

*Under the Employment Relations Act 2000*

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE

BETWEEN	Tanya Vegar (Applicant)
AND	Albany Students Association (Respondent)
REPRESENTATIVES	Applicant in person Tracey Molloy for respondent
MEMBER OF AUTHORITY	Y S Oldfield
INVESTIGATION MEETING	19 July 2001
RECEIPT OF FINAL PAPERS	4 September 2001
DATE OF DETERMINATION	6 September 2001

**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER**

Ms Vegar lodged her employment problem with the Employment Relations Authority on May 2 2001. At that time she was Education and Welfare Vice President of the Albany Students' Association, and wished the Authority to resolve a problem she had in her working relationship with the President of the Association, Mr Shand. Ms Vega requested that the matter be dealt with urgently because, she said, Mr Shand was behaving towards her in an abusive fashion and she found it increasingly difficult to perform her role in such circumstances.

Ms Vegar named the Association as the respondent and Mr Shand as its representative. Upon receipt of the statement of problem, the Association advised that it challenged the jurisdiction of the Authority to investigate Ms Vega's problem, on the basis that she was an office holder only, and not an employee, of the Association. No statement of reply was lodged and the respondent did not consent to mediation. It was therefore necessary for me to proceed to determine the jurisdictional issue as a preliminary matter.

**The investigation process**

The burden of proving that a contract of employment exists falls on the applicant, Ms Vegar, as the party relying on it to establish the jurisdiction of the Authority. (*Smith v. Practical Plastics Ltd [1998] 1 ERNZ 323*, at page 339, a case concerning the director of a company.) I have given some thought to what it means to bear the burden of proof in the context of an investigation. I have concluded that I must rely on the burden of proof in the event of an evenly balanced conflict in the evidence. However, in order to give Ms Vegar's problem full and fair consideration, I needed to be sure I had all the relevant information. Ms Vegar is not represented and has found herself having to answer an objection that calls for some legal argument if it is to be properly addressed. I am satisfied that in order to resolve this problem, pursuant to s. 160 of the Employment Relations Act 2000, I may call for evidence and information beyond that supplied at the initiative of the parties.

With this in mind, and with the agreement of the parties, the following process was initially arrived at for determination of the jurisdictional issue:

1. The investigation would begin “on the papers.” In this instance the papers included the material that was attached to the statement of problem, along with further material and submissions the parties wished to provide to me within an agreed timeframe.
2. If necessary, the Authority would of its own motion have reference to case law in the area.
3. Should any of the information supplied be disputed, or should it be insufficient for me to arrive at a determination, an investigation meeting would follow in order that any conflict as to the facts might be clarified, and further information sought if necessary.
4. I would provide the parties with an opportunity to comment on any initial views I might form.

Having got as far as step 3 it was clear to me that I would need to meet with the parties and I did so on 19 July. The applicant attended with a support person (her mother.) The respondent was represented by Ms Molloy and by Mr Green, the Association’s General Manager. I outlined some initial thoughts on the case (arising out of information and argument presented up to that point) and both parties spoke in response. Arising out of issues Ms Vega raised the Association indicated that it would like to have the opportunity to provide a statement of behalf of Mr Shand also. (The Association had made the decision that he would not attend the meeting because of the tension between him and Ms Vega.)

Meanwhile, I also inquired of the parties whether they might yet consider attempting mediation. I reiterated what I had previously told them in telephone conference: although I could not direct them to mediation in the face of a protest to jurisdiction, I nevertheless recommended that they attempt mediation by consent. Ms Vega was open to this suggestion provided the Association was represented by someone other than Mr Shand. Ms Molloy and Mr Green also saw some benefit in the idea and indicated that they would discuss it further with the Association. However, after they had done so, the Association decided that it preferred that the Authority complete its investigation into the jurisdiction question.

As arranged during the meeting, it also proceeded to supply to me a complete set of minutes of executive committee meetings for the period during which Ms Vegar held office as Education Vice-President. I had already been supplied with the Constitution and other relevant documents, and supplementary submissions from Ms Vegar. On August 13 I received an unsworn statement from Mr Shand. Ms Vegar supplied a written response to this statement on September 4. Although the two of them put a different interpretation on these events, the material points made by Mr Shand regarding critical discussions with, and requests of, Ms Vegar, did not differ from what Ms Vegar had already told the Authority and repeated in her final statement. For this reason I proceeded to determine the matter without requiring Mr Shand to come in to affirm his statement or be questioned on it. ( I note that other parts of the statements were hotly contested but because they related to the substantive issues between the parties and not to the preliminary point for determination here, I have disregarded them.)

### **The argument.**

Ms Vega has continued to be unrepresented throughout this investigation. In her first written submission she referred me to section 6 of the Employment Relations Act and argued that because she did receive reward (an honorarium of \$15,000.00 per annum) she falls under the definition of an employee contained in that section.

Section 6 sets out that ‘employee’ means:

*“...any person of any age employed by an employer to do any work for hire or reward under a contract of service”*

Section 6(1) also contains provisions dealing with homeworkers, volunteers, and persons intending to work, none of which have been suggested as having any application to this situation. Section 6(2) states:

*“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 might be) must determine the real nature of the relationship between them.”*

Section 6(3) then goes on to say:

*“For the purposes of subsection (2) the Court or 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.”*

Subsection (3) is usually invoked in the context of a dispute over whether a contract is “for services” or “of service.” (It may also be of some application to the present case however, a point to which I will return later.)

Ms Vegar did not at first address the issue whether the parties had concluded a contract of service (also known as a contract of employment or employment agreement.) This was therefore the subject of further submissions from her as well as questions from me at the meeting.

Ms Molloy argued that Ms Vega is an office holder of Albany Students Association but not an employee as there was no contract of service between the parties. Ms Molloy provided me with thorough and helpful legal submissions. These have been taken into consideration in arriving at the following summary of the relevant law as I take it to be.

### **Relevant Law**

It is not in dispute that quite extensive duties attach to the position of Vice-President and that therefore, Ms Vega was expected to ‘do work’. Nor is it in dispute that she was remunerated for this work by way of a substantial honorarium. However, as I explained to Ms Vega at our meeting, these two factors, by themselves, do not bring her within the Authority’s jurisdiction. Many office holders of boards, incorporated societies and other similar organisations perform a great deal of work without being classified as employees. The question for determination here relates to the second part of the definition in section 6, that is **whether there was a contract of service between Ms Vega and the Students’ Association.**

It is well established that a director of a company may enter into a contract of employment with that company. (*Lee v. Lee’s Air Farming Ltd [1961] NZLR 325. Smith, supra at p.340-341 also contains helpful remarks on this point.*) I am satisfied that in this context membership of a student association executive is analogous to a company directorship. Therefore, the holding of office

need not be incompatible with entering into a contract of employment with the organisation in which one holds office.

In the *Lee* case, the contract of employment was a completely separate matter from the directorship. Mr Lee was employed as a pilot, a position that need not have been held by a director of the company. The Albany Students Association employs a number of staff in the normal way, including the general manager, Mr Green himself. If Ms Vega had held, for example, a regular job as a bartender during her term of office as an executive member, and been remunerated separately for that, she would have found herself in a similar position to Mr Lee.

The claim Ms Vega makes here does not relate to that sort of situation. She claims to have an employment relationship that is part and parcel of her role as an executive member. Ms Molloy has argued that directors of companies can only be employed to do tasks outside the role of director. However, I am of the view that even if that were so, the same would not necessarily be the case for all office-holders. The type of situation Ms Vega claims to be in is not unprecedented. An example frequently encountered in the area of employment relations, is the position of union secretary. The holder of this office commonly serves on the executive of the organisation whilst also working as a full time paid employee and acting in effect as its general manager. In this type of scenario the rules of the organisation permit the two functions to be incorporated into one role.

An even more relevant example from case law is to be found in *Brown v University of Canterbury Student's Association Incorporated*, 24 October 1996, CT 114/96. In that case, which concerned the President of a Students' Association, it was common ground that the position holder was at one and the same time both officer and employee. Just like a union secretary, Mr Brown performed functions that were the sole preserve of the office holder. Yet both parties agreed that he also performed a role in the nature of a job. The functions of the office holder were also the duties of the employee.

The respondent has argued that it would be a nonsense for the Executive to employ one of its own members, but I do not agree. I consider that the type of arrangement Ms Vega claims to have had is possible. I note that Ms Molloy herself referred me to *Halsbury's* para 7, p.18 which reads:

*"While it is true that in the case of certain major offices the individual's status as an office holder may mean that he is not an employee, in most cases this will not be so and there will be nothing to prevent the ordinary definition of "employee" from being satisfied."*

*(102 Social Club and Institute Ltd v Bickerton [1977] ICR 911, EAT cited.)*

Although this comment appears to refer principally to holders of certain sorts of public office, and may not apply strictly to office holders generally, I agree that it is not impossible for office holders to have a concurrent contract of employment in respect of performance of the same duties. (I will discuss this decision further below.)

If we read 'Vice President' for 'director and/or shareholder' the issue for me to determine now becomes that set out in *Smith* supra:

*"The issue is whether, viewed as a totality, the evidence establishes the existence of a contract of service, whether express or implied, notwithstanding that the contracting party is a director and/or shareholder of the company."* (p.341.)

In answering this question a useful starting point is found in the process applied in *Mabon v. Conference of the Methodist Church of New Zealand [1997] ERNZ 690*. Mr Mabon was a minister

who for forty years received a living allowance from the Methodist church. In 1996 the respondent terminated his appointment as Minister of a parish and Mr Mabon began personal grievance procedures for unjustified dismissal. The respondent countered that it was not his employer, in other words, that the relationship between them did not amount to an employment contract. The Full Court noted that in addition to contracts of employment, there are other working arrangements, such as those under which a person is categorised as an office holder. (An example cited was *O'Rourke v Secretary for Justice [1996] 2ERNZ 169*. There the Court held that a judicial officer was not an employee even though he was in receipt of an income and paid taxes.) The Court went on:

*“Before there can be categorisation of the contract of employment it is necessary to determine whether the applicant and the respondent concluded a contract.” (p 21)*

In turn, it said, this depended on **whether or not the parties intended to create legal relations**. The Full Court began with the proposition that where there is evidence that supports the intention to create legal relations (such as consideration) then the onus is on the party who asserts that no legal effect was intended (p.23.) Also, it noted that **an intention to create legal relations will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts**. (*Rose and Frank Co v J R Crompton & Bros Ltd [1923] 2 KB 261 (p288)*)

(In the Mabon case, the laws of the respondent expressly indicated that the parties did not intend to be legally bound. The provision of a stipend and reimbursing allowances (approved by IRD) was held to be nothing more than a continuation of the historical tradition of providing for the ministers living, and it was concluded that the relationship between the applicant and the respondent was not one of employment.)

This is an appropriate point for me to return to *102 Social Club*. This case considered the question whether the secretary/manager of a social club had a contract of employment concurrent with his office. The Secretary was clearly distinguishable from the other executive members and was expected to play a more extensive role in the management of the club. Unlike other office holders, once elected, he was not subject to a yearly ballot but remained in office during the pleasure of the club. The payment he received was considerably more than other office holders and the Rules of the club described it thus:

*“The officers of the club shall receive such honorarium if any, or in the case of the secretary, such salary, as the committee shall from time to time determine.”*

Although that matter was referred back to a lower Tribunal for determination, it set out a list of criteria to be considered as indicators of the intent of the parties:

*“in deciding whether an individual is an office-holder, the important matters to be taken into account are:*

- 1. The nature of the payment made to the office-holder (was it an honorarium or a salary?)*
- 2. The mode and frequency of the payment*
- 3. Whether the individual has a right to payment*
- 4. The size of the payment*
- 5. Whether the individual is exercising the functions of an independent office or is subject to the control and orders of others*
- 6. The extent and weight of the duties performed; the smaller they are, the less likely he is to be an employee; and*

7. *The description given to the payment its treatment in the payer's accounts and for tax...purposes.*"

Factors considered of no relevance in that decision were:

1. Membership of the club
2. Lack of written agreement
3. Position as an office holder
4. That the Club secretary had another job.
5. That the club secretary was elected.
6. That the club secretary was removable by a two-thirds majority.

Ms Molloy had submitted that this case can be distinguished from the present case on its facts and that in any event, it is not binding on me because it is from a low level British tribunal and has never been applied here. She is correct in both these assertions. Nonetheless like the *Mabon* case this one is of some assistance insofar as it provides some guidance as to what indicators might be of relevance in determining (in the absence of express agreement) whether a contractual relationship exists.

### **The material facts of this case**

Ms Vegar stood and was elected as Education and Welfare Vice-President of the Albany Students Association in late 2000. In terms of the Constitution of that organisation, this made her a member of its Executive Committee, and like the other members of that Committee (all of whom had been elected with her) she held office for a term of one year. She was one of two Vice-Presidents; the Executive Committee consisted also of a President, seven other members each with a special area of responsibility, and a representative of each college. The Constitution provides that the only ways to cease being a member of the Executive before the expiry of the one-year term are:

- to resign,
- to cease to be a member of the Association, or
- to lose a vote of confidence at an AGM.

At successive Committee meetings from the beginning of the new year the conflict between Mr Shand and Ms Vegar continued to simmer. He repeatedly asked her to commit to office hours (20 per week) to be 'accountable' and to work at a level that 'justified her honorarium'. Although she had agreed to set herself office hours at one point, she later continued to assert that it was not a requirement of her 'job description.' Following failed attempts to resolve the difficulties in the working relationship between Ms Vegar and Mr Shand, and after these proceedings were lodged, she was voted off the executive at the AGM on 23 May 2001.

The nomination form Ms Vegar signed when she was put up for election to the Executive committee reads as follows:

*"I acknowledge that as a member of the Association this position is a voluntary position and notwithstanding the payment of a honorarium I am not an employee of or an independent contractor to Albany Student's Association Incorporated.*

*I acknowledge the duties of my portfolio and I agree to undertake the fulfilment of the duties of my portfolio as set out in this document and in the Constitution and Regulations of the Albany Student's Association Incorporated as lodged with the Registrar of Incorporated Societies."*

(Emphasis added.)

It would seem that this undertaking (signed by all those who stood for office) was taken at face value by the President [Nick] because the minutes of Executive Committee Meeting #7 (March 12 2001) record this:

*“Nick thinks we should consider a constitution change—to the president’s and vice president’s job descriptions, making an hourly paid commitment. This could be done by making it a fixed term employment contract, and it shouldn’t cause problems with employment law. This would have to be done at a General Meeting. It would give us more accountability, but we have to look at the legalities of this first.”*

Ms Vegar was present during this discussion (indeed it arose out of a wish by Mr Shand to be able to make her more ‘accountable’ in relation to the exercise of her duties as Education and Welfare Vice-President.) No response is recorded from her or from other Committee members present. I draw a clear inference that as far as Mr Shand was concerned, office holders were not employees although he thought that would be a desirable state of affairs. I also infer from the silence of the others present that they did not oppose this interpretation of their current status.

In the minutes of the meeting of 21 May also there is mention of what is described as a ‘return’ to salaried positions for executive members. At the AGM on 23 May 2001 a motion advancing a constitutional amendment to the effect that executive members be required to complete a minimum number of hours per week was withdrawn ‘due to illegality’. However, a motion putting in place reporting requirements and making payment of executive honoraria dependent on receipt and acceptance by the Executive Committee of [the members’] reports was carried. (It was at this same meeting that a vote of confidence in Ms Vegar was lost.)

At the investigation meeting I held with the parties on July 19, I explained that I needed to find out whether there was any evidence that the parties had concluded a contract of service. I explained to Ms Vegar that I would need to consider whether there had been any sort of agreement between herself and the Association and whether there was an intention to create legal relations.

Ms Vegar stated that she considered that Nick Shand acted as her employer. In discussions between the two of them after her election to her position on the Executive of the Association, he told her that:

- he required her to keep regular office hours;
- he spelt out the duties of her position;
- he told her that some secretarial duties (principally reception work) were required of executive members.

The statement Mr Shand provided to me on August 24 confirms what Ms Vegar has said here regarding this conversation.

Ms Vegar relies on this conversation and what she describes as its subsequent ‘ratification’ by the next Committee meeting (#7, March 12 again) to show that there was an agreement and that it constituted a contract of service. The minutes of that meeting record:

*“Nick...believes it is important for Tanya to allocate office hours so that is things come up she can deal with them efficiently and effectively. Tanya agreed to set office hours.”*

She also explained that she did not consider her nomination form to be an employment contract but believed that her ‘job description’ was. This she said contained a list of responsibilities “*as all employees are given when they start a job.*”

What Ms Vegar labels a job description is a section of the Association’s Constitution headed: “*Functions and Powers of Albany Student’s Education and Welfare Vice-President.*” I agree that this list of duties is reasonably detailed and does bear some resemblance to a job description. In itself, however, it does not constitute a contract of any sort.

Under ‘*Remuneration*’ the constitution reads:

*“The Association shall pay the Education and Welfare Vice-President a [sic] honorarium of \$15,000.00 gross.”*

Like all members of the Committee, Ms Vegar received her remuneration through the same payroll system the Association used for its paid staff. What she calls her ‘pay slip’ refers in one place to her honorarium and in another to ‘salary/wages.’

The respondent has submitted, through Counsel, that the Association’s Executive Committee is an employer of staff but directly exercises that role only in relation to its General Manager, Mr Green. He in turn hires, manages and if necessary fires, other staff. This is confirmed by the Minutes of Executive Committee meeting # 09, 26 March which read:

*“Nick explains that any complaints concerning staff are to be brought to the attention of both Nigel Green and himself. The Executive Committee employs Nigel to deal with all employment matters and Nigel employs the other staff of the association. This creates a buffer between the Executive and staff. The Executive Committee acts as the employer for the association and the Executive committee would do well to be careful in its dealings with staff as the Association could easily end up in the employment court.”*

Again, not only do the minutes record Ms Vegar as present at this meeting, but this discussion involved her directly, as it arose in connection with a complaint by a staff member, about her own behaviour. This related to an occasion on which she was alleged to have told a security staff member that he or she “would not have a job tomorrow” after refusing her entry to a bar because of an alleged lack of ID.

Mr Green agreed at the investigation meeting that the duties of the Vice-President’s position were extensive but denied that the office holder was also an employee. The Association employed a small staff of whom only he and one other (the editor of the student newspaper) were permanent fulltime staff. His own job had been advertised in the normal way. After he had applied he had been interviewed by a panel including the then President of the Association and a representative of the University, who had been brought in to assist at the Association’s initiative. He also noted that previously an accounts clerk employed by the Association (who was also a student) had stood for office and been elected. As he recalled, that person resigned from the clerical position in order to avoid any conflict of interest.

## **Conclusions**

The following factors could, arguably, indicate the existence of an employment contract:

- Ms Vegar was expected to do a substantial amount of work.

- Her duties, as set out in her job description, were extensive and she was required to complete reports.
- Her payment was described on her payslip as salary; it was fixed in advance and was substantial in amount.
- She believes she had a right to that payment.
- Ms Vegar felt Mr Shand treated her as an employee, and the evidence supports the contention that he attempted to exert a degree of control over her.
- She was taxed at the same rate as an employee.

To this she has added the assertion that the conversation she had with Mr Shand amounted to the creation of a verbal contract, because he had required her to work a regular twenty hours in the office and she had agreed. She says it was clearly Mr Shand's wish to create an employer/employee relationship with her.

Set against these are the factors and arguments in support of the proposition that Ms Vegar was an office holder and nothing more:

- Ms Vegar was elected to a position in an incorporated society.
- In putting herself up for office, she expressly declared that this office did not constitute paid employment.
- Unlike the secretary in *102 Social Club* (but like everyone else on the Executive in this case) she did not remain in office during the pleasure of the Association but only until the end of the one-year term of office.
- The rest of the Executive Committee did not select her for the role, any more than she chose them; she was the choice, by election, of the wider student membership.
- The appointment of officers of the Executive is governed by the Incorporated Societies Act 1908 and the Constitution. Ms Molloy argues that to suggest that the Applicant is an employee would mean that the Authority would have the power to override the democratic wishes of the members of the Respondent who are entitled to remove Executive members through a motion of confidence.
- The other Vice President and the President also received substantial payment and undertook considerable workloads. If she was an employee, then so would they be. Three members of the Executive Committee would thus employ themselves. The existence of employment contracts in these circumstances would be contrary to public policy.
- The Courts should be reluctant to interfere with the lawful and constitutional internal operations of a private organisation.
- No 'job' was advertised, nor was she interviewed for a position; there is nothing to evidence offer and acceptance or indeed any sort of agreement between the parties.
- Her payment was described as an honorarium; the words 'salary/wages' being shown on the payslip only because one payroll was used for both office holders and staff of the Association. The tax deducted was withholding tax.
- Mr Shand had no authority to employ Ms Vegar or anyone else. Only the Executive itself, or Mr Green as the Executive's delegate, were authorised to enter into contracts of any description on behalf of the Association.
- It was clearly Mr Shand's preference that she be on the footing of an employee, however, his proposal does not appear to have received support and no policy or constitutional change was effected to achieve it. The minutes indicate that Ms Vegar knew this.
- Mr Shand denies that the conversations he had with her amounted to contract negotiations. Since the minutes record that he would have had the Association employ her if he could, but did not believe this to be possible, I conclude that it is unlikely that there was, on his part, any intention to create legal relations.

- During the conversation with Mr Shand, Ms Vegar did agree in principle to post office hours. However, the minutes indicate that this continued to be a bone of contention in that she did not keep to this. Ms Vegar's relaxed attitude to meeting this undertaking does not square with an alleged intention to be legally bound by it.

Taking all these factors into consideration, in the light of the legal principles explained above, I am not satisfied that the evidence indicates the existence of any sort of agreement between the parties, let alone any intention to create legal relations. The Association made no representations to the applicant that she could reasonably construe as an offer of employment. The conversation with Mr Shand is the closest the parties come to that, but for the reasons given above, I do not consider it was sufficient to bind the Association into a legal relationship with all that entails. In the absence of anything to indicate that either party had an intention to be bound I cannot find that a contract of service was formed.

I am also mindful of my obligation in terms of section 6 to "*determine the real nature of the relationship between them.*" Standing back from the case and looking at it in context I have no doubt that the real nature of this relationship was that Ms Vegar was an office holder of the Executive and nothing else. Although I have disagreed with Ms Molloy's contention that it would be impossible for an executive member to be an employee, I do accept that if this were to be done, special arrangements would have to be put in place to make it work. That has not been the case here, although the Minutes show that Mr Shand attempted to do so. Without such arrangements, it is hard to see how an organisation such as this could function if several of its Executive were also to be employees.

**In short, I conclude that Ms Vegar did not have a contract of service with the Albany Student's Association and I do not have jurisdiction to investigate her problem.**

### Costs

This is the only remaining issue for my determination. The Association has indicated in submissions that in the event it was successful on this preliminary point it would be seeking full solicitor/client costs. I am aware that the applicant is a young student and that any such award, were it to be made, could cause her great difficulty. I also point out that costs awards of that nature are rare in this jurisdiction. It was in part for this reason that I urged the parties to attempt to mediate their differences. That has not been possible, but now I urge them again to attempt to agree the issue of costs. **If that is not possible, the Association has fourteen days in which to request that the Authority determine the issue.**

Y S Oldfield  
Member of Employment Relations Authority