

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 248/10
5097249**

BETWEEN JOHN JOSEPH MAIO
 Applicant

AND EFFECTIVE FENCING LIMITED
 First Respondent

 MICHAEL O'CONNOR & MERILYNN
 O'CONNOR
 Second Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 Michael O'Connor for Respondents

Investigation Meeting: 21 January 2009

Determination: 24 May 2010

DETERMINATION OF THE AUTHORITY

[1] The applicant Mr John Joseph Maio (“Mr Maio”) claims commissions from the respondents. I did not consider mediation would not contribute constructively to the resolution of this employment relationship problem.

[2] Mr Maio alleges that during the period from 7 June 2001 to 17 April 2002:-

he secured some \$344,044.74 in sales for the respondents. [He] claims he performed these sales as an agent for the respondents and at their specific request.

[3] Mr Maio says that as the respondents' agent, he was entitled to a commission of approximately 14% in the sum of \$48,160.56.

[4] It is necessary to determine whether Mr Maio was employed by Effective Fencing Limited.

[5] In a determination dated 19 June 2003¹, this Authority found that:-

Mr Maio was employed by the respondent as Contracts Manager in its fencing business from 28 May 2001.

[6] The respondent and therefore the employer in that investigation was Effective Fencing Management Limited.

[7] The Authority further found that:-

His duties were wide ranging and included management of contractors and contract supervisors, work scheduling, costing, pricing and invoicing, commission payments, and recruitment along with essentially anything else involving contracts management. he reported to the managing director, Mr O'Connor. On 18 April 2002 he was summarily dismissed for serious misconduct.

[8] The Authority noted that Mr Maio's terms and conditions of employment were subject to a written employment agreement and paragraph (16) of which provided:

OTHER BUSINESS OR EMPLOYMENT ACTIVITIES

You will be expected to devote your full time and energy to this position. For this reason, together with the need to protect the company's commercial and business interests, you will not be permitted to engage in any other business or employment related activities without the company's prior written consent.

[9] When the matter came before the Authority again before another Member, the Authority found:-

[13] When Mr Maio was engaged by [Effective Fencing Management Limited] he signed, on 16 May 2001, an individual employment agreement referring to his position as "Contracts Manager". The remuneration included a salary of \$55,000, business and private use of a vehicle and similar use of a cell phone, a total package worth \$73,550. The schedule to the employment agreement does not indicate that his job was intended to extend to a distinct sales role. I accept however that Mr Maio did in fact, as well as performing his job as Contracts Manager, spend significant extra time in pursuing and securing sales for [Effective Fencing Management Limited].

[10] In relation to his claim for commissions against Effective Fencing Management Limited the Authority said this:-

¹ *Maio & Effective Fencing Management Limited*, unreported, AA184/03, 19 June 2003, Y S Oldfield

Unfortunately I cannot reconcile various claims Mr Maio has made about the circumstances in which he extended his work into sales. There is significant inconsistency in his assertions about the contractual and legal basis relied upon as the foundation for his substantial claim to commission.

[11] Mr Maio pursued his claims against Effective Fencing Management Limited as his employer. He was successful in obtaining remedial orders from the Authority against Effective Fencing Management Limited.

[12] But Mr Maio challenged the determinations of the Authority to the Employment Court. Those challenges were withdrawn upon the liquidation of Effective Fencing Management Limited in June 2004.

[13] Mr Maio also applied to have the Authority investigations reopened but that application was refused.

[14] So while Mr Maio previously succeeded in obtaining relief against his employer, he now comes to the Authority claiming commissions against Effective Fencing Limited. Mr Maio says:-

The employment of the applicant, by Effective Fencing Limited, was outside the terms of the applicant's employment agreement, with Upstairs Limited, formerly Effective Fencing Management Limited (In Liquidation), which the applicant reiterates, did not make sales, did not manufacture goods, pay employee wages, PAYE or ACC.

[15] I determine that Mr Maio did not have an employment relationship with any of the now named respondents as would permit this Authority jurisdiction to enter upon an enquiry as to commission debt owed to him.

[16] The issue of the identity of his employer has already been conclusively determined in earlier proceedings. There is an issue estoppel and the matter cannot be

redetermined so as to found liability against another entity.

[17] I decline to make the orders Mr Maio now seeks. The application is refused and there will be no formal orders.

Leon Robinson
Member of Employment Relations Authority