IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 360
5300082

BETWEEN	ALAN MAYNE First Applicant
	JEAN FRANCES CRAIG Second Applicant
	BERNADETTE ANN KERR Third Applicant
AND	POLYCHEM MARKETING LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Chris Patterson, counsel for Applicants John Hannan, counsel for respondent
Investigation meeting:	17 and 18 February 2011
Determination:	17 August 2011

DETERMINATION OF THE AUTHORITY

EMPLOYMENT RELATIONSHIP PROBLEM

[1] The applicants consider they have been deprived unlawfully of subsidised medical insurance that for a long time was provided by the respondent Polychem Marketing Ltd (PolyMark). They claim that the payment for the cover was made for them by PolyMark pursuant to a legally enforceable obligation related to or arising out of terms and conditions of an employment relationship.

[2] There is no dispute that before PolyMark had become a registered company the applicants, Mr Alan Mayne, Ms Jean Craig and Ms Bernadette Kerr, were employed by Polychem NZ Limited (PNZ). Mr Mayne was also Managing Director and sole shareholder of PNZ and he decided that it would provide subsidised medical insurance to all employees of the company. Payment for the cover continued even when the applicants ended their employment with PNZ and, in the case of Ms Craig

and Ms Kerr, retired from the workforce at the same time. They expected the subsidised cover to continue indefinitely.

[3] Ms Craig and Ms Kerr retired in 1981. Mr Mayne retired in 1990.

[4] None of the applicants had a written individual employment agreement with PNZ or PolyMark but it is possible that the kind of work Ms Craig or Ms Kerr did up until 1981 had been within coverage of a collective agreement or an award, such as the Clerical workers Award.

[5] In May 1982 PNZ sold some of its assets to the newly incorporated company PolyMark and at about the same time there was a transfer of PNZ employees to PolyMark on identical or similar terms and conditions as those they had agreed with PNZ. Although Ms Craig and Ms Kerr by then had ceased working for PNZ and retired they continued to receive subsidised health care cover after the asset sale and transfer of employment.

[6] PNZ continued to exist as a legal entity until 1992 when it was removed from the register of companies. By then Mr Mayne too had retired.

[7] In 2005 the business of PolyMark was sold to Nuplex Industries Ltd (Nuplex) which then began trading as Polychem Marketing Ltd. PolyMark remains in existence as a subsidiary of Nuplex.

[8] Evidence was given of communications Mr Mayne in particular had after the 2005 sale with directors or senior managers of Nuplex about the continuation of the subsidised medical insurance the applicants had been received. Nuplex has not been a respondent party in this investigation.

[9] Ms Craig and Ms Kerr continued to receive the subsidised medical insurance after the 2005 sale to Nuplex but in 2009 they were advised that the payment of it would stop. This had been proposed in 2004 and Mr Mayne had then agreed to reimburse PolyMark for the costs incurred by the company of his membership of its group medical insurance scheme.

Mr Mayne

[10] Being the sole shareholder of PNZ and its Managing director, Mr Mayne as an employee of the company was in a quite different position to Ms Craig and Ms Kerr. Mr Mayne directed PNZ to provide the subsidised medical insurance to company employees. After the 1982 asset sale to PolyMark he continued to receive the subsidised cover. He claims he became employed by PolyMark and worked for it.

[11] Mr Mayne's evidence was that in 2004 he had agreed to pay PolyMark back for the cost of premiums on this cover provided the company continued paying for the cover of Ms Craig and Ms Kerr. Mr Mayne said he entered that arrangement for them as a guardian of their interests and did not want them to know of it. He saw himself as their protector because of his high regard for them and also because of their financial situation which was much less advantageous than his own. In evidence Mr Mayne referred to a partly moral obligation PolyMark had to continue subsidising the medical insurance of Ms Craig and Ms Kerr.

[12] PolyMark disputes that there was any trade off with Mr Mayne and claims it simply decided to continue paying the premiums for Ms Craig and Ms Kerr who had retired over 20 years earlier because of their personal circumstances.

Remedies Sought

[13] The three applicants seek through the remedy of compliance the restoration of their membership of the PolyMark group medical insurance scheme and continued payments of the cost of that cover by PolyMark. They seek payment of arreas for the cover from the time it was stopped, and penalties for breach of an employment agreement and for breach of the statutory duty of good faith under s 4 of the Employment Relations Act.

Authority's jurisdiction

[14] There is no dispute that Ms Craig and Ms Kerr were never at any time employed by PolyMark. They had retired before that company was registered even. Mr Mayne claims that as Managing Director of PolyMark he had been an employee of the company but does not dispute that he no longer 'served' PolyMark or any other employer after 1990 when he retired.

[15] In these circumstances it became necessary for a preliminary issue to be argued by counsel, Mr Patterson for the applicants and Mr Hannan for the respondent. That issue was whether the Authority has jurisdiction to provide all or any of the applicants with the remedies claimed under the Employment Relations Act 2000.

[16] Under the Employment Relations Act in discharging its role of resolving employment relationship problems the Authority has jurisdiction to provide the remedies specified at ss 161 and 162. The term "employment relationship problem' is defined by s 5 of the Act as including a personal grievance, a dispute and any other problem relating to or arising out of an employment relationship.

[17] It is contended for Ms Craig and Ms Kerr that although they were not directly in an employment relationship at any time with PolyMark they nevertheless have or had with that company an employment relationship as defined by s 5 of the Act. Mr Patterson submitted that the applicants may lodge a statement of problem because their problem is related to or arises out of "a breach of an employment agreement" being a matter listed at s 161 of the Act over which the Authority has jurisdiction.

The *Waikato Rugby Union* case

[18] In *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)* [2002] 1 ERNZ 752 the Employment Court held that a consequence of the definition of "employment relationship problem" was:

> *…… that it is possible for persons who are not direct parties to an employment agreement to file a statement of problem so long as the problems in it are related to or arise out of matters listed in s.161 and are not otherwise excluded from the jurisdiction by the ERA.*.

[19] It is apparent from reading the Court's decision that the employment relationship in the case was one formed in 2002, when the professional rugby player Deacon Manu entered into an agreement with one or more incorporated entities which were involved in the administration or promotion of rugby.

[20] It is also clear that Mr Manu was regarded as an employee of one or more of the employer parties in the case and an employment relationship therefore existed. The same is true in *Rolling Thunder Motor Company Ltd v Kennedy [2010*]

NZEMPC 109, a case referred to by Mr Patterson. Neither Mr Manu or Ms Kennedy was an outsider to an employment relationship from which a cause of action was claimed to have arisen.

[21] The judgment in the *Waikato Rugby Union* case does not suggest that the definitions of "employment relationship" and "employment relationship problem" at ss4 and 5 of the Employment Relations Act also have the effect of creating causes of action where they had not existed before 2 October 2000 when the Act was passed. The Court did not go so far as to say that a person who was not directly or indirectly in an employment relationship prior to the passage of the Employment Relations Act in 20000 could nevertheless lodge a statement of problem under the Act.

[22] I find that the Employment Relations Act did not retrospectively create an employment relationship directly or indirectly between Ms Craig and Ms Kerr and PolyMark. No employment relationship has been formed between any of the applicants and PolyMark since the Employment Relations Act was passed on 2 October 2000. Under transitional provisions, at ss 242 and 243 of the Act, every individual employment contract and every collective employment contract within the meaning of the Employment Contracts Act 1991 and that was in force immediately before 2 October 2000 continued in force and was "enforceable in the Authority".

[23] Under the Employment Contracts Act 1991 an employment contract was defined as meaning "a contract of service".

[24] It may be that Ms Craig and Ms Kerr or both were covered by the provisions of the Clerical Workers Award of the day but, if not, they had individual 'common-law' contracts of service or employment agreements with PNZ. It appears that they performed no more work for PNZ under the terms of any employment contract, whether individual or collective, after 1981 when they retired.

[25] The claims of Ms Craig and Ms Kerr require the Authority to find that when the Employment Relations Act came into force on 2 October 2000 they were still at that time each a party to a contract of service. But as at 2 October 2000 neither was under any obligation to serve any employer let alone PolyMark, and no employer was obliged to offer them any work to perform for hire or reward. By then the same was true of Mr Mayne.

[26] Although Ms Kerr and Ms Craig performed no worked under a contract of service after 1981 when they ceased employment with PNZ, it was argued that there were obligations under their employment contracts that survived the cessation of work by them and continued to bind their employer PNZ. Those obligations, it was contended, included the provision of subsidised health care to the women for the rest of their lives.

[27] In my view, any terms of the employment contract that survived after the retirement or resignation of Ms Craig and Ms Kerr ceased to have effect when PNZ ceased to exist as a legal entity in 1992.

[28] It was argued that before then in 1982, when PNZ sold certain assets to PolyMark, the latter also became responsible for all employment obligations including the provision of subsidised healthcare to by then retired employees such as Ms Craig and Ms Kerr. Certainly they both continued to receive subsidised health chare cover after the asset sale in 1982.

[29] I am unable to find that PolyMark took on responsibility for the healthcare cover under the terms of any enforceable obligation under an employment contract with Ms Craig or Ms Kerr. There is no evidence that they consented to a transfer of their employment contracts to PolyMark or of any terms that had survived the termination of their employment upon retirement from PNZ. It is fundamental that a binding contract of employment is not created by novation.

[30] I find that there was no employment contract between Ms Craig and Ms Kerr and PolyMark covered by ss 242 and 243 of the Employment Relations Act to enable those two applicants to bring an employment relationship problem before the Authority.

[31] If PNZ had entered into a binding obligation with Ms Craig and Ms Kerr during their employment to provide subsidised health care, that obligation, in principle, remained enforceable after their retirement or resignation, depending on the terms on which it was created. If PNZ upon selling some of its assets to PolyMark had purported to transfer such obligation to the respondent company, the applicants are likely to have retained the ability to enforce that obligation against PNZ in the event

that PolyMark did not continue to meet it. Ms Kerr and Ms Craig seem likely to have had an action based upon an alleged failure of PNZ to preserve their ongoing

interest in receiving the subsidised healthcare cover. Such an action might have been outside the scope of employment law and even the law of contract, but in principle a breach of the obligation of the kind alleged would seem to be able to be remedied in law.

[32] The ability to bring proceedings against PNZ ended when that company was removed from the Register of Companies in 1992. Any subsisting employment contract between Ms Craig and Ms Kerr and PNZ would also hae stopped when the company ceased to exist as a legal entity.

Contract (Privity) Act

[33] If PolyMark had contracted with PNZ at the time of the asset sale in 1982 to continue subsidising the medical insurance of Ms Craig and Ms Kerr could they as third parties to it now enforce that agreement? The remedies available under the Contract (Privity) Act 1992 may be granted by the Authority under s 162 of the Employment Relations Act.

[34] Although the Contracts (Privity) Act allows a third party to enforce a contract made between others where that contract contains a promise conferring a benefit on a third party, the Act expressly excludes from its operation any contract made before 1 April 1983. The contract under which PNZ sold assets to PM and any contract made in about mid-1982 to provide the health care cover would therefore be excluded. Ms Craig and Ms Kerr are unable to enforce any contractual promise if one was made by PolyMark with PNZ to meet the obligation with regard to paying for their healthcare.

Determination

[35] PolyMark directors resolved in 1982 to appoint PNZ as a management company to undertake services including “negotiation and settlement of terms of employment of staff”. Through the provision of this service the transfer of employees from PNZ to PolyMark was able to be achieved, where employees agreed to that, but there is no indication that there was or was going to be negotiation and settlement

with retired PNZ employees as to any terms on which retirement benefits would be continued by PolyMark.

[36] Those benefits were simply continued without reference to Ms Craig or Ms Kerr. Mr Mayne was well placed to instruct or approve their continuation, without it becoming necessary to confirm whether PolyMark had become liable in law to pay for the medical insurance and if so on what contractual or other legal basis. I find payments previously by PNZ were continued by PolyMark simply by the force of Mr Mayne's will, which he was in a commanding position to exercise until he retired in 1990.

[37] I find that the claims brought by Mr Mayne, Ms Craig and Ms Kerr are not within the jurisdiction of the Authority as employment relationship problems. In the case of Ms Craig and Ms Kerr an employment agreement or employment relationship with PolyMark has never existed. In the case of Mr Mayne if he did become an employee that relationship finished in 1990 when he stopped serving PolyMark. After that there remained no contract of service or employment relationship able to transition through both the Employment Contracts Act in 1991 and the Employment Relations Act nine years later in 2000. It cannot be said that an employment contract or an employment agreement had remained "in force' immediately before the enactment of each statute.

[38] I find that the evidence goes no further than to show that PolyMark voluntarily assumed the role of a provider of the subsidised medical insurance the applicants had received originally from PNZ. In doing so it can be said, as Mr Patterson submitted, that PolyMark "took on" a responsibility, but there is no evidence that PolyMark committed itself to meet a legal obligation in this regard. I find this to be the position with all three applicants.

[39] I find that Mr Mayne intended on behalf of PNZ and PolyMark that the latter would continue providing the subsidised cover after the 1982 asset transfer and transfer of employees. However since Ms Craig and Ms Kerr had retired before the transfers to PolyMark the transferred obligation was not enforceable under any employment contract, as there was no transfer of the applicant's employment.

This is because they were no longer employed and were not asked to consent to any transfer. Mr Mayne's evidence was that he had not thought about the fact that Ms Craig and Ms Kerr had not become employees of PolyMark.

Custom and practice

[40] I agree with Mr Hannan that the entitlement as claimed by the applicants could not be founded on custom and practice. The claimed entitlement was uncertain in its scope. Ms Kerr and Ms Craig were unsure how long into their retirement it would continue apart from indefinitely. The contended custom and practice was not a matter of notoriety, as the evidence shows that there were PNZ employees who transferred to Polymark and who did not have it recorded in their employment agreements when those were eventually put in writing. Also, the continuation of it for life or indefinitely could not today be considered reasonable, given the sharply increasing cost of medical insurance over the last few years. Mr Mayne confirmed in evidence that when introducing the premium subsidy for PNZ employees he had not contemplated the possibility of "skyrocketing" costs of medical insurance.

Determination

[41] For the above reasons I find that the Authority has no jurisdiction over the applicant's claims as they are not founded on an employment relationship under the Employment Relations Act 2000. No orders are therefore required to be made against the respondent PolyMark.

Costs

[42] Costs are reserved. As usual counsel are invited to try and resolve any question of costs by agreement, if possible. If not, application may be made in writing by the respondent PolyMark within 14 days of the date of this determination and the applicants shall have a further 14 days in which to file any reply.

A Dumbleton

Member of the Employment Relations Authority