IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 310
5329611

	BETWEEN	MARTIN POLZLEITNER Applicant
	AND	WWW MEDIA LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	David Hayes, Counsel for Applicant Mark Hammond and Karina McLuskie, Counsel for Respondent
Investigation Meeting:	9 May 2011 at Hamilton
Submissions Received	13 May 2011 from Applicant 23 May 2011 from Respondent 07 June 2011 from Applicant 16 June 2011 from Respondent 17 June 2011 from Applicant
Determination:	15 July 2011

DETERMINATION OF THE AUTHORITY

A The Authority does not have jurisdiction to hear Mr Martin Polzleitner's claims because the parties were not in an employment relationship.

Employment relationship problem

[1] By consent, this matter was heard at the same time as *Melanie Zink v www Media Limited*[1]. Ms Melanie Zink is Mr Martin Polzleitner's fiancée.

[2] This matter involved evidence from three members of the Polzleitner family; the applicant Martin Polzleitner, his brother Matthias Polzleitner, and their sister

[1] *Melanie Zink v www Media Limited* [2011] NZERA Auckland 311

Michaela Polzleitner. I have referred to Martin Polzleitner as Mr Polzleitner and to Mattias as Matt Polzleitner.

[3] Mr Polzleitner:

a. claimed he was constructively dismissed by WML. He said he resigned because after 12 weeks of work his salary had still not been paid;

b. alleged he had been unjustifiably disadvantaged "*at the beginning of August 2010*" as a result of a unilateral demotion from General Manager to a sales position;

c. claimed wage arrears for non payment of;

i. $100,000 gross per annum salary from 5 July to 13 September 2010; and

ii. 8% of his total gross unpaid earnings as annual holiday pay.

Jurisdictional issues

[4] In his Statement of Problem Mr Polzleitner sought:

a. Three months' salary in lieu of notice;

b. $7,500 hurt and humiliation for breach of contract;

c. $20,000 hurt and humiliation for the unilateral change to his job (i.e. the alleged unjustified disadvantage claim);

d. $7,500 hurt and humiliation for WML's breach of good faith.

[5] There was no written employment agreement or other such documentation which recorded what (if any) relationship or arrangement had been agreed between the parties.

[6] The Authority does not have the power to impose contractual terms on parties, even if it concluded these parties were in an employment relationship.[2] It therefore has no power to award Mr Polzleitner pay in lieu of notice in the absence of a contractual term which provided for such a payment.

[2] Section 161(2)(b) ERA

[7] The Authority does not have the power to award compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 ("the Act") for humiliation, loss of dignity, and injury to feelings for a breach of contract.

[8] Compensation under section 123(1)(c)(i) of the Act may only be awarded to an employee who has a personal grievance if the Authority is satisfied they have suffered humiliation, loss of dignity, and injury to feelings as a result of a personal grievance.

[9] The Authority does not have the power to award compensation under s.123(1)(c)(i) of the Act for humiliation, loss of dignity, and injury to feelings for a breach of good faith. It may only impose a penalty for certain breaches of good faith in accordance with s.4A of the Act.

[10] Mr Polzleitner did not raise a breach of good faith claim in his Statement of Problem and he provided no evidence in support of such a claim.

[11] Mr Polzelitner's personal grievance claims were raised by letter dated 26 November 2010. This was more than 90 days after his alleged unjustified disadvantage claim arose. There was no application for leave to raise a personal grievance claim out of time, and WML did not consent to that, so even if he was an employee the Authority did not have jurisdiction to consider that claim.[3]

[12] WML said Mr Polzleitner was never an employee. It accepted he had done work for WML but said he did so in his capacity as a shareholder putting unpaid sweat equity into a family start up business. WML said, because there was never an employment relationship between the parties, the Authority did not have jurisdiction to investigate any of Mr Polzleitner's claims. Its Statement in Reply was filed under protest to jurisdiction.

[13] By agreement, the jurisdiction issue was dealt with at the same time as the substantive investigation.

Facts

[14] In 2009 Matt Polzleitner came up with the idea for WML ("the business") and he has been the driving force behind it. He has been working full time in the business

[3] Section 114 ERA

since 1 December 2009 and he has never been paid for the work he has done. Matt Polzleitner's intention has always been to develop the business to the point where it could afford to employ him, but until then he has been putting unpaid sweat equity into the business to get it up and running.

[15] WML is a family owned and operated start up company. The shareholders are;

a. Matt Polzleitner (30% shareholding);

b. Martin Polzleitner (20% shareholding);

c. Matt Polzleitner's fiancée Natalie Ellis (30% shareholding);

d. Natalie Ellis' mother Shiree Ellis (10% shareholding);

e. Natalie Ellis' father Chris Ellis (10% shareholding).

[16] Matt Polzleitner and Ms Ellis put around $40,000 and Mr and Mrs Ellis' have contributed around $60,000 to WML. Mr Polzleitner is the only shareholder who has not financially contributed to the business.

[17] WML says all of the shareholders agreed to do whatever it took to get the business up and running, which meant they have all put varying amounts of unpaid time into the business. Matt Polzleitner has by far put the most time into the business.

[18] When WML was started Mr Polzleitner and his fiancee Ms Zink were living in Germany and through regular skyping Matt Polzleitner used his brother as a sounding board for many aspects of the business. Prior to Mr Polzleitner becoming a shareholder in the business, Matt Polzleitner engaged him to do a one off piece of development work for WML. By agreement, Mr Polzleitner was paid $10,000 for that development work.

[19] He was also given a 20% shareholding in the business. Matt Polzleitner said Mr Polzleitner was given this shareholding without having to pay for it on the understanding he would contribute his time, energy, and skills to help develop the business. The parties agree he did that until he returned to New Zealand and Mr Polzleitner said he did not expect to be paid for the work he did when he was in Germany.

[20] Mr Polzleitner said that changed when he and Ms Zink returned to New Zealand. He said they only returned because they had both been offered employment by WML and would otherwise have never left Germany.

[21] Mr Polzleitner said Matt Polzleitner offered him employment during various skype conversations. He said he was offered the position of General Manager with a gross salary of $100,000 per annum and Ms Zink was offered a position as a receptionist on a salary of $40,000 gross per annum. Mr Polzleitner said a further term of these offers of employment was that they would live with Matt Polzleitner and Ms Ellis, who would cover their accommodation and living expenses. Mr Polzleitner reiterated a number of times in his evidence that Matt Polzleitner had said "*my job as General Manager would be "all the fun stuff"*".

[22] Mr Polzleitner said he and Ms Zink both accepted their offers of employment, packed up their life in Germany, returned to New Zealand, and started work for WML on 5 July 2010. He said they were never paid, which caused them to both resign on 10 September 2010.

[23] Mr Polzleitner said after he and Ms Zink had both worked for a month without being paid he raised concern about that with Matt Polzleitner, who told him the business was short for PAYE that month, so he would be paid later. Mr Polzleitner said he "*agreed to keep working so long as the wages were caught up in the following months*". Matt Polzleitner denied there had ever been any conversations about payment because the understanding was Mr Polzleitner (like him) would not be paid for the work he was doing to develop the business.

[24] There is no corroborating evidence or contemporaneous record of the parties ever having agreed to accrue Mr Polzleitner's and Ms Zink's alleged salaries as an ongoing liability which would be paid out at some future but unspecified date when the business became profitable. That suggests no such arrangement was made, because there was never any agreement to pay them.

[25] Mr Polzleitner also said after working for a month or so he asked Matt Polzleitner for employment agreements for himself and Ms Zink, but nothing happened. Matt Polzleitner said no such request was ever made, because neither of them were employees. There was no documentation to show employment agreements had ever been discussed or requested.

[26] Mr Polzleitner said that after he had been selling for six or seven weeks, he had enough and decided "*to resign*". Mr Polzleitner sent an undated letter to Matt Polzleitner after he resigned saying he was owed nine weeks' wages.

[27] Mr Polzleitner's letter said he had been promised a $100,000 job plus commissions; a job for Ms Zink; that they would live in a nice house; and they would not have to worry about food. His letter also included the following comments;

a. You got me here to develop and run the www Media side of the business

b. You said you wanted a partner in the business;

c. My job was going to be all the fun stuff;

d. Selflessly I have committed to making you successful;

e. I came here to help you. That's it.

[28] Matt Polzleitner said Mr Polzleitner left after a bitter argument with him about the business, not because of non payment of salary. I accept, on the balance of probabilities, that is more likely to be the case than Mr Polzleitner's claim he left because he had not been paid. It was very clear from Mr Polzleitner's evidence he was very upset and angry with the way Matt Polzleitner was running the business. Given the family relationship and his shareholding I also consider Mr Polzeitner would have been likely to have formally raised concerns about non payment before that caused him to walk out. I have therefore preferred Matt Polzleitner's evidence.

[29] Matt Polzleitner said that, with the exception of Martin, all the other shareholders had financially contributed to the business and they had put at least 5000 combined hours of time into the business, with no expectation of reward or remuneration for the work they had done. WML said it was within this context that Mr Polzeitner worked for the business without payment.

[30] Matt Polzleitner, Ms Ellis and Mrs Ellis all gave evidence that Mr Polzleitner had also agreed as a 20% shareholder to put his time into the business without payment, in order to develop the business into a profitable enterprise. They all said that at different times Mr Polzleitner have specifically recognised and acknowledged to each of them that he would not be paid for his work unless the business got to the

stage where it could afford to put him (and Matt Polzleitner) on the payroll. No specific date was set for that to occur, because it was totally dependent on the business' financial performance. I find it did not in fact occur.

[31] They said Mr Polzleitner's motivation for working without payment was based on his hope and expectation the business would became successful, which would then increase the value of his shareholding. They all described this arrangement as a mutual intention to put "*shareholder unpaid sweat equity*" into the business.

[32] The other shareholders said there was no special arrangement made with Mr Polzleitner whereby he would be the only shareholder to be remunerated for the time he put into the business as well as being the only shareholder who was not required to financially contribute to the business. They said they would never have agreed to such an arrangement because it would have been such an unfair deal in comparison to their own situation. I accept their evidence.

[33] WML said it had not entered, and had never intended to enter into, a contractual relationship with Mr Polzleitner. It said this was an informal situation where each of the shareholders used their skills and the time they had available to assist the business. It was a fluid situation where they each did as much or as little as suited their individual circumstances at the time.

[34] WML agreed there was an intention that Matt Polzleitner and Mr Polzleitner would eventually be employed by the business, but that would not occur until the business was at the stage where it could afford to do so. Until then, the agreement and understanding was they would both work in and on the business without payment.

[35] Michaela Polzleitner is a full time WML employee. She is not a shareholder or director of the business. She has always only ever worked for WML as a paid employee. Ms Polzleitner was employed on 24 February 2010 as a Multi Media Designer under a written individual employment agreement.

[36] Ms Polzleitner said there was a clear understanding that Mr Polzleitner and Matt Polzleitner would both work in the business for nothing until it got up and running. She said both her brothers had spoken to her about that arrangement. Ms Polzleitner stated Mr Polzleitner had also specifically told her he was helping Matt Polzleitner get the business up and running and that he was not getting paid for the work he was doing. He did not raise any issue or concern about working without pay.

[37] Ms Polzleitner said she was aware from her discussions with them that Matt Polzleitner and Mr Polzleitner both expected that once the business was up and running they would then be able to start drawing a salary, but because it was a start up business they both expected it to take some time before WML could afford to pay them salaries.

[38] Ms Polzleitner said Mr Polzleitner and Ms Zink had visited her and her partner numerous times and had discussed the business but had never mentioned they were employed by WML. Although they had repeatedly said they were not getting paid for the work they were doing for WML, but had not been concerned about that.

[39] Ms Polzleitner was aware Matt Polzleitner and Ms Ellis were financially supporting Mr Polzleitner and Ms Zink until the business was financially able to employ them. She said they were doing that so Mr Polzleitner could afford to work for WML without being paid.

[40] Ms Polzleitner obviously found it difficult giving evidence in what has effectively become a dispute between her brothers. I considered her to be somewhat reluctant, but nevertheless reliable and credible witness.

[41] Matt Polzleitner said he took professional advice about WML's employment obligations from WML's accountant and solicitor before it began to employ staff. As a result of that advice, specific documentation was prepared for all employees. Employees were required to fill out a written employment agreement, IR1330, Kiwisaver forms, and WML cover sheets with personal information, bank account details and the like. Employees were then entered into the payroll system before they started work.

[42] No exception to that was made for family members. Ms Polzleitner went through the same process any other WML employee had and would. Aimee Preest, who was employed under an individual employment agreement dated 24 February 2010 as a Junior Marketing Manager, also confirmed WML had adopted its usual employment process with her.

[43] WML's normal employment process was not used for Mr Polzleitner, or for that matter Ms Zink. None of the usual employment documentation was generated and they were never put on the WML payroll.

[44] There was no documentation to support Mr Polzleitner's claim he had been offered and had accepted employment. There was also no documentation which established Mr Polzleitner or Ms Zink had ever raised any concern, during the period they allege they were employed, about not being paid. Matt Polzleitner denied they had ever asked for payment and said the non payment issue only arose after they had left the business. I have accepted that evidence because Mr Polzleitner did not give me any detail of the alleged discussions about the ongoing non payment of salary.

[45] Mrs Ellis said she hosted dinner for Mr Polzleitner and Ms Zink in July/early August 2010 during which Mr Polzleitner commented he was happy to work without pay until the company got on its feet. Mrs Ellis' evidence was that Mr Polzleitner expressly stated during this dinner that he did not expect to get paid until the company could afford it.

[46] Natalie Ellis gave evidence that whilst Mr Polzleitner and Ms Zink were living with her and Matt Polzleitner, Mr Polzleitner said "*I will sleep on the couch if I have to, to get this business up and running. When we are making millions we will all get paid, we'll do whatever it takes."* Ms Ellis said she and Matt Polzleitner put Mr Polzleitner and Ms Zink up and covered their living expenses because they were not employed by WML, so did not have any income. I considered Mrs Ellis to be a credible witness.

Relevant law

[47] Under s.161 of the Act, the Authority has exclusive jurisdiction to make determinations about employment relationship problems. An employment relationship is defined in s.5 as any of the relationships specified in s.4(2) of the Act. Section 4(2)(a) of the Act refers to "*an employer and an employee employed by the employer"*.

[48] Section 6 of the Act defines an employee as a person employed by an employer to do any work for hire or reward under a contract of service.[4]

[49] When determining whether a person is employed under a contract of service, the Authority must determine the real nature of the relationship between them.[5] If the

[4] S.6(1)(a) ERA
[5] S.6(2) ERA

real nature of the relationship between the parties is something other than a contract of service, the Authority will not have jurisdiction.

[50] In determining whether there was a contract of service between the parties, the Authority must consider all relevant matters, including any matters that indicate the intention of the parties,[6] but it is not to treat as determinative any statement by them which describes the nature of their relationship.[7]

[51] An employment agreement may be an oral agreement so compliance with s.65 of the Act is not required for an employment agreement to be enforceable.[8] It is clear from *Bryson v. Three Foot Six Ltd*[9] that the investigation required by s.6(3)(a) includes the written and oral terms of any contract between the parties.

[52] However, s.6 does not allow the Authority to disregard or ignore usual contractual principles. Mr Polzleitner therefore bears the onus, on the balance of probabilities, of establishing these contractual requirements were either expressly intended or can be implied from the parties' words and conduct.[10]

[53] The Authority must be satisfied the parties entered into contractual relationship before it becomes necessary to determine the real nature of that relationship. Whether a contractual relationship existed is to be determined in light of the usual common law requirements of offer, acceptance, contractual intention, consideration and certainty.[11]

[54] The starting point in determining whether the parties were in a contractual relationship is usually the contractual documents that existed at the commencement of the relationship. However, in this case, there are none. This means that any subsequent communications, actions or documentation from which the intention of the parties can be derived will need to be examined.

[55] The Employment Court in *McDonald* [12] stated:

> *The search for the intention to create contractual relations is echoed in s.6(3)(a) of the Act, which requires the Court to consider any*

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[6] S.6(3)(a) ERA
[7] S.6(3)(b) ERA
[8] *Warwick Henderson Gallery Ltd v. Weston (No 2)* [2005] ERNZ 921, [2006] NZLR 145 (CA)
[9] [2005] ERNZ 372
[10] *MacDonald v Ontrack Infrastructure Limited & Allied Workforce Limited* [2010] NZENPC 132
[11] Ibid 10
[12] Ibid 10

> *matters that indicate the intention of the parties. That appears to us to correspond with the common law inquiry into whether there is an intention to create legal relations.*
>
> *Whether there is an intention to create legal relations will turn on the specific facts of any particular case, which will need to be examined carefully. However, the subject matter and attendant circumstances may suggest that the parties have no intention of creating a legally enforceable obligation. Alternatively, the converse may also be true.*

[56] The factors the Supreme Court identified in *Bryson*[13] which are to be considered when determining whether a contractual relationship is an employment relationship or an independent contractor relationship are not relevant when assessing whether there was an intention to create contractual relations. It is only once the evidence has established that there was a mutual intention to enter into a legally binding relationship that the status of that relationship falls to be determined.

Issues

[57] The issues to be determined include:

(a) Did the parties intend to enter into a legally binding contract?

(b) If so, was the contract an employment relationship?

(c) If so, was Mr Polzleitner unjustifiably dismissed?

(d) If so, what (if any) remedies should be awarded?

(e) If I find he was an employee, does Mr Polzleitner have a wage arrears claim?

(f) If so, how much is he owed?

Findings

Did the parties intend to enter into a legally binding contract?

[58] In the absence of any relevant documentation, my view about whether or not the parties entered into a contract turns entirely on my assessment of the credibility of Mr Polzleitner as compared with the other shareholders.

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[13] Ibid 9

[59] The fact Mr Polzleitner was a shareholder does not necessarily preclude him from also being in a contractual relationship with WML, but his shareholder status is one of the factors I have considered when determining whether the parties intended to conclude a contract.

[60] I consider there was no extrinsic evidence which established the parties intended to enter into a legally binding relationship, so on the face of it the parties did not appear to have concluded a contract. After carefully considering Mr Polzleitner's evidence I have concluded he did not discharge his onus of establishing a contract existed.

[61] I find this was a situation where all of the shareholders devoted their time and energy to the business without payment for the common purpose of developing it into a profitable concern, with the intention the value of their individual shareholdings would increase.

[62] I have resolved the conflict between the evidence of Matt Polzleitner, Natalie Ellis, and Mrs Ellis and the evidence given by Mr Polzleitner in favour of the four other shareholders. Because I consider, on the balance of probabilities, their evidence is more likely to be correct when looked at in terms of the parties' actions/inaction. Mr Polzleitner's evidence simply did not persuade me the parties had ever intended to enter into a contractual relationship. I consider it more likely WML never intended to do so.

[63] I believe it was unlikely Mr Polzleitner (or for that matter Ms Zink) were offered employment. WML was not in a financial position to commit to paying two new employees a combined salary of $140,000 gross per annum. It also had no need for a receptionist, so it did not make sense for it to have employed one.

[64] It seems unlikely the other shareholders would have agreed to enter into a contract to pay Mr Polzleitner $100,000 for the work he did when none of them were being paid for the time they put in to the business, particularly when they had all put many thousands of dollars into the business, but Mr Polzleitner had not made any financial contribution.

[65] Matt Polzleitner and Ms Ellis provided Mr Polzleitner and Ms Zink with free accommodation and paid for all of their living costs over the period they had claimed to be WML employees. It would be surprising for them to have done that if WML

had also contracted to pay Mr Polzleitner and Ms Zink a combined income of $140,000 gross per annum.

[66] Matt Polzleitner had not received any income since he started the business on 1 December 2009. Their sole income was therefore from Ms Ellis' teacher's salary. Given their limited means it would not make sense for them to have agreed to financially support another couple who were between them being paid $140,000 gross per annum.

[67] Matt Polzlietiner's and Ms Ellis' decision to provide free accommodation and to cover all living expenses out of Ms Ellis' teacher's salary makes far more sense when viewed as a family arrangement which was done so Mr Polzleitner could afford to work for a family business without pay.

[68] The circumstances of this matter tend to suggest there was no contractual relationship because it was a family based arrangement, not a true commercial situation. WML was a family run start up company in which all of the shareholders did whatever was necessary to run the business. One example of that was Ms Ellis cleaning the business premises, without pay, after she finished her normal work as a school teacher.

[69] The shareholders did not have clearly defined roles or responsibilities as would have been the case in a normal commercial situation. I find that Mr Polzleitner's title of General Manager and Matt Polzleitner's title of Managing Director were merely convenient labels to present to the outside world but did not truly describe the ambit of the work they did for WML. An example of that is Mr Polzleitner devoting his time to sales when that became WML's main priority. I consider this is indicative of the flexible and fluid informal arrangement the other shareholders said existed.

[70] Mr Polzleitner's repeated comments that he had been employed as General Manager "*to only do the fun stuff*" supports my view that WML did not intend to enter into a legally binding relationship with Mr Polzleitner because it would not have made commercial sense for it to pay a General Manager a six figure salary to just do "*fun stuff*". His comments about "*the fun stuff*" make more sense within the context of a discussion about Mr Polzleitner applying his own sweat equity to the business, because in that case he would be free to choose what he did or did not do.

[71] Although Mr Polzleitner denied making the comments acknowledging he was not being paid and did not expect to be paid for his time, I consider it likely he did make these comments. Such comments suggest Mr Polzleitner worked in the business to increase the value of his shareholding rather than because he was employed to do so.

[72] Mr Polzleitner agreed he had devoted time and energy to the business from February to 5 July 2010 with no expectation of reward or remuneration as unpaid shareholder sweat equity. I consider this was the same arrangement which applied from 5 July until he left in September 2010.

Outcome

[73] Mr Polzleitner has not discharged the onus of establishing the parties were in a contractual relationship. In the absence of a contractual relationship, Mr Polzleitner cannot bring himself within the s6(1) definition of employee in the Act. This means the parties cannot have been in an employment relationship, so the Authority does not have jurisdiction to hear Mr Polzleitner's claims.

Costs

[74] The parties are encouraged to resolve costs by agreement. If that is not possible costs will be dealt with by exchange of memoranda. WML has 14 days within which to file its costs memorandum, Mr Polzleitner has 14 days there after with which to file his costs memorandum, with WML having a further 7 days within which to file its memorandum in reply (if any).

[75] Departure from this timetable requires the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority