



# New Zealand Employment Relations Authority Decisions

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## **Patterson v Workman [2011] NZERA 254; [2011] NZERA Wellington 68 (2 May 2011)**

Last Updated: 18 May 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 68 File Number: 5308468

BETWEEN

Nadya Patterson Applicant

AND

Sharleen Workman Respondent

Member of Authority: Denis Asher

Representatives:

Phillip Drummond for Ms Patterson Gretta O'Connell for Ms Workman

Investigation Meeting Palmerston North, 29 March 2011

Submissions Received 29 April 2011

Determination:

2 May 2011

### **DETERMINATION OF THE AUTHORITY and Prohibition of Publication of the Name of a Witness**

#### **The Problem**

[1] Was Ms Patterson an employee or a contractor? If she was an employee, was she unjustifiably disadvantaged and similarly dismissed by the respondent, Ms Workman? If she was, what remedies if any are appropriate? Or, was the applicant engaged as an independent contractor and is therefore unable to pursue this matter by way of the [Employment Relations Act 2000](#) (the Act)?

[2] Mediation did not resolve this employment relationship problem.

[3] Each party seeks costs.

#### **The Investigation**

[4] Some delay was occasioned in the processing of this application as a result of the applicant subsequently filing a criminal complaint. The outcome of that complaint was not known as at the date of this determination.

[5] By way of a telephone conference on 27 September 2010 the parties originally agreed to a one-day investigation in Palmerston North on 20 January 2011, as well as time lines for filing witness statements and the provision of other evidence by way of an agreed bundle of documents.

[6] Because of the respondent's subsequent unavailability for the original agreed date, agreement was later reached on the 29

March investigation date.

### **Applicant's Position Summarised**

[7] Ms Patterson says she was employed in a part-time capacity on Ms Workman's property, in Te Horo, from 9 September 2009 to feed and check horses, while the respondent was absent at horse shows, and undertake property maintenance.

[8] No employment agreement was offered to her.

[9] Ms Patterson says it was agreed she would receive \$15 per hour. By email dated 17 September 2009 Ms Patterson asked if the agreed \$15 per hour was the aftertax rate. Ms Workman replied the same day advising she did not think the applicant would have to pay tax but that she would check with her accountant. Ms Workman later advised Ms Patterson in person that, having checked with her accountant, she -the respondent - would have to pay the tax.

[10] Ms Patterson received 4 bank payments from the respondent; all subsequent wages were paid in cash.

[11] During January 2010 Ms Patterson agreed to the respondent's request that she undertake grooming duties at various forthcoming events, for another show-jumper.

[12] On 27 January Ms Patterson travelled to Gisborne and met the show-jumper for the first time. The applicant says that person made lewd and sexually suggestive comments to her and that he sexually assaulted her the following night in the horse truck which was provided as accommodation for herself, the respondent and the show-jumper.

[13] Ms Patterson says she complained to Ms Workman the following day: she says the respondent overheard the events complained of the night before but failed to intervene. Ms Workman took no action in respect of Ms Patterson's complaint other than to raise the matter with the show-jumper who said he had no recollection of the event as he was affected by alcohol.

[14] Ms Patterson travelled to Christchurch on 10 February and again alleges she suffered sexual harassment by the show-jumper: the applicant says the respondent again declined to take action in respect of her complaint.

[15] On From 25 February Ms Patterson forwarded texts to Ms Workman requesting wages as she had not been paid for a month.

[16] On 1 March the applicant advised the respondent she did not want to work as a groom at the forthcoming Horse of the Year event.

[17] By return email of the same date Ms Workman terminated Ms Patterson's employment.

[18] Remedies sought by Ms Patterson include: a finding she was unjustifiably disadvantaged by the respondent; failure by Ms Workman to provide her with a written employment agreement (and a statutory penalty for the same) despite her requests; failure by Ms Workman to act on the applicant's complaints of sexual harassment and assault (thereby breaching her duty to provide a safe and healthy workplace); that Ms Workman wrongly deducted money owed for a saddle from wages owed the applicant; compensation of \$10,000 for humiliation and loss of dignity; reimbursement of lost wages including holiday pay; and costs and other relief as seen fit by the Authority.

### **Respondent's Position Summarised**

[19] Ms Workman is the sole director and shareholder of Xtreme Sport Horses Limited.

[20] Ms Workman says Ms Patterson was engaged as an independent contractor on an as required basis. The applicant took care of her own affairs, including tax and ACC. There was no employment agreement, oral or written, nor was there any intention to form an employment relationship.

[21] Ms Patterson was engaged to replace another contractor, temporarily unavailable, as an independent contractor from 9 September 2009 on an as required basis.

[22] Ms Patterson was not unjustifiably dismissed as it was the applicant who, in a text message dated 1 March 2010, declined to provide her services at the final show of the season; she was not required after that time.

[23] Ms Patterson worked in the same capacity for at least two other persons at the same time.

[24] Discussions between the parties were about GST payments, and whether the applicant was obliged at law to make those payments. On or about 22 September the respondent advised Ms Patterson that she, Ms Workman, would pay GST in addition to the agreed \$15 per hour if the applicant became GST registered; Ms Patterson never became GST registered.

[25] Other than the 4 payments made into Ms Patterson's bank account, monthly payments after the 20th of each month were made by the respondent to the applicant after the former had confirmed her total hours for the preceding month.

[26] Ms Patterson did not work set days nor did she have regular hours or start and finish times. For example, in September and November 2009 she worked respectively a total of 12 and 26.5 hours, whereas in January 2010 she provided no services at all.

[27] The applicant's complete control over the days and hours she worked is evidenced by Ms Patterson's unavailability to provide services as sought by Ms Workman, including the applicant's refusal to feed the respondent's horses when asked on 28 February 2010 or groom at the final show of the season.

[28] Ms Workman denies the allegations of sexual harassment and assault, and says that the show-jumper's conduct was appropriate, civil and friendly at all times; and that Ms Patterson had an opportunity to sleep elsewhere in the truck other than close to the third person, but declined. The applicant joked to Ms Workman about the show-jumper's attempt to kiss her the previous night but said she did not go there as she wanted something serious and not a fling. The show-jumper denied attempting to kiss Ms Patterson.

[29] Ms Patterson knew in advance that the same sleeping arrangements existed in respect of the Christchurch event and raised no concerns.

[30] Payment to the applicant in February was delayed only because Ms Patterson had not provided the respondent with details of her work hours.

[31] The applicant did not make herself available for the final show of the year, at which point the respondent reasonably regarded her engagement as having ceased. Ms Workman advised Ms Patterson she would deduct the final saddle payment owing to the respondent as earlier agreed by the parties.

[32] There was no degree of control by the respondent over the applicant, hence the relationship was one of independent contractor. The services the applicant provided were not fundamental to the continuation of the respondent's business; the latter had numerous contractors who could be engaged at any time. Ms Patterson was never integrated into Ms Workman's business and was simply contracted on and as required basis unless others were available.

[33] In the alternative, if there was an employee/employer relationship it was at best that of casual employment in which there was no guarantee or expectation of ongoing work. Ms Patterson was engaged for short periods and only for specific purposes.

## **Discussion and Findings**

[34] An objective assessment is required as to what was the real nature of the relationship between Ms Patterson and Ms Workman: [s. 6 \(2\) of the Employment Relations Act 2000](#) (the Act). An intensely factual inquiry is required: *Singh v Eric James and Associates Limited* [\[2010\] NZEMPC 1](#).

[35] To that end I find in favour of Ms Workman on the basis of the evidence before the Authority that, while Ms Patterson did not operate a business, she did work for others in a similar capacity (an exchange of services in return for horse grazing).

[36] Furthermore, the applicant's work was not directly controlled by Ms Workman, who would give general directions only and leave Ms Patterson to get on with those tasks.

[37] Ms Patterson was not closely integrated into the respondent's business, but acted instead - according to the latter - in a relieving capacity.

[38] As demonstrated by her refusal to undertake the final show of the year, Ms Patterson enjoyed a significant degree of control of her own activities to the extent of being freely able to decline work offered her by the respondent.

[39] Further evidence that no contract of employment was ever formed by the parties can be found in the lack of specificity as to what Ms Patterson's terms and conditions of employment were (including no agreement as to sick, etc leave, annual holidays), the lack of regularity and/or consistency as to her hours of duty, and the variation of those terms (in particular, Ms Patterson's rate of pay) depending on the duties she undertook for Ms Workman, whether grooming or doing other work: *Byrson v Three Foot Six* [\[2005\] NZSC 34](#).

## **Prohibition of Publication of Name of Witness**

[40] As sought by the respondent, I hereby prohibit the publication of the name of the show-jumper referred to in this determination and any evidence that might identify that person: Clause 10 (1) of Schedule 2 of the Act applied.

## **Determination**

[41] For the reasons set out above I am satisfied Ms Patterson was never an employee of Ms Workman and is therefore unable to bring an allegation of unjustified disadvantage and unjustified dismissal per [s. 102](#) of the [Employment Relations Act](#)

2000.

[42] Costs are reserved.

**Denis Asher**

**Member of the Employment Relations Authority**

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