

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 230  
3048272

BETWEEN                      NICOLA JANE McKAY  
Applicant

AND                              WANAKA PHARMACY LIMITED

and

WANAKA SUN (2003) LIMITED  
Respondents

Member of Authority:            Helen Doyle

Representatives:                Nicola Jane McKay in person  
Kieran Tohill and Jacinta Grant, counsel for the Respondent

Investigation Meeting:           30 January 2020 at Wanaka

Submissions Received:         6 March 2020 from the Applicant  
11 February 2020 and 16 March 2020 from the Respondent

Date of Determination:         16 June 2020

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**DETERMINATION OF THE AUTHORITY**

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- A    Nicola McKay was an employee of the Wanaka Pharmacy Limited and the Wanaka Sun (2003) Limited.**
- B    She was unjustifiably dismissed from her employment.**
- C    Wanaka Pharmacy Limited and Wanaka Sun (2003) Limited is ordered to pay to Nicola McKay:**
- (i)    Compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$13,000 without deduction.**
- (ii)    Holiday pay in the sum of \$57,334.24 gross.**

- (iii) **Reimbursement of fuel costs between 5 and 18 September 2018. Leave is reserved to return to the Authority in the event of difficulty with reaching agreement about that.**
- (iv) **Costs in the sum of \$500 together with reimbursement of the filing fee of \$71.56.**

### **Employment Relationship Problem**

[1] At the heart of this employment relationship problem is whether Nicola McKay was an employee of Wanaka Pharmacy Limited and Wanaka Sun (2003) Limited (Wanaka Pharmacy and Wanaka Sun or the companies).

[2] Ms McKay says that she was an employee of the companies from October 2005 until she was dismissed on 17 September 2018. She says that her dismissal was unjustified and she claims \$20,000 for compensation and \$14,497.38 for reimbursement of lost wages. Ms McKay also claims \$62,166.70 for unpaid holiday pay, \$2,609.23 for outstanding leave after she was set up as a new employee for spousal maintenance purposes, \$669.41 for unpaid mileage, payment for her last two weeks of work, legal costs incurred before the investigation meeting and reimbursement of the filing fee.

[3] Wanaka Sun and Wanaka Pharmacy say that Ms McKay was not an employee because of the matrimonial relationship at the material time between her and Aaron Heath, the sole director and shareholder of both companies. The companies say that there was no intention to create a formal legal employment relationship with Ms McKay and as she was not an employee she cannot claim she was unjustifiably dismissed or that she has an entitlement to holiday pay.

### **The Issues**

- [4] The Authority needs to determine the following issues in this matter:
- (a) What was the real nature of the relationship between Ms McKay and Wanaka Pharmacy and Wanaka Sun?
  - (b) If Ms McKay was an employee of the companies then:
    - (i) Was there a dismissal and, if so, was it unjustified?

- (ii) If there was an unjustified dismissal then what remedies are available?
- (iii) Is holiday pay due and owing, and if so, in what amount?
- (v) Is money owed for travel expenses?
- (iv) Should Ms McKay receive a contribution towards legal costs incurred before the investigation meeting?

**What was the real nature of the relationship between Ms McKay and Wanaka Pharmacy and Wanaka Sun?**

***Start of the relationship***

[5] Aaron Heath is a pharmacist by profession. He has operated the Wanaka Pharmacy since 1995 and was involved in the promotion and publication of the Wanaka newspaper since in or about 2000/2001.

[6] Mr Heath described the relationship with Ms McKay properly beginning in early 2005. At that time Ms McKay was working in real estate and Mr Heath said that he provided her with an allowance from his shareholding account and the use of a car owned by Wanaka Pharmacy for her real estate work. The shareholder account records monthly payments to Ms McKay of \$2,500 commencing on 20 May with a final payment on 20 September 2005.

[7] The Wanaka Pharmacy employee report records the employee start date for Ms McKay as 4 October 2005. From that date Ms McKay was paid by way of a salary from the Wanaka Pharmacy.<sup>1</sup> The Authority was provided with a payslip from 2005. The date of that payslip in mid-October 2005 suggests it may have been the first payslip Ms McKay received. Payment of salary continued until the relationship ended in September 2018 at which time Ms McKay was receiving \$2,416.23 per fortnight which is a salary of \$62,822. She was also provided with use of a company vehicle and a fuel card.

[8] Ms McKay says that she was put on the payroll of the Wanaka Pharmacy in October 2005 as it was coming towards the busy season and more staff were required. She was trained by Mr Heath and other dispensary and retail staff in retail work and would work rostered shifts in the shop in the role of retail assistant. She recalled she would wear a uniform when working in the shop, although Mr Heath could not recall that. In response to a question at the

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<sup>1</sup> Page 17 of the bundle of documents.

Authority investigation from Mr Tohill, Ms McKay accepted that she worked part-time in the Pharmacy. She said that she also undertook some work at that time for the Wanaka Sun.

[9] It is common ground that Ms McKay's work as retail assistant in the Pharmacy shop was short lived. It was replaced from in or about 2006 by other roles and responsibilities that she undertook for the companies. Mr Heath said that in those early years Ms McKay spent much of her time training horses on the Stud Farm purchased in or about late 2005/2006. Ms McKay said that she still carried out work for the companies. Mr Heath acknowledged that as the relationship grew and developed, particularly after their marriage in April 2007, Ms McKay became more involved in the companies. The evidence supported there was a decrease in the work Ms McKay undertook on the Stud farm following the birth of their three sons.

[10] There is no dispute that Ms McKay carried out work for the companies. It is the extent and nature of that work, how it was undertaken and its value to the companies that is in dispute. It is common ground that as time went on most of the work Ms McKay undertook was for the Wanaka Sun.

[11] Mr Heath accepts that Ms McKay was paid "a salary of sorts" by the Wanaka Pharmacy even though she undertook most of her work for the Wanaka Sun. He explained in his evidence that the Wanaka Pharmacy made more money than the Wanaka Sun. Further that the payment of a salary to Ms McKay was a way to introduce funds into the relationship or family home by "income splitting" for tax purposes. Ms McKay was not a shareholder or director of the companies and Mr Heath said that this was a way of drawing money to pay for household expenses. He does not accept that at any time there was an intention to create an employment relationship and says that at all material times Ms McKay was not an employee of either Wanaka Pharmacy or Wanaka Sun.

[12] There was no written employment agreement entered into between Ms McKay and the companies.

### *End of the relationship*

[13] Mr Heath and Ms McKay separated in or about late August 2018. On 3 September 2018 Ms McKay's fuel card was cancelled. When Ms McKay attended at Wanaka Pharmacy to process the pays on 17 September 2018 she was advised that someone else had taken over that role. The same day she then received written communication from Kieran Tohill Law Limited that she was no longer working with the Wanaka Sun and Wanaka Pharmacy.

[14] Ms McKay raised a personal grievance on 28 November 2018.

### *The legal framework*

[15] The Authority is required to consider whether Ms McKay was an employee of Wanaka Pharmacy and Wanaka Sun within the definition of employee in s 6 of the Employment Relations Act 2000 (the Act). The relevant provisions of that section are set out below:

#### **6. Meaning of employee**

- (1) In this Act, unless the context otherwise requires, **employee**—
  - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
  - ...
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2), the court or the Authority—
  - (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
  - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.
  - ...

[16] The leading judgment about all relevant matters is that of the Supreme Court in *Bryson v Three Foot Six Ltd (No 2)*.<sup>2</sup>

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<sup>2</sup> *Bryson v Three Foot Six Limited (No 2)* [2005] 3 NZLR 721; [2005] ERNZ at [32]

[17] The Supreme Court held that all relevant matters include:

- (a) The written and oral terms of the contract which will usually contain indications of common intention concerning status.
- (b) Any divergences from or supplementation of the terms and conditions in the way in which the relationship has operated in practice. The Authority should consider the way in which the parties have actually behaved in implementing their contract.
- (c) All relevant matters requires the Authority to have regard to features of control and integration and whether the contracted person has been working on his or her own account which is the fundamental test.
- (d) It is not until there has been an examination of the terms and conditions of the contract and the way it operated in practice that it will usually be possible to examine the real nature of the relationship in light of the control, integration and fundamental tests.

[18] Throughout the time Ms McKay undertook work for the companies she had a relationship with Mr Heath and they married in 2007.

[19] A recent Employment Court judgment in *Christopher Dillon v Tullycrine Limited* concerns a family arrangement and an assessment whether the true nature of the relationship is one of employment.<sup>3</sup> Judge Holden noted in that case:

There are surprisingly few cases in which a family arrangement is examined, and none since s 6 of the Act was enacted in its current form.<sup>4</sup>

[20] There was a family arrangement considered in the Employment Court judgment in *McGillivray v Jones (t/a Tahuna Camp Store)*.<sup>5</sup> In that case Ms McGillivray sought wages for working in a shop owned by her prospective in-laws. It was held that the ingredients of a contract of employment, being an intention to create legal relations and certainty of terms, were not present in the parties' arrangements. There was in that case some reward to Ms

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<sup>3</sup> *Christopher Dillon v Tullycrine Limited* [2020] NZEmpC 52

<sup>4</sup> Above n 3 at [35]

<sup>5</sup> *MacGillivray v Jones (t/as Tahuna Camp Store)* [1992] 2 ERNZ 382 (EC)

McGillivray for work undertaken in the shop such as free accommodation, provision of groceries and an expectation of some benefit in the future when she and her partner purchased the business. She was not paid a wage.

[21] Judge Holden in *Dillon* confirmed that a family context does not preclude a finding of employment and noted that there are circumstances where one member of a family is vulnerable to exploitation by others by virtue of the family relationship.<sup>6</sup> It was further stated in *Dillon*:

Nevertheless, in circumstances where there is a personal connection between the parties, whether familial, neighbourly or through friendship, and there are tasks undertaken for which some recognition is given, the Court must be careful not to find there is employment where that was not intended and does not reflect the true basis on which the exchange between the parties occurred. Each case will need to be carefully considered and determined, in context and on its own facts.<sup>7</sup>

### ***Common Intention***

*What was said?*

[22] Ms McKay says that there was a discussion about her working in the Pharmacy in 2005 and she was trained to work in the shop, completed a new employee form and was added to the payroll.

[23] Mr Heath does not accept there was ever an intention to create a relationship of employment with Ms McKay and the reason for payment of a salary to Ms McKay was to limit the tax that would otherwise have been paid by income splitting. It was more beneficial for tax purposes he said to pay that way than by way of the allowance from his shareholder account. Whilst he accepts that Ms McKay undertook some work for the companies for which he was grateful he disputes it was to the extent Ms McKay maintains and describes it as flexible and work she undertook of her own volition. He says that after the relationship with Ms McKay ended no-one was engaged to perform the work she undertook, although there was some increased hours of work to cover some of the work.

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<sup>6</sup> Above n 3 at [31]

<sup>7</sup> Above n 3 at [32]

[24] There was no clear evidence of a discussion between Mr Heath and Ms McKay about Ms McKay becoming an employee in 2005. Given the passage of time there is in all likelihood no clear recollection of exactly what was said.

[25] In submissions Mr Tohill refers to Ms McKay working for the Pharmacy for a few months and being paid an allowance before being placed on the payroll in 2005. I could not be satisfied of that from the evidence. Mr Heath's evidence is to the effect that the allowance was paid when Ms McKay was still working in real estate as she was a contractor and had no fixed income and he cared about her. Ms McKay's recollection of payment of the allowance at all was vague.

[26] Mr Tohill placed reliance on the similarities between the allowance and the amount paid to Ms McKay following her placement on the payroll in 2005. The payslip at that time refers to payment of a net amount consistent with what Ms McKay had received monthly from Mr Heath by way of allowance from his shareholder account since May 2005. The employee records support that Ms McKay was paid fortnightly. If that was the case in 2005 she received more by being on the payroll than she did by way of the allowance. Mr Heath in his evidence was unclear about the rationale for the amount paid by way of salary to Ms McKay at that time and said that he "may have been trying to keep it consistent with the allowance." There was only one pay increase received by Ms McKay.

*No record of hours worked kept*

[27] Mr Tohill submits that there was no record of hours kept. That is not, I find, a determinative factor as Ms McKay was on a salary and employee records record her as full time, permanent and on a salary.

*Paid parental leave*

[28] Ms McKay produced a paid parental leave application for an employee that Mr Heath had signed on 3 March 2012. She said that she had taken paid parental leave following the birth of her three children although I have only seen the one application and it is that which I can place weight on. In the employer's declaration for paid parental leave Mr Heath declared and signed that Ms McKay had been employed at that time for 6 years and 5 months and had worked an average of 40 hours per week. Mr Heath could not see any particular difficulty

with the form being completed in that way, notwithstanding that he said that no employment relationship was intended with Ms McKay.

[29] Mr Tohill does not accept this is a determinative factor in intention. He says it is important and significant the employer is stated on the form as Wanaka Pharmacy not Wanaka Sun for whom Ms McKay undertook most of her work. I do not consider the description of Ms McKay's employer a significant matter in the same way as Mr Tohill because it could be explained by the fact that Wanaka Pharmacy paid Ms McKay's salary.

[30] At the time the declaration was made in 2012 some thought must have been given again by Mr Heath to the nature of the relationship supported by the declaration made and level of detail provided about hours of work and duration of the relationship.

*Suggestion that Ms McKay take up a managerial position with the Wanaka Sun*

[31] Mr Heath said that at one point he discussed with Ms McKay that she become manager of the Wanaka Sun and that this was the only attempt to formalise the relationship and offer work. In response she said that she was too busy and did not have enough time for that work. When questioned about this at the Authority investigation meeting Ms McKay said that she was already working "every hour under the sun." She said that she did not feel that she had time to take on more work. This was put forward as the only time when there was some discussion to formalise the relationship as one of employment.

[32] From her evidence Ms McKay saw that offer as an increase to her duties. I accept that the discussion took place but there was insufficient detail about it to conclude what would have happened to the other duties.

*Familial relationship*

[33] Mr Tohill submits that consideration should be given to the fact this was a familial and spousal working relationship and that there are further considerations to take into account in such a relationship as this.

[34] In *MacGillivray* and *Dillon* there was reference to an English Court of Appeal judgment in the context of a family arrangement, and an observation made in that judgment that there is a presumption of fact against an intention to create a legal relationship where

arrangements are made between close relations including husband and wife.<sup>8</sup> Mr Tohill refers to this presumption in his submissions. As to why there is such a presumption of fact it was stated in the judgment, which was not an employment case, that:

...It derives from experience of life and human nature which shows that in such circumstances men and women usually do not intend to create legal rights and obligations, but intend to rely solely on family ties of mutual trust and affection.<sup>9</sup>

[35] Mr Tohill referred to an Authority determination in *Patrick v Johns and Mana Awhi*<sup>10</sup>. He submits that there were similarities to this matter in that there was no employment agreement, rate of pay and no essential terms of employment. He submits a relationship of employment was not found notwithstanding a salary was paid. The original intention between the parties in that case was a joint business venture. The date when Ms Patrick says she became an employee pre-dated the date of incorporation of the company and she had complete access to the company funds. Her evidence was that she was able to draw a wage at a later time. The amount drawn down by her was irregular, inconsistent and out of sequence with the pay cycle. The Authority found that the pattern of payments was more consistent with a business principal taking drawings or reimbursing themselves for company expenditure. I consider the facts of this matter distinguishable from those in *Patrick*. Ms McKay was paid a consistent amount by way of salary. There was no evidence to support that she had unlimited access to company funds or that there was any discussion prior to 2005 about a shareholding or business interest.

[36] As was stated in *Dillon*, intention is not the only matter to be considered when determining whether the real nature of the relationship was employment. Care needs to be taken where there is a familial connection not to find employment where it was not intended and is not reflective of the true basis or real nature of the relationship. Each case needs to be carefully considered and determined in context and on its own facts.<sup>11</sup>

[37] Obtaining a tax advantage and paid parental leave by describing the relationship as employment is not determinative of any intentions about whether Ms McKay was engaged as an employee. The Authority is required to consider whether the real nature and true basis of the relationship was employment and a contract of service.

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<sup>8</sup> Above n 5 at pg. 392 and 393.

Above n 3 at [30].

<sup>9</sup> *Jones v Padavatton* [1969] 1 WLR 318 (CA) at 332..

<sup>10</sup> *Patrick v Johns and Mana Awhi* CA 185/09, 23 October 2009 Member Cheyne

<sup>11</sup> Above n 3 at [32]

**The relationship in practice**

[38] There was significant focus in the evidence about the nature of the work Ms McKay undertook.

*Newspaper communications and deliveries*

[39] Ms McKay said that she answered all incoming general phone enquiries to the Wanaka Sun that were directed to her mobile phone on a 24 hour/7 day basis. She said that she would answer all incoming social media enquiries and email enquiries that came to the main incoming email address. Further, she would liaise between the editor and administrator as required. Some ten years earlier she had created a coded spreadsheet to manage all Wanaka Sun advertising bookings and placements and the spreadsheet was provided in the bundle of documents. Ms McKay said she organised community events. One was the Wanaka Christmas hamper and foodbank drive and she considered this work was an important factor in advertising and promotion for the Wanaka Sun. Photographs of the charitable events in the Wanaka Sun were produced in the bundle of documents and referred to as “Wanaka Sun Christmas Food Bank Drive.” Ms McKay also delivered copies of the Wanaka Sun every Thursday morning to a variety of businesses around Wanaka. She described these roles combined as taking approximately 15 hours per fortnight.

[40] Mr Heath accepted that Ms McKay carried out communications for the Wanaka Sun from time to time. He said this was a part of the role that was done at her volition and leisure and often from home or while she was out and about. He noted that if Ms McKay had been an employee she would not have been expected to answer calls 24 hours, 7 days a week, as that would have been unreasonable. He also said in his evidence that the Wanaka Sun set up for calls to go directly to the group or person responsible. For example advertising requests going directly to the advertising representative with calls about news or stories directed to the editor.

[41] Further that any emails to the catch-all email address would have been minimal and that the work as a community event co-ordinator was not related to any work at the Wanaka Pharmacy or Wanaka Sun but was volunteer work. Mr Heath accepted that deliveries for the Wanaka Sun were carried out by Ms McKay, however, he did not accept that the delivery work would have taken the amount of time that Ms McKay said it did and he considered

deliveries would take no more than 4 hours a fortnight. Sometimes Mr Heath and Ms McKay's children would help out with the deliveries and Ms McKay would pay them by way of pocket money. He said they were not regarded as employees.

#### *Website Editor*

[42] Ms McKay said that she had website editor responsibilities for the Wanaka Sun. This included uploading every online edition of the Wanaka Sun every Thursday to the website between 4.30am and 6.30am. Further, that she would oversee the website layout, check content for accuracy, proof read and edit material and collaborate with professionals to improve presentation. Some examples of this work were provided. Ms McKay said that this work took about 18 hours per fortnight.

[43] Mr Heath said that this was a role Ms McKay took on of her own volition and there was never any strategy for the website. Further, that the editor for the Wanaka Sun had advised on occasions that she would be able to assist; however, Ms McKay would not let her.

#### *Social Media Manager*

[44] Ms McKay said that part of her role was social media manager for Wanaka Sun and Wanaka Pharmacy and her name was alongside social media in the paper. In this role she managed and contributed to posts on various social media platforms including Facebook, Instagram and Twitter. Her evidence was that this role occupied approximately 40 hours per fortnight.

[45] Mr Heath's view was that this was a title that Ms McKay had given herself and that the size of the Wanaka Sun and Wanaka Pharmacy did not allow for a person to be employed solely to do this work. He considered the responsibilities that Ms McKay had set out in a document attached to her evidence were irrelevant to the Wanaka Sun and Wanaka Pharmacy and something that had been taken off the website. He produced a website printout of a job description for a social media manager and pointed out the similarities to what was provided by Ms McKay. Mr Heath said that the only work that Ms McKay did that could be close to what a social media manager would do was posting content on Facebook or Instagram and monitoring comments posted. He said that he disagreed with the amount of time that Ms McKay was spending on Facebook and Instagram as it was onerous for the family and he

noted that when they separated there was little, if any, negative effect as with the limited access to social media.

*Human Resources and Recruiter*

[46] Ms McKay described responsibilities she had for recruiting for the Wanaka Sun and Wanaka Pharmacy. She said that she designed advertisements, proofed and edited them. She then received the applications, shortlisted and conducted interviews. Examples of this were provided in the bundle of documents. She also said that she developed updated job descriptions, specifications and conducted interviews. Ms McKay said that she would prepare employment agreements, offer positions and provide relevant documents and procedures for new employees to become integrated. She also dealt with grievances when they arose. Ms McKay maintained payroll information and collated and managed timecards sending the checked hours to payroll.

[47] Ms McKay had put the time required for these roles as approximately 10 hours per fortnight.

[48] Mr Heath did not agree that Ms McKay was employed as a human resource person. He said that she did not have the experience or qualifications to undertake the role. He agreed that she was involved in recruitment and that she did the rosters although Ms McKay referred to that as an administration responsibility for the Wanaka Pharmacy. He said that aside from these duties there was very little human resource type work or management of staff. He did not disagree that Ms McKay did undertake some grievance work however he said some of the work was undertaken by lawyers. He said that the payroll work Ms McKay undertook was in her own time and usually from a café. He accepted that there were deadlines with this work so that staff could get paid on time but that he simply trusted her to do it on time when it suited her.

[49] Mr Heath said Ms McKay did not maintain pay records as these were outsourced for both Wanaka Pharmacy and Wanaka Sun, initially to an accountant and latterly to a payroll company. Ms McKay was required to email the time records to the payroll provider who would prepare the pay records and slips and Ms McKay would do the checking off before paying. A contractor did the actual paying. Mr Heath said that since Ms McKay was no longer involved he did the pays with another staff member and it only took an hour and a half

to pay everyone from the Wanaka Sun and Wanaka Pharmacy. He attached an email from a staff member confirming this. He considered there may have been some double handling around the paying of employees.

#### *Administration*

[50] Ms McKay said that she had responsibilities as Pharmacy Administrator. In that role she referred to managing rosters for up to 15 staff at the pharmacy for the business that operated for 12 hours a day, 7 days a week for 365 days of the year. Further that she ensured cover, arranged staff changes and managed outstanding leave balances for staff and leave applications. She also said that she developed and updated workplace procedures. She also said that she managed the daily turnover spreadsheet and the staff incentive programmes.

[51] She considered that this work was about 10 hours per fortnight.

[52] Mr Heath denied that Ms McKay did the administration work and said that someone else was employed to do the work. He did accept though that Ms McKay did the rosters and that they discussed the staff incentive work in the evening after he returned home.

#### *News Photographer Wanaka Sun*

[53] It was agreed that Ms McKay took photos for the Wanaka Sun. Examples of these were provided. Mr Heath said that Ms McKay enjoyed photography and would provide the photos to the Wanaka Sun for a photo library and also to television on occasions for the weather segment of the news. He described the work as incidental to Ms McKay's day to day life and that many of the photos were taken as she was driving around for other reasons. He accepted that Ms McKay worked with the editor of the Wanaka Sun. Some examples of online conversations between the editor and Ms McKay were provided in the bundle of documents.

#### *Conclusions about work*

[54] Mr Heath knew work was being undertaken by Ms McKay but he said that it came down to him "not being clear what Ms McKay was working on." He described going to work at the Pharmacy in the morning about 8am and leaving about 6.30pm in the evening and that "stuff happened around that." He was not clear if it was work or not. He said that the social

media side of the work had not existed previously and then became all encompassing. He remained unclear about what Ms McKay was doing when he saw her on social media and whether or not that was work related. He acknowledged that she undertook work with rosters and pay and some interviewing and recruitment.

[55] In the bundle of documents there are articles from the Wanaka Sun about changes for the newspaper with social media and an online audience. There is a 2016 edition celebrating 15 years of the Wanaka newspaper.<sup>12</sup> In one of the articles Ms McKay states that since the publication began using social media it had been an invaluable tool in breaking news and communicating with readers. There is reference to a growing audience on Facebook of 70,000 people per week. There is also an article quoting Mr Heath in which the history of the paper that he was instrumental in producing, with the first edition going to print in September 2001, is traversed. He is quoted amongst other matters as saying:

With online communication growing rapidly over the last four or five years, Facebook has become an important tool to get the news to the community. We have developed a high online following that greatly contributes to the readership stats of the Wanaka Sun. I'd like to thank my wife Nikki who has almost singlehandedly driven the social media side of the paper.

[56] This was not a case where I conclude there was income splitting for a reduction of tax liabilities with no or minimal work undertaken in exchange for the payment. I was reassured in reaching this conclusion by some answers about leave.

[57] I asked Ms McKay whether she had taken any leave. Ms McKay referred to approximately four overseas family trips but said that she as she worked whilst on leave she did not regard them as holidays. Mr Heath in his evidence referred to holidays in Rarotonga, Australia, Fiji and a short break in Te Anau over the years since 2005.

[58] Mr Heath accepted that they had both worked whilst on holiday. He recalled some down time with a boating trip in Rarotonga of about five or six hours and they did a "couple of activities before dinner." Ms McKay said that she worked because there was no-one else to do the work that she did.

*How and when did Ms McKay perform the work she did?*

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<sup>12</sup> Bundle of documents at pg. 173 - 175

[59] Ms McKay was not physically based at either the Wanaka Sun or the Wanaka Pharmacy when she undertook her duties after she stopped working at the Pharmacy shop. The Wanaka Sun had moved away from physical offices a few years prior but Mr Heath said, even at the time there were physical offices for the Wanaka Sun, Ms McKay was not based there. The evidence supported that Ms McKay attended at the Wanaka Pharmacy to pick up timesheets for the pays but that was on an irregular basis. Her work was often undertaken at home and sometimes from a café and she took photos when she was out and about. She said in her evidence that she interviewed staff for recruitment purposes at a café. Whilst some of her responsibilities had set times, such as uploading the Wanaka Sun and photos and in the process for paying of staff, other tasks did not. Ms McKay said that she fitted the work in around her family commitments and there was flexibility in when and how she undertook much of her work. Her evidence is that she fitted in with and around the children.

### *Control test*

[60] Under this test the Authority is asked to consider how supervision and control was exercised over Ms McKay.

[61] Mr Tohill submitted that Ms McKay answered to no-one. Ms McKay in answer to a question from Mr Tohill at the Authority investigation meeting stated that she answered in her role to Mr Heath. The evidence supports that there were discussions about matters concerning staff including rostering, recruitment, staff leave and incentive pay. There was an opportunity for control/supervision from Mr Heath during discussions at home about staff matters and related tasks. The documents show that Ms McKay also took instruction from the editor of the Wanaka Sun.

[62] In his evidence Mr Heath said other employees had to apply for leave, undertake performance assessments, meet sales goals and their employment was more formalised and measurable than Ms McKay's. I accept that Ms McKay had a reasonably high degree of autonomy particularly with her social media and online work. For much of her work she was able to determine when she performed it and where. I accept that she was not required to undertake performance assessments. In part though this reflects the nature of some of the roles that Ms McKay undertook. In terms of measurability of value of the work undertaken the numbers of those accessing social media and the website were available.

[63] There were some tasks with more limited flexibility. The paper was uploaded to the website on a particular day and within a window of a few hours each week. Ms McKay was involved in the pay process for staff and she prepared rosters. She was also involved in deliveries of newspapers and followed up when things went wrong with deliveries. If recruitment of staff was required she had to prepare an advertisement, consider responses, interview prospective staff, make offers and provide relevant employment agreements. There were certain controls about the undertaking of those tasks in the sense that if they had not been performed or performed properly then it would have been obvious and questions would have been asked. Ultimately Ms McKay was answerable to Mr Heath about those matters. The nature of those tasks and performance of them does not support control or supervision would have necessarily been different if the work had been carried out by an employee or a contractor.

[64] Ms McKay did not apply for leave because she did not consider that she had taken any leave, rather that she continued undertaking her work remotely whilst away from Wanaka. She organised and approved leave applications for other staff. She said in her evidence that she regarded her increasing leave balance as akin to a savings account in case something went wrong. I accept that most employees would not have control about accumulation of leave. That is a factor that could point away from a contract of service.

[65] Mr Tohill referred to an absence of time records that were kept by employees of the Wanaka Sun and Wanaka Pharmacy. Ms McKay was on a salary and the employee reports show other staff were paid wages so that is a neutral factor.

[66] There are factors under this head that point to a relationship other than employment and factors that point to an employment relationship.

### ***Integration test***

[67] Mr Tohill submits that Ms McKay's work was not performed as an integral part of the business but as an accessory to it.<sup>13</sup> In his submissions he referred to a judgment of the Employment Court in *McGreal v Television New Zealand Limited*<sup>14</sup> and reference to the inclusion of Mr McGreal in a roster of independent contractors and employees. He referred to

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<sup>13</sup> *Stephenson, Jordan and Harrison v MacDonald and Evans* [1952] 1 NZLR 101 per Lord Denning. *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42.

<sup>14</sup> *McGreal v Television New Zealand Limited* (2007) 4 NZELR 345 at [19].

the fact that Ms McKay was not on the rosters even though she prepared them. That could be explained though because Ms McKay had not undertaken work in the shop since 2005 at which time her evidence was that she did work to a roster.

[68] Mr Tohill referred to the core business of the Pharmacy being to dispense pharmaceuticals not prepare rosters. Further that since Ms McKay left no-one has been hired to take over the tasks she performed.

[69] I conclude that tasks such as preparation of rosters so that staff knew when they were working, pay processing duties so staff could be paid, applications for leave and recruitment of staff is work that is an integral part of the work operation.

[70] Mr Tohill says that the tasks undertaken by Ms McKay for the Wanaka Sun online, by way of social media and photography were not integral but rather an accessory to the paper which was in the business of publishing news stories and advertisements. There was evidence that putting the paper online increased readership and there was more exposure to advertisements. Further that social media made the news stories and photography more accessible and may in turn have in turn provided for other stories. The editor asked for photos from time to time. I am not persuaded that the work Ms McKay undertook for the Wanaka Sun was not integral to the publishing of news articles and advertisements.

[71] Mr Tohill submits that the salary was paid to Ms McKay regardless of hours she worked over the almost 13 years. Further that there was only one salary increase and it was for a reason of increased household expenses. A reason put forward to request a pay increase on the basis of an increased cost of living is not unusual. The fact that the basis advanced for a pay increase was recalled by Mr Heath is a factor that could support an employment relationship. Consistency of the amount paid each fortnight would also be less likely in an independent contracting relationship.

[72] Whilst on its own this test is not determinative it does not indicate strongly a relationship other than one of employment.

**Fundamental test**

[73] This test considers whether Ms McKay was in business on her own account. There was no evidence to support that she was in business on her own account. The only work she undertook over the almost 13 years was for the Wanaka Sun and Wanaka Pharmacy. She was not a shareholder in either business.

[74] Mr Tohill in his submission said that Ms McKay used the word “we” about decision made by her and Mr Heath about the company suggesting that she saw herself as an equal.

[75] I accept that, because of her relationship with Mr Heath, Ms McKay had an interest in the success of the companies and how they operated. Equally she was very aware that she was not a shareholder of either company and there was no evidence throughout the relationship of any disputes about ownership of the companies. She did not see herself as an equal in that sense. Mr Heath explained in his evidence that there is a requirement for a pharmacy that 75% of the shares be held by a Pharmacist.

[76] If this test was applied in the usual way then it would strongly favour an employment relationship. The overarching familial relationship also needs to be considered.

**Conclusion as to the nature of the relationship**

[77] The Authority is required to determine the real nature of the relationship between Ms McKay and the companies.

[78] I accept Mr Tohill’s submission that the method of payment of remuneration may not be determinative of the real nature of the relationship if there are stronger factors that suggest otherwise. Warnings, though, have been given in judgments about those who introduce taxation advantages and then subsequently deny that the relationship is what the tax advantages were given for. It has been said that they may have to abide by the consequence of that initial classification.<sup>15</sup>

[79] Importantly this was not the first time since 2005 that the parties have had to consider the real nature of their relationship with a degree of care. It was considered in 2012 at the time of the application for paid parental leave and the declaration in that application that Ms

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<sup>15</sup> *Telecom South v Post Office Union* [1992] 1 ERNZ 711 at 725 per Sir Gordon Bisson J

McKay was an employee. Therefore I could not be satisfied, as Mr Tohill submits, that it was not until this claim that Ms McKay has maintained she was an employee.

[80] I have not found that the work Ms McKay undertook over the years was of a minimal nature and/or without value to the companies. Whilst she had a degree of freedom in when and how she undertook some of her responsibilities it was not to the extent that there was no control or supervision at all. The integration and fundamental tests favoured a relationship of employment. In undertaking her role Ms McKay had no expectation of a shareholding in either company.

[81] From all of the above and not simply the method of payment I conclude that the real nature and true basis of the relationship between Ms McKay and Wanaka Pharmacy and Wanaka Sun was employment under a contract of service.

[82] I now turn to determine the claims by Ms McKay as an employee.

#### **Was Ms McKay dismissed from her employment?**

[83] After her separation from Mr Heath Ms McKay attended at the Wanaka Pharmacy on 17 September 2018 to process the pays and was told that Mr Heath was taking over that role. She was then advised in a written communication, from Kieran Tohill Law Limited on 17 September 2018, that she was no longer working for Wanaka Sun and Wanaka Pharmacy.

[84] Ms McKay was dismissed from her employment.

#### **Was the dismissal unjustified?**

[85] The dismissal was undertaken by the companies on the basis that Ms McKay was not an employee. It did not satisfy the test of justification in s 103A of the Employment Relations Act 2000 (the Act) because, objectively assessed, it was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[86] It may have been difficult to continue with the relationship. Ms McKay did not accept its end would have been inevitable in the same way that Mr Heath did.

[87] Ms McKay was unjustifiably dismissed. Having made out her personal grievance of unjustified dismissal she is entitled to an assessment of remedies.

*Lost wages*

[88] Under s 123(1)(b) of the Act an employee is entitled to the whole or any part of the wages or other money lost as a result of the grievance. Ms McKay seeks 12 weeks loss of wages in the sum of \$14,497.38 gross and 2 week's unpaid wages.

[89] The evidence disclosed that there was payment through Wanaka Pharmacy to Ms McKay of a fortnight's unpaid wages and an amount that equated to wages for a period of at least 12 weeks after 17 September 2018. It was described by Mr Tohill as a form of spousal maintenance but was essentially the same amount paid to her previously by way of fortnightly salary. To make the payments after dismissal Ms McKay was set up as a new employee of the Wanaka Pharmacy.

[90] I am aware that there are different claims in different jurisdictions between Ms McKay and Ms Heath. I cannot be sufficiently satisfied, as I need to be, that a loss of wages has been sustained by Ms McKay for the period she claims reimbursement for. I therefore make no award under this head.

*Compensation*

[91] Ms McKay seeks \$20,000 under this head.

[92] She says that the dismissal was the low point in her life and she struggled. She felt that the dismissal was undertaken with a view to hurt her and that no other employees had been dealt with as she had. She referred to feeling isolated and that there was a corresponding impact on her mental health. Ms McKay said that she loved her job and still misses it a considerable period of time later.

[93] In determining compensation I have weighed, as Mr Tohill submits, that there were other considerable stresses at that time of the separation for Ms McKay to deal with. I also weight that the end of Ms McKay's employment may have been inevitable in the circumstances. However I accept that the job was very important to Ms McKay and that its loss in a manner without her input and any process was therefore significant.

[94] Subject to any order for contribution a suitable award under this head is \$13,000 without deduction.

*Contribution*

[95] I am not satisfied that Ms McKay contributed to her personal grievance of unjustified dismissal.

**Is holiday pay owed?**

[96] Ms McKay claims the sum of \$62,166.70 is due and owing to her for holiday pay. That amount accords with her employee records.

[97] Mr Tohill submits that this claim has not been adequately proven and holidays were taken and that a considerable accounting exercise would be necessary to determine what leave is actually owed.

[98] This is a significant claim for holiday pay. The Authority heard evidence about it in the event that it found the relationship to be one of employment. There was evidence of some overseas and local trips with no significant disagreement about these having occurred. The issue is whether or not they were in fact holidays for Ms McKay.

[99] The records can be relied on as a starting point. Ms McKay says that although trips were taken she undertook work whilst away and so they were not holidays as such. I could not be satisfied that there was a requirement that Ms McKay work on holiday from Mr Heath. I could not be satisfied that someone else could not have undertaken the work for the short time whilst she was away or it could not have simply been left. I consider that there should be some adjustment to reflect some holidays taken where there was the opportunity for rest and recreation. I also weigh, particularly at the start of the employment relationship, work undertaken for the Stud farm which was not work undertaken for the companies in assessing leave.

[100] Exactness about leave taken in this case is not possible. The Authority, in resolving employment relationship problems, should make a determination according to the substantial merits of the case.<sup>16</sup>

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<sup>16</sup> Section 157 of the Employment Relations Act 2000

[101] Over this extended period of employment, where there was evidence about work undertaken on the Stud farm and trips both overseas and local, I consider it fair to both parties that four weeks salary be deducted from the leave balance. That is the sum of \$4,832.46.

[102] Holiday pay is due and owing to Ms McKay in the sum of \$57,334.24 gross.

[103] For completeness there is no outstanding leave payable for payments made to Ms McKay following her dismissal when there was the creation of a new employee to facilitate these payments.

#### **Is Ms McKay owed reimbursement for travel expenses?**

[104] Ms McKay claims mileage of \$669.41 from her last fortnight of work. An element of confusion about reimbursement for this may have arisen from an email from Mr Tohill to Ms McKay's then solicitor dated 5 September 2018 following the cancelling of the fuel cards. I accept Mr Tohill's submission that there can be no claim for mileage because the company owned the vehicle that Ms McKay was using. The company sustained the cost associated with wear and tear of its vehicle, not Ms McKay in her own vehicle.

[105] Ms McKay is entitled to be reimbursed for any fuel costs for that last fortnight that are work related after the fuel card was cancelled. She should make any claim in that regard to Mr Tohill within 7 working days from the date of this determination and Mr Tohill should respond within 7 working days. Either party can return to the Authority if resolution is not possible.

#### **Legal costs and reimbursement of filing fee**

[106] Ms McKay was self-represented from the point she lodged her statement of problem. She has attached a copy of an invoice from a solicitor dated 30 November 2018 in the sum of \$1,350.10 and seeks an order for reimbursement of those costs and the filing fee of \$71.56.

[107] Costs in the Authority are modest. Awards are usually on the basis of a contribution towards costs often assessed on the basis of a daily tariff. The tariff for the first day of any investigation meeting is currently \$4,500 and \$3,500 for each subsequent day.

[108] I accept that at a very early stage Ms McKay did incur some costs related to her claim that she was an employee. These in essence related to raising a personal grievance and

consideration of the nature of any claim. The statement of problem was drafted along the same lines as the letter raising a personal grievance. It would not be fair, given the costs were at a very early stage, to award other than a modest contribution towards them.

[109] I find that a fair contribution towards costs is the sum of \$500 together with reimbursement of the filing fee.

**Orders made**

[110] I order Wanaka Pharmacy Limited and Wanaka Sun (2003) Limited to pay to Nicola McKay the following amounts:

- (a) Compensation under s 123(1)(c)(i) of the Act of \$13,000 without deduction.
- (b) \$57,334.24 gross for holiday pay.
- (c) Any fuel costs incurred by Ms McKay between 5 and 17 September 2018.  
Failing agreement either party may return to the Authority.
- (d) \$500 being costs.
- (e) \$71.56 being reimbursement of the filing fee.

**Helen Doyle**  
**Member of the Employment Relations Authority**