

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 70  
5343757

BETWEEN	MICHAEL WILSON Applicant
AND	DRINNAN ENGINEERING LIMITED Respondent
AND	FAAC NZ LIMITED (FORMERLY AUTOMATIC GATES NEW ZEALAND LIMITED) Party Sought to be Joined

Member of Authority: Philip Cheyne

Representatives: Mark Saunders, Counsel for Applicant  
Jonathan Smith, Counsel for Respondent and party  
sought to be joined

Investigation Meeting: 22 November 2011 at Christchurch

Determination: 18 April 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] On 12 May 2011 Michael Wilson lodged with the Authority a statement of problem setting out his claim of having been unjustifiably dismissed from his employment with Drinnan Engineering Limited (DEL) in December 2010.

[2] As usual the statement of problem was served by the Authority on the nominated respondent. The statement in reply lodged on 26 May 2011 from Drinnan Engineering Limited was to the effect that Mr Wilson had been justifiably dismissed from the employment for redundancy in February 2011.

[3] The parties agreed to attend mediation but the problem was not resolved.

[4] In July 2011 Mr Wilson applied to the Authority to join Automatic Gates New Zealand Limited (AGNZL) as a party to the Authority's investigation on the basis that Mr Wilson under instruction from DEL did work for AGL while being paid by DEL; that AGNZL and DEL's operations were intertwined; and that Mr Wilson was concerned that DEL might dispossess itself of assets so as to avoid any judgment. An amended statement of problem addressing the issue of joinder (and other matters) was lodged with the Authority and served on DEL and AGNZL. In reply DEL maintained its position as Mr Wilson's sole employer and that it had justifiably dismissed him.

[5] Counsel agreed that the Authority should investigate as a preliminary issue whether AGNZL should be joined as a party to Mr Wilson's personal grievance on the basis of AGNZL being his employer at the relevant time. That investigation meeting was in November 2011. Evidence was provided from a number of witnesses and counsel both provided comprehensive submissions. This determination is limited to this preliminary issue.

### **Company structures**

[6] DEL was incorporated in 1980. Grant Drinnan is DEL's managing director. Mr Drinnan and Mrs Drinnan are the directors and shareholders. For many years, DEL operated a general engineering business based in Christchurch. DEL's business closed in August 2011 and it no longer trades although the company remains on the companies register.

[7] AGNZL was incorporated in 1989. Mr Drinnan is the sole director and he and Mrs Drinnan are the sole shareholders. AGNZL changed its name to FAAC NZ Limited in October 2011. Mr Drinnan's evidence is that the change related to permission from an Italian company (FAAC) to use the name in New Zealand, AGNZL having been granted distribution rights by FAAC. Mr Drinnan's evidence is that AGNZL's business remained unchanged. There is no reason to doubt Mr Drinnan's evidence on these points. However, I will continue to refer to the company as AGNZL in this determination.

[8] Mr Drinnan's evidence is that in an attempt to spread his business interests he formed a number of limited liability companies and that, on his accountant's advice, he used company structures to operate his businesses as the most economical and tax efficient method of trading. There is no reason to doubt this evidence. The Companies Office website shows that Mr Drinnan is associated with a number of existing and struck off companies. It reflects Mr Drinnan's evidence that he uses different companies for different business activities, as he is entitled to do.

[9] AGNZL's business involves distributing and selling FAAC automatic gate operation and control systems.

[10] AGNZL first registered with IRD as an employer in May 2011.

### **Mr Wilson's employment**

[11] Mr Wilson first worked for DEL from April 1987 until March 1994. He resigned to work in Australia. On his return from Australia Mr Wilson was re-employed by DEL from January 1997 first as a fitter/welder and was then promoted to the position of workshop manager in early 2003. Mr Wilson remained in that position until his dismissal.

[12] It is common ground that Mr Wilson received remuneration solely from DEL. DEL deducted PAYE tax and otherwise dealt with all employment matters with Mr Wilson.

[13] There is a written employment agreement dated 19 May 2003 between Mr Wilson as employee and DEL as employer. The agreement refers to the employer's business of engineering in Christchurch and Mr Wilson's position as *Supervisor*. This agreement is signed and dated by both Mr Drinnan and Mr Wilson. The agreement does not refer to AGNZL. Mr Wilson told me that there was also a signed agreement in 2005 but I have not been provided with a copy of this document. It is not suggested that it differed materially from the 2003 agreement.

[14] There is some controversy about two 2009 documents. There is an unsigned document dated 17 April 2009 drafted as an employment agreement between DEL and Mr Wilson. It makes no mention of AGNZL. Mr Wilson says that he created the document by using the Department of Labour employment agreement builder. He also says that it was saved on the computer as a generic agreement. However, I note that the heading records it as an agreement between DEL as employer and Mr Wilson as employee. Otherwise, the document was not personalised or even completed.

[15] The second document is in similar form except as follows. It is dated 10 July 2009. It includes information such as the place of employment, hours of work, pay period, notice period and remuneration. The document provided to the Authority includes DEL's logo in several places including at the top of the first page. It also includes in the entitling:

*BETWEEN Drinnan Engineering Ltd/Automatic Gates Ltd  
AND Michael Jason Wilson*

[16] Schedule 3 is a job description which includes:

*OVERALL OBJECTIVE  
To safely and profitably engage in all business of Workshop Manager/Sales  
Engineer for Drinnan Engineering Ltd and Automatic Gates NZ Ltd.*

[17] Mr Wilson's evidence is that this document was the finished draft based on the 17 April 2009 document. It was done at Mr Drinnan's request. He says that he gave the 10 July 2009 printed document to Mr Drinnan who placed it on his desk. Mr Wilson went on to say:

*This was just a draft contract. Things were either going to be added or subtracted. I never had any further discussion with Grant Drinnan after giving it to him. As far as I was concerned I remained covered by my 2005 signed agreement.*

[18] Mr Drinnan's evidence is that the documents look like they were drawn up using a software package owned by DEL. He says that he did not instruct Mr Wilson in 2009 to draw up an employment agreement between himself, DEL and AGNZL and that they never had any discussions about it. In his prepared statement of evidence he says that he did not know about the existence of the 10 July 2009 document until after these issues arose when he searched Mr Wilson's computer for relevant documents. However, in response to a question Mr Drinnan said *I think I found the 2009 agreement on my desk at some time*. If he is correct about this Mr Drinnan's evidence in his prepared statement cannot also be correct. In light of

items of correspondence referred to below and Mr Drinnan's oral evidence I reject Mr Drinnan's prepared statement of evidence on this point. Mr Drinnan must have forgotten that Mr Wilson gave him a draft agreement which he put on his desk.

[19] Mr Wilson says that he took over the day to day running of AGNZL when Grant Welsh left. He says that Mr Welsh was general manger of DEL and AGNZL. Mr Drinnan's evidence is that Mr Welsh was not general manager but became involved in and employed by DEL as the technical sales engineer with a view to buying into the business. He also says that Mr Welsh only ever did the odd customer inquiry for AGNZL and the company's turnover at the time was very modest compared to DEL. I accept Mr Drinnan's evidence on these points as accurate.

[20] When Mr Welsh left DEL Mr Wilson assumed responsibility for responding to inquiries for AGNZL product and services. There are substantial differences in the evidence of Mr Wilson who estimates that he spent between 25% and 40% of his time on AGNZL work and Mr Drinnan who accepted that Mr Wilson recorded a very small amount of time for AGNZL. DEL's work for AGNZL was done on a job card basis with AGNZL treated to some extent like an external client. On any review of the evidence, Mr Wilson spent most of his time by a substantial margin on DEL work unrelated to AGNZL. Since AGNZL did not have any employees at the relevant time, DEL deployed its employees (including but not limited to Mr Wilson) to attend to whatever demand there was for AGNZL product and services. If work of any substance was required DEL treated AGNZL as an external client for invoicing purposes.

### **Submissions for Mr Wilson**

[21] The principle submission is that there was an employment relationship between Mr Wilson and AGNZL as well as with DEL.

[22] I am referred to several items of correspondence from or on behalf of DEL. A letter dated 7 February 2011 refers to Mr Wilson's position as *Workshop Manager/Sales Engineer*, a term used in the 10 July 2009 agreement rather than the 2003 or 2005 agreements. A letter dated 18 February 2011 refers to a six month restraint of trade provision, something contained in the 10 July 2009 agreement but

not previously. A letter dated 14 March 2011 from DEL's solicitors enclosed part of the 10 July 2009 document as *Mr Wilson's employment contract*. There are other items to similar effect. These references to the 10 July 2009 document as the applicable contract are relevant to whether Mr Drinnan's evidence about when he first saw the document is correct but assertions that a document has contractual force do not answer the question whether it does in fact have such force. That must be assessed objectively.

[23] Mr Wilson's evidence is that Mr Drinnan told him in 2010 that AGNZL paid his wages when the engineering work was slow. The context was that Mr Wilson asked whether he could stop doing AGNZL work because he was busy with DEL work. In effect Mr Drinnan told him that the AGNZL work done by DEL was an additional revenue stream that assisted with DEL's profitability. Nothing in this exchange makes any difference to whether Mr Wilson was an employee of AGNZL as well as DEL.

[24] AGNZL's turnover was modest. Unaudited accounts show sales of \$44,021 and \$57,917 to March 2009 and March 2010 respectively. Other information indicates that there were sales of \$44,986 to March 2011. The accounts do not show any wages or salary charges, supporting Mr Drinnan's evidence that AGNZL did not employ anyone until 2011.

[25] I am referred to s.6 of the Employment Relations Act 2000 as to the applicable law concerning the relationship between Mr Wilson and AGNZL. S.6 defines an employee as a person of any age employed by an employer to do any work for hire or reward under a contract of service (emphasis added). When deciding whether a person is employed by another person under a contract of service the Authority must determine the real nature of the relationship. Counsel makes a number of submissions about whether Mr Wilson was a volunteer with respect to AGNZL and about Mr Drinnan exercising control on behalf of DEL and/or AGNZL. With respect, the real question in the present case is whether there was a contract between Mr Wilson and AGNZL. If there was a contract it undoubtedly would have been a contract of service.

[26] Counsel makes submissions that there should not be any evidential burden on Mr Wilson because Mr Drinnan failed to have a signed employment agreement in place despite Mr Wilson drafting the 10 July 2009 agreement. The argument is that AGNZL should not benefit from its failure to comply with its legal obligations so that the 10 July 2009 agreement must be treated as having been signed and prima facie evidence of an employment relationship between Mr Wilson and AGNZL. I do not accept this submission for several reasons. The first difficulty is Mr Wilson's evidence, set out above, that he provided Mr Drinnan with the 10 July 2009 as a draft for further discussion. There was none. This was against the background of an existing long standing employment relationship between Mr Wilson and DEL so more than the presentation of a draft for discussion was required to effect a change such as establishing a contract (whether in substitution or in parallel) between Mr Wilson and a different legal entity. The second difficulty is that there was a signed employment agreement in respect of the employment between Mr Wilson and DEL so it is not correct to say that Mr Drinnan breached any obligation owed to Mr Wilson.

[27] I agree with counsel's submission that the evidence critical about Mr Wilson's work performance is irrelevant for present purposes.

[28] I am referred to *Orakei Group (2007) Ltd v Doherty* [2008] ERNZ 345. The case is helpful as to the proper approach. In particular I note at paragraph [45] the Court said:

*I accept Mr Quigg's submission that in the end what is important is who the employer was at the start of Mr Doherty's employment and whether that employer was ever formally changed by mutual agreement up until Mr Doherty was made redundant.*

[29] Here, there is no doubt that Mr Wilson's employer in 1997 was DEL. I have canvassed the evidence about developments since then but it does not disclose any mutual agreement, express or implied, for Mr Wilson to be employed by AGNZL. It shows no more than Mr Wilson being deployed by DEL to perform AGNZL's work as part of his employment by DEL. However, the substantial majority of Mr Wilson's work was unconnected with AGNZL's business. There was never a contract of any category between Mr Wilson and AGNZL.

[30] If AGNZL was not Mr Wilson's employer (solely or jointly) it should not be joined as a party to his personal grievance claim against DEL.

[31] There is a submission to the effect that the Authority has power to and should lift the corporate veil. The business of DEL has closed. There is nothing to indicate that there has been any transfer of assets (much less an improper transfer) from DEL to AGNZL or another entity to try and avoid some liability to Mr Wilson. I see no grounds for lifting the corporate veil.

### **Conclusion**

[32] I decline to join AGNZL as a party to this problem for the reasons set out above.

[33] Costs are reserved.

[34] Mr Wilson should advise the Authority whether he wishes to progress an investigation into his personal grievance claim against DEL.

Philip Cheyne  
Member of the Employment Relations Authority