appreciably higher asset-value as a result not only of the development work done by them but also as a result indirectly of the efforts of persons such as Mr Kidd in the day-to-day management and running of the operation.

[102] The evidence favours overwhelmingly the existence of an employment arrangement with Mr Kidd.

[103] The Authority erred in its decision that Mr Kidd was a volunteer and, thereby, not an employee. The correct approach ought to have been, via s 6, to determine whether Mr Kidd was, in law, an employee rather than reaching primarily the conclusion that he was a volunteer, emphasising the use of that description of their relationship by the defendants. Applying s 6(1)(c), the Authority ought to have concluded that, irrespective of whether Mr Kidd *expected* to be rewarded for the work that he performed (as I find he did if only because this was promised to him by the Beaumonts), that there was the incontrovertible fact that he received rewards for it, so excluding him statutorily from being a non-employee volunteer.

[104] Whilst the Authority may have been correct that volunteering is the lifeblood of communities, as with all such truisms, it can be misleading to apply these sentiments universally as legal principles.[28] Where, as in this case, a commercial enterprise is undertaken with a view to profitable operation and ultimate sale for a capital gain, one of the arteries sustaining a business is, where owner/operator input is insufficient, the employment or other engagement of staff in return for remuneration and/or other reward. Mr Kidd was not related to, or even previously known to, the Beaumonts, so that this is not a case of a close family member working in a family business without regular or minimal remuneration. There is no suggestion that he was an independent contractor in business for himself engaged in managing one campground part-time. Considered objectively and realistically, there

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[28] See, for example, *The Warehouse Ltd v Harris* [2014] NZEmpC 188 at [226], in relation to the expression "The customer is always right".

can really be no conclusion other than that Mr Kidd was an employee working part-time at the campground.

[105] Mr Kidd was rewarded for performing his work. The definition of employee under s 6 of the Act allows such consideration to include a "reward", that is a benefit which is other than purely monetary or wages or salary. Mr Kidd's reward was tangible and precisely ascertainable, being in the form of a free licence to occupy a campsite, together with the associated benefits attaching to that, including the provision of electricity and access to bathroom and other facilities. More latterly, he also shared in a payment of $25 per day worked, usually amounting to a net $100 per week.

[106] Contrary to the findings of the Authority, I conclude that the nature of the relationship between Mr Kidd and the defendants meets the several tests or guidelines that go to make up what has been called the s 6 'reality' test of whether there was an employment relationship. Mr Kidd was an employee of whichever entity is determined subsequently was his employer.

Who was Mr Kidd's employer?

[107] Until this point, I have not identified precisely who or what was the employer of Mr Kidd at the time of his dismissal. While I have concluded that he was an employee of his employer, for the purposes of ascribing liability for any remedies that may be available to him, it is now necessary to determine which of the three defendants, or combination of them, was the employer.

[108] The Beaumonts are defendants in two separate legal categories. First, it is alleged that in their purely individual private capacities they, or either of them, were Mr Kidd's employers. Alternatively, the plaintiff's contention is that the Trust employed him. Such a trust must be and is sued in the names of its trustees, two of whom are the Beaumonts and the third, their accountants' trustee company. In this regard, the Beaumonts are sued as trustees.

[109] The registered proprietor of the land on which the campground was sited was the Trust. For local authority purposes, the campground was operated by the family trust in which the Beaumonts were both the settlors and among the beneficiaries.

[110] I have concluded that the business of owning and operating the campground lay with the Trust. It prepared annual accounts included among which were income and expenditure relating to, and assets held by, the campground. The income that was foregone by the loss of site rental was incurred by the Trust so that, in this sense, it may be seen to have remunerated Mr Kidd by way of reward for the work that he performed.

[111] Such cash payments as Mr Kidd received were paid by Mrs Beaumont from what she described as her own income from her National Superannuation income and from their own 'wages' (or perhaps drawings) from the business. The Trust was the owner of the business and despite not paying, directly and fully, the rewards to Mr Kidd, it did forego the revenue that he would have paid for his licence to occupy his caravan's site. The Trust lost income but gained the value of the work performed by Mr Kidd.

[112] I find, in these circumstances, that the employers of the plaintiff were the Beaumonts (Gail and Roy) and Diprose Miller Trustees Ltd, jointly and severally in their capacities as trustees of the Trust.

Employee or employees (plural)?

[113] I am satisfied that there was an employment relationship between the Trust as employer and Mr Kidd as employee, and an (unwritten) employment agreement between these parties. It is, however, necessary to determine the rights and obligations of each of the individual employees under that agreement to decide what Mr Kidd alone may now be entitled to. That is because the employment relationship was with the Kidds jointly, although the performance of it was determined by them personally.

[114] The work of a part-time manager/caretaker of the campground could have been undertaken by one person. That is not only consistent with the content of previous advertisements for the position seeking a person or a couple for this work, but was confirmed in evidence by witnesses for both sides. Even when there were duties to be fulfilled contemporaneously (that is, both cleaning the facilities and being available in the camp office), this was achievable by one person using a combination of a cordless telephone and temporary signs which meant only short delays and minor inconveniences to those needing the manager.

[115] The practice of a couple sharing the employment duties of one person is not uncommon, particularly in this field of endeavour. Both persons are trained and able to undertake the duties required of a single person and, between them, they are able to perform the work obligations of one person, by combinations of sharing the tasks. The employer's need was, nevertheless, for the completion of a set of tasks on a daily basis but with a degree of flexibility around the timing of their performance and, especially, who did what.

[116] So, I conclude, the arrangement between the Kidds and the Beaumonts was that so long as, in whatever combination the Kidds chose, the tasks were performed in a satisfactory and timely manner by one or both of them, the rewards for this work would be provided globally and could be shared by them as they wished. There was, however, one exception to this general scheme. The Beaumonts would not permit Mrs Kidd in particular (or indeed, as I understood the evidence, any woman) to empty caravan toilet cassettes, because of the weight and awkwardness of this task, and especially in relation to such cassettes as lacked appropriate handles. Mrs Beaumont justified this restriction on the nature of the work that Mrs Kidd was able to perform, by saying that it was a health and safety issue. It was therefore, in practice, necessary that Mr Kidd undertook that part of the cleaning job that he and Mrs Kidd agreed to perform.

[117] There is otherwise insufficient evidence about the division of labour between the Kidds in practice, even approximately. In these circumstances, the most just way to determine Mr Kidd's entitlements as reflecting the hours he worked and/or was required to be available on duty, is to divide these equally between the Kidds. So,

Mr Kidd's hours of work were, in my conclusion, the equivalent of 50 per cent of those periods when the couple were rostered to be on duty as managers of the campground. Towards the end of Mr Kidd's employment, those periods for the Kidds were four continuous days (periods of 24 hours) over an eight-day cycle, followed by a similar period during which there were no working obligations imposed on the Kidds.

[118] Next, what might be called 'sleepover' complications do not arise in this case. Even although it is clear that the Kidds were expected to be available to deal with any matters arising at whatever time during their rostered shift periods, Mr Kidd's claim excludes specifically the duty period between when the office closed in the evening and when it reopened on the following morning and during which the Kidds were expected to occupy the manager's accommodation adjacent to the camp office and front entrance.

[119] Also arising out of the way in which Mr Kidd's claim has been brought, the plaintiff accepts that he should give credit for his proportion of those rewards that the Beaumonts provided to the Kidds. Although reflecting periodically increased site licence fees, Mr Kidd's share of those rewards ranged from $80 per week at the beginning of his employment to $105 per week at its conclusion: that is, one-half of the prevailing caravan rental fees ranging from $160 to $210 per week. Also to be deducted from any claim made by Mr Kidd is his share of the weekly cash payment made to him and Mrs Kidd by Mrs Beaumont during the period of their employment. This was, in effect, a daily payment to both the Kidds of $25, most usually in a sum of $100 when a shift of four days was worked, but on occasions when that period was only three days, $75. On a daily basis of a $25 payment to the Kidds, therefore, Mr Kidd's share of that was $12.50 per day when he and Mrs Kidd were the on-duty managers.

Minimum Wage and Holidays Act claims

[120] In these circumstances, the Court must examine Mr Kidd's claim for unpaid remuneration and for holiday entitlements. Because a rate of pay for the work that he performed was not ever fixed (otherwise than by reference to the rewards that he

received in lieu of remuneration), this must necessarily be the then applicable rate under the Minimum Wage Act 1983. The different rates have been identified in evidence by the Labour Inspector and there is no dispute about their accuracy at the relevant times. Assuming liability to pay minimum wages (which the defendants contested, but which I conclude is the consequence of Mr Kidd's status as an employee), there was no dispute about the accuracy of the Labour Inspector's figures which were in evidence. So, too, are Mr Kidd's holiday entitlements those minimal ones under the Holidays Act 2003.

[121] Next, it is necessary to determine the lengths of time in which Mr Kidd was engaged in that work. No question of a statutory time limitation on Mr Kidd's claim arises. Bearing in mind that the claim relates now only to Mr Kidd himself, I conclude that he became entitled to the relevant minimum wage and holiday entitlements from the commencement of his work at the campground for the Trust. This can be fixed most conveniently in time by reference to the date on which the Kidds ceased paying a weekly licence fee for their caravan and use of the facilities at the campground. That concession was in consideration of the work they performed and its date ought to be able to be ascertained reasonably easily by reference to the defendants' records of campground fees paid by the Kidds.

[122] Next, offset against the calculation under the Minimum Wage Act should be an allowance for the value of the rewards received by Mr Kidd, so that whether there is any unpaid remuneration to him and, if so how much, can be calculated. All of these calculations will need to exclude those periods when Mr Kidd worked but which fell outside camp office opening hours. That is because he has disavowed deliberately any claim in the nature of a sleepover payment: that is for a payment when he and/or his wife were required to stay in the accommodation adjacent to the office and to be available on call if needed. In these circumstances, it has been unnecessary to determine whether Mr Kidd might have been entitled to minimum wages for those 'sleepover' periods and I have not done so.

[123] The evidence of remuneration loss and holiday entitlements presented to the Court is now either so insufficient and/or not in conformity with the Court's findings that it is impossible now to determine, first, whether Mr Kidd is entitled to any

compensation for less than minimum payments or other benefits; or, if he is, the amount of such compensation. Hopefully, this judgment and the reasons for it will allow the parties, together with the Labour Inspector who has a statutory responsibility for ensuring that such payments are made, to calculate the outcome without further recourse to the Court. In case that cannot be done, however, leave is reserved to the parties to apply to the Court. Any such application should be made before 20 December 2016.

Personal grievance(s) - decision

[124] Next is Mr Kidd's claim that he was disadvantaged and/or dismissed unjustifiably. I have already concluded that at the time that his employment ended at the campground, Mr Kidd was an employee. This enables his recourse to the Act's personal grievance procedures.

[125] In his submissions to the Court Mr Reid, advocate for the plaintiff, did not identify any particular elements of a disadvantage grievance suffered by his client, nor did he distinguish such a grievance from that relating to Mr Kidd's alleged unjustified dismissal. I do not consider that the plaintiff has established a separate disadvantage personal grievance, at least sufficiently to shift the onus to the Trust to justify its acts or omissions. The defendants' failures to deal with Mr Kidd as an employee under the Minimum Wage and Holidays Acts are compensable monetarily, but as compensation for breaches of them. Personal grievances are different causes of action. In one sense Mr Kidd was disadvantaged in his employment by the Trust's breaches of those statutes. He could be compensated for those breaches including by an allowance for interest on monetary losses. However, I do not consider that any of the other events leading up to the end of Mr Kidd's employment by his abandonment of it, amounted to a disadvantage grievance. Even if, therefore, that cause of action, as pleaded, had been advanced as such at the hearing, I conclude it would not have been made out and is, therefore, formally dismissed.

[126] The next question is whether Mr Kidd was dismissed, either actually or constructively. In view of the defendants' denials, there is an onus on Mr Kidd to

establish a sufficient case of dismissal, actual or constructive, for that onus then to move to the defendants to justify the dismissal.

[127] I am not satisfied that Mr Kidd has established, to the requisite standard, that he was dismissed, either actually or constructively. In reaching this conclusion I have considered, objectively and carefully, the states of mind and intentions of the Beaumonts and Mrs Beaumont in particular because she was responsible for the management of staff including Mr Kidd. Despite not being satisfied with the quality of Mr Kidd's interactions with potential and actual customers, I have concluded that she did not intend to dispense with his services and, despite what Mr Kidd may have thought, did not convey such an intention to him.

[128] The end of the employment did not come at the Beaumonts' initiative. Indeed, I have concluded that in spite of their views of Mr Kidd and his performance, they wished him to take time off for his surgery and to recuperate, and took steps to provide for others to perform his work during that period. Mr Kidd was wrong to have assumed that this proposed arrangement was a permanent one: that is to replace him (and Mrs Kidd) including after he was able to return to work. Although, as I have already concluded, Mrs Beaumont did not make that entirely clear, neither did Mr Kidd himself clarify what was intended by the defendants. Had he done so, I conclude that Mrs Beaumont would have assured him that his replacement was temporary and medically-related. There was no breach by the Trust, as Mr Kidd's employer, entitling him to treat this as a repudiation of their agreement and, therefore, a constructive dismissal.

[129] In these circumstances, I conclude that Mr Kidd was not dismissed, either constructively or actually, and that his personal grievance founders on that preliminary point. It is unnecessary, in these circumstances, to consider justification for the Beaumonts' actions because they were not repudiatory of what I have found to be the employment agreement between the parties.

Summary of judgment

[130] From the date on which Mr Kidd began work at the campground in return for reduced occupancy licence fees, he was an employee of Gail Beaumont, Roy Beaumont and Diprose Miller Trustees Ltd as trustees of the Beaumont Family Trust.

[131] As such, he was entitled to the minimum benefits provided for employees under the Minimum Wage Act and the Holidays Act. The amounts of these entitlements have been calculated, in part, by the Labour Inspector and these amounts should form the basis of negotiations between the parties' representatives, with a view to quantifying the amounts due to Mr Kidd. If these cannot be agreed upon, if necessary with the assistance of the Labour Inspector and/or further mediation, before 20 December 2016, leave is reserved for the parties, or any of them, to apply to have the Court quantify these remedies.

[132] Mr Kidd was not disadvantaged in his employment or dismissed from it unjustifiably by his employer. His personal grievance claims fail and are dismissed.

[133] The determination of the Authority dismissing Mr Kidd's proceedings on the basis that he was not an employee, is set aside and this judgment is issued in substitution for it.

[134] Mr Kidd is entitled to a contribution towards his costs in the Authority and in this Court. That entitlement must, however, take into account the defendants' success in the personal grievance claim. If agreement cannot be reached between the parties as to these amounts, leave is reserved for any party to apply to the Court no sooner than one calendar month after the date of this judgment to determine costs. The parties are reminded of their election earlier in the case that costs be calculated by reference to the scale known as 2B under the Court's pilot scale costs guideline.

GL Colgan
Chief Judge

Judgment signed at 2.45 pm on 28 November 2016