

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 230/09
5137323**

BETWEEN PHILIP DUNN
 Applicant

AND ECOCOVER (NZ) LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: D Cowan, counsel for applicant
 S Barter, counsel for respondent

Investigation Meeting: 14 May 2009

Submissions received: 19 May 2009

Determination: 14 July 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Philip Dunn seeks a determination as to the identity of his employer, and an order for the payment of a bonus in the sum of \$20,000.

[2] The underlying problem is that Mr Dunn says his employer was EcoCover NZ Limited (“ENZ”) throughout the relevant period, and he is entitled to certain terms and conditions including those in a letter of offer containing what was said to be the parties’ agreement. The terms in the letter include entitlement to bonus payments. ENZ agrees in effect that it was the employer, but adds that the entitlement to a bonus payment was a term of an employment arrangement with another company, EcoCover Developments Limited (Vanuatu) (“EDL”), which never commenced.

[3] Other claims were withdrawn at the commencement of the investigation meeting. In addition the citing of Murray Cruickshank as second respondent - in

respect of allegations that he was Mr Dunn's employer either in his personal capacity or jointly with ENZ - was struck out by consent.

ENZ and EDL

[4] In or about 1997 Mr Cruickshank acquired the technology licence and manufacturing plant on which the EcoCover business is based. EcoCover is a plant management or garden product marketed as an environmentally friendly weed and mulch mat. EcoCover Pacific Limited ("EPL") was formed to operate the business, and was registered in 1999. It employed Mr Dunn, who already had a long-standing working relationship with Mr Cruickshank and his interests, as general manager. The EPL business included a manufacturing plant in West Auckland.

[5] Mr Dunn had shares in EPL, and for periods was also a director. In the early part of the new century there was a series of disputes between EPL's directors which need not be detailed here. Mr Dunn's employment with EPL ended relatively early in the course of the disputes, and he began employment in an unrelated organisation. By late 2003 the litigation and threats of litigation associated with the disputes between the EPL directors had been resolved, the manufacturing plant had ceased to operate, EPL had ceased to trade and Mr Cruickshank had acquired the licence and the plant.

[6] Mr Cruickshank planned to separate the manufacturing business from the intellectual property and licensing rights. To that end he registered a company, EcoCover Developments Limited (Vanuatu) ("EDL"), to hold the worldwide rights to grant licences, develop and exploit the relevant patent, and develop international sales. He also registered a New Zealand company, ENZ, as licensee to manufacture and sell product in New Zealand.

[7] Mr Cruickshank discussed his plan with Mr Dunn in an informal way as it developed. Mr Dunn was aware, for example, of Mr Cruickshank's attempts to secure an investor for ENZ, and of Mr Cruickshank's intentions regarding the international operation of the business. Mr Cruickshank expressed the hope that a revived New Zealand operation would serve as a showcase for international purchasers, and that Mr Dunn would join him in the venture.

[8] When suitable investment funds were secured discussions about Mr Dunn's involvement became more serious. Mr Dunn said much of the discussion was about international opportunities, including hopes and expectations regarding levels of international sales. His role would be to commission and install manufacturing plants overseas, train staff and provide general advice on becoming established in the market.

[9] However it was common ground that the early priority was to re-establish the New Zealand plant. There were discussions about Mr Dunn's role in this.

[10] According to Mr Cruickshank the work required in New Zealand would be similar to that carried out for EPL except that, once the plant was restored to operation, Mr Dunn would move to work on global sales. The theme of the two men's discussions was that Mr Dunn would 'work for' ENZ for an initial period which was expected to be brief. During that period Mr Dunn would 'manage' the process of getting the New Zealand plant back into business. Once that had been achieved someone else would be employed to manage New Zealand, and Mr Dunn would resign to take up a new role with EDL. There was no evidence of any express discussion or agreement in respect of the 'resignation' to take up the 'new role with EDL.'

[11] Mr Cruickshank said the discussions were followed by a letter of offer to Mr Dunn which, he said, plainly set out the discussions. These were that Mr Dunn would 'work for ENZ until it became self-sufficient, then move to EDL'.

[12] The letter of offer was dated 8 July 2004. It was headed 're: Employment Offer – EcoCover Developments Limited (Vanuatu)'. Mr Cruickshank signed it 'for and on behalf of EcoCover Developments Limited (Vanuatu). It read in part:

“1. The position offered is initially as Manager of EcoCover (NZ) Limited, to get the New Zealand Company firmly established in the marketplace. Although ENZL will be paying your salary, it is in effect a subcontracted position from EDL. ...

2. Immediately ENZL is established a new manager will be appointed to run the business and your skills will be transferred to the EDL international operation.

3. Internationally you will be responsible for:

- a. Plant supply (to all licensees) in the broadest sense of the word. Assisting with globally accredited plant manufacturers, quality standards, plant R & D, in fact working alongside me in all aspects of the international business.
 - b. Plant installation with appropriate engineering assistance.
 - c. Staff training at new plant installations.
 - d. Marketing input to future licensees.
4. I see your role in assisting me with all of the practical aspects of the whole plant/product design and development process internationally.
5. The initial package would consist of:
- a. A salary of \$83,000 per annum
 - ...
 - c. A bonus of \$10,000 on each and every EcoCover mulch mat plant sold globally during your employment with EDL.”

[13] There was no conversation about precisely who the employer would be, the mechanism under which Mr Dunn would ‘transfer’ to EDL, when or how EDL’s ‘self sufficient’ status would be indentified, or when or how the ‘establishment’ of ENZ would be identified.

[14] Mr Dunn said that, despite the wording in the letter, he did not turn his mind to the identity of the employer and nor did he take note of the phrase ‘subcontracted position from EDL.’ As for the ‘transfer’ to the international operation he believed he would assist in getting the New Zealand plant ‘up and running’, moving to the international business when the plant was operational and could be shown to prospective international purchasers.

[15] Mr Dunn’s receipt of the letter, and acceptance of the offer, caused him to resign from his existing employment. The letter was not followed up with a written employment agreement.

[16] Mr Dunn began his employment within a few days of receiving the letter. He described his duties as managing ENZ, the factory, office, staff management, sales and trials. He said he was also expected to assist with international sales, including talking to prospective purchasers and providing information. He assisted salespeople with costings for overseas markets, worked with design engineers and suppliers, and provided a sales pitch to prospective purchasers representing interests in New South Wales and in the Czech Republic during visits New Zealand.

[17] The subsequent sale of manufacturing plant to both the Australian and Czech purchasers led Mr Dunn to claim bonus payments in or about December 2007. He did so on his return from six weeks in New South Wales spent assisting in the installation of the plant, commissioning and training employees.

[18] Mr Cruickshank's response then, and in the Authority, was that Mr Dunn was not entitled to the payments because they were available only after Mr Dunn had commenced employment with EDL. Mr Dunn had not yet made that move, and remained an employee of ENZ. Mr Cruickshank said in evidence that he: 'was simply standing by exactly what the letter of engagement said. I told him he was not in EDL yet because he had not yet got ENZ to the point of profitability or sustainability that the letter clearly signposted in the precondition.'

Determination

[19] Mr Barter submitted that the ENZ role was set out as a 'precondition' of the EDL role, meaning that once the role was completed EDL would employ Mr Dunn. The role was not 'completed', so that ENZ remained the employer throughout. Mr Dunn is not entitled to a bonus because, in terms of the 8 July letter, the entitlement was a term of employment with EDL, not ENZ.

[20] Mr Cowan also submitted that the employment relationship throughout was between Mr Dunn and ENZ, but differed from Mr Barter in that he submitted further that the terms and conditions contained in the 8 July letter were binding in their entirety as between ENZ and Mr Dunn.

[21] I have difficulty with both sets of submissions. They are not consistent with the express wording of the 8 July letter, or, to the extent that it is relevant, with the content of the surrounding discussions.

[22] Regarding Mr Barter's submissions, I acknowledge that clause 1 in the letter recognises ENZ would pay Mr Dunn's salary while he acted as manager of ENZ. However rather than including words suggesting there was a separate employment relationship as a result, it says only that the position at ENZ was in effect a 'subcontracted' position. Wording of that kind is more consistent with an arrangement between EDL and ENZ to provide Mr Dunn's services to ENZ for a

particular period or purpose, than with the creation of a stand-alone employment relationship between ENZ and Mr Dunn.

[23] Clause 2 in the letter does not provide that a new agreement with EDL would be entered into immediately ENZ was established, only that Mr Dunn's skills would be 'transferred'. The notion of a 'transfer' of skills is consistent with an overall reading of the letter as an offer of employment by EDL, with an arrangement that those skills be put to use for the benefit of ENZ in the early stages of the employment relationship. It is reading too much into the provision to interpret it as stating one employment relationship would end and a new one would commence once ENZ was 'established', particularly as ENZ is not cited as a party to the arrangement embodied in the letter.

[24] The difficulty with Mr Cowan's submission is that, while he agreed no 'transfer' of Mr Dunn's skills to EDL occurred, he did not agree that meant no provision for bonus payments applied. However, according to the 8 July letter the entitlement to a bonus expressly relates to 'employment with EDL.' I do not accept those words can simply be replaced by 'employment with ENZ.' It was not open to Mr Dunn to 'take it' that such was the case.

[25] Although I have difficulty with the positions advanced by both parties, they have in effect agreed that ENZ was the employer. Neither has asked me to find EDL was the liable employer in respect of the bonus, and EDL is not a party to this employment relationship problem.

[26] As a result I determine this matter by finding that the 8 July letter, in the form of clause 5(c), sets out an entitlement to a bonus during employment with EDL. Mr Dunn has asked the Authority to look through clause 5(c) and substitute the reference to EDL with a reference to ENZ. I decline to do so, for the reasons indicated above.

[27] There will therefore be no order in respect of the bonus.

Costs

[28] Costs are reserved.

[29] The parties are invited to agree on the matter. If either seeks a determination from the Authority any party seeking an order shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority