IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 11/06
CRC 18/05

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MICHAEL PEARCY INVESTMENTS LIMITED Plaintiff
AND	HEATHER MILLER Defendant

Hearing: 11 May 2006
(Heard at Christchurch)

Appearances: J S Fairclough, Counsel for Plaintiff
P Butler and J Lucas, Advocates for Defendant

Judgment: 10 November 2006

JUDGMENT OF JUDGE A A COUCH

Introduction

[1] The sole issue for decision by the Court in this case was the nature of the working relationship between the parties.

[2] Between 2001 and 2004, the defendant's services were provided to the plaintiff by another company. The defendant claimed that, from February 2004, she became an employee of the plaintiff. On this basis, she issued proceedings in the Employment Relations Authority seeking remedies arising out of the termination of the relationship in early 2005.

[3] The plaintiff opposed these claims. Its position was that, although the parties discussed entering into an employment relationship, the parties never reached a binding agreement and that the defendant's services continued to be provided as before.

[4] The Authority decided to investigate the nature of the relationship between the parties as a preliminary issue. In a determination dated 16 June 2005 it found

that the defendant was employed by the plaintiff from 16 February 2004. The plaintiff challenged that determination and the matter came before the Court by way of a hearing de novo.

The issue

[5] As already noted, the determination of the Authority on which this challenge is based related only to the nature of the working relationship between the parties. By agreement, the hearing by the Court was limited to the same single issue.

[6] The parties were agreed that they both wanted to enter into an employment relationship and that the essential terms of employment had been agreed. The case for the plaintiff was that the defendant's agreement was subject to confirmation following discussion with her husband and that this condition was never fulfilled. The essential issue, therefore, was whether any such condition had been imposed by the defendant and, if so, whether it had been satisfied.

Background

[7] The plaintiff is a well established company which imports and distributes fashion accessories. On a day to day basis, the company is operated by Michael Pearcy although, in recent years, his wife Letitia has also been involved in its management.

[8] The defendant began doing work for the plaintiff sometime early in 2001 and continued doing so on an intermittent basis until about November 2002. Initially, the defendant did clerical work but, in about September 2001, she began doing sales work for the plaintiff. She continued doing this work until about November 2002.

[9] Throughout this period, the defendant's services were provided to the plaintiff by the defendant's husband, John Miller, who provided monthly GST invoices to the plaintiff.

[10] In about September 2003, Mr Pearcy made contact again with the defendant. Initially this was for another purpose but it led to discussion between them about the defendant doing further work for the plaintiff. This led to an agreement that the defendant's services would be provided to the plaintiff for a period of 8 weeks during October and November 2003. The work to be done by the defendant consisted principally of making sales trips around New Zealand. As before, the defendant's services were provided through a third party but in this case it was a company, CirPac Limited. This was a company operated by Mr Miller. GST invoices were provided by CirPac Limited for this work.

[11] At the time Mr Pearcy discussed with the defendant the provision of her services to the plaintiff in October and November 2003, he also told her that the plaintiff wished to employ a sales person from mid February 2004. The defendant expressed interest in this position and they discussed terms of employment.

[12] The defendant began working full time in the plaintiff's business on 16 February 2004. The work she did was principally that of a sales person although she also did associated clerical and warehouse work. The defendant ceased doing work for the plaintiff in December 2004 and their business relationship came to and shortly afterwards.

[13] To this extent the facts were agreed or were the subject of uncontradicted evidence. On other significant issues, the evidence of Mr Pearcy and of the defendant differed to a greater or lesser extent. I now deal with those issues.

Disputed events

[14] Mr Pearcy and the defendant agreed in their evidence that, in September 2003, they discussed the terms on which the defendant might be employed by the plaintiff the following year. They were also in agreement that the package offered by Mr Pearcy on behalf of the plaintiff including the following terms which were acceptable to the defendant:

- A base salary of $30,000 per year
- 4 weeks' annual leave and 5 days' sick leave per year
- A company vehicle in the form of a second hand Toyota Landcruiser recently purchased by the plaintiff
- A cell phone

[15] Mr Pearcy and the defendant both gave evidence that, in addition to the base salary, commission would be paid and that it would be at the rate of 5 percent on sales made by the defendant. Mr Pearcy, however, said that this commission was to apply only to sales in excess of $500,000 in the first year whereas the defendant's evidence was that she was offered commission on all sales. Another term of employment which the defendant said was agreed but which was not mentioned by Mr Pearcy was that she would have the option of taking leave without pay during quiet periods.

[16] In addition to these differences in their evidence about the content of the proposed employment package, Mr Pearcy and the defendant also differed about

whether the defendant accepted employment on the terms offered by Mr Pearcy on behalf of the plaintiff and, if so, when that occurred.

[17] It was common ground that, at the time Mr Pearcy and the defendant discussed the terms of employment, the defendant was also considering an alternative offer of employment from a language school. As a result, the defendant told Mr Pearcy that it would be some time before she responded to the employment proposal from the plaintiff.

[18] Mr Pearcy's evidence was that he did not hear again from the defendant about the employment proposal in 2003. He went on to say, however, that in February 2004 he and Mrs Pearcy had *"quite lengthy"* discussions with the defendant about the proposed terms of her employment "*over several days.*" According to Mr Pearcy, this led to agreement about the terms as between the three of them but that the defendant made her acceptance conditional upon discussing the matter first with her husband. According to Mr Pearcy "*The ball was in her court to come back to us once she had spoken to her husband*" but that she never did so.

[19] The defendant's evidence was distinctly different. She produced a copy of memorandum dated 30 October 2003 which she said was an attachment to an e-mail she sent to Mr Pearcy that day. This memorandum began by reporting on a sales trip to the North Island which the defendant had then recently completed. The memorandum then went on:

> *To confirm our conversation earlier in the month with regard to my coming on board as the Sales Manager for New Zealand, I will be responsible for managing all New Zealand sales and will work with you on some of the bigger clients. I will have two sales indent trips plus two stock trips per annum around the North and South Islands. All travelling expenses will be reimbursed and I will have a company credit card plus a reimbursement account for small cash expenses. I will have a company vehicle – a later model Landcruiser has been agreed upon. A cellphone will be provided and all business related calls covered. A base salary of $30,000 plus a commission of 5 percent on all company indent and stock sales within New Zealand has been agreed with annual reviews. Annual leave has been agreed of four weeks plus the option of taking leave without pay during quiet periods. Sick leave of 5 days, available after 6 months of service will be provided if necessary.*
>
> *I'll call you when I get back from Melbourne and we can discuss where we are at and what to do next.*

[20] Mr Pearcy said that, although he received an e-mail from the defendant on 30 October 2003 and opened an attachment to it in the form of an invoice from CirPac Limited, he was not able to find another attachment and was therefore unaware of the memorandum at that time. According to Mr Pearcy, he did not see

the memorandum until May 2004 when it was mentioned by the defendant in discussion and he asked her to provide him with a copy of it.

[21] The defendant's evidence was also that she provided Mr Pearcy with another copy of the memorandum dated 30 October 2003 but she said that this was on 30 November 2003 following her return from a sales trip around the South Island. Her evidence-in-chief was:

> *7. On my return I emailed an invoice for my SI trip on 30 November 2003 and when presenting this to Michael I asked him if he had read my memo of 30 October. He said he hadn't, so I printed this and gave it to him to read. I stood at his door while he read it. His only response to this memo was* "the vehicle may not necessarily be a Toyota Landcruiser*".*
>
> *8. I understood from his response that subject to his proviso on the motor vehicle, my memo accurately recorded the terms of employment the company had offered and I had accepted.*
>
> *9. Michael then indicated that my start date would be February.*

[22] The defendant elaborated on these events which she said took place on 30 November 2003 by saying that she had no difficulty in accessing the memorandum dated 30 October 2003 on the personal computer in the plaintiff's premises which was used by Mr Pearcy and the other staff. The defendant said that, when Mr Pearcy said he had not read the memorandum, she went to the computer and printed it out immediately for him. The defendant also said that she printed a further copy of the memorandum for Mr Pearcy in the same way in May 2004.

[23] According to the defendant, an employment agreement was concluded in her discussion with Mr Pearcy on 30 November 2003. She denied that there was any further discussion with Mr Pearcy and/or Mrs Pearcy about the terms of employment in February 2004. In cross-examination it was put to the defendant that a particular topic of conversation in February 2004 was the level of sales required by the plaintiff to meet the cost of her position and this was revised downwards from the figure of $500,000 suggested in September 2003 to a figure of $350,000. The defendant agreed that such a discussion had taken place but suggested that this occurred in 2003.

[24] As noted earlier it was common ground that the defendant began work in the plaintiff's business on a full time basis on 16 February 2004. It was also common ground that from that time on she received payments from the plaintiff of $919.59 per fortnight by automatic payment to her bank account. These payments were recorded in a standard form of wage book which showed the gross payment per

fortnight as $1,153.85 and deductions of PAYE tax of $234.26. The gross amounts equated to an annual salary of $30,000. The amounts shown as PAYE deductions were very close to that required for such a salary.

[25] The wage book was apparently obtained by the defendant and she made the initial entry in it. In mid March 2004, the plaintiff engaged a woman called Robyn Anderson to do clerical work on a part time basis. The remaining entries in the wage book relating to the defendant were made by Ms Anderson. I received by consent a brief affidavit from Ms Anderson confirming this but she qualified it by saying that she made the entries simply by copying the initial entry made by the defendant and that she never mentioned the wage book or the entries in it to Mr or Mrs Pearcy.

[26] The automatic payment authority for these fortnightly payments to the defendant described the payments as "*salary*". Mr Pearcy accepted that he signed this automatic payment authority on behalf of the plaintiff but, when pressed in cross-examination on the description of the payments as *"salary*", he said that he had only been concerned about the amount of the payments rather than their description.

[27] In the months immediately after she recommenced work for the plaintiff in February 2004, the defendant completed sales trips in both the North and South Islands. In doing so, the defendant incurred substantial expenses. She sought to recover those from the plaintiff by way of a tax invoice from CirPac Limited to the plaintiff dated 30 April 2004. The defendant explained this by saying that, although it had been agreed that the plaintiff would provide her with a credit card for business expenses, it did not do so before the sales trips and that the only other credit card that she had available at the time was one in the name of CirPac Limited. It was common ground that the plaintiff did provide the defendant with a credit card later in 2004.

[28] In September 2004, Mr Pearcy proposed changes to the manner in which the defendant was paid for her work. This proposal was recorded in a page of notes handwritten by Mr Pearcy which he gave to the defendant. This referred to a series of "*bonus*" payments based on achieving sales targets for particular products and was intended to replace the commission structure then in place. Mr Pearcy characterised this proposal as part of continuing efforts by him to agree terms of employment with the defendant. The defendant saw it as a proposal to vary the terms of her employment.

[29] The defendant rejected this proposal. She recorded that in a letter to Mr Pearcy dated 20 September 2004 which she said was sent to him as one of two attachments to an e-mail dated 27 September 2004. Mr Pearcy acknowledged receiving the e-mail but said that he was unable to open the attachments and that, when he raised this with the defendant, she gave him only a subsequent letter dated 27 September 2004.

[30] In her letter to Mr Pearcy dated 27 September 2004, the defendant said:

> *2. I have sought advice today and it is our position that the Employment Agreement is the Memo I wrote to you in October 2003 confirming our agreement regarding my employment, because no other written agreement has been provided and it was agreed upon at the time. Therefore I am proceeding on that agreement until and unless something else is agreed upon to replace it. Please understand that I have not agreed to your proposed new arrangement.*

[31] Shortly after that letter was sent to Mr Pearcy, the defendant went off on another sales trip. After she returned in mid November, she provided the plaintiff with a tax invoice from CirPac Limited for commissions said to be owed for sales made by her from October 2003 to September 2004. This was a tax invoice including GST.

[32] By this time, a dispute had developed between Mr Pearcy on behalf of the plaintiff and the defendant and her husband about the amount of commission payable by the plaintiff for sales generated by the defendant. The principal issue was whether commission was payable on sales made during October and November 2003 when the defendant's services were being provided to the plaintiff through CirPac Limited. The defendant and Mr Miller claimed that it was agreed commission would be paid at the rate of five percent on the value of all sales less GST. Mr Pearcy denied that there was any agreement to pay commission on those sales. Mr Pearcy also disputed whether GST was properly payable on commissions for sales generated by the defendant after she began work again on 16 February 2004. A further issue was whether commissions were payable on the basis of the original agreement reached between the parties or on the basis of the alternative bonus payment proposal Mr Pearcy had made to the defendant in September 2004.

[33] These disputes were the subject of correspondence between Mr Pearcy and Mr Miller. On 24 November 2004 Mr Miller wrote to Mr Pearcy acknowledging receipt of some payments which had been made by the plaintiff and seeking payment of the balance he said was owed. He concluded his letter by saying:

> *The subsequent commissions owed by Field Maple to Heather Miller, generated from Heather's commencement as an employee in February 2004, totals $10,672.19 at this time. This is a matter that Heather will no doubt be addressing with you on her return.*

The reference to "*Field Maple*" is to the trading name sometimes used by the plaintiff.

[34] Mr Pearcy sent a reply to that letter on 26 November 2004. He began by disputing aspects of what Mr Miller had said in his letter and then said:

> *The agreed terms negotiated by Heather Miller, Letitia Kinney and myself prior to the offer and acceptance of a contract in February 2004 were as follows.*
>
> *That a 12-month sales contract would begin on the date of acceptance under the following terms.*
>
> *1) Base remuneration would be $30,000.00 paid on a fortnightly basis into your nominated account.*
> *2) A further bonus of 5 percent commission would be payable on invoiced sales once an agreed target of $350,000 of sales had been achieved in a calendar year, and payable at the conclusion of that year*
> *It was also discussed at the time that MPI may be prepared to make a payment in advance in October of 2004 if cashflow allowed.*
> *3) That all sales related costs would be re reimbursed to CirPac.*
> *4) That MPI would supply a car and cellphone for the purposes of generating sales.*
>
> *A number of smaller considerations were agreed to by all and from our point of view a contract has been offered and accepted in good faith.*

[35] That letter of 26 November 2004 was given to Mr Miller by Mr Pearcy at a meeting between Mr Pearcy, the defendant and Mr Miller had on 29 November 2004. It was common ground that, at this meeting, Mr Pearcy said that he regarded the defendant as an independent contractor. Later that day, Mr Miller wrote a brief reply to Mr Pearcy, concluding:

> *To reiterate from my earlier correspondence, commissions owed to Heather Miller for work done during the time in which she was an employee (including $10,672.19) are a separate matter that she will be corresponding with you about directly.*

[36] Mr Pearcy in turn, replied to Mr Miller on 3 December 2004. After setting out his view of the basis on which various payments had by then been made and asserting that they amounted to payment in full, Mr Pearcy said:

> *The reason for the G.S.T. content remaining unpaid was because Heather is an employee of Michael Pearcy Investments Limited and the payment was a bonus, therefore a tax invoice should never have been issued.*

Discussion

[37] Consistent with the case advanced through the pleadings, Mr Pearcy conceded in his evidence that there had been agreement between himself, Mrs Pearcy and the defendant that she would be employed by the plaintiff and the essential terms of that employment. The plaintiff's case rested on the proposition that this agreement was conditional on the defendant discussing the terms with her husband and then providing final confirmation to the plaintiff. To this end, the plaintiff relied not only on Mr Pearcy's evidence of the parties' discussions about employment but also on the conduct of the parties during the period for which the defendant claimed she was employed.

[38] On key questions of fact, there were conflicts of evidence between Mr Pearcy and the defendant which I must resolve. Having carefully considered all the evidence they gave, in the context of the documents produced, and having regard to the manner in which the evidence was given, I have reached the conclusion that both Mr Pearcy and the defendant have an imperfect recollection of events. With respect to most of the disputed events, however, I prefer the evidence of the defendant.

[39] In his account of the negotiations for an employment agreement, Mr Pearcy's evidence was that agreement was reached between himself and his wife, on behalf of the plaintiff, and the defendant in discussions which took place in early February 2004 but that, on the defendant's part, her agreement was conditional upon further discussion with her husband. This version of events was at the heart of the plaintiff's case. The defendant denied that there were any substantial discussions with her about employment in February 2004. She also denied that her agreement to become an employee of the plaintiff was conditional.

[40] On this issue, I prefer the evidence of the defendant. I do so for three main reasons.

[41] Firstly, the suggestion by Mr Pearcy in his evidence that the defendant accepted employment with the plaintiff only on a conditional basis is inconsistent with all of the contemporary documents. Given the detailed and relatively extensive correspondence that passed between Mr Pearcy and the defendant and her husband during the latter half of 2004 regarding the business relationship between the defendant and the plaintiff, I do not find it credible that Mr Pearcy would not have referred to the defendant's agreement to become an employee being conditional if that was indeed the case.

[42] A key document in this regard was Mr Pearcy's letter of 3 December 2004 where he described the defendant as an employee of the plaintiff without qualification. Similarly, in his letter of 26 November 2004, Mr Pearcy twice referred to there having been "*offer and acceptance*" between the parties without any suggestion that this was conditional on the defendant's part. The significance of these unequivocal statements by Mr Pearcy is increased by the fact that he made them in the course of correspondence in which the defendant had repeatedly stated her position that she was an employee of the plaintiff. If Mr Pearcy disputed that proposition at the time, he would have said so.

[43] Secondly, Mr Pearcy's evidence that there was substantial discussion in February continuing over several days in February 2004 was inconsistent with his own evidence about what had been proposed and agreed in September 2003. When asked in cross-examination what the specific subjects of discussion in February 2004 were, Mr Pearcy was only able to suggest one. That was the reduction in the threshold for commission from $500,000 to $350,000. I do not find it credible that this issue could be the subject of "*quite lengthy*" discussions "*over several days*" as Mr Pearcy suggested.

[44] Thirdly, it became apparent in the course of cross-examination of Mr Pearcy that certain aspects of his evidence-in-chief were based on reconstruction from documents rather than a recollection. After conceding that two aspects of his evidence-in-chief were incorrect, Mr Pearcy accepted the proposition that his account of events was "*at best approximate*".

[45] It was also submitted on behalf of the plaintiff that the conduct of the parties after 16 February 2004 was inconsistent with an employment relationship and that this should be taken into account in determining whether such a relationship had ever been concluded.

[46] On 30 April 2004, CirPac Limited invoiced the plaintiff for the expenses incurred by the defendant during her sales trips in February and March. The plaintiff sought to rely on this document as evidence that the defendant's services in 2004 were being provided to the plaintiff through a third party. I do not construe it that way. The defendant's evidence that the plaintiff had failed to provide her with the promised credit card to meet her expenses and used a card belonging to CirPac Limited instead was credible and unchallenged. It was also effectively supported by Mr Pearcy's concession that the plaintiff did later provide the defendant with a credit card. The invoice was simply a means of dealing with a practical problem, not an

indication of the relationship between the parties. In this regard, it was significant that the invoice related solely to the expenses incurred by the defendant, and not to payment for the defendant's services.

[47] The plaintiff also relied on an invoice dated 1 October 2004 from CirPac Limited to the plaintiff for commissions said to be owing for sales made by the defendant between September 2003 and September 2004. This was a GST invoice. By its nature, this document was inconsistent with the defendant being an employee of the plaintiff. In context, however, I am of the view that little weight can be put on it. On Mr Pearcy's evidence, this invoice was provided to him on 15 November 2004. This was well after he had received a letter from the defendant dated 27 September 2004 in which she had made it clear that she regarded herself as an employee of the plaintiff. To the extent that the invoice related to commissions on sales made in October and November 2003, the invoice was also correct to claim GST as it was common ground that the defendant's services were being provided to the plaintiff by CirPac Limited at that time. It was also common ground that this invoice was withdrawn on 29 November 2004 and replaced with one relating solely to the period prior to the defendant returning to work for the plaintiff in February 2004. I regard this invoice as more a matter of administrative error than an indication of how the defendant regarded her status with respect to the plaintiff.

[48] It was common ground that the plaintiff never accounted to Inland Revenue for any PAYE tax deducted from the fortnightly payments made to the defendant. Mr Pearcy's explanation was that this was because he regarded the defendant as an independent contractor until he received final confirmation from her that she accepted employment. He also said that, in September 2004, he asked the defendant to provide tax invoices for the regular payments being made to her. I do not accept that evidence. Mr Pearcy was an experienced and capable businessman. If he had genuinely regarded the defendant as an independent contractor, he would have paid the whole of the amount owing to her and would not have waited more than 6 months to ask for tax invoices justifying them.

[49] In his closing submissions, Mr Fairclough placed considerable emphasis on the evidence given by the defendant that, at the meeting which took place on 29 November 2004, Mr Pearcy said that he considered her to be an independent contractor. I do not see this evidence as particularly significant. The defendant also gave evidence that the parties were advancing differing positions at this meeting and it was common ground that no agreement was reached. At best, therefore, this

statement can be seen as a bargaining position adopted by Mr Pearcy. It must also be seen in light of the unequivocal statement made by Mr Pearcy in his letter of 3 December 2004 that the defendant was an employee of the plaintiff.

[50] Other aspects of the working relationship between the parties not relied on by the plaintiff were positively indicative of an employment relationship. The plaintiff made fortnightly payments directly to the defendant of an amount equal to the agreed annual base remuneration less PAYE tax. This arrangement was signed off by Mr Pearcy. The defendant worked out of the plaintiff's premises. She used vehicles and other business tools provided by the plaintiff. She was eventually provided by the plaintiff with a credit card. She was an integral part of the plaintiff's business to the extent that it relied substantially on her to generate its sales.

[51] Overall, I do not find that the conduct of the parties after 16 February 2004 detracted at all from the nature of the relationship they had entered into. On the contrary, I find that it was more consistent with an employment relationship than with the defendant's services being provided through a third party as suggested by the plaintiff.

[52] Although I have largely accepted the case relied on by the defendant, there is one issue on which I have reservations. That issue is the defendant's claim that it was a term of her employment that she be paid commission at the rate of 5 percent on all sales made by her for the plaintiff. The plaintiff's position was that the agreement was for 5 percent commission on sales over an initial threshold, initially set at $500,000 but finally agreed to be $350,000. On this issue, I prefer the plaintiff's position.

[53] As a matter of commercial common sense, it would be distinctly unwise to enter into an employment agreement which provided for both a salary and commission on all sales. The nature of the defendant's position was such that, in addition to her salary, the plaintiff would also incur substantial expenses associated with her sales trips. The evidence was that the plaintiff would have to make sales of $350,000 just to cover the cost of the defendant's position. Taking into account Mr Pearcy's experience in this field, I find it inherently unlikely that he would have agreed to pay commission on sales under that breakeven threshold in addition to a annual salary of $30,000.

[54] This is supported by the evidence. In answer to a question in cross-examination, the defendant said that a *"$350,000 break even point"* was mentioned in her discussions with Mr Pearcy about the terms of her employment. The obvious

context in which this would have been relevant was in setting a threshold for payment of commission and, in answer to a question from me, the defendant confirmed in evidence that it was discussed in this context. She also confirmed that she had agreed with Mr Pearcy that commission should be on the value of sales exclusive of GST and freight. On balance, I find that a threshold of $350,000 was not only discussed but also agreed as the basis for commission payments.

Conclusion

[55] The defendant was employed by the plaintiff from 16 February 2004.

[56] The essential terms of the employment agreement were that the defendant would receive:

- A base salary of $30,000 per year
- Commission of 5 percent on the value of indent and stock sales within New Zealand made by the defendant over $350,000 per year exclusive of GST and freight
- 4 weeks' annual leave and 5 days' sick leave per year
- Use of a company vehicle
- Use of a company cellphone for business calls
- A company credit card for business expenses

Costs

[57] The defendant is entitled to costs on a conventional basis. The representatives are encouraged to agree costs if possible. Otherwise, Mr Butler is to file and serve a memorandum within 21 days of the date of this judgment. Mr Fairclough is then to file and serve a memorandum in reply within a further 14 days.

A A Couch
Judge

Judgment signed at 3.00pm on 10 November 2006

Representatives: Cavell Leitch Pringle & Boyle, Christchurch for Plaintiff
Phil Butler and Associates, Christchurch for defendant