

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Lynda June Marshall (Applicant)

**AND** Bettalife International Limited (First Respondent)  
**AND** Bettalife International (NZ) Limited (in liq) (Second Respondent)

**REPRESENTATIVES** No appearance by Lynda June Marshall  
Richard Alexander for First Respondent

**MEMBER OF AUTHORITY** R A Monaghan

**INVESTIGATION MEETING** 4 July 2005

**DATE OF DETERMINATION** 5 July 2005

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Lynda Marshall says in her statement of problem that she was employed by Bettalife International Limited (“BIL”), and that BIL unjustifiably dismissed her on 5 December 2004. She says, too, that she was owed outstanding wages and holiday pay at the time of her dismissal.

[2] BIL says Ms Marshall’s employer was Bettalife International (NZ) Limited (“BILNZ”). The sole director and registered shareholder of BILNZ, Edgar Alexander, denies Ms Marshall was unjustifiably dismissed. Moreover, BILNZ ceased trading on 17 December 2004 and was placed in liquidation on 11 March 2005. By letter to the Authority dated 15 April 2005, the liquidators advised they did not agree to the commencement or continuation of proceedings against BILNZ (in liquidation).

[3] During a telephone conference on 11 April 2005, in which Ms Marshall participated, the identity of the employer was discussed and I said the matter would be dealt with, along with Ms Marshall’s other concerns, at the Authority’s investigation meeting. The meeting date was also discussed, as was a timetable for the filing of statements of evidence, and all dates were confirmed to the parties in writing.

**Ms Marshall’s failure to attend the investigation meeting**

[4] Ms Marshall filed a written statement of evidence but did not attend the investigation meeting arranged for 4 July 2005. I am satisfied she was aware of the date of the meeting. She did not provide any reason for her failure to attend, so I have proceeded in her absence pursuant to clause 12, Schedule 2 of the Employment Relations Act 2000.

## **The identity of the employer**

[5] Edgar Alexander gave evidence about the circumstances of Ms Marshall's employment.

[6] In 2003 BILNZ suffered a serious trading setback, and Mr Alexander's attempts to ensure the company could continue to trade included search for a new investor. He was successful in negotiating an agreement with an investor, and the investor provided BILNZ with substantial cash injections in the period from approximately June to September 2004. The hope was that BILNZ would recover and continue to trade. Nevertheless BIL was registered in May 2004, so that a trading vehicle would be available in the event that BILNZ failed.

[7] Meanwhile BILNZ had not been processing supplier rebates because of a computer problem. By the time this was addressed a build up had occurred, which the company did not have the capacity to address. Accordingly it created a short term accounts position, and the main task for the incumbent was to carry out the necessary reconciliations and associated tasks. Mr Alexander and the company's operations manager, Neil McCormick, conducted the recruitment process.

[8] Ms Marshall was appointed to the position in May 2004. During a pre-employment interview Mr McCormick held out the possibility of appointment to a permanent position if one became available when the reconciliation work was finished. Mr Alexander told me that was a reference to the possibility, if BILNZ recovered, of an accounts position being created. No such position existed at the time, and Mr McCormick had been doing some of the accounts work.

[9] BILNZ did not recover. In addition to its existing difficulties, by December 2004 it had received a statutory demand under s 289 of the Companies Act 1993, and it ceased trading on 17 December 2004.

[10] Also in December it obtained a tax number for BIL, and BIL commenced trading on 20 December 2004. Richard Alexander is the sole director of BIL, and all of the shares are held by a Bettalife International company apparently registered in the British Virgin Islands. Edgar Alexander retained some involvement in the BIL's operation, but is not now able to participate in its management and told me he intends to return to Australia.

[11] Overall I conclude that BILNZ was Ms Marshall's employer because:

- (a) it recruited her and entered into an employment agreement with her before BIL came into existence;
- (b) it recruited her to carry out a project which fell squarely within its specific needs, and not those of BIL;
- (c) it continued to trade during her employment, while BIL did not trade at all during that period;
- (d) Ms Marshall reported to Mr McCormick and Edgar Alexander, who were both directly associated with BILNZ and not (at that stage) with BIL; and
- (e) it paid her.

[12] Having made that finding as to the identity of the employer, in the normal course of events I would proceed to determine the merits of Ms Marshall's employment relationship problem and BILNZ would be liable in respect of any remedies she obtained. However s 248(1)(c) of the Companies Act prevents a person from commencing or continuing legal proceedings against a company in liquidation unless the liquidator agrees or there is a court order granting such permission. Since neither has happened here, Ms Marshall cannot continue against BILNZ (in liq) and the Authority cannot take her problem any further.

[13] Nevertheless I have some further comments.

### **Money owed to Ms Marshall**

[14] In the written material she filed Ms Marshall says she is owed outstanding wages, holiday pay, and one week's pay in lieu of notice. She also says she was not paid for 3.75 hours' work on a Saturday in July or August 2004. Edgar Alexander says her final pay was calculated as one week's pay in respect of the week's work prior to the week of the termination of her employment, 2 days' pay for time worked in the week of the termination, 1 day's pay in lieu of notice and holiday pay calculated as 6% x \$17,970. Ms Marshall refused to accept that payment.

[15] Accordingly, with the exception of 1 week's pay subsequently credited to her bank account, it seems Ms Marshall has not received her full final payment. She is entitled to 2 days' pay for time worked and not paid for, and holiday pay calculated at 6% of her total gross earnings. For the reasons set out above the Authority can make no orders in that respect, and Ms Marshall should approach the liquidator for those payments.

[16] Further to the allegation of a failure to pay for work not done on a Saturday in July or August, Ms Marshall's time sheets show she worked for 3.75 hours on Saturday 3 July 2004. I cannot tell whether she was paid for that time, but that is also a matter to taken up with the liquidator.

[17] Further to Ms Marshall's entitlement to one week's pay in lieu of notice, I comment briefly on the circumstances in which her employment ended.

[18] By December 2004, Ms Marshall had completed the reconciliations. Since BILNZ was likely to cease trading and BIL did not wish to offer her a permanent position, Edgar Alexander telephoned her on or about 5 December 2004 to advise that her employment was to end. That is when he offered one day's pay in lieu of notice.

[19] BILNZ did not provide Ms Marshall with a written employment agreement, although there was an oral arrangement that her employment would end when the reconciliation was completed. This has implications under s 66 of the Employment Relations Act 2000, as amended by the Employment Relations Amendment Act (No 2) 2004. In all of the circumstances I consider it appropriate at the very least to imply as a term of the parties' employment agreement a requirement that one week's notice of termination of employment be given.

[20] I therefore find Ms Marshall should have been given one week's pay in lieu of notice when her employment ended. Again the Authority cannot make any orders in respect of that matter and it, too, should be taken up with the liquidator if Ms Marshall wishes to pursue it.

**R A Monaghan**  
**Member, Employment Relations Authority**