

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 232/07
5071449 & 5078618

BETWEEN PANEL HOLDINGS LIMITED
 Applicant in 5078618
 Respondent in 5071449

AND PAANIA PAKI
 Respondent in 5078618
 Applicant in 5071449

Member of Authority: Dzintra King

Representatives: Penny Swarbrick, Counsel for Panel Holdings Limited
 No appearance by Paania Paki

Investigation Meeting: 5 July 2007

Determination: 3 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Panel Holdings Ltd (“the company”) brought proceedings against Ms Paki claiming breach of contract. Panel Holdings asked that the matter be dealt with urgently as it had been attempting to address the issues since November 2006.

[2] The company claims that Ms Paki has:

- Breached her employment agreement by giving inadequate notice of her resignation;
- Breached her contract of employment in respect of a number of transactions which she entered into on behalf of the company without authorisation and for which the company has received no benefit;
- Breached her contract of employment by altering company records and removing company documents from the premises.

[3] The company seeks penalties and reimbursement of monies taken by Ms Paki.

Background

[4] Ms Paki was employed as Office Manager for a period of 15 years. She was responsible for general office duties, including managing accounts payable and receivable and had access to the company's computer systems and bank accounts. She was largely in a sole charge position and reported to the General Manager in Wellington.

[5] Mr Andrew Savage was appointed New Zealand Manager in August 2006. Ms Paki was to report to him.

[6] Mr Savage was concerned about the accounting and administrative procedures. Around September 2006 he became concerned about cash flow issues and began to implement new administrative procedures. He discussed his concern about having one person in sole charge of the administrative and accounting processes with the directors. It was decided to create a position of Operations and Planning Manager. This was undertaken by Ms Melissa Savage, who started in her role on 11 September.

[7] Ms Paki was instructed to obtain approval before making any payments on behalf of the company.

[8] Ms Paki was on leave between 5 and 20 October 2006. During this period a number of concerns came to Ms Savage's attention. These included very high Telstra and Telecom bills, the existence of two unidentified 0800 numbers and an invoice for work on Ms Paki's car billed to the company. Ms Savage called the 0800 numbers and Ms Paki answered.

[9] On 24 October Ms Savage spoke with Ms Paki, explained the reasons for the new procedures and asked her about the accounts.

[10] Despite being told that two signatures were required for accounts payable and payroll Ms Paki contravened that instruction and made a number of unauthorised payments on 25 October totalling \$60,000.

[11] Ms Savage met with Ms Paki on 26 October. Ms Paki said she wanted the direction in writing. Ms Savage prepared such an instruction which Mr Savage signed and left on Ms Paki's keyboard.

[12] Ms Paki sent Mr Savage an email saying she had a doctor's appointment that day and then a further email saying she was sick and would not be in for the rest of the day. The following day (27 October) she notified by text that she would not be in. Ms Paki did not return to work after 26 October.

[13] On 27 October Ms Savage attempted to access the MYOB system but had difficulty doing so as Ms Paki was accessing the system from her home. Ms Savage left a number of messages asking Ms Paki to log off so that she could log in. The messages were ignored.

[14] As Ms Savage was concerned about her inability to access MYOB, the fact that Ms Paki was doing so during her sick leave and about the accounts a decision was made to remove Ms Paki's computer access until she returned to work and there had been a full investigation. Access was removed on 27 October.

[15] On Monday 30 October Mr Savage found that Ms Paki had entered the premises over the weekend of 28 and 29 October. All her personal belongings had been removed. On 30 October the company received a medical certificate covering Ms Paki for 14 days.

[16] Ms Paki removed her original signed employment agreement and replaced it with one that included a clause relating to a work vehicle with the employer being responsible for paying associated running and maintenance costs.

[17] On 6 November Ms Paki resigned while still on sick leave.

[18] Ms Savage continued her investigations and found that on 11 September, the day Ms Savage had started work, Ms Paki had deleted 393 banking "batches" from the computer system and that she had continued to access the company's ASB fastnet office account via internet banking after her resignation and up till 7 December. The company recovered the deleted batches from ASB and found that Ms Paki had disguised various purchases she had made on Trade Me. Also on 11 September she had altered her sick leave entitlement from 11 to 20 days.

[19] In March 2007 the company instructed Mr Nick Paterson from PricewaterhouseCoopers to carry out an audit and analysis of Ms Paki's activities. Mr Patterson uncovered \$32,000 worth of unauthorised expenditure.

Chronology

[20] Mr Savage attempted to contact her to discuss her resignation letter, which was read as a resignation that was effective immediately. She did not respond to his phone calls. On 8 November he wrote saying "We note that you are in breach of your employment agreement and we reserve our rights". This is a reference to the month's notice required by the employment agreement. Ms Paki did not respond to the letter or to Mr Savage's phone calls.

[21] On 13 November Ms Paki emailed saying she had received the 8 November letter and attached a medical certificate for a period of 20 days from 13 November.

[22] On 16 November Mr Savage sent her a letter by registered post saying that the company would require a meeting to discuss serious issues regarding use of company funds. No reply was received.

[23] On 21 November 2006 Mr Savage wrote a further letter to Ms Paki saying that several accounting discrepancies had been uncovered and that there had been unauthorised expenditure for her personal benefit. Ms Paki was asked to attend a disciplinary meeting on 23 November and advised that the company was considering suspending her. She was advised to bring a representative. Ms Paki did not reply to the letter or attend the meeting.

[24] On about 24 November Mr Savage received a letter dated 21 November from Insight Legal raising a personal grievance alleging constructive dismissal. The letter stated that "As a result of your conduct, our client is now suffering from depression and anxiety disorders for which she is receiving medical treatment".

[25] The company rejected the grievance claim by letter dated 29 November 2006. The letter stated "Ms Paki has not been constructively dismissed. She resigned of her own volition. Our client apprehends that her resignation came at a time when she realised that her activities as set out below had come to our client's attention". The letter went on to list the matters of concern and to

say that instructions had been given to issue proceedings to recover the amounts alleged to have been taken by Ms Paki.

[26] On 14 February the company filed a Statement of Problem.

[27] On 20 February a conference call took place. A direction to mediation was issued that day and the Statement in Reply was to be filed within 14 days. This was filed on 2 March with a mediation scheduled to take place on 8 March to discuss both the company's claims and Ms Paki's personal grievance.

[28] On 8 March 2007 the parties attended mediation.

[29] Ms Paki filed a Statement of Problem alleging constructive dismissal and sexual harassment on 16 March

[30] On 29 March a further conference call was held at which it was determined that an amended Statement of Problem would be filed by the company.

[31] On 22 April it appears that Ms Paki advised Dr Gray that he should deal with a Mr Colin Pile (a former employee of the applicant). That instruction was given by email and was the last direct contact Dr Gray had with Ms Paki.

[32] On 30 April the company's Statement in Reply to Ms Paki's grievance claim was filed.

[33] On 9 May the company lodged an amended Statement of Problem.

[34] On 16 May a telephone conference took place. A timetable for the exchange of briefs and a date for the Investigation were set. Both the company and Ms Paki were to file briefs as applicants on 7 June with reply statements on 21 June. It was also agreed that an amended Statement in Reply would be filed within 14 days. There was no indication that Ms Paki would have any difficulty complying.

[35] On 17 May a notice of hearing and a notice setting out the agreed timetable was sent to the parties.

[36] No amended Statement in Reply was received from Ms Paki.

[37] On 8 June the company sought an extension of time to file briefs. The request was copied to Dr Gray. No indication of any problem was received. No briefs were filed by Ms Paki and there was no request for an extension.

[38] The company's briefs were filed on 18 June.

[39] On 21 June Ms Swarbrick emailed Dr Gray inquiring about the whereabouts of Ms Paki's briefs.

[40] On 27 June I asked that Dr Gray be contacted regarding the briefs of evidence. I asked that they be supplied by Friday midday at the latest, the hearing being scheduled to commence the following Thursday. If he could not guarantee to have them in by that date I wanted a conference call.

[41] On 28 June an email was received from Dr Gray following a telephone conversation between Dr Gray and a Support Officer. Dr Gray said he had been unable to contact Ms Paki to receive instructions and that he understood from an associate of her's that she was unwell and he would be receiving a full medical report within the next day or so. He indicated that he understood that her health might be such that she could not attend the hearing.

[42] A conference call was arranged for 3 July. Dr Gray said he had received a medical certificate that indicated Ms Paki was unable to attend the forthcoming personal grievance hearing due to depression and stress. He read out the certificate. The certificate was from a locum doctor and Dr Gray had been unable to contact him to obtain further information. After hearing from the respondent I told Dr Gray, who had no instructions to seek an adjournment, that I would treat the supplying of the medical certificate as a de facto application. However, given that the medical practitioner was a locum and that there were insufficient details I was not prepared at that stage to adjourn the proceedings. If he was able to supply further information by midday the following day I would take that information into account.

[43] A copy of the certificate from the locum was duly emailed later on 3 July to the Authority and to the company. The certificate is not dated, it is handwritten and no indication is given of how long the illness might last. The certificate is from a medical practice in Huntly.

[44] During the conference call I became aware for the first time that Dr Gray had had no direct contact with Ms Paki for some time and that a Mr Colin Pile had been communicating with Dr Gray on Ms Paki's behalf.

[45] At 5.35pm on 4 July Dr Gray emailed a further medical certificate to the Authority and to the company. This certificate was from a different doctor, a Dr Mustafa, at a different medical practice located in Hamilton. This certificate states that she is not able to attend the hearing and that she is taking medication for depression and stress and had not found her regular doctor that day. It said "Become anxious & stressed by not found her doctor. Have palpitation. Shaking". The diagnosis was anxiety with depression and the plan was to continue the medication.

[46] There is no indication that Dr Mustafa had access to any medical records pertaining to Ms Paki. The likelihood is that the information regarding her medical history and medication was information derived from Ms Paki. This certificate was not helpful.

Adjournment "Application"

[47] At 8.43 am on Thursday morning, the day of the hearing, Dr Gray sent a lengthy email to the Authority and to Ms Swarbrick. The email indicated that Mr Pile had told Dr Gray that Ms Paki had an appointment with her regular doctor on Thursday.

[48] In that email Dr Gray said he had had no direct contact with Ms Paki since an email from her on 22 April telling him that due to her deteriorating mental health he was to communicate with Mr Pile. This was the first the Authority or the respondent knew of an alleged mental health problem occurring in April. He said since that time he had made extensive efforts to contact her by email, telephone and text but to no avail.

[49] He said he had no instructions to appear on her behalf at the investigation meeting and that in such circumstances he would normally seek leave to withdraw. However, given the medical evidence and the seriousness of the charges against Ms Paki he would instead ask for an adjournment. If I did not grant an adjournment he would seek leave to withdraw as he had no instructions.

[50] Dr Gray had no instructions to seek an adjournment.

[51] The applicant opposed the adjournment “application” saying that it was made without instructions and the medical certificates supplied were from different doctors in different towns.

[52] The applicant provided a printout from a website, www.squashnz.co.nz, showing that Ms Paki had been regularly playing competition squash throughout the period in question. The most recent event was 1 July. I was told that people involved with squash had had no difficulty contacting Ms Paki.

[53] At no stage have I received a full medical report although Dr Gray told me that one would be supplied. I would have expected a report from preferably a registered clinical psychologist, a psychiatrist or a properly qualified counsellor or psychotherapist; or a combination of these. I would also have expected there to be some reference to the American Psychiatric Association’s Diagnostic and Statistical Manual.

[54] In *Munro v Village Care New Plymouth Ltd (T/A Highlands Lodge)* [2004] 2 ERNZ 40 Shaw J noted at para 27 that the power to grant an adjournment was discretionary and that justice and reason were to be the guide and balanced consideration was to be given to the position of both parties.

[55] The question is what course of action will best achieve the interests of justice? That test was originally proposed by the Court of Appeal in *Canterbury Hotel etc IUOW v University of Canterbury Students Assn Inc* [1990] 3 NZILR 471.

[56] The purpose of the discretion in the case of an application for an adjournment the purpose is to help a litigant avoid suffering the injustice of the case proceeding at a time when the litigant would be unable to do himself, or herself, or itself, full justice.

[57] I have considered what brought about Ms Paki’s absence and her failure to issue instructions to her representative. It is my considered view that her failure to attend and provide instructions were motivated by an anxiety regarding dealing with the matter at issue. That reason is insubstantial, and the adjournment was refused. Ms Paki has attempted to frustrate the process by a deliberate lack of cooperation.

[58] Ms Paki knew the timetable and did not object to it. She knew the hearing date. She did not give instructions that an adjournment be sought. Most people would find dealing with allegations such as those made against Ms Paki stressful, upsetting and depressing. If Ms Paki were depressed to such an extent that she was incapable of personally instructing her representative and incapable of appearing to give evidence at the Investigation Meeting I would have expected a full medical report to be provided well prior to the date of the Investigation.

Resignation

[59] The resignation letter states:

I wish to tender my resignation as per the terms of my contract, effective today 6 November 2006.

The resignation letter gives notice of one month as per the contract. The words “effective today” mean not that the resignation takes place on 6 November but that the notice period runs from that date. There was no breach by Ms Paki in terms of her giving notice.

The Claims

[60] Mr Paterson is a Chartered Accountant, an Associate of the Institute of Chartered Accountants of England and Wales since 1999, a provisional member of the NZ Institute of Chartered Accountants since May 2004 and a director of PricewaterhouseCoopers. He works in the firm’s Investigation and Forensic Services division. He has spent eleven years specialising in forensic accounting and external auditing both in the UK and NZ. He is a certified Fraud Examiner and the President of the Auckland Branch of the Association of certified Fraud Examiners. Mr Paterson detailed the work he had done in the field of forensic accounting.

[61] Mr Paterson looked at the period since the incorporation of Panel Holdings in October 2004 until the resignation of Ms Paki in November 2006. He undertook a forensic analysis of Ms Paki’s computer, analysed and investigated Panel Holdings’ records including printouts from Panel Holdings’ accounting system, MYOB, batch transaction reports provided by the ASB Bank and original expense receipts. He also liaised with third parties such as Telecom, Telstra Clear and Genesis Energy regarding Panel Holdings’ accounts.

[62] Mr Paterson concluded that Ms Paki made a number of purchases for her own benefit for which she paid using Panel Holdings' money. She also made payments to service providers for services at her home. These included Genesis Energy and Telecom, using Panel Holdings' money. Mr Paterson has not spoken with Ms Paki.

[63] I have been supplied with all relevant supporting documentation. Mr Paterson identified the following unauthorised expenditure made by Ms Paki for her benefit:

Expense Category/Company	Amount (\$)
• Genesis	1,401.04
• Custom Fleet	4,094.04
• Telstra Clear	2,431.30
• Telecom NZ	830.00
• ASB Credit Card	2,848.98
• Pharmacy	961.51
• Expense Claims	1,897.45
• Alf Wykes	2,877.58
• Trade Me	10,036.46
• Allenmara	230.00
• Miscellaneous Expenses	5,205.32
TOTAL	32,813.68

[64] The sole rejoinder to the allegations made by Panel Holdings has been in the first Statement in Reply where Ms Paki asserted that she had authority to enter into the transactions in question and that Panel Holdings received a benefit from her doing so. The Statement in Reply said at para 2.13 that "A full and detailed response to each of the Applicant's allegations of unauthorized expenditure will be made by the Respondent at the hearing". Ms Paki had an opportunity to do that prior to the hearing by filing a brief of evidence as agreed. She failed to do so, did not seek an extension of time and did not communicate with her representative.

[65] I am mindful of the fact that substantial amounts of money are involved and that the allegations are serious. It is difficult to see how purchases such as cosmetics, hair colours, artificial nails, an ipod, a sofa bed, a Sony home theatre system, a two and a three seater couch, sunglasses, a washing machine, a topaz necklace, a vibrator, an alpaca cardigan and gold studs, for example, could in any way benefit Panel Holdings.

[66] Given Ms Paki's failure to provide any rebuttal information and her failure to attend the hearing, and Mr Paterson's expert uncontested evidence, I have no hesitation in finding that Ms Paki breached her employment agreement by making unauthorised payments for her own benefit, that she removed documents from the workplace without authorisation and that she has altered documents without authorisation. She falsified company records to disguise her Trade Me transactions and overwrote the MYOB system to increase her sick and annual leave entitlements.

[67] Ms Paki is to reimburse Panel Holdings Ltd the sum of \$32,813.68.

Penalty Claims

[68] Panel Holdings seeks a penalty in the sum of \$5,000 in respect of each of Ms Paki's breaches of the employment agreement; and an order that the penalties be paid to the company.

[69] In *Xu v McIntosh* [2004] 2 ERNZ 448 at para 29 Goddard CJ said that the standard of proof was the standard applying in all civil cases: proof on a balance of probabilities. He also noted that the evidence in a penalty action should be clear.

[70] The company has asked that any penalties awarded be paid to it. In *Prins v Tirohanga Group Ltd* [2006] 1 ERNZ 321 at para 72 Colgan CJ said that a penalty was prima facie payable to the State and that a penalty for a breach of an employment agreement focused on the conduct of the breacher and the breacher's act or omission. A penalty was intended to be both a punishment for unlawful behaviour and a deterrent, both particular and general, rather than to restore loss suffered.

[71] The company has an order that the money lost should be reimbursed. That will rectify the financial loss. A penalty should only be awarded where some form of punitive action is deserved. Ms Paki's actions were unlawful and punitive action is deserved.

[72] In *NZ Timber Industry IOUW v Waimate Timber Co Ltd* [1990] 1 NZILR 985 at p.1012 the Court referred to the "totality principle" where multiple breaches were proved. The seriousness of the breaches is to be assessed through a separate and collective consideration. The Court should then stand back and assess how they should be dealt with.

[73] Ms Paki has to repay what she has unlawfully taken. Ms Paki's behaviour was ongoing over a lengthy period of time. It is just that a penalty should be awarded. The breaches fall into

three categories: unauthorised expenditure for personal benefit, removal of documents and alteration of documents. For each category of breach Ms Paki is liable to a penalty of \$5,000: a total of \$15,000. I have borne in mind what Colgan CJ said in *Prins* (supra) regarding the payment of penalties. In the circumstances pertaining here, I think it just that the company should be paid half of the penalties. The other half is to be paid to the Employment Relations Authority and then into the Crown bank account.

Personal Grievance Claim

[74] The applicant did not attend the meeting. The personal grievance matter is dismissed.

Costs

[75] Costs were reserved. Unless the parties are able to resolve the issue of costs Panel Holdings Ltd should file a memorandum within 28 days of the date of this determination. Ms Paki is to file a memorandum in reply within 14 days of receipt of Panel Holding Limited's memorandum.

Dzintra King

Member of the Employment Relations Authority