

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 185/09
5108651

BETWEEN	MAREE PATRICK Applicant
AND	IOANE OKARE JOHN First Respondent
AND	MANA AWHI LIMITED Second Respondent

Member of Authority: Philip Cheyne

Representatives: Maree Patrick, the Applicant in person
John Shingleton, Counsel for Respondents

Investigation Meeting: 20 October 2009 at Christchurch

Determination: 23 October 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a statement of problem lodged as long ago as December 2007, Maree Patrick says that she was unjustifiably dismissed and also is owed wage arrears and holiday pay from her employment in a business started by her and her former de facto partner (Ioane John). Ms Patrick's claims are against Mr John personally as the first respondent and, in the alternative, against a company called Mana Awhi Limited (MAL) as the second respondent.

[2] In response, the respondents say that Mr John never employed Ms Patrick, that MAL employed but did not dismiss her and does not owe her any wages or holiday pay and that Ms Patrick owes MAL up to \$141,033.25 for company funds paid by her into her bank account without explanation or justification.

[3] These matters were referred to mediation but were not resolved. The difficulties thereafter in getting this matter to an investigation meeting do not need to

be canvassed here. When a further phone conference was convened on 27 July 2009 Ms Patrick withdrew her personal grievance claim and arrangements were agreed for a meeting to investigate her arrears claim and the MAL counterclaim. Shortly before the investigation meeting, Ms Patrick sought to reinstate her personal grievance claim. That was opposed by the respondents. I declined to widen the scheduled investigation to include a personal grievance claim and the reasons for that decision are contained in a minute to the parties.

[4] Investigation arrangements included a requirement for Ms Patrick to provide specified documents relevant to the counterclaim but Ms Patrick neglected to do this.

[5] This determination therefore resolves only Ms Patrick's arrears claim but it will be apparent to the parties that the same reasoning would apply to the counterclaim and any renewed personal grievance that was lodged with the Authority.

[6] It is helpful to briefly explain the context in which the claim arose before considering in greater depth the essential issue of whether Ms Patrick was an employee of either respondent.

Context for the claims

[7] Ms Patrick and Mr John were in a de facto relationship or at least a relationship of that nature. Ms Patrick had the idea for a nursing agency business specialising in providing nursing and care staff in the fields of intellectual disability and mental health. Ms Patrick had some experience in this work and Mr John had some capital. They agreed to proceed with this endeavour.

[8] A company (Mana Awhi Limited) was incorporated on 21 June 2005 and a Westpac bank account in the company's name was opened on 27 June 2005 with funds from Mr John. A solicitor was instructed in the formation of the company. His instructions at the time were that Mr John was to be the sole director and shareholder while Ms Patrick would perform the function of manager of the business. In evidence Ms Patrick accepted this description of the instructions as accurate.

[9] The business employed staff who were placed with various clients. The clients were charged fees and the staff were paid wages by MAL. The business and staff numbers grew quickly and Ms Patrick worked day and night, up to 7 days per week on its establishment, growth and management. Mr John was required to

introduce more capital to meet cashflow requirements. However, he had little formal control over the company's funds because most of the transactions on the company bank account were by way of internet banking which Ms Patrick controlled. Ms Patrick was initially a signatory on the company cheque account but that right was soon removed. That restriction made no practicable difference to Ms Patrick's ability to use company funds.

[10] Ms Patrick used her residential address as business premises. In about November 2005 a house was bought in Mr John's name. Ms Patrick then lived there with Mr John and operated the business from this property with company funds used to meet Mr John's mortgage obligations. Throughout, Mr John maintained a separate residence where he sometimes stayed.

[11] Ms Patrick did not receive any wages or salary before April 2006 although she says that an employment relationship was formed in April 2005, several months before the company's formation.

[12] By October 2006, differences between Mr John and Ms Patrick had emerged about the ownership and control of the business. They consulted their solicitor who wrote to them in November 2006. The business issues were complicated by the personal relationship between Ms Patrick and Mr John and the potential for claims between them over relationship property and the like. By this time, there were also significant tax issues between the company and IRD.

[13] Christina John is Mr John's daughter. She commenced working for the company on 29 September 2006 and quickly developed concerns about its operation. I infer that Ms John spoke to her father about these concerns. The relationship between Ms Patrick and Ms John deteriorated, as did Ms Patrick's domestic relationship with Mr John. By late January 2007, matters had got to the point that (according to the statement of problem), Ms Patrick's employment was terminated by Ms John taking control of the business records and assets.

[14] Ms Patrick initiated proceedings under the Property (Relationships) Act 1976 in February 2007 and claimed a half share in the house from which the business operated and where she lived and Mr John stayed or lived and a half share in the business and assets of MAL. Those proceedings ended by consent orders in August 2007 including a full and final settlement of all matters between the parties under that

Act. By the terms of these consent orders, Ms Patrick accepted that she *shall have no further interest in the company Mana Awhi Limited*. The consent orders do not bar the present proceedings.

[15] Also in February 2007, Ms Patrick, through her solicitor, commenced correspondence over claims of a personal grievance and arrears of wages and holiday pay based on her contention that there was an employment relationship. That correspondence eventually culminated in these proceedings.

Employment Relationship

[16] Essential to Ms Patrick's claim is a finding that she was employed by either Mr John or Mana Awhi Limited to do work for hire or reward under a contract of service: see s.6 Employment Relations Act 2000. In considering that point, the Authority must determine the real nature of the relationship. I must consider all relevant matters, including any matters that indicate the intentions of the persons. I am not to treat as a determining matter any statement by those persons that describe the nature of their relationship.

[17] This statutory direction does not negate the point of cases such as *MacGillivray v Jones* [1992] 2 ERNZ 382 that the common law elements of a contract of service must be present. In that case, because of the familial relationship, the Court found no intention to create the legal relationship of employer and employee despite the outward appearance of other aspects of an employment relationship such as the doing of work for hire or reward.

[18] Ms Patrick's case is that an employment relationship was formed in April 2005 in the following circumstances despite the original intention between her and Mr John of a joint business venture.

[19] Ms Patrick's evidence is that she initially had cheque signing authority on the Mana Awhi Limited account and one week after the account was opened she purchased a bed with a company cheque. Her own bed had been repossessed and she and Mr John needed a bed to sleep in. When Mr John found out that she had used a company cheque for this purpose, he became very angry and in a drunken state assaulted and abused her. At that time he told her he was going to remove her cheque signing authority, that he was going to take over control of the finances, that he was the boss and that she worked for him. Mr John threatened to leave Ms Patrick unless

she agreed. Ms Patrick's evidence is that three days later Mr John returned, he was remorseful and they went to a club where they talked about how the business would be run. Ms Patrick's evidence is that the discussion included Mr John promising her that she would be paid a wage when the business could afford it and that she would be paid back for all of her work saying *don't worry, love, one day all this will be yours*.

[20] With Ms Patrick's evidence there is a timing difficulty. If these events happened in April 2005 as she says, no company existed nor was there a company bank account. Whatever their precise nature, the events must have happened after the company's bank account was opened. I note that the first drawing from the company's account was on 27 June 2005 and that there was a debit of \$300 in early July.

[21] There is no reason to doubt Ms Patrick's evidence about the assault or the reconciliation except to say that I do not accept that any words evidencing an intention to create an employment relationship were used. I do not accept that the reconciliation resulted in any arrangement different from what was originally intended. Mr John's behaviour was about him exercising power over Ms Patrick and their business venture in the context of their domestic relationship, not about establishing an employment relationship.

[22] I have already mentioned the instructions given to the solicitor who acted on the formation of the company. What is not expressed in those instructions is any intention on the part of Mr John or Ms Patrick that she be employed under a contract of service with either Mr John personally or with the company. Consistent with the absence of such an intention, there was never an employment agreement drawn up. No rate of pay was agreed, nor were terms of employment discussed. Ms Patrick's evidence is that she did not draw any wages or salary from the business before April 2006 (I will deal with the payments made to Ms Patrick from April 2006 later). Ms Patrick in practice had complete access to company funds from the outset. In reality the only control exercised by Mr John over the business was periodically checking up on her spending. When he noticed expenditure that he thought was unnecessary, he became angry and abusive in the way a controlling spouse or de facto partner might. Mr John or the company paid for the normal expenses of the home occupied by Ms Patrick. Ms Patrick apparently received a small amount of money from other sources so her normal daily living expenses were met in these ways.

[23] From all this I conclude that there was never an intention by either Mr John or Ms Patrick to form the legal relationship of employer and employee between themselves or involving the company. Ms Patrick's involvement in the business continued until January 2007. The only significant change during this time relates to Ms Patrick's inclusion on the payroll from April 2006 so I should consider if that made a difference.

Salary paid from April 2006

[24] Ms Patrick's evidence is that she was finally allowed to draw a wage in April 2006. There is a computer-generated pay slip in Ms Patrick's name printed on 4 April 2006 for the period ending 2 April 2006 showing \$3,500 (\$2,142.57 net) as her full time fortnightly gross pay. The pay slip also records a total of \$11,249 gross year to date for wages. Ms Patrick denies receiving this amount and there is no other evidence to establish that it was paid. No such payment is apparent from the company bank accounts. Subsequent payslips show year to date errors. In light of this I accept Ms Patrick's evidence that it must be a clerical error by whoever inputted the payroll data.

[25] The company bank records show a payment to Ms Patrick of \$2,142.50 on 6 April 2006. That corresponds with the payslip just mentioned. I have been provided with some of the printed pay slips from April 2006 until August 2006. The last pay slip records the fortnightly salary as \$1,760 (\$1,243.63 net), about half the previous rate. The company bank records show a payment of \$1,243.63 into Ms Patrick's bank account on 9 August 2006. There is no explanation for this dramatic change. There are therefore several instances where company bank records match the payslips. However, for the most part, the payments to Ms Patrick as recorded in the company bank statements were much less than either her gross or net salary according to the pay slips and were not on a regular fortnightly basis.

[26] In summary, from April 2006 Ms Patrick was paid irregularly, usually much less than shown on the pay slip and often out of sequence with the pay cycle despite her having complete control over the internet banking by which the payments were made. In evidence, Ms Patrick said that this was because she always paid herself last after paying other staff and meeting the company's other commitments.

[27] I do not accept Ms Patrick's evidence as an explanation of the irregular pattern of payments or the significant underpayment of the allegedly agreed salary. The company almost always had more than sufficient funds available in its bank account for Ms Patrick to pay herself in accordance with the pay slips generated at her direction by the office staff.

[28] I note also that on 11 May 2006, before the relationship disputes arose, and in a meeting with the company's solicitor, there was discussion about payments to Ms Patrick without any suggestion that commencing payments marked the beginning of an employment relationship.

[29] The pattern of these payments that Ms Patrick made to herself out of the company bank account, although salary in form, in substance is much more consistent with a business principal taking drawings or reimbursing themselves for company expenditure. Accordingly I do not accept that there was any change to the true nature of the relationship between Ms Patrick and Mr John or the company as a result of such payments from April 2006.

Other matters

[30] My view about the real nature of the relationship has been influenced by other aspects of Ms Patrick's conduct throughout the relevant period. From October 2005, Ms Patrick often used the internet banking bill payment facility to make payments into her own bank account using a range of *other party names* on the transaction record. There is no documentation to support that all these payments were liabilities incurred by the business although MAL accepts that some might be. In evidence Ms Patrick told me that one regularly paid party (*Alimac*) was fictitious. In October and November 2006, Ms Patrick was very clear in her assertions that she owned the business despite the legal ownership and control being with Mr John. In October 2006, Ms Patrick withdrew \$8,000 and \$11,000 from the company bank account and then deposited \$18,000 into the company bank account about a week later. In November 2006, Ms Patrick used the internet banking bill payment facility to pay \$10,000 into her own bank account.

[31] These unexplained payments to Ms Patrick's bank account form the basis of Mana Awhi Limited's counterclaim against Ms Patrick. Ms Patrick was supposed to

have provided her personal bank statements to allow tracing of these funds but neglected to do so.

[32] In December 2006, as the dispute became more intense, Ms Patrick opened a bank account with another bank in the name *Mana Awhi* and diverted or caused to be diverted payments due to Mana Awhi Limited into this other account to which only she had access. Some of these funds were used apparently by Ms Patrick to pay company staff for the work they performed for Mana Awhi Limited. This action followed Ms Patrick sending an ultimatum to Mr John and others demanding her appointment as managing director of Mana Awhi Limited. Some of the diverted funds were subsequently returned to MAL.

[33] During this turmoil, Ms Patrick also wrote a note which says that she had always been the owner of Mana Awhi Limited, that Mr John was given the title of director because she loved him and wanted to acknowledge her gratitude for his financial support.

[34] Finally, I should note that Ms Patrick re-established her business with staff who had been employed by the company providing services to former clients of the company. She formed a new company that traded for a time before being liquidated by creditors.

Conclusion

[35] From all the above, I conclude that the real nature of the relationship between Ms Patrick and Mr John and/or Mana Awhi Limited was never that of employment under a contract of service. It is unnecessary and probably outside the scope of the Authority's role to determine the legal nature of the relationship beyond this finding. The Authority can do nothing further for any of these parties.

[36] Costs are reserved. Any claim must be made within 28 days by lodging and serving a memorandum. The other party may then lodge and serve any reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority