**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2013] NZEmpC 33
ARC 68/11**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ALAN MAYNE Plaintiff
AND	POLYCHEM MARKETING LIMITED Defendant

Hearing:	10 and 11 December 2012 (Heard at Auckland)
Counsel:	Mr C Patterson and Ms Halloran, counsel for plaintiff Mr J Hannan and Ms Simpson, counsel for defendant
Judgment:	14 March 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Mayne was director and sole shareholder of Polychem New Zealand Limited (PNZ). He says that he initiated a medical insurance scheme which guaranteed cover for employees and their families until death. Both he and his wife received coverage under the scheme. PNZ was subsequently sold to Polychem Marketing Limited (PML). Mr Mayne was a director, and alleged employee, of PML. He says that he retired from PML in 1990 and continued to receive insurance cover until it was terminated in 2009. Mr Mayne takes issue with the decision to terminate the coverage that he and his wife had enjoyed for a number of years. He asserts that the defendant is legally obliged to continue with the payments until such time as both he and his wife die.

[2] The proceedings initially came before the Court on a de novo challenge to a determination[1] of the Employment Relations Authority (the Authority) relating to a preliminary jurisdictional point. Two issues were advanced on behalf of the defendant. Firstly, that the Authority lacked jurisdiction because the plaintiff was never its employee. Secondly, even if the plaintiff was once its employee, he had retired from the company in 1990 and accordingly was not in an employment relationship with the defendant when the Employment Relations Act 2000 (the Act) came into effect. The Authority held that the transitional provisions in the Act did not apply and concluded (more generally) that the company did no more than voluntarily assume the role of a provider of subsidised medical insurance to Mr Mayne. The Authority held there was no legal obligation to continue with this arrangement. The Authority dismissed Mr Mayne's claim and those of two other former employees of PNZ as unenforceable. Mr Mayne challenged the Authority's determination.

[3] The Chief Judge upheld[2] the plaintiff's challenge on the jurisdictional point, finding that the defendant had failed to establish an absence of jurisdiction and that the challenge could proceed to be considered on its merits.[3] The substantive challenge was heard on a de novo basis.

The issues

[4] Counsel agreed that two key issues arose, namely, whether Mr Mayne was an employee of PML at the time of his retirement and, if so, whether provision of employer-paid health insurance for him and his wife until their death was a legally binding term of his employment agreement.

The facts

[5] Mr Mayne started work with PNZ in 1965, initially as a sales representative. He had a meteoric rise in the company, acquiring a 49% shareholding in it in 1976.

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[1] [2011] NZERA Auckland 360.
[2] For reasons set out in an interlocutory judgment: [2012] NZEmpC 60.
[3] At [19].

In 1980 another company was formed (Mercator Chemical Company Limited), of which Mr Mayne was principal shareholder. It appears that by 1981 Mr Mayne was the sole director and shareholder of PNZ.[4] There is no doubt that Mr Mayne took a generous approach to remuneration issues with employees of PNZ. This is reflected in the hefty salary rises, and bonus payments, that were approved by him as director over time. Substantial payments to the directors were also approved during this period.

[6] Mr Mayne's evidence was that he introduced a post retirement health insurance benefit some time before 1981. The nature and extent of what was introduced by Mr Mayne on behalf of the company was in dispute. I return to this issue later.

[7] PML was incorporated in early 1982. Mr Mayne, along with Messrs Clarke, Paul, Angus and Rose were appointed directors of this company. PML purchased certain assets and goodwill from PNZ for $1.8m, with PNZ advancing $1.7m of the purchase price, payable on demand. PML appointed PNZ to undertake administrative management and secretarial services for it and the fee for those services was to be agreed annually between PML and PNZ. The directors resolved at their first meeting that Mr Mayne would take on the role of managing director of PML and that his salary (along with that of Mr Clarke) would be fixed and paid in full by PNZ and would be included in the management fee to be charged by PNZ. Staff (subject to named exceptions) would transfer to PML and their salaries would be paid by that company. Messrs Paul, Angus and Rose were to remain "in the employ of PNZ" with salaries to be fixed and paid by PNZ.

[8] It is evident that significant sums of money were paid by PML to PNZ (and subsequently Mercator Chemical) under the agreed arrangement. These payments were approved by the directors, with Mr Mayne declaring an interest as a shareholder and as an officer in board minutes.

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[4] Mr Mayne received remuneration as a director from PNZ from 1977 to 1979.

[9] In October 1984 Mercator Chemical acquired Mr Mayne's shares in PML. Five months later, the directors of PML resolved to obtain administrative and secretarial services from Mercator Chemical rather than PNZ. Again, Mr Mayne is recorded as declaring an interest as shareholder and officer of Mercator Chemical and officer of PNZ in board minutes.

[10] The Polychem group of companies (including PML and PNZ) was acquired by English China Clays PLC (ECC), effective from 1 October 1986.

[11] In November 1986, the directors of PML resolved to offer to provide Mercator Chemical and PNZ with administrative management and secretarial services on fees to be agreed, and that PML would purchase fixed assets from Mercator Chemical. Mr Mayne again disclosed his interests, along with Mr Clarke, at this meeting.

[12] Mr Mayne spent some time identifying and training his successor as managing director of PML. Mr Austin-Smith was appointed to the role in October 1988. Mr Mayne resigned as director of PML with effect from 31 December 1990. PNZ was removed from the companies register in September 1992.

[13] Issues subsequently arose in relation to the provision of medical insurance benefits. In July 1996 Mr Mitchell (part of PML's accounting team) stated, in a memorandum to the managing director of PML, that:

> The Company provides subsidised membership of the Medic Aid "Economy" policy for longer serving employees and their families and retirees and their families.

[14] The issue was discussed at a management meeting[5] in August 1996. The minutes record:

> A change in company policy to discontinue subsidising employees' dependants over the age of 21 and to discontinue cover for future retirees was confirmed.

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[5] Of Polychem/Multichem.

[15] A management meeting on 13 July 1998 confirmed the decision not to offer medical and superannuation benefits to support staff.

[16] In December 1999, PML Holdings Ltd was incorporated. Minutes of a meeting on 20 November 2003 record that concerns were being raised about the ongoing costs of medical insurance. Specific reference was made to ex-employees, as follows:[6]

> **Medical Insurance for Previous Employees:** [Mr Tommas, Chairman of PML Holdings] advised we spend approx $6k per annum on medical insurance premiums for 5 ex-employees. These employees have all been out of the company at least 12 years, *but the continuation of medical insurance after leaving was apparently part of their employment conditions. Discussion ensued on the legality of this, and the moral implications on Polychem and the existing Directors.* It was finally agreed that [Mr Tommas] would write to all 5 ex-employees, and advise that we would like to terminate our payments with a minimum of 6 months' notice. The letter would however offer them continued insurance cover via our group scheme, but that they would need to reimburse Polychem for the full costs of their specific premiums.

[17] The issue was revisited at the Annual General Meeting of PML Holdings on 27 May 2004. The minutes record that:[7]

> **Previous Employee Medical Insurance**: ... Alan Mayne, as an officer of the Company, *had let the Insurance continue for staff until at least age 65*. Currently there are 5 previous employees still on the scheme, costing us approx $6k pa in premiums. After discussion it was agreed that [Mr Tommas] would write to all 5, advising that we would like to terminate our paying of their premiums once they reached age 65. We agreed however to further discussion dependant on responses, *as there are some moral issues surrounding this historical situation* that complicate matters.

[18] Mr Tommas subsequently sent a letter to previous employees advising that the company was to cease payments effective from the next membership cycle, but that it was happy to have them remain a member of the group scheme provided they agreed to reimburse the company for its associated costs. Mr Tommas gave evidence that he had also sent a letter to Mr Mayne, although no copy of the letter could be located despite extensive searches. Mr Mayne said that he did not receive such a letter. I accept that it is more likely than not that Mr Tommas did send a letter to Mr

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[6] Emphasis added.
[7] Emphasis added.

Mayne in relation to this issue. The minutes of a subsequent meeting of the directors of PML Holdings dated 25 November 2004 record Mr Tommas' confirmation that he had sent "a letter in mid October to all previous employees still enrolled in our company paid medical insurance scheme" and that Mr Angus was the only one to have responded as at the date of the meeting. The letter is also referred to in the minutes of the Annual General Meeting of PML Holdings of 11 April 2005, as follows:

> **Previous Employee Medical Insurance:** [Mr Tommas] confirmed that following the letter sent in mid October 2004 to the previous employees still enrolled in our company paid medical insurance scheme, the following had occurred:
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> - Alan Mayne and Peter Rose have agreed to reimburse the company (Peter Rose however has written a letter, which is available on file, expressing his disappointment at this decision)
> - Colin Angus has withdrawn entirely from the scheme
> - The Directors have agreed to continue to pay the premiums for the two women currently in the scheme, being Jean Craig and Bernadette Kerr.

[19] Mr Mayne said that Mr Tommas had been in touch with him to discuss the proposal to cease payments and that he (Mr Mayne) was very concerned about the possibility of Miss Craig and Miss Kerr, two elderly former employees of PNZ, having their coverage terminated. His evidence was that he agreed to forego his entitlement to coverage if the company agreed to continue to meet its obligations to these two elderly women (who were, by this time, in their 70s and 80s). Mr Tommas vigorously disputed Mr Mayne's recollection of events. His evidence was that Mr Mayne agreed to the proposal that coverage be discontinued but that he be able to access the company's scheme. He said that the company decided to continue to pay for Miss Craig and Miss Kerr's insurance for moral reasons. I accept Mr Tommas's recollection of events, which was clear and which tended to be supported by the contemporaneous documentation.

[20] Mr Mayne reimbursed PML for the costs relating to medical cover for himself and his wife until October 2009. It appears that cover for Miss Craig and Miss Kerr was discontinued around this time.

[21] On 28 September 2009, PML wrote to Mr Mayne advising him that from 1 November 2009 he would need to make arrangements to continue his policy directly with Southern Cross outside of the Polychem Marketing Group Scheme. He replied on 15 October 2009 claiming that PML had an obligation to continue cover and asking that the issue be reconsidered. He raised particular concerns about the discontinuance of cover for Miss Craig and Miss Kerr, and requested that their cover be reinstated. A meeting was subsequently held between Mr Hirst (of Nuplex) and Mr Mayne. A meeting between Mr Mayne and Mr Tommas followed. No resolution was reached and a claim was subsequently filed in the Authority on 23 March 2010.

An employee of PML?

[22] On the plaintiff's analysis he was employed by two employers – PNZ and PML.[8] The defendant submits that while it is conceptually possible to have two employers, Mr Mayne was not an employee of PML, and accordingly his claim cannot succeed.

[23] Mr Mayne was a director of PML. There is no dispute that the fact that he was a director of the defendant company is not determinative of whether he was also one of its employees.[9] It is necessary to consider the real nature of the relationship to determine whether a contract of service existed between the plaintiff and the defendant.[10]

[24] The plaintiff's evidence was that he effectively wore two hats in terms of the activities he undertook for PML: operational and governance. It was submitted that he wore the latter hat when determining the strategic direction of the company as a director. The former hat was worn when he executed the directives of the board. It is the operational aspect of Mr Mayne's role that is said to provide the best indication

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[8] See *Hutton v ProvencoCadmus Ltd (in Receivership)* [2012] NZEmpC 207 for discussion of joint employment.

[9] *Lee v Lee's Air Farming Ltd* [1961] NZLR 325 (PC), where the Privy Council held that a governing director and majority shareholder of a company may in a personal capacity enter into a valid contract of employment with the company.

[10] Employment Relations Act 2000, s 6(2).

as to whether he was in a contract of service with PML. It was submitted that without someone in Mr Mayne's role, PML "would have simply ground to a halt".

[25] Mr Mayne's undisputed evidence was that he worked from "sun up to sun down" six to seven days a week doing what needed to be done in order to keep the PML business going. He met with customers and key suppliers on a daily basis and provided guidance to the management team of PML. He attended board meetings on a monthly basis and accounted to the other directors for his activities as managing director. He also guided the other directors. It is clear from the evidence that he devoted a substantial amount of time to operational matters involving the company and that the company benefited significantly from those efforts.[11]

[26] Mr Mayne received a salary in his role as managing director of PML that was paid by PNZ, and was accounted for in the management fee charged to PML by PNZ. While Mr Mayne received payment from PNZ (and latterly Mercator Chemical) for his role in PML, that was for administrative and tax reasons, as accepted by the defendant. Mr Mayne's evidence was that after 1 October 1986 (when he sold his shareholding interests) he received fixed remuneration for his role as managing director of both PML and ECC Pacific (NZ) Ltd, a subsidiary company of ECC. He says that sometime after the sale, he began to be paid his salary directly by PML rather than through PNZ.

[27] The plaintiff referred to a statement of account as disclosing only one entry for provisional tax which, it was submitted, reflected the fact that he was drawing directorship fees and a salary. I do not accept that the documentation provides any material assistance in support of the plaintiff's claim.

[28] Mr Mayne described himself as being the chief executive officer of PML, as well as its managing director. Both Mr Tommas and Mr Stott (a senior sales employee) accepted that that is how they would have introduced him. His business cards referred to PML, as did his correspondence.

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[11] See *Hutton* at [98].

[29] I accept that the distinction between PML and PNZ was largely for administrative purposes. There was a close proximity between the companies, and a degree of common control. While there are some factors (most notably the payment regime) that point away from Mr Mayne being employed by PML, I conclude that the evidence establishes that he was more likely than not an employee of the company as well as a director. That means that if there was a binding obligation on the defendant in relation to the provision of post retirement healthcare insurance to employees, and as Mr Mayne retired from PML, his claim must succeed.

The healthcare insurance scheme

[30] Mr Mayne's evidence was that he introduced a health insurance benefit some time before 1981. However, it is clear that a health insurance scheme for employees had been introduced by PNZ some 10 years prior to this time. Minutes of a directors' meeting of 14 May 1971 refer to a Manchester Unity health scheme and an agreement that all staff members be invited to join the scheme. While Mr Mayne is recorded as being at the meeting, he could not remember any discussion relating to the scheme, or anything about it. His recollection of events more generally was also patchy, perhaps not surprisingly given the effluxion of time.

[31] Extensive searches were undertaken in an attempt to locate documentation relevant to the matters at issue in these proceedings. Despite some gaps in the documentation, a significant number of board minutes were recovered, including board minutes recording important management decisions. The minutes reflect a pattern of discussing issues relating to staff benefits, with a focus on salary and bonus payments. However, none of the minutes refer to any discussion, or agreement, to provide post retirement medical insurance coverage to employees. If the company had decided to bind itself to providing such a benefit to employees, to indefinite dates into the future (until death), it would indisputably represent a significant contingent liability for the company. Viewed in this way it is unlikely that it would not have been discussed and adopted, by way of formal resolution, by the directors and reported to the shareholders. It is notable too that other important

matters relating to staff issues (such as salary increases and bonuses) were the subject of discussion at board level.

[32] Mr Mayne says that he conducted business on a hand-shake basis and that his word was his bond. He said that the post retirement obligation was entered into on behalf of PNZ in this way and was not committed to writing for this reason. However, that does not explain the apparent absence of discussion and agreement at a board level for what would have been a significant, long term and costly undertaking. Mr Mayne accepted that it was not a decision for him solely to make and that it would have required the agreement of the other directors, and that the directors were answerable to the shareholders.

[33] Mr Mayne made the point that he wanted to encourage loyalty and longevity in the company's staff, and that offering paid medical insurance coverage into retirement and until death was an excellent way of achieving such objectives. However, it became apparent in evidence that staff were not told about the alleged benefit. Accordingly, it could not have achieved the purpose that Mr Mayne said it was designed to meet. I consider that if such a benefit existed it is likely that staff would have been told about it.

[34] Mr Stott, who had been employed by PNZ in 1975 and who retired from Polychem Marketing in 2012, gave evidence (which I accept) that he never understood that there was a term of employment providing health care insurance from retirement to death.[12]

[35] The subsequent conduct of the parties may be relevant in interpreting employment agreements so as to give effect to the common intention of the parties.[13] The subjective views of witnesses about what they intended or understood their words to mean at any particular time is not to be taken into consideration as part of the inquiry.[14]

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[12] He did, however, believe that he would be able to access the company's insurance scheme, reimbursing the company, following his retirement (although the company has taken a different view and he has dropped out of the scheme entirely).
[13] *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.
[14] *Vector Gas Ltd v Bay of Plenty Energy* Ltd [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

[36] Mr Mayne was clear that he believed that PNZ had assumed a binding obligation to employees who retired that they would receive medical insurance cover until their deaths. However, this is not sufficiently reflected in the extrinsic material before the Court. While the company did meet the costs of health insurance coverage of a limited number of people following their retirement (including Mr Mayne) there is a paucity of evidence reflecting an intention to enter into a binding agreement to do so. The absence of reference to the alleged agreement in the board minutes before the Court during the 1970s and 1980s reinforces the defendant's position that no such obligation was assumed by PNZ. And it appears from the changes to the provision of medical insurance coverage that occurred in 1996, that the then management team considered the issue to be one of policy which could be unilaterally changed.[15] Mr Mitchell, who attended various meetings and who gave evidence on behalf of the plaintiff, conceded that this was so in cross examination.

[37] Two reviews were carried out of the company's employment agreements, following enactment of the Employment Contracts Act 1991 and the Employment Relations Act in 2000. The first review was undertaken by Russell McVeagh, the second by Bell Gully, both large law firms. Mr Mayne could not recall these reviews, and it was put to Mr Tommas that they had not in fact occurred. He was adamant that they had, and could recall in some detail a meeting that he had attended. I accept his evidence. There is no reference to the alleged health benefit post retirement in the employment agreement documentation before the Court that followed, including Mr Stott's individual employment agreement. If an obligation of the sort contended for had existed, it is surprising that it would not have been recorded in writing.

[38] It is clear that Mr Mayne (and his wife), Mr Angus, Mr Green, Miss Craig and Miss Kerr received medical insurance coverage following their retirement. This provides some (but not definitive) support for the plaintiff's argument that there was a legal obligation to meet such payments.

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[15] *Cuttriss v Carter Holt Harvey Ltd* [2007] ERNZ 233 at [37]-[40].

[39] In *Everist v McEvedy*[16] the High Court observed that a well-established custom or practice may become an enforceable term of a contract where it has acquired such notoriety that the parties should be taken to have known of it and intended that it should be part of their contract; it is certain and reasonable; it is capable of being proved by clear and convincing evidence; and where it is not inconsistent with any express term of the contract. The evidence falls well short of meeting the threshold criteria endorsed in *Everist*.

[40] There was no evidence that paying for a healthcare scheme following retirement was a general or notorious custom or practice within the company. Although it is clear that post retirement payments were made to five staff members, Miss Craig and Miss Kerr were never actually employed by PML. They had retired from PNZ prior to staff transferring to PML, and before its incorporation. Revealingly Mr Stott, who would (on the plaintiff's analysis) have been covered by the custom or practice contended for, was unaware of it. And Mr Mayne's evidence was that staff were not advised of it. The scope and coverage of the alleged benefit was also uncertain. Mr Mayne said that all staff were entitled to it on retirement, but this became unclear during the course of cross-examination. It was uncertain, for example, whether the alleged benefit extended to family members, and if so whether it was restricted to spouses, whether it was extended to all employees of whatever length of service or was restricted to long serving employees. The alleged benefit represented an expensive obligation of uncertain duration.

[41] Based on the evidence before the Court, the plaintiff has not been able to establish the existence of a legal obligation of the nature contended for. This is sufficient to dispose of the challenge.

[42] Issues relating to costs are reserved. The parties requested that costs be dealt with by memoranda following this judgment. I urge the parties to agree costs but if they cannot, the defendant is to file its memorandum and any supporting material

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[16] [1996] 3 NZLR 348 at 360. See also *Whitcombe and Tombs (Limited) v Taylor* (1907) 27 NZLR 237.

within 30 days of the date of this judgment with the plaintiff to have like time in which to respond.

Christina Inglis
Judge

Judgment signed at 12 noon on 14 March 2013