

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Michael Anthony Heffernan (Applicant)
AND Estate of Patrick David Heffernan (Respondent)
REPRESENTATIVES Werner van Harselaar, Counsel for Applicant
Peter Churchman, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 27 February 2006
28 February 2006
1 March 2006
2 March 2006
DATE OF DETERMINATION 3 May 2006

DETERMINATION OF THE AUTHORITY

Introduction

[1] This is a claim for arrears of wages payable in respect of work said to have been performed by Michael Heffernan from late November 1999 until 13 September 2002 and from that date until mid-January 2003. Michael Heffernan says that he was employed by his father (Patrick Heffernan) who died on 13 September 2002. The respondent is cited as the Estate of Patrick Heffernan.

[2] A statement of problem was lodged with the Authority on 24 March 2005, to which the respondent replied. An amended statement of problem was lodged on 23 September 2005 and a reply was lodged on 5 December 2005. The claims arise under both the Employment Contracts Act 1991 and the Employment Relations Act 2000. To preserve rights of appeal under the former Act, and by agreement, one consolidated hearing was conducted in the form of an adjudication hearing before the Employment Tribunal. The amended statement of problem and statement in reply were treated as if they were a statement of claim and a statement of defence respectively. I should also record that I have been appointed by the Chief of the Authority pursuant to section 252 of the Employment Relations Act 2000 to exercise the jurisdiction of the Employment Tribunal.

[3] The litigation is against a background of family disharmony and it is necessary to explain some of that background. There is significant disagreement over many facts, whether central to or remote from the essential issue for decision. It is not necessary to deal with the factual disputes that are remote from the central issue except to the extent that they have formed the basis of judgments about witness reliability.

The people and the places

[4] Patrick Heffernan bought a farm at Moonlight near Macraes in Central Otago in 1956. The property was called Craigmoor. In 1976, half of Craigmoor was settled on a trust called the Craigmoor Farm Trust. The Craigmoor Farm Trust purchased a small farm at Awamoa (near Oamaru) in 1977 which was run in conjunction with Craigmoor. In 1985 a second trust was established, the Enterprise Farm Trust, and a property at Morven in South Canterbury was purchased partly by that trust, partly by Patrick Heffernan and partly by his wife Catherine Heffernan.

[5] Patrick and Catherine Heffernan had six children: Michael, David, Stephen, Felicity, Nicola and Therese. In these proceedings, Michael, Felicity and Therese gave evidence and were cross-examined. Stephen provided an unsworn statement and made himself available by phone conference to be questioned on oath. David provided an unsworn statement but was not available to answer questions. Catherine Heffernan provided an affidavit but was not available to answer questions. The evidence of Stephen, David and Catherine Heffernan was provided by the applicant in support of his claims. Holding a phone conference to deal with Stephen's evidence was organised shortly before the hearing but the applicant did not make any application to accommodate the non-appearance of David or Mrs Heffernan.

[6] A number of witnesses were cross-examined, having been called by the applicant to support his contention that he worked at Craigmoor and Awamoa at the relevant times. They are Kenneth McConnell, Neil Roy, Garry Stevens, Graham Arlidge, Ian Davidson, David Matheson and Malcolm Mackenzie. Marlene Shields, a district nurse who visited Patrick Heffernan at Awamoa during the illness leading up to his death, provided an unsworn statement but would not appear to confirm it on oath or answer questions. Again, the applicant did not make any application.

[7] The respondent provided statements from eight witnesses, seven of whom were available for cross-examination. Michael O'Neil is a solicitor. Like his father before him, he provided legal services for Patrick Heffernan and is the solicitor for the estate. Stuart McLauchlan is a partner in the firm of accountants who provided accountancy services to Patrick Heffernan and is also the accountant for the estate. Ellen Ramsay is a trustee of the estate and Patrick Heffernan's cousin. Mrs Ramsay lives near Palmerston, between Moonlight and Awamoa. Anne McCarthy, Patrick Heffernan's eldest sister, lives in Invercargill. Thomas Lynch, Patrick Heffernan's brother-in-law, also lives in Invercargill. Therese Heffernan and Felicity Heffernan are two of Patrick and Catherine Heffernan's three daughters. Felicity Heffernan, a solicitor, is a trustee of the estate of Patrick Heffernan. Alan McClea is a retired farmer who worked at Awamoa for Patrick Heffernan but whose employment ended before the period of the claim. There is an unsworn statement from Mr McClea.

[8] Late in the piece, the applicant sought to call his solicitor, Evan Moore, to rebut some evidence given by Felicity Heffernan. There was no objection so he gave *viva voce* evidence and was cross-examined.

[9] To complete the geographical picture, I should note that Michael Heffernan bought a house at Moeraki in about February 2000. Moeraki is between Palmerston and Awamoa. Michael Heffernan also purchased a block of land at Awamoa (the Grants Block). That land shares boundaries with Patrick Heffernan's Awamoa farm. In 1998, the Awamoa land was divided between Patrick and Catherine Heffernan and each took about 50 acres. Catherine Heffernan sold her 50 acres to Michael Heffernan in 2002. Patrick Heffernan lent money to Michael Heffernan for that purchase.

Family arrangements

[10] Patrick and Catherine Heffernan separated in 1993. Also, there was discord between other family members but it is not necessary to canvass any details about that. In July 1998, family members and other parties executed a set of interrelated documents, two of which are in the exhibits. There is a deed of family arrangement executed by Patrick and Catherine Heffernan, the six children and the trustees of the Craigmoor Farm Trust and the Enterprise Farm Trust. There is a further deed between Patrick Heffernan, Michael Heffernan and the trustees of the Craigmoor Farm Trust. Pursuant to the latter deed, it was agreed that the deed constituted a full and final settlement of all issues including but not limited to employment issues. Specifically, ... *Michael's employment has been terminated on 20 April 1998. The deed went on to provide that Any services provided by Michael after 20 April 1998 are pursuant to a labour-only contract for services (not an employment contract) and shall not include the benefits incidental to an employment contract. In the absence of agreement to the contrary the rate for services shall be \$42 per day net.*

[11] With the capital sum made available under the deed, Michael Heffernan purchased a hotel in Dunedin which he sold later in about September 1999. The present claim for arrears of wages commences soon after that in November 1999.

[12] Following the death of Patrick Heffernan in September 2002, there were Family Protection Act proceedings contesting the will. Those proceedings were settled by consent in about October 2004. The exhibits include a partially executed memorandum of consent which, it is agreed, records the terms of that settlement. Relevant for present purposes is clause 2(i) which reads:

*The Plaintiff **Michael Heffernan** is not barred from bringing a claim for wages against the estate to an agreed maximum of \$120,000 provided that any claim is commenced on or before 24 March 2005.*

[13] In evidence, Michael Heffernan was adamant that the settlement allows him to claim up to \$120,000 net from the estate in these proceedings. His argument is that an employer is responsible for any tax owing. I do not accept Michael Heffernan's position on the point, despite his claim that the settlement discussions referred to net amounts. The meaning of a document such as a deed is to be ascertained from the words used in light of its purpose. It is clear from clause 2(ii) that the maximum payable by the estate is intended to be \$120,000. The clause provides a formula to share that amount (or any lesser sum awarded in these proceedings) rateably across the whole estate including the sum payable by the estate in settlement of the Family Protection Act proceedings. Even without this provision, I am satisfied that the deed does not permit an award of \$120,000 net to Michael Heffernan. The situation is no different from that where an employment agreement (for example) states that an annual salary of (say) \$50,000 is to be paid to the employee. In those situations, the employer divides the salary figure by the relevant period and then deducts tax before paying the remainder to the employee. For the employee to actually receive \$50,000 in the hand, more words would be required. The same applies in the present situation. I am satisfied that the words of the deed limit the maximum payable by the estate to \$120,000 including any tax.

[14] The foregoing description of family arrangements sets out the background against which the present claim is made. However, the central issue is whether Michael Heffernan was an employee employed by Patrick Heffernan to do work for hire or reward under a contract of service. Next, I will deal with the pleadings and evidence about that point.

Formation of contract of service

[15] In his amended statement of problem, Michael Heffernan says that he returned to work for his father in late November 1999 but was wary of their earlier employment problems. He says that he wrote out an employment agreement by hand and signed it along with his father. There is a photocopy of this employment agreement in the exhibits. Michael Heffernan says the original was stored with other papers in his father's desk but those papers were cleared out of the desk by Felicity Heffernan within 48 hours of Patrick Heffernan's death. The amended statement of problem further alleges that Patrick Heffernan stopped Michael Heffernan in the street in Palmerston and said he needed Michael Heffernan to work for him and then Michael Heffernan started work in late November 1999.

[16] The exhibited agreement reads:

20/11/99

I Patrick David Heffernan, farmer of Moonlight, authorise Michael Anthony Heffernan to work on my property Craigmoor and the Awamoa property in Oamaru. I undertake to pay fair wages for services rendered.

[signed] P D Heffernan M A Heffernan

[17] Its bona fides is contested. In his written statement of evidence, Michael Heffernan says that he wrote out the employment agreement by hand and signed it along with his father. Michael Heffernan expanded on that in his evidence-in-chief. He said he was living at Moeraki in 1999, that he had sold the Dunedin hotel at the end of October 1999 and that his father came to see him at Moeraki and asked him to work for him. When cross-examined, Michael Heffernan said his father came to see him at his property in Moeraki to tell him when he should commence work. It was put to Michael Heffernan that he claimed to have started work in November 1999 and to have purchased the Moeraki property in February 2000. Therefore, Patrick Heffernan could not have come to the Moeraki property to tell him when to commence work. In response, Michael Heffernan then gave evidence that the visit by his father at Moeraki was when Michael Heffernan wanted to be put on the PAYE system. As to the contested agreement, Michael Heffernan says that it was signed right at the beginning, meaning November 1999.

[18] There is no satisfactory evidence by Michael Heffernan as to why his father would come to see him at Moeraki in February 2000 or later if they already had a written agreement signed on 20 November 1999 as alleged. It must be remembered that, on his account, Michael Heffernan was regularly working and staying at Craigmoor by February 2000 so there would have been no need for his father to travel to Moeraki to talk to him about something that only Michael Heffernan was concerned over. The evidence about the timing of a visit from his father is not consistent with the evidence also given in cross-examination by Michael Heffernan that his father came to see him at Moeraki about when he should start work when there was a discussion about what to do about pay. In light of the challenge to the bona fides of the written agreement, Michael Heffernan's evidence about the circumstances of its making is most unsatisfactory. He is the only person able to give direct evidence on the point, but I find it unconvincing.

[19] In reaching that conclusion, I have also assessed Michael Heffernan's evidence explaining the absence of the original signed 20 November 1999 agreement. There is a second agreement, also handwritten by Michael Heffernan of which only photocopies have been produced. Michael Heffernan gives the same explanation to the absence of the original of this second document. The second document reads:

3/8/02

I Patrick David Heffernan of Oamaru, agree to exchange certain items of machinery, valued at their market price and to pay in cash any outstanding wages to Michael Anthony Heffernan for the work since late 1999 on both the Moonlight and the Awamoa properties.

Items of machinery include: large red truck (D series Ford reg JH8629)

- *Truck/sheep cattle crate*
- *Hay rake*
- *A tractor of choice*

[signed] P D Heffernan M A Heffernan

[20] I prefer the evidence of Felicity Heffernan that she did not clear any papers out of Patrick Heffernan's desk in the house at Awamoa after his death. She arrived at Awamoa late on 13 September 2002 after having travelled from Christchurch to Dunedin, where Patrick Heffernan had died in hospital. Anne McCarthy, Patrick Heffernan's cousin, accompanied Felicity Heffernan from Dunedin to Awamoa. Felicity Heffernan spent 14 September 2002 attending to funeral arrangements along with another relative, the late Maureen Heffernan. Mrs McCarthy was staying at Awamoa and confirms that she did not see Felicity Heffernan clearing out papers from the desk. Therese Heffernan's evidence is that she went through the papers in Patrick Heffernan's desk in order to attend to a GST return and that she did not see the originals (or any copy) of the agreements. This occurred on or after 17 September, the date that she arrived at Awamoa. The evidence of Felicity Heffernan, Therese Heffernan and Mrs McCarthy concerning the documents in the desk was either not challenged or remained consistent in cross-examination. In cross-examination, Michael Heffernan's evidence became an allegation that Felicity Heffernan and Mrs McCarthy were present on the Saturday morning when Felicity Heffernan (mainly) was sealing up boxes of papers. Michael Heffernan advanced the presumption that these boxes were sent to either the lawyer (Mr O'Neil) or the accountant (Mr McLauchlan). However, there is no evidence that such boxes ever arrived, nor any suggestion that any material consigned to the relevant professionals did not arrive. I see no reason to doubt Mrs McCarthy's evidence which means Michael Heffernan's evidence about the boxes of documents is not correct.

[21] There is another reason to doubt the bona fides of the 3 August 2002 agreement. It entitles Michael Heffernan to receive a *tractor of choice* and the *large red truck* for services rendered by Michael Heffernan. There was an estate clearance sale in April 2003. Michael Heffernan bid and paid for a tractor at that sale. He did not raise any claim to the tractor or refer to the 3 August 2002 agreement at the time. His explanation for that state of affairs was that he received little notice of the date of the clearance sale but that does not explain why he did nothing from September 2002 about the purported right to a tractor of choice or the red truck.

[22] There is also a difficulty about the *large red truck*. That was not included in the clearance sale but advertised for sale separately in October 2003. Michael Heffernan made no claim to the truck at that stage and actually declined any interest in it when he and his other brothers were offered it prior to the advertisement. However, when the purchaser arrived at Awamoa to collect the truck, Michael Heffernan drove it away. In cross-examination, Michael Heffernan denied doing this but I find his evidence unconvincing. The Police then became involved and Michael Heffernan returned the truck. It is in connection with justifying these actions that Michael Heffernan first referred to the existence of the 3 August 2002 written agreement and provided a copy of the alleged agreements in early November 2003. At that time, Michael Heffernan's solicitor wrote *Michael ... does not know where the originals are. He assumed they would have been in the late Mr Heffernan's desk*. Later, when pressed in cross-examination, Michael Heffernan claimed to

have seen the originals on the desk on the Tuesday prior to Patrick Heffernan's death, but I find that evidence also unconvincing.

[23] The last point about the red truck that should be mentioned is the evidence of a bill of about \$3,000 for repairs and maintenance. When first questioned on the point during cross-examination, Michael Heffernan said that the work was necessary in order to get a certificate of fitness to use the truck to cart the remaining equipment from Moonlight in accordance with the request from the estate. Michael Heffernan's evidence is that the last movement of property from Moonlight was in November 2002 by a cartage firm so the use of the red truck for the same purpose must have finished by November 2002 at the latest. However, the evidence is that the bill for the repairs and maintenance work was presented many months later in 2003. When this was put to him, Michael Heffernan responded by saying that the truck may have been due for its next certification. His evidence on the point is unconvincing and has contributed to the conclusion that his evidence alone cannot be safely relied on where there is any contest of evidence.

[24] For the reasons explained above, I find that the agreements dated 20 November 1999 and 3 August 2002 cannot be relied on as proof of an employment contract between Michael Heffernan and Patrick Heffernan.

Other evidence of an employment contract

[25] There is a substantial amount of evidence about the extent to which Patrick Heffernan used contractors to perform farm work, particularly at Craigmoor up to the date of its sale in about April 2002. There are many invoices but usually they contain little detail about the actual work done. Nonetheless, there is no doubt that Patrick Heffernan made substantial use of contractors to perform routine farming operations at Craigmoor. Michael Heffernan's evidence-in-chief is directed at describing the seasonal routine of farming work at a property such as Craigmoor. However, he says that one of his first jobs in November 1999 was tidying up the house at Craigmoor. In cross-examination, he several times said that the house was *unliveable* when he commenced work at Craigmoor in November 1999.

[26] Therese Heffernan, Felicity Heffernan, Thomas Lynch and Anne McCarthy all gave evidence contradicting Michael Heffernan's assertion that the house at Craigmooore was unliveable. They spoke both of times they were present and their background knowledge of Patrick Heffernan's habits. In particular, Mrs McCarthy was able to recall a time when she visited and Michael Heffernan still owned the Gresham Hotel. Her evidence is that Michael Heffernan had left his bedroom at Craigmoor in a mess for some time. Mrs McCarthy also said that there was a *nicely made bed* for her when she visited and that the kitchen was tidy with food in the fridge. Similarly, Mr Lynch also said that he was a regular visitor at Craigmoor and that the house there was tidy, ordered and comfortable. There is no reason to doubt the evidence of Mrs McCarthy and Mr Lynch on the point, which I accept. The evidence of Therese Heffernan and Felicity Heffernan on the point is consistent and I accept it also as accurate. Accordingly, I reject Michael Heffernan's evidence that the house at Craigmoor was unliveable and that he had to tidy up the house as one of his first jobs.

[27] Apart from the evidence about the use of contractors, the respondent points particularly to Michael Heffernan's business interests related to his Awamoa property and his EftPos transaction records to disprove the allegation that he worked as a farm manager for Patrick Heffernan and is entitled to substantial arrears of wages. Michael Heffernan provided copies of his BNZ account and a Visa account. They show a considerable number of transactions by Michael Heffernan at licensed premises throughout the period covered by the claim. Michael Heffernan was frequently at Stanley's Hotel at Macraes, a short distance from Craigmoor. He was sometimes at the

Highwayman Hotel in Dunback. He was also often at licensed premises in Dunedin, Palmerston, Hampton and Oamaru. Occasionally, Michael Heffernan was at licensed premises elsewhere in Central Otago or in Christchurch. There was only a faint suggestion (which I reject) by Michael Heffernan that he was not consuming alcohol on the occasions when the records show him at these licensed premises. It is obvious that Michael Heffernan frequently consumed a substantial quantity of alcohol and that he often was some distance from Craigmoor (in particular). However, it does not necessarily follow that he did not work for Patrick Heffernan.

[28] There is evidence to support the contention that Michael Heffernan did perform work at or for Craigmoor. Kenneth McConnell worked for PPCS as a sheep drafter and visited Craigmoor five or six times a year from about 1995 until 2002. His recollection was that he had seen Michael Heffernan at Craigmoor on about half those occasions assisting with the drafting. He also assumed that Patrick Heffernan and Michael Heffernan would have done the dagging on those occasions.

[29] Neil Roy has farmed on a neighbouring property to Craigmoor for many years. In cross-examination he confirmed that his farm part-owns a combine harvester and that they did some contract work for Patrick Heffernan in December 1999 and March 2003. He knew of Patrick Heffernan's use of various contractors for farm work and he confirmed that Patrick Heffernan hired his nephew to do some fencing in late 2001 and early 2002. He could say that he righted a tractor for Michael Heffernan one day when Michael Heffernan had been ploughing at Craigmoor. He thought that this occurred between December 1999 and January 2003. He gave a description of the routine of farm work on Craigmoor, a property similar to but significantly smaller than his own. Mr Roy's impression was that Michael Heffernan appeared to return to the property on a full-time basis but he was not able to say definitely that he recalled actually seeing Michael Heffernan doing work on the property between November 1999 and January 2003. That said, his recollection was that Michael Heffernan was assisting Patrick Heffernan at the time that Mr Roy purchased Craigmoor, a period that extended over a month or two in early 2002. Mr Roy also supported the view that the property was somewhat rundown when he purchased it.

[30] Garry Stevens is a contract shearer and his business did the shearing for Patrick Heffernan at Craigmoor for 18 years. That work involved him being at Craigmoor several times a year to a total of 10-14 days with three-four days for pre-lamb shearing being the longest single period. Mr Stevens' recollection was that Michael Heffernan was present at Craigmoor pretty much every year except when he owned the Gresham Hotel. Both Michael Heffernan and Patrick Heffernan did tasks related to the shearing when Mr Stevens was present.

[31] David Matheson is a silage contractor and did that work at Craigmoor between November 1999 and February 2002. His firm also carted equipment from Craigmoor to Awamoia after the sale of Craigmoor, about April 2002. Mr Matheson socialises with Michael Heffernan at the Moeraki Tavern from time-to-time. His evidence was that Michael Heffernan assisted with silage making in early 2002 by doing the raking. He also thought that Michael Heffernan gave directions about the location of the silage pit. He was able to say that he personally saw Michael Heffernan do some loading of gear onto trucks at Craigmoor and he described circumstances that suggest that Michael Heffernan put away gear that had been unloaded at Awamoia.

[32] Malcolm Mackenzie owned and farmed a property at Moonlight that shared a boundary with Craigmoor. He used to socialise with Michael Heffernan at Stanley's Hotel. His evidence is that he helped Michael Heffernan load the farm equipment for transport to Awamoia after Craigmoor was sold. Mr Mackenzie distinguished between the period of six months prior to the sale when he thought Michael Heffernan was working full-time and the period before then but after Michael Heffernan had sold the Gresham Hotel when he thought that Michael Heffernan was working part-time at Craigmoor.

[33] Graham Arlidge worked as a contract shearer for Patrick Heffernan at Awamoia. That involved usually weekend work about four times a year. He confirmed that Patrick Heffernan remained pretty active until the last year. He also confirmed that Michael Heffernan *was not a great morning person*. That was an oblique reference to Michael Heffernan's drinking, something referred to by other witnesses and confirmed by the bank statements. Mr Arlidge's evidence was to the effect that both Michael Heffernan and Patrick Heffernan did tasks related to the shearing while he was present at Awamoia.

[34] Ian Davidson is a retired mechanic who lives near Michael Heffernan's crib at Moeraki. His evidence is that he visited Awamoia on a number of occasions and helped Michael Heffernan do some work on an irrigation line and patch up a few fences. He says that Patrick Heffernan gave instructions to Michael Heffernan about work to do on the farm. However, Mr Davidson did not know whether any of this related to Patrick Heffernan's or Michael Heffernan's land at Awamoia.

[35] From all of this evidence, it is clear enough that Michael Heffernan assisted Patrick Heffernan with some farming work at Craigmoor during the period from November 1999 until the sale of the property; that Michael Heffernan assisted with the removal of equipment from Craigmoor to Awamoia before Patrick Heffernan's death; and that Michael Heffernan assisted with shearing of Patrick Heffernan's sheep at Awamoia and possibly some other tasks there. From about November 1999 until the sale of Craigmoor, Michael Heffernan frequently stayed overnight at the family home on Craigmoor, but he also often stayed overnight at his own property at Moeraki. These living arrangements provided the context and opportunity for Patrick Heffernan to arrange for Michael Heffernan's assistance with particular tasks related to the operation of Craigmoor in particular.

[36] There is evidence that Michael Heffernan received some payment for work during this time. In the exhibits is Patrick Heffernan's cheque butt for cheque No 000355. It records in Patrick Heffernan's handwriting a payment of \$250 to Michael Heffernan for *wages* on 20 August 2000. In cross-examination, Michael Heffernan denied having received that money. There is no record of a cheque for that amount being deposited in Michael Heffernan's BNZ account at the time but nor is there any evidence that the corresponding cheque was written in a form that had to be banked into Michael Heffernan's account. Patrick Heffernan's hospital records show that he was an inpatient at Dunedin Hospital between 20 August 2000 and 6 September 2000 having been seen as an outpatient on 14 August 2000 in preparation for surgery. The coincidence raises the inference that Patrick Heffernan wrote a cheque for wages for Michael Heffernan for doing some work during Patrick Heffernan's forthcoming incapacity. I do not accept Michael Heffernan's evidence that he did not receive the payment.

[37] There is a second cheque butt (number 000360) written in Michael Heffernan's handwriting. It reads:

18/9/00
\$315-00
less tax
wages 70.56
244.44 x3
M.A.Heffernan
\$733.32
payment to end of Sept. 00
\$733.32

[38] There is a deposit for \$733.32 into Michael Heffernan's BNZ account on 18 September 2000. The hospital records show Patrick Heffernan was an inpatient at Dunedin Hospital between 18 September 2000 and 22 September 2000.

[39] Michael Heffernan's evidence-in-chief is that around August 2000 he argued with his father about getting his time recorded, that he had been working for around seven months and wanted to see some money. He says he received around \$700 and argued with his father about what that meant. When cross-examined, Michael Heffernan said that he wrote out the cheque butt to indicate that he was not prepared to work for \$244 a week and also in order to have a record for the future. He also claimed that his words *payment to end of Sept. 00* do not mean that the cheque represented payment in full as arranged between himself and Patrick Heffernan at the time.

[40] Counsel put to Michael Heffernan Felicity Heffernan's evidence about her part in facilitating this payment. Michael Heffernan said that he did not accept any of Felicity Heffernan's evidence and he denied dealing with Felicity Heffernan about the pay. When pressed, Michael Heffernan had to acknowledge that aspects of Felicity Heffernan's evidence about the payment were accurate, but his extravagant denials indicate the depth of his animosity towards Felicity Heffernan. This passage of cross-examination demonstrated the difficulty in accepting Michael Heffernan's evidence as reliable. Accordingly, I reject Michael Heffernan's claim that his words *payment to end of Sept. 00* do not indicate that the cheque was a complete payment for his work to 30 September 2000. It follows that Michael Heffernan was fully paid for any work for his father to the end of September 2000. It supports my earlier conclusion that Michael Heffernan did receive the cheque for \$250 in August 2000.

[41] There is evidence of a further wages payment to Michael Heffernan. Patrick Heffernan's BNZ bank statement shows a cheque payment of \$375 on 22 May 2001. There is a deposit into Michael Heffernan's BNZ account of \$375 on 22 May 2001, identified as a branch teller transaction. On Patrick Heffernan's statement in his handwriting is recorded *wages M Heffernan*. I see no reason to doubt the inference that Patrick Heffernan paid Michael Heffernan \$375 for some work performed by Michael Heffernan around May 2001.

[42] Patrick Heffernan's Pyne Gould Guinness account shows a payment of \$2,000 to Michael Heffernan on 21 March 2002. Michael Heffernan's BNZ statement shows a direct credit of \$2,000 from Pyne Gould Guinness on 21 March 2002. Michael Heffernan's evidence-in-chief is that he received \$2,000 from his father some time in March for preparing sheep for sale at Craigmoor and that he was paid this money because his father had a habit of paying people when he had received funds rather than when a payment was due. If the purpose of that evidence is to raise a doubt that the \$2,000 was a complete payment for all the work done by Michael Heffernan preparing Craigmoor for sale, I reject it. I also accept the suggestion by Felicity Heffernan that work done by Michael Heffernan in connection with this payment probably explains the observations by Mr Roy and Mr Mackenzie.

[43] What all this evidence establishes is that Patrick Heffernan paid Michael Heffernan for casual farm work. There may have been other occasions when Michael Heffernan received such payments during the period from November 1999 until September 2002 because the records produced by the estate are not complete. The inference that Patrick Heffernan actually paid Michael Heffernan each and every time they agreed work would be performed for payment sits comfortably with family history. Part of Michael Heffernan's complaint settled in 1998 by the deed of family arrangement related to irregular payment for work performed for Patrick Heffernan. Commonsense suggests that Patrick Heffernan would have ensured thereafter that he paid Michael Heffernan each and every time there was an agreement for paid work to be done.

[44] There is an affidavit sworn by Patrick Heffernan on 3 April 2002 in support of an application by Michael Heffernan for a limited licence. That followed a conviction for driving with excess breath alcohol and a six month disqualification commencing 27 February 2002. In the affidavit, Patrick Heffernan says *I employed my son Michael Anthony Heffernan as a farm labourer and have done so for 10 years; and I applied for an extension to settle with the purchaser of my farm at*

Moonlight as a result of my farm labourer being disqualified from driving; and I would suffer undue hardship if the applicant was unable to attend his employment at Moonlight and Awamoa Road.

[45] I accept Felicity Heffernan's evidence about the background to this affidavit. Specifically, Patrick Heffernan had arranged for Michael Heffernan to shift plant and equipment from Craigmoor to Awamoa because of the sale of Craigmoor. It is correct that Patrick Heffernan had employed Michael Heffernan as a farm labourer at various times over the last 10 years. There is no specific assertion in the affidavit that the employment was permanent or full-time or that it was continuous for 10 years up to the date of the affidavit. Seen that way, the affidavit is consistent with Patrick Heffernan's declaration made on 13 September 2002 that he was a self-employed farmer on his own with no staff. The whole of the affidavit makes it clear that Patrick Heffernan required Michael Heffernan's assistance to move equipment and plant from Craigmoor to Awamoa. This work could be part of the work for which Michael Heffernan received \$2,000 on 21 March 2002 but that is somewhat speculative. However, Michael Heffernan's evidence that the March payment related only to preparation of sheep for sale cannot be relied on. I also accept Felicity Heffernan's evidence that Michael Heffernan made little use of the limited licence for shifting equipment and plant from Craigmoor to Awamoa, a task that had to be completed by cartage contractors and family members (including Michael Heffernan) after Patrick Heffernan's death. Seen in context, therefore, Patrick Heffernan's affidavit of 3 April 2002 does not verify the claims currently made by Michael Heffernan.

[46] Shortly after Patrick Heffernan's death, Felicity Heffernan, as a trustee and executor of the estate, asked Michael Heffernan to detail any outstanding matters between him and his father. In response, Michael Heffernan gave Felicity Heffernan two pieces of paper in his own handwriting listing the outstanding matters. Both pieces of paper are included in the exhibit. Michael Heffernan identified a first mortgage to Patrick Heffernan in the sum of \$170,000 with interest at 9%. However, he stated that no interest had been paid because of a *contra* deal. That related to use of his land for grazing Patrick Heffernan's stock and *worked unpaid during winter looked after stock on PD Heffernan's property fed stock and maintain the farming operation as per instructions of P D Heffernan*. Also mentioned is the removal of chattels and machinery from Craigmoor and an exchange of labour for the use of Patrick Heffernan's tractors.

[47] There is no mention of the 20 November 1999 agreement, the 3 August 2002 agreement or arrears of wages or salary between November 1999 and September 2002. If Michael Heffernan believed he had a valid claim for unpaid wages, one would expect it to have been included in this list. After all, if the 3 August 2002 agreement was bona fide, the claim and related matters had only recently been discussed by the two men.

[48] There is further evidence against Michael Heffernan's claims. Patrick Heffernan kept a diary between 15 April 2002 and 30 August 2002 in which he noted daily living and farming events. Michael Heffernan is infrequently mentioned providing some assistance with farming tasks and working on his own Awamoa land. If Michael Heffernan had been working for Patrick Heffernan during this period, one would expect to see in the diary much greater detail about the farming tasks performed by Michael Heffernan.

[49] A review of the reliable documentary evidence and an assessment of the testimony of the various witnesses does not support Michael Heffernan's claim for arrears of wages between November 1999 and September 2002. That part of the application is therefore denied.

Claim for arrears following Patrick Heffernan's death

[50] The common law position is that the death of either party terminates a contract of employment. However, the personal representatives of a deceased employer can agree to employ someone on behalf of the estate. Michael Heffernan's claim against the estate for the period after Patrick Heffernan's death appears to be on the basis of an arrangement to continue the prior employment but I have not upheld the existence of a prior employment agreement except for occasional casual work. Accordingly, his claim for arrears of wages for work performed under an employment agreement between September 2002 and January 2003 must also fail.

[51] What was agreed between the trustees and Michael Heffernan was that he would do some work on the estate's Awamoa property in exchange for a waiver of his obligation to pay \$1,365 per month interest on the \$170,000 loan. Therese Heffernan kept a notebook in which she kept notes of the work done by Michael Heffernan under this arrangement. I accept them as an accurate account.

[52] On 23 October 2002, Michael Heffernan told Therese Heffernan that he was giving three weeks' notice to end this arrangement. I accept Therese Heffernan's evidence that he subsequently changed his mind and continued performing some work on the estate's Awamoa property until about January 2003.

[53] Undoubtedly Michael Heffernan performed work on and off for about four months after Patrick Heffernan's death and received reward in the form of a waiver of interest for doing so. However, the essential point in the present case, as in *Macgillivray v Jones* [1992] 2 ERNZ 382, is whether there was a contract of service. The real nature of the relationship between Michael Heffernan and the trustees and executors of the estate was never employment under a contract of service. It was a family arrangement to assist with the preservation of estate assets pending sale or disposition. Accordingly, any claim in respect of the period after Patrick Heffernan's death is dismissed.

Summary

[54] The whole of Michael Heffernan's claim for arrears is dismissed.

[55] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority