

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

Determination Number: AA 196/07
File Number: AEA 515/02

BETWEEN JOHN MAIO
 Applicant

AND EFFECTIVE FENCING MANAGEMENT
 LIMITED, now UPSTAIRS LIMITED (in
 liq)
 Respondent

Member of Authority: R A Monaghan

Representatives: John Maio, in person for Applicant
 Michael O'Connor, formerly a director of the Respondent

Submissions received: 31 May 2007 from Applicant
 30 May 2007 from Michael O'Connor

Determination: 29 June 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] John Maio has applied to the Authority for the reopening of its investigation in respect of the following determinations:

Maio v Effective Fencing Management Limited AA 184/03, 19 June 2003

Maio v Effective Fencing Management Limited, AA184A/03, 1 September 2003

Maio & Anor v Effective Fencing Management Limited, AA 131/04, 19 April 2004

[2] The grounds relied on appear to be that the certain contents of decisions of the High Court¹, and in turn the Court of Appeal², amount to information not available to

¹ **Chapman & Anor as liquidators of Upstairs Limited (in liq) v Effective Fencing Limited** 21 April 2005, Associate Judge Faire, CIV 2004-404-5905

² **Effective Fencing Limited v Chapman & Anor as liquidators of Upstairs Limited (in liq)** [2007] NZCA 12

the Authority at the time of its investigations and which should now be taken into account. In particular, the information concerns the identity of the employer. Mr Maio also seems to be relying on an argument that the decisions of the High Court and Court of Appeal show various misrepresentations have been made, including to him when he entered into the employment relationship. He wants the Authority to pursue that matter.

[3] Effective Fencing Management Limited was renamed Upstairs Limited (“UL”) in October 2003. Upstairs Limited went into liquidation in June 2004 and I have amended the entitling to reflect that. I record further that the Authority provided the liquidator with a copy of the present application, and has been awaiting his response. For Mr Maio’s information, before this application can proceed it is necessary to obtain the permission of the liquidator or a court.³ As at the date of this determination no response from the liquidator has been received, and nor has there been any permission for this matter to proceed against the company in liquidation.

[4] Since an issue was raised about the identity of the employer, I heard from Michael O’Connor regarding the present application. Mr O’Connor is the Managing Director of Effective Fencing Limited (“EFL”) – a company which Mr Maio seems to be saying was his true employer – and was a director of UL. For completeness I considered whether some form of reopening of the investigation should go ahead in order to address that matter.

Challenges in the Employment Court

[5] Overall, I consider the following state of affairs determines the present application as far as the Authority is concerned, regardless of the position in relation to the liquidation.

[6] Challenges were filed in the Employment Court against the determinations of the Authority identified above. Not only that, there is also an application before the court for directions that Michael O’Connor and EFL be joined as parties to the challenges. As I understand it the current status of the challenges is that, in August 2006, a call-over conference was adjourned sine die along with a requirement that the

parties indicate the state of the proceedings in the High Court and Court of Appeal. At the time there was nothing before the Authority. Since then the Court of Appeal has issued its decision on the appeal from the High Court, the present application has been filed, and the proceedings in the Employment Court remain adjourned sine die.

[7] Thus, according to my information, the challenges and the application for joinder have not been withdrawn. There is nothing to stop Mr Maio from raising the issue of the identity of the employer in the course of the challenge, or from proceeding with his application for joinder in association with that issue. As for the allegations of misrepresentation, while they may be new allegations there is nothing to prevent Mr Maio from raising them in the course of the challenge either. In effect, Mr Maio wants the Authority to address or reconsider matters which can be addressed in the course of the challenge already properly before the Employment Court. It is neither appropriate nor necessary for the Authority to do that.

[8] Moreover if I were to grant the application to reopen in some form, as well as addressing any associated applications for joinder, the potential arises for the resulting redetermination to again be the subject of a challenge. Matters would be back to where they are now. I do not consider that an efficient or effective process.

[9] For those reasons I decline to reopen the investigation.

R A Monaghan

Member of the Employment Relations Authority

³ Companies Act 1993, s 248(1)(c)