

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 171/08
5113774

BETWEEN ELIZABETH ANN MULLER
 Applicant

AND BOTANICAL FOOD
 COMPANY PTY LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Applicant, In person
 Aaron Lloyd and Isobel Foote, for Respondent

Investigation Meeting: 3 April 2008

Submissions received: 3, 9, 11, 15 April, 7 and 8 May 2008

Determination: 8 May 2008

DETERMINATION OF THE AUTHORITY AS TO A PRELIMINARY ISSUE

Employment Relationship Problem

[1] By agreement of the parties this determination deals with two preliminary issues; whether Ms Muller's relationship with the respondent was an employment relationship and, if so, what is the governing jurisdiction for resolution of the employment relationship problem.

[2] In the statement of problem Ms Muller says she was employed by Botanical Food Company Limited to perform services for the respondent. She says unpaid monies owed under the employment agreement should be paid by the respondent because:

- (i) Botanical Food Company Limited no longer exists;
- (ii) the respondent was a wholly owned subsidiary of Botanical Food Company Limited;

(iii) the unpaid monies relate to work performed for the respondent.

[3] The respondent says it has never employed Ms Muller. It says it entered a contractual arrangement with Botanical Food Company Limited to provide project management services, the services performed by Ms Muller. The respondent says any obligation lies with Botanical Food Company Limited. In the alternative, the respondent says if it is Ms Muller's employer then the Authority does not have jurisdiction because the employment was based in Queensland and that is the governing jurisdiction.

Identity of employer

[4] Ms Muller was employed to manage a Tauranga food processing business from June 1998 until January 2006 when she agreed to a new role in an associated business.

[5] In an appointment letter dated 17 January 2006 the change in role was described as "*...your position within the Group will be changed so as to assign you full time to Gourmet Garden, with the primary task of Project Manager for the new facility.*" This letter was under the name of Trevor Miles, the managing director of Botanical Food Company Limited and is written on The Botanical Food Company Limited letterhead.

[6] There is no legal entity known as "*the Group*". The term refers to a number of companies in which Mr Miles had an interest. Those companies included the respondent and Botanical Food Company Limited. The respondent was building Gourmet Garden, a herb processing plant in Queensland.

[7] Until mid-2006 the respondent was a wholly owned subsidiary of Botanical Food Company Limited. Mr Miles was the director of Botanical Food Company Limited and chairman of the respondent.

[8] In January 2007 Ms Muller's employment ended; the project management role was completed and she ceased to be paid. However, bonus payments remained outstanding, consistent with the following term set out in the 17 January 2006 letter:

5. As also mentioned in the settlement agreement, you will be entitled to a completion bonus of \$60,000 upon the completion of the project, with the timing at the discretion of Colin. This amount will be paid as a taxable bonus.

[9] The parties agree completion of Ms Muller's project management role did not mean completion of the project.

[10] The "Colin" referred to in the 17 January 2007 letter is Colin Kop, a director of the respondent. Mr Kop gave evidence to the Authority including:

- The respondent contracted with Botanical Food Company Limited to provide project management services;
- Those services were provided by Ms Muller;
- The respondent was not privy to the contractual arrangements between Ms Muller and Botanical Food Company Limited.

[11] On 19 January 2007 Ms Muller emailed Mr Kop directly about the payment of the completion bonus. The email included:

Colin

I never had an expectation of the bonus being paid at the time of completing my work with Botanical – it is absolutely fair and reasonable and expected by me that the bonus would NOT be paid until such time as completion is effected.

...

Progressing a post project claim against GHD [the project engineering company] is clearly outside the project scope from a completion perspective but it is an issue which I am willing to commit to assisting with resolution of in which ever possible way I can.

On this basis I would like to propose a compromise whereby you approve payment of half of the project completion bonus at the time when Ashley has signed off the project works as being complete and that the other half is retained until such time as you are happy that satisfactory resolution GFD claim has been achieved.

I can assure you that half of the bonus remains a substantial amount to me and one that I am motivated to work hard to obtain.

[12] Mr Kop's reply of the same day included:

I note your ongoing commitment to the project and am therefore willing to agree (and therefore ahead of Doug's return to the office) to the compromise proposal on the basis that you have outlined.

[13] Botanical Food Company Limited was no longer in the picture. The business was sold in late January 2007.

[14] Ms Muller continued to assist with completion of the project and prepared a government funding application on behalf of the respondent.

[15] By early March 2007 the project had reached the next stage of completion. On 1 April 2007 Ms Muller's company, Get Stuff Done Limited, generated an invoice for the respondent for payment of \$30,000, described in the invoice as *Payment of 50% of Project Completion Bonus*. The respondent made the payment to Get Stuff Done Limited on 5 April 2007 in accordance with the agreement reached between Ms Muller and Mr Kop on 19 January 2007.

Determination

[16] Ms Muller seeks to substitute the respondent for her former employer Botanical Food Company Limited on the basis that the businesses were closely related and her employment intertwined with the two.

[17] The respondent says that no employment relationship was entered then or earlier between it and Ms Muller. It says the relationship between the respondent and Botanical Food Company Limited was at arms length, the work Ms Muller performed after her employment ended was minimal and undertaken to secure her bonus and, with regard to that work, Ms Muller had promised to perform it prior to termination or undertook it without the respondent's knowledge, to which no benefit accrued.

[18] The evidence shows that Ms Muller was employed by Botanical Food Company Limited until January 2007 when that employment ended. At about this time the shareholding in that company was sold and Ms Muller turned to the respondent regarding the residual bonus issue. Mr Kop then entered discussions with Ms Muller about that bonus and agreed a framework for the payment of at least half that bonus.

[19] I find a relationship was entered between the parties from 19 January 2007. The respondent cannot rely on a triangulated relationship with Ms Muller mediated through Botanical Food Company Limited when it entered direct communications with her concerning the terms of that agreement and reached agreement concerning those conditions.

[20] The next issue to determine is the nature of the relationship between the parties. Ms Muller says this relationship was an employment relationship. That is inconsistent with the invoice which she generated for the respondent in the name of her company and consistent with the contract structure set up the respondent and Botanical Food Company Limited.

[21] For the above reasons I find Ms Muller was not an employee of the respondent. I find Ms Muller's company and the respondent entered a contracting arrangement from 19 January 2007.

Costs

[22] Costs are reserved.

Marija Urlich

Member, Employment Relations Authority