IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 15
5598859

	BETWEEN	PERFORMANCE CLEANERS ALL PROPERTY SERVICES WELLINGTON LIMITED Applicant
	AND	IOANA CORINA CHINAN Respondent

Member of Authority:	Michele Ryan
Representatives:	Barbara Buckett, Counsel for Applicant Jenni-Maree Trotman, Counsel for Respondent
Investigation Meeting:	3-5 August 2016 at Wellington
Subsequent information:	2, and 23 September 2016 from Applicant 16 September 2016, from Respondent
Determination:	6 March 2017

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Peter Barron is the sole director of Performance Cleaners All Property Services Wellington Limited (Performance Wellington); a company that provides commercial property cleaning and maintenance services.

[2] Mr Barron says former employee, Ioana Chinan, breached her employment agreement with Performance Wellington by receiving monies to which she was not entitled and thereby also breached her fiduciary and good faith obligations.

[3] Mr Barron alleges Ms Chinan made unauthorised overpayments of salary and holiday entitlements; reimbursed personal and/or fictitious expenditure characterised

as business expenses, and misappropriated funds, all for personal gain. He further says Ms Chinan employed and paid wages and holiday pay to her mother without consent. Finally, he says Ms Chinan is in possession of property belonging to Performance Wellington.

[4] Performance Wellington has sought to recover $311,080.48 in connection with the claims, and interest.[1] It seeks a further order requiring Ms Chinan return property or reimburse it the value of the items.

[5] Before determining the claims it is useful to briefly set out the context in which the application before the Authority has been brought.

Background information and context

[6] In addition to Performance Wellington, Mr Barron is the sole director of Performance Cleaners All Property Services Auckland Limited (Performance Auckland) and Performance Cleaners (Sydney) Pty Ltd (Performance Sydney). Collectively these companies are referred to as the "Performance Group". He is also the director of an additional entity "The Lucky Country Australia Pty Ltd", registered in Australia. Mr Barron is a Trustee of two Trusts, one of which has interests in the New Zealand based Performance Group companies.

[7] Ms Chinan emigrated to New Zealand from Romania in 2001. She was initially employed by Performance Auckland in 2001. In 2002 she began undertaking accounting and office work for Performance Wellington. By early 2005 Ms Chinan was working in the role of Financial Controller. In February 2008 she became an Associate Chartered Accountant.

[8] In mid-2002 Mr Barron and Ms Chinan began living together in a de-facto relationship. In 2004 they had a child. The pair separated in March 2005 for a brief period following a domestic incident which resulted in Ms Chinan seeking alternative accommodation and obtaining an Interim Protection Order. Payment of her wages ceased over this period.

[9] The parties engaged in relationship counselling and in early May 2005 the domestic relationship and the employment relationship both resumed.

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1 As set out in its second amended statement of problem dated 1June 2016

[10] A feature of the decision to reconcile was that Ms Chinan would be provided with security of employment in the form of an employment agreement. Her employment is a matter that is also addressed in a Contracting Out Agreement (the COA) between Mr Barron and Ms Chinan.[2]

[11] In 2009 Mr Barron and Ms Chinan moved to Auckland. Thereafter Mr Barron regularly commuted between Wellington and Auckland. Ms Chinan worked predominately in Performance Group offices in Auckland or at a home based office.

[12] The de-facto relationship between Mr Barron and Ms Chinan ended on 1 January 2012. Ms Chinan's employment concluded in on or about 8 February 2012.

[13] Between their separation and the date on which the claims before the Employment Relations Authority were lodged, there has been ongoing litigation between them in the Family Court and courts of ordinary jurisdiction. I have summarised only those proceedings which have some bearing on how this application came to the Authority.

[14] Mr Barron sought leave to file a counterclaim out of time in response to an application made by Ms Chinan to the District Court concerning the COA. The application was declined. The Authority was advised that the counterclaim contained matters that are now before the Authority. Following District Court orders in Ms Chinan's favour, Mr Barron, Performance Wellington and Performance Auckland commenced proceedings in the High Court. Counsel reports that those matters were sent back to the District Court, struck out, or regarded as not within its jurisdiction. Mr Barron says it is on this basis that Performance Wellington has lodged its claims with the Authority.

[15] Mr Barron's position is that Ms Chinan had full autonomy over all the financial systems, including payroll, of the Performance Group, and that he had little or no knowledge of those matters for the duration of Ms Chinan's employment.

[16] A settlement agreement was reached between Mr Barron and Ms Chinan on Monday 3 December 2015. Performance Wellington lodged the current application with the Employment Relations Authority on Friday 1 December 2015. It is not clear

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[2] Under the Property (Relationships) Act 1976

whether Ms Chinan was aware of those proceedings when the settlement agreement was reached.

[17] Ms Chinan says the claims in the Authority are an abuse of process. She reports that it was not until she sought a Protection Order in 2012 that Mr Barron raised an issue of overpayment of salary and later, allegations of misappropriation. She says Wellington Performance's claims are a means by which he can continue to harass her where he is prevented from having contact with her. Counsel reports that Mr Barron was sentenced in 2015 to 9 months' supervision for ongoing breaches of the Protection Order. Counsel refers also to the 2014 District Court judgement concerning the COA where the presiding Judge found:

> [44] … I am satisfied that Peter's conduct at this proceedings has been for a number of collateral purposes, and has been conducted with the intention of delaying the resolution causing Ioana to incur additional costs and, as it turns out, unnecessary costs and conduct in such a way as to endeavour to intimidate and harass her.[3]

[18] Ms Chinan rejects Performance Wellington's claims in their entirety. She says Mr Barron had intimate oversight of Performance Group finances at all times and either instructed or consented to the arrangements and transactions that now comprise the claims against her. If she is found to indebted to Performance Wellington she asks to have that sum offset against salary and rent arrears owed to her by Performance Wellington as well as sums associated with outstanding loans to it.[4]

The Authority's investigation

[19] As permitted by s 174E of the Employment Relations Act I have not set out a full record of every event or matter of dispute between the parties. This determination is confined to making findings of fact and law necessary to dispose of the claims.

[20] Performance Wellington's original statement of problem was lodged on 1 December 2015. Five of the six heads of claim sought monetary remedies that, in part, involved actions that are alleged to have occurred over 6 years before filing at the Authority. Section 142 of the Employment Relations Act has the effect of precluding the Authority from determining disputes that occurred more than 6 years

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3 *Chinan v Barron* District Court Wellington, CIV 2012-032-000419

4 Comprising $15,606.78 being the difference between the monies advanced by Ms Chinan to the Applicant for unpaid advances and $11,000 as unpaid rent for the period April 2011 to February 2012 in accordance with the rental agreement between the parties. The claims regarding underpayment of salary did not specify a quantum.

before the date on which the claim is lodged. In its second amended statement of problem Performance Wellington amending remedies sought to begin on 1 December 2009. A claim for a penalty was withdrawn.

[21] The Authority's investigation lasted three full days. Mr Barron and Ms Chinan attended the investigation and provided written and oral evidence as did Alan Scott, Chartered Accountant, and Michael Hoffman, Solicitor, both of whom provide advice to Performance Wellington. Louise Dolan who has been employed by Performance Wellington since 2013 and Andrew Ford, a Chartered Accountant also gave evidence. Iustina Chinan, Ms Chinan's mother gave evidence to the Authority via an interpreter. A security guard was in attendance for the duration of the investigation.

[22] There were difficulties with the production of documents. Despite agreement by counsel to a scheduled exchange of documents well in advance of the Authority's meeting, it became apparent on the morning of the first day of the Authority's investigation that there were a significant number of documents not yet produced. Counsel was asked to hand up all additional documents that Performance Wellington wished to rely upon. Fourteen additional documents were produced. A portion of those documents did not advance the claims and were not admitted.

[23] Three additional documents were advanced on behalf of Ms Chinan.

[24] Performance Wellington sought to introduce further documentation over the course of days 2 and 3 of the investigation. I refused to allow that material given the amnesty afforded to it on the first day of investigation. Another 27 pages of additional material was attached to Submissions sent on Performance Wellington's behalf after the meeting had finished. I declined to view the material and the documents were sealed.

[25] In a telephone conference held prior to the Authority's investigation meeting I expressed reservations about whether the Authority had jurisdiction to resolve those claims which appeared to concern personal arrangements between Mr Barron and Ms Chinan. Counsel for Performance Wellington emphasised that the claims are not made by Mr Barron but are brought by Performance Wellington as Ms Chinan's employer.

[26] No matter how the causes of action have been framed, I have been unwilling to ignore the practical reality of the parties' circumstances or to limit my assessment of the parties' actions as if they occurred within the confines of an employment relationship only.

[27] This determination has been issued outside the statutory period of three months after receiving the final submissions. As permitted by s 174C(4) the Chief of the Authority decided that exceptional circumstances existed to allow a written determination of findings later than the latest date specified at s 174C(3).

The law

[28] The allegations against Ms Chinan are particularly serious. Although Performance Wellington did not make direct claims of fraud there is an inference in submissions to that effect.[5] It submits that the burden of proof should be of a lower standard given Ms Chinan's position within the company. I was not provided with any legal authority to support that proposition and do not accept it.

[29] While it is the civil standard of proof (the balance of probabilities) that applies in this case, I consider the evidence required to establish claims of this nature must necessarily be clear.

Did Ms Chinan make unauthorised increases to her salary?

[30] Performance Wellington says Ms Chinan overpaid her salary by $151,015.66 between 1 December 2009 and February 2012. It points to cl. 5 of the employment agreement which states:

> *"You will be provided with written advice of any changes to your gross pay…"*

[31] Performance Wellington says Ms Chinan was required to obtain written authorisation to change remuneration. It rejects Ms Chinan's assertion that the COA altered the mechanism by which remuneration would be calculated and agreed.

[32] To determine whether Ms Chinan obtained unauthorised salary payments it is necessary to set out the material events and circumstances prior to the date on which

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5 Submissions for the Applicant, 2 September 2016, p 35

the claim commences. Relevant to this assessment is the IEA, the letter of 19 July 2006 and the COA.

[33] I need to examine also whether there was any other conduct that impacted on the way Ms Chinan's remuneration operated. At issue is what was agreed by the parties.

Did changes to Ms Chinan's remuneration require written agreement?

The 2005 IEA

[34] The Authority was provided with 3 versions of the 2005 employment agreement. Two of these were signed by Mr Barron, one of which records Ms Chinan's annual salary as $70,200 whereas the other records $75,400 per annum. None of the employment agreements furnished were signed by Ms Chinan.

[35] Ms Chinan says the employment agreement that states the higher of the two salary rates was the sum agreed, whereas Mr Barron says it is the lower rate.

[36] The issue as to which of the employment agreements should be preferred was disputed not for the purpose of establishing which of the two conflicting salary rates should prevail agreed, but as a matter of credibility.

[37] Payroll information records that in early October 2005 Ms Chinan started to receive weekly salary payments that equate to an annual salary of $70,200 commenced in early October 2015. I consider it more likely $70,200 was an agreed salary rate, but that finding does not explain or resolve why Mr Barron's signature is attached to two documents which record conflicting salary rates.

[38] All of the employment agreements are dated 30 August 2005 although it is apparent from the evidence that the negotiations for an employment agreement continued until at least mid-November 2005. I have no doubt that the quantum of Ms Chinan's salary was a subject of ongoing negotiation.

[39] On balance I accept Ms Chinan's testimony that the terms of employment were never fully settled in writing. I consider it likely that the sum of Ms Chinan's salary was increased in October 2005 as the lessor of the two possible sums under discussion and the matter was simply not revisited when negotiations ceased.

The letter of 19 June 2006

[40] Performance Wellington says written authorisation for a salary increase was provided to Ms Chinan on one occasion only, on 19 June 2006.

[41] The letter dated 19 June 2006 contains Performance Wellington's banners and is headed in bold: "*Re: Confirmation Ioana Chinan is employed by Performance All Property Services Wellington Ltd as the Financial Controller".* The letter is addressed; "*To whom it may concern*". Amongst other details the correspondence advises that Ms Chinan has responsibilities for the Sydney branch, and her remuneration is $78,000 per annum. Mr Barron's name and position is recorded at the bottom of the letter.

[42] I consider it more likely that the letter was drafted for receipt by a third party. I consider it telling that the letter includes the following; *"I can be contacted on 568-6888 to give verbal affirmation of this letter"*. I find that remark and the abstract description of the intended recipient as well as reference to the employer's identity and the duration of Ms Chinan's employment are each wholly unnecessary statements if the purpose of the letter was to affirm a change of salary between the parties according to the IEA. I consider it likely that Performance Wellington has attempted to re-characterise the purpose of the correspondence to better establish its claim.

[43] I do not accept that the letter is evidence of a practice to provide Ms Chinan "*with written advice of any changes to her gross pay"* in accordance with cl. 5 of the IEA.

The 2007 COA

[44] On 5 December 2007 Ms Chinan and Mr Barron contracted out of the Property (Relationships) Act 1976. Clause 6.2 of that agreement (the COA) provides:

> Peter as sole Director of the New Zealand companies listed in Schedule A will procure the said companies to provide Ioana with employment as the group of companies Financial Controller, at a salary to be agreed between the parties based on the NZICA annual remuneration survey. Notwithstanding anything set out in this agreement both parties will enjoy their full rights under the Employment Relations Act 2000 or any other related employment legislation.

[45] Schedule A listed companies include those referred at [6] of this determination.

[46] The Authority has no jurisdiction to determine whether Mr Barron and Ms Chinan lawfully contracted out of the Property (Relationships) Act 2001, or determine the division of property under that agreement. However, insofar as cl. 6.2 contains a contractual term relevant to Ms Chinan's employment, I consider it is a matter that is within the Authority's jurisdiction to examine and determine.[6]

[47] Performance Wellington submits it is not a party to the COA and is not be bound by its contents. It says the COA is a private agreement between Mr Barron and Ms Chinan. I do not accept that is a correct statement of the law in the particular circumstances. Section 18(1)(e) of the Companies Act 1993 prevents a company – in this case Performance Wellington - from asserting against a person dealing with the company that *"a document issued on behalf of a company by a director … with actual or usual authority to issue the document is not valid or genuine".*

[48] The content of cl. 6.2 unequivocal; Mr Barron agreed to exercise his authority as Director of the companies named in Appendix A to have them "*provide* [Ms Chinan] *with employment as the group of companies Financial Controller, at a salary to be agreed between the parties based on the NZICA annual remuneration survey".*

[49] I find that cl. 6.2 of the COA was binding on Performance Wellington. The provision superseded cl. 5 of the 2005 employment agreement and provided new terms as to how Ms Chinan's employment remuneration would be decided and altered. In light of this finding, it is not necessary to determine whether Ms Chinan regarded the 2005 employment agreement as exclusively governing her employment but I will do so for completeness.

[50] In 2011 Ms Chinan forwarded by email a copy of the 2005 employment agreement and the COA to Mr Scott, (Performance Wellington's accountant) in reply to his query as whether she had an employment agreement. Ms Chinan responded noting her wages had increased "*with the work required (trusts and Australia)*" and asked if it would be a good idea to have Mr Barron explain what she did for all the entities.

[51] I note Mr Barron's written evidence also confirms that the COA recorded the employment agreement between Ms Chinan and Performance Cleaners.[7] I am

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6 Section 161 Employment Relations Act

7 Brief of Evidence in Reply of Peter Barron, paragraph 24.

satisfied that both Ms Chinnan and Mr Barron considered the COA altered the terms of Ms Chinan's employment. There is nothing in cl. 6.2 of the COA that required changes to Ms Chinan's salary to be authorised in writing.

Is there other conduct which demonstrates agreement between Mr Barron as director of Performance Wellington and Ms Chinan to increase her salary?

[52] Ms Chinan's salary increased significantly over the course of her employment.

[53] In just over two years between commencing on the salary associated with the employment agreement and execution of the COA Ms Chinan's salary increased by about $40,000. She says in or by mid-2006 her work not only included Performance Wellington and Performance Auckland but also Performance Sydney. The letter of 19 June 2006 appears to confirm that assertion. She says by mid-2007 her duties included Mr Barron's two family trusts also.[8]

[54] A month or so following the conclusion of the 2007 COA Ms Chinan's remuneration moved to $124,800 per annum. She says Mr Barron agreed to a salary increase to recognise her recently obtained qualification as an Associate Chartered Accountant. Ms Chinan's salary rose to $128,000 in July 2008 then dropped to $112,799 in November 2008. Her salary increased again in March 2009 and in May 2009. It reached its peak in May 2010 at $180,000 per annum. Ms Chinan's salary dropped to $50,000 in September 2011 and $22,000 on 1 January 2012. As previously noted Ms Chinan says her salary rose and dropped at Mr Barron's instructions and according to business need.

[55] Performance Wellington asked the Authority to make credibility findings against Ms Chinan. I have considered the submissions on those matters but do not accept them. I found Ms Chinan to be a credible witness.

[56] I consider it entirely feasible that Ms Chinan's day to day responsibilities increased over time but that her work and activities remained subject to Mr Barron's directions and instructions. I accept her evidence that the increases to her salary between 2005 and 2007 inclusive were agreed by Mr Barron despite there being no evidence of written authorisation on those matters. I find it likely that the agreement

[8] One of which owns Performance Sydney and another company

at cl. 5 to record salary changes was simply not enforced by either of the parties and was effectively varied by conduct.[9]

[57] I accept also that between 2008 and 2011 inclusive Ms Chinan's salary was largely in accordance with the levels set out in the relevant NZICA annual remuneration surveys, as agreed in the COA.

[58] Ms Chinan explained that the ongoing increases to her salary between 2008-2010 were a consequence of additional activities associated with a series of IRD audits, and with work previously undertaken by staff no longer working at Performance Wellington, including the Operations Manager. She says her salary progressions were always discussed with, and verbally agreed by, Mr Barron noting that in 2008 he instructed her to reduce her salary and again in 2011. Mr Barron denies Ms Chinan's workload increased over time or that he agreed to changes to her remuneration.

[59] I found the following events were material in assessing the level of Mr Barron's knowledge of Ms Chinan's salary. My conclusions are based on what is more likely to have occurred, and where required, matters of credibility:

(i) The COA negotiations. These commenced in August 2006 and concluded on 5 December 2007. Mr Barron's testimony concurred with that of his solicitor; the effect of every clause contained in the COA was discussed between them. During questioning Mr Barron agreed he had reviewed the 2007 NZICA Remuneration survey before signing the COA.[10] That survey records that the mid-point annual salary rate for a Group Financial controller in 2007 was $128,333.

Mr Barron says Mr Chinan's salary did not alter after the COA was concluded and that it continued as the same rate as was agreed in June 2006. I do not accept his account on this point. Mr Barron's solicitor said that paying Ms Chinan a market rate salary in accordance with NZICA's remuneration surveys was an important aspect of the parties' discussions. I consider it most unlikely that Ms Chinan would have agreed to the COA without securing agreement to an increased salary rate.

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9 *Barnes v Whangarei Returned Services Association (Inc)* [1997] ERNZ 626

10 Published annually by Hudson Ltd and then Ranstad Ltd

(ii) The Inland Revenue Department (IRD) audits. Between mid-2008 and mid 2010 IRD undertook extensive audits of the Performance Group companies for the period 2005-2007. In a letter dated 29 June 2009 addressed to Mr Scott, and copied to Mr Barron, IRD raised, amongst other things, concerns that wages attributed to Mr Barron's children (from another relationship) had been paid into bank accounts held by Mr Barron personally, as had portions of Ms Chinan's wages. It noted a discrepancy between Performance Wellington's financial statements, tax returns and reported PAYE. IRD asked the Performance Group to respond to those matters.

In a letter sent to Mr Scott and copied to Mr Barron on 4 June 2010 IRD advised that evasion penalties had been applied to Mr Barron as a consequence of his use of his children's IRD numbers to pay wages to himself which resulted in a tax saving for him. IRD advised "*this is the most serious level of offending and this letter serves as a warning…should such activity be detected again…IRD will pursue prosecution action*".

Mr Barron's testimony is that he was not involved with the response to IRD's concerns as to wage payments, and therefore had no knowledge of Ms Chinan's salary rate. He denied seeing IRD's letter of 29 June 2009 which raised the concern about his children. On further questioning he advised he *"may"* have spoken to Mr Scott about that. Under cross-examination he again rejected the proposition that wages paid to family members were of interest to IRD. That evidence is in contrast to Mr Scott's sworn testimony before the District Court in 2014 that Ms Chinan's salary and those paid to Mr Barron's children were under close scrutiny by IRD and this resulted in Performance Wellington's accounts being under review by Mr Barron, Ms Chinan and himself. I am unwilling to accept that Mr Barron's involvement in responding to IRD's inquiries was as peripheral as he attests and I consider it more than likely that Mr Barron's was aware of Ms Chinan's salary over this time frame.

(iii) MYOB Payroll. Ms Chinan says Mr Barron taught her how to use MYBO when she was first employed in 2002, and that they did weekly payroll together until 2004. In contrast Mr Barron says he had no idea how to access MYOB until after Ms Chinan's employment ended. He said he not recall who

performed the payroll functions when Ms Chinan was on maternity leave or when they separated in 2005.

Mr Barron conceded that he attended to the payment of staff wages on approximately 7 occasions while Ms Chinan travelled overseas with their daughter for 2 months in 2010 (when Ms Chinan's salary was at its height). Mr Barron says the wages were pre-loaded and therefore he did not notice the sum applied to Ms Chinan. That evidence was undermined by Ms Chinan's unchallenged testimony that staff wages alter each week depending on hours worked and wage and payroll processes are conducted manually.

[60] I found Mr Barron's lack of recall in response to questions where further particulars might harm Performance Wellington's case, as convenient. When questions were answered more fully he would frequently backtrack when it became apparent that evidence previously given would not assist the claims. For example, Mr Barron denied Ms Chinan's workload increased by undertaking the Operational Manager duties or that she had been engaged with IRD audit work. Mr Barron initially said he performed the Operational Managers role but resiled from that when it was put to him that the positon required payroll activities. He conceded Ms Chinan had worked on IRD matters when questioned as to who and how the accountants were instructed in response to IRD's concerns.

[61] Overall Mr Barron's evidence lacked credibility. The thrust of his testimony is that he trusted Ms Chinan without question and he therefore made no inquiry as to payroll matters and more broadly, the financial management of Performance Wellington and/or the Performance Group companies. I do not accept he could have been as indifferent or oblivious to the financial performance of his businesses over a period of six years or so.[11]

[62] My assessment is reinforced by the fact that the financial reporting of the companies was under close review by IRD for a portion of this timeframe. I also find that Mr Barron's claim that he was ignorant of the financial activities of his company unlikely in circumstances where he attested he had been successfully running businesses for over 25 years.

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[11] 2006 -2012

[63] I am more than satisfied that Mr Barron was fully aware of Ms Chinan's salary increases and that he agreed to the arrangements on behalf of Performance Wellington. The claim that Ms Chinan overpaid herself is dismissed.

[64] There is an additional claim that Ms Chinan paid herself a salary of $14,999.93 through Performance Auckland's payroll system. It appears Performance Wellington seeks reimbursement of that sum. Performance Auckland is not a party to the claims before the Authority nor is there any information to record that Performance Wellington has authority to seek remedies on that entities behalf. This claim is dismissed.

Did Ms Chinan employ her mother Iustina Chinan without authority?

[65] A sworn affidavit dated March 2012 by Mr Barron records that Ms Chinan's father died during her pregnancy and Ms Chinan's mother, Iustina, relocated to New Zealand in 2004 to be with her only daughter. His affidavit implies that he suggested Iustina live with them.

[66] Performance Wellington seeks remedies of $8,332.26 (comprising wages and holiday pay) from Ms Chinan in connection with her mother Iustina. It is alleged that Ms Chinan employed Iustina without its authorisation and paid wages to her via Performance Auckland accounts.

[67] Counsel for Ms Chinan observed in submissions that Performance Wellington has not made a demand against Iustina to return wages. She notes that this claim remains targeted at Ms Chinan. I find Mr Barron's written statements that "*there is nothing to be gained personally*" from the ERA proceedings, and that the claims by Performance Wellington are "*a business matter*" do appear at odds with this particular claim.

[68] It is not in dispute that Iustina was employed by Performance Wellington and and by Performance Auckland.

[69] The Authority was provided with letters and email exchanged between Mr Barron and Immigration New Zealand (INZ) concerning the work that was being offered to Iustina,[12] as well as a complaint, purportedly made by him, to INZ about its service. One letter contains Mr Barron's signature. Mr Barron says the document

[12] between 2004-2005 at R54

was written by Ms Chinan and his electronic signature inserted. Submissions from Performance Wellington point to another letter which contains an instance of incorrect grammar. It submits the letter is more likely to have been drafted by Ms Chinan given English is her second language.

[70] Ms Chinan denies Mr Barren had an electronic signature. No evidence was provided to the Authority to establish whether a digital signature was in use at the material time. I consider that a letter containing a single grammatical mistake does not provide conclusive evidence that Ms Chinan is the author of the correspondence. That matter could just as easily be a typographical error.

[71] There appears to be no dispute that the two letters that Mr Barron seeks to distance himself from each provide his mobile phone number as a contact number. I do not find it credible that Mr Barron's phone number would be provided for queries, yet he was unaware of any communications with INZ. I am also sceptical (as with my findings in respect of letters sent by IRD) of his assertion that he did not receive any correspondence from INZ particularly when it is evident that one letter was sent to his Post Box in Auckland when Ms Chinan resided in Wellington at the material time.

[72] I accept Iustina's oral and written testimony that she performed tasks for Performance Wellington, albeit largely from the home based office, such as attending to correspondence that needed posting including weekly wage slips, and washing aprons, uniforms and cleaning rags. During questioning she conceded that she was predominantly engaged in household duties including child-minding while both parents worked. I consider Mr Barron agreed to have Performance Wellington employ her for that purpose. I note also that Iustina was paid wages processed by Mr Barron when he was responsible for payroll processing in 2010.

[73] The claim that Ms Chinan employed her mother without its authority is dismissed.

Did Ms Chinan make an overpayment of holiday pay to herself?

[74] Performance Wellington alleged Ms Chinan overpaid holiday pay of $4,793.83 to herself on 5 January 2012 by initiating a payment advancing holiday pay. It seeks recovery of that sum.

[75] Performance Wellington provided a copy of a screenshot of the MYOB system that it says demonstrates the overpayment and establishes the claim.[13]

[76] The screenshot document sets out Ms Chinan's holiday pay and other information. It has a number of columns which provide information as to quantum of 'Outstanding', 'Accrued' and 'Advanced' hours of holiday plus a 'Balance' column. 'Outstanding' entitlement refers to the hours of holiday entitlements which have crystalized as at the last anniversary date. 'Accrued' entitlement refers to the amount of holiday hours that are accumulating during the current year of employment beginning from the last anniversary date of employment. The 'Advanced' column indicates when leave that is being paid has not yet crystalized and/or accrued.

[77] Counsel for Ms Chinan considers the information in the MYOB screenshot presented to the Authority has been tampered with. She notes that the screenshot sets out the quantum of hours Ms Chinan accrued but that there is no corresponding record reflecting the monetary value of the accrued hours, as would be expected. I agree that information appears to be missing from the screenshot record.

[78] Setting that concern aside, I consider that Performance Wellington is mistaken in its interpretation of the screenshot. I find there is a logical connection between the hours recorded as 'Accrued', in this instance 73.21, and the 'Advanced' payment of 70.14 hours. This link is demonstrated in the final 'Balance' column which records Ms Chinan entitlement reduced following the advancement, whereby her accrued leave was now 3.07 hours. In effect, the screen shot demonstrates Ms Chinan advanced a payment of leave that she had accrued.

[79] The negative 'amount' sum of $4,793.83 recorded in the 'Balance' column does not evidence an overpayment of holiday leave, rather it is likely a function of the MYOB system making a distinction between holiday entitlements that have crystalized as at the previous holiday anniversary date and accrued holiday entitlement which will crystalize at the next anniversary date of employment. Ms Chinan was entitled to pay out accrued leave on cessation of her employment. If the information in the MYOB screenshot is reliable Ms Chinan is owed 3.07 hours in holiday pay.

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[13] Applicant's Supplementary Bundle of Documents. Document 6

[80] In submissions sent after the investigation meeting concluded, Performance Wellington sought further remedies of $21,928.37 in connection with holiday pay entitlements. It says Ms Chinan received both salary and holiday pay contemporaneously at various junctures of her employment. The claim was not raised in Performance Wellington's statement of problem nor was leave sought to bring the action. However I accept Ms Chinan's explanation that she often did not take her full entitlement to leave each year and that she "cashed up" her annual leave from time to time on Mr Barron's instructions or with his consent. This claim is also dismissed.

The remaining claims

[81] Performance Wellington claims Ms Chinan:

- reimbursed herself $72,180.05 for personal or fictitious expenses;
- misrepresented or altered accounting records on three occasions and thereby misappropriated $64,552.68;
- is in possession of its property.

The claim alleging Ms Chinan reimbursed fictitious and personal expenses to herself

[82] Over the course of the investigation meeting Performance Wellington accepted that $60,860.05 of the initial claim for $72,180.05 was expended on genuine business expenses.[14] The remaining dispute concerns $11,320.[15]

[83] There appears to be no real dispute that Performance Wellington did not have credit cards in its own name, or that Ms Chinan used her personal credit cards to purchase goods and services for Performance Wellington. There is a conflict as to whether Mr Barron urged Ms Chinan to obtain credit cards in her name in order to provide Performance Wellington cash advances from time to time. I do not need to determine that issue albeit there is evidence that cash advances by Ms Chinan to Performance Wellington were made.[16]

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14 Final submissions for Performance Wellington continued to seek $72,180.05 in remedies corresponding to this claim. Given the concessions made in the investigation meeting I have assumed remedies sought in that document are made in error.

15 Revised document A14

16 Documents R25, R26, R27

[84] There are further areas of dispute. I am unable to determine with any certainty who is responsible for missing invoices however the absence of that documentation (with the exception of those furnished by Ms Chinan for 2010) precludes a proper assessment as to whether a portion of the remaining expenses at issue were business expenses or not.

[85] Having said that, there is no doubt that a significant portion of the $11,320 now claimed relates to transactions that occurred at supermarkets. Receipts associated with 2010 reveal that the purchases largely involved food, grocery, and household items.

[86] I agree these items are not generally regarded as business expenses but I am unwilling to make findings (and corresponding orders) that Ms Chinan has reimbursed herself fictitious or personal expenses in all the circumstances. I satisfied that the purchases were made were for the benefit of the family including Ms Chinan and Mr Barron's daughter and with Mr Barron's consent (either express or implied). I consider it likely that Mr Barron, as the controlling mind of the business, was aware that these types of expenses were being run through Performance Wellington. Claims in the Authority require applicants to come before it with clean hands. This claim is dismissed.

Did Ms Chinan misappropriate funds by incorrectly altering account records?

[87] Performance Wellington cites three instances where it alleges Ms Chinan transferred monies to her personal account from a Performance Wellington account.[17] It says Ms Chinan wrongly assigned the transaction as Mr Barron's drawings and these actions were purposely deceptive.

[88] Ms Chinan agrees the funds were withdrawn. Two of the transactions occurred between May and June 2010. She says at that time Mr Barron held concerns that charges would be laid by the IRD and he instructed her to access his drawings so as to reimburse her monies owed to her for relationship and family expenses where they did not share a joint account and she had shouldered the majority of the domestic costs. She says Mr Barron agreed to have his drawings reimburse her for payments made on a car purchase, renovations to her house and advance payment for the 2010

[17] $25,000 on 12 May 2010; $29,552.84 on 14 June 2010; $10,000 on 2 February 2011 ;

holiday to Romania. She says the third alleged transaction concerns the repayment of monies she had lent to one of Mr Barron's trusts.

[89] Separate to the transactions which comprise Performance Wellington's claim, it became apparent during the Authority's investigation that Ms Chinan had made 21 separate advances to Performance Wellington ($180,000 in total or thereabouts) between 2008-2010.[18] There is additional evidence of an advance of over $23,000 by Ms Chinan to the Peter Barron Family Trust in 2009 and $3,200 to Performance Auckland in 2008.

[90] Counsel for Performance Wellington questioned Ms Chinan about a loan she made to Wellington Performance of $100,000 which was subsequently overpaid. It was not clear from the evidence whether those monies formed a portion to the $180,000 previously mentioned or were part of a separate arrangement.

[91] The matter of the overpayment has since been settled but counsel sought to demonstrate the overpayment as an example of Ms Chinan acting deceptively. I have not reached that conclusion. There is clear documentation which demonstrates that Ms Chinan was open with the accountants about the overpayment and I can find no evidence of dishonesty.

[92] It was also accepted by witnesses for Performance Wellington that in relation to the third transaction alleged, Ms Chinan had deposited $10,000 into one of Mr Barron's trust accounts 12 days prior to reimbursing that sum.

[93] With the exception of bank statements and account printouts I was not provided with any documentation that records the duration of the various advances Ms Chinan made to Mr Barron's entities or what agreements were made about repayment.

[94] Both the informal nature and the volume of transactions between Ms Chinan and the entities Mr Barron controlled leads me to conclude that the actions alleged to demonstrate "misappropriation" are in reality a continuation of Ms Chinan and Mr Barron's personal arrangements. These are not matters that directly and essentially concern the employment relationship.[19]

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18 Document A21 compared to R16 Doc A21

19 *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255 at [95]

[95] Performance Wellington has not established its claims of misappropriation, and I dismiss the claims.

The claim regarding property

[96] This claim involves property allegedly owned by Performance Wellington and Performance Auckland. As previously noted Performance Auckland is not a party to these proceedings. Performance Wellington had an office at Ms Chinan's home and it seeks the return of property held at the office and in other locations around Ms Chinan's home.

[97] Mr Barron denies that the property he is seeking on behalf of Performance Wellington was subject to settlement in the Family Court.

[98] I have not set out all of items claims but the chattels listed and sought by Performance Wellington are identical to items listed as Mr Barron's property in an email to Ms Chinan in 2013. By way of example both lists refer to "*a grey lounge suite x 2 chairs and 1 couch*", a "*Ricoh Photocopier*" , an *"Office desk and chair*", "*Black and Decker power drills*", "*spades and shovels*". I agree with submissions on behalf of Ms Chinan that the existence of multiple identical items exactly matching those in a settled list is not credible. This claim is also dismissed.

Summary

[99] Ms Chinan has not breached express (or implied) terms and obligations of her employment. The applicant's claims are dismissed.

Costs

[100] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority