

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Robert Martin Antram (Applicant)  
**AND** AFFCO New Zealand Limited (Respondent)  
**REPRESENTATIVES** Alex Hope, Counsel for the Applicant  
Gillian Spry, Counsel for the Respondent  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETING** 26 September 2005  
**SUBMISSIONS RECEIVED** 18 October 2005  
26 October 2005  
22 December 2005  
**DATE OF DETERMINATION**

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

- [1] Mr Antram claims that he is owed the sum of \$59,922.86 as unpaid redundancy compensation. Mr Antram says that this sum represents the shortfall in a redundancy payment due to him. Mr Antram says that when his position was made redundant, and the termination of his employment took effect on 31 May 2004, AFFCO New Zealand Limited (AFFCO) failed to take into account his total years of continuous service with the Company when calculating his redundancy entitlement.
- [2] Mr Antram also claims that he has a personal grievance in that he was disadvantaged in his employment by an unjustifiable action by his employer, namely the failure to recognise his past continuous employment. Mr Antram also claims that he has a further personal grievance because he was unjustifiably dismissed from his employment on 31 May 2004.
- [3] AFFCO says that Mr Antram has received his due entitlement to redundancy payments calculated on his qualifying years of service. AFFCO says that Mr Antram was engaged for a period of time as an independent contractor on a contract for services. Therefore, he was not an employee for that period and hence he did not have the total continuous service that he claims payment for.
- [4] The problem that has arisen here is somewhat unusual in that while both parties accept that they entered into a variety of contracts for the provision of services, the Applicant, Mr Antram, says that those contracts were a sham and that he was in reality, an employee for the total time that he was associated with AFFCO.

## **Background**

- [5] Mr Antram has considerable experience and knowledge within the meat industry having commenced his employment with AFFCO in 1970 as a labourer and worked his way through the ranks to be appointed to the position of General Manager – Operations, in 1986.
- [6] In 1993, AFFCO restructured its business. The evidence of Mr Antram is that his role within the Company was effectively divided up across five product companies, each with its own General Manager. The changes came into effect on 1 October 1993. As it was obvious to Mr Antram, that his position within AFFCO would inevitably cease to exist, he decided that rather than apply for any of the new positions, he would resign. Mr Antram advised the senior management of AFFCO of his intention to resign with effect from 31 December 1993. The evidence of Mr Antram is that because he had chosen to resign, he did not expect to receive a severance or redundancy payment, but he did expect to have his 24 years of service with the Company recognised.
- [7] As a member of, and Trustee/Chairman of the AFFCO Superannuation Fund, Mr Antram was aware of his superannuation entitlements and he made some financial commitments contingent on the superannuation payment he would receive upon the termination of his employment. Mr Antram was committed to a transaction having signed a sale and purchase agreement for a rental property.
- [8] On 27 October 1993, Mr Antram accepted a fixed term employment agreement for the position of Group Manager – Advisor to CEO. The terms of the agreement were effective from 4 October 1993 to 31 December 1993. The agreement provided that:

“By the signing of this Agreement both parties acknowledge that there is a desire for you to be available to provide consultancy services to the Company at the discretion of the Chairman or Chief Executive on such terms as are mutually agreed at the time.”

The agreement also provided that:

“Upon your resignation, as at 31 December 1993, you will receive all payments/entitlements due to you under your conditions of employment including accrued holidays and superannuation benefit. In addition you will receive payment equivalent to nine months salary at your current rate as severance pay.”

- [9] Mr Antram was also given the company vehicle that he drove as consideration for a three year restraint of trade undertaking.

## **Reconsideration of resignation**

- [10] The evidence of Mr Antram is that on or about the second week in December 1993, he engaged in a meeting with the Chairman and Deputy Chairman of the AFFCO Board of Directors. Also present was another person from a banking syndicate. A request was made to Mr Antram to reconsider his resignation - and would he stay on with AFFCO and look after a number of subsidiary companies. Mr Antram says that he advised the Chairman of the Board that while he was interested in the position being offered, he had made a number of financial commitments that were dependant upon him receiving his superannuation payout when ceasing his employment on 31 December 1993. If Mr Antram remained in the employment of AFFCO he would not be able to receive his superannuation payments.
- [11] The further evidence of Mr Antram is that the Chairman of the Board suggested that Mr

Antram could still go ahead with his resignation as planned, and then AFFCO would “re-employ” him as a contractor/consultant. As this proposal suited Mr Antram he accepted it.

### **Engagement as a Consultant**

[12] Consistent with this acceptance, on 18 November 1993, Mr Antram wrote to the Chief Executive Officer of AFFCO, Mr Don Manson. The substance of that letter is:

“You requested that I record what I saw as my requirements if we were to progress the suggestion that I may continue with AFFCO but as a consultant.  
I have endeavoured to do this on the attached pages. Could you please consider same and respond accordingly.”

[13] The “attached pages” set out Mr Antram’s:

#### “Requirements as a consultant.

- I conclude my present employment arrangements with AFFCO 31 December 93’
- At the cessation [sic] of my employment and under the terms and conditions of my employment contract I will receive all monies due to me including superannuation, holiday pay and severance.
- Effective 1 February 1994 I will enter into a contractual arrangement with AFFCO to provide services as a consultant.
- The period of this contract will be effective 1 February 1994 to 31 December 1994 with scope by agreement to extend the period beyond the above dates which will be subject to review and discussion by no later than 30 August 94’.
- During the period of the contract AFFCO will have no responsibility for the following entitlements
  - superannuation
  - holiday payments
  - telephone rentals
  - vehicle or running costs
  - medical benefits
  - death disability cover
  - salary continuance cover
- AFFCO will undertake to “offer” me a minimum of 13 days work in each calendar month and for that work will guarantee the payment of \$13,520 gross per month.
- For employment beyond the 13 day offer AFFCO will pay me at the rate of \$1040 per day or if applicable \$130 per hour.
- In agreeing to the above levels of time and remuneration commitments AFFCO also acknowledge that I may be required to service a consulting role for International Pet Foods. The cost of any such service would be met by I.P.F at an agreed rate to be negotiated between I.P.F and myself.
- Secretarial services, particularly as they pertain to typing will be provided at no cost to myself by the company that I am providing the service for.
- Toll calls and any travel costs incurred by me out side [sic] of the normal business area relating to the company that I am working for will be reimbursed to me by that company.

- I will provide at my expense if deemed necessary any telephones, faxes, answer phones etc required to enable me to carry out my business effectively.
- I will report to and work directly for the CEO in respect of AFFCO and the Board of Directors in respect of I.P.F.
- It is my understanding that my contractual services will include Management Board involvement with the following Company's [sic]/ Divisions
  - International Pet Foods
  - Wanganui Abattoir
  - Trade Air
  - AFFCO Beef
  - AFFCO Lamb
  - AFFCO Leathers
  - AFFCO Livestock
  - AFFCO Meats
  - AFFCO Finance & Treasury"

[14] Mr Manson replied to Mr Antram via a letter dated 7 December 1993. The letter was headed: **"CONSULTANCY CONTRACT"** and went on to say: "I would like to offer you a Consulting Contract with AFFCO New Zealand Limited commencing 1 February 1994." The contract is largely as proposed by Mr Antram, as above. I note that the respective payments to Mr Antram are \$13,520 + GST and \$1,040 + GST. Mr Manson concludes his letter:

"You are free to provide consulting service [sic] to International Pet Foods on any basis that you may negotiate with the Board of that company."

[15] The evidence of Mr Antram is that upon taking up his duties as a Consultant, he occupied the office that he had been in before his resignation took effect, without having to clear it out. The Chairman of the Board also used the office from time to time.

[16] Mr Antram registered a company (19 January 1994) – R M Antram & Associates. He says that this was for the purposes of his "contract arrangements."

### **Evidence of further contracts**

[17] By way of a memorandum dated 24 August 2004, Mr Antram conveyed to Mr Manson that he wished to renew the contract with AFFCO to provide consultancy services. Mr Antram went into some detail about the time that was being expended in regard to his work for AFFCO and International Pet Foods (IPF) respectively. Mr Antram set out what he saw as being a suitable time involvement with AFFCO and IPF and concluded:

"Obviously if either IPF or AFFCO do not wish to renew on a contractual basis my involvement then I must seek employment elsewhere as one without the other will not, in my opinion, provide me with an adequate level of remuneration as a self employed consultant."

[18] Mr Manson replied on 8 September 1994 offering an extension to the **"CONSULTANCY CONTRACT"** on the same terms as previously with one variation, - the guaranteed days of work per month would be reduced from 13 to 6. The contract had an expiry date of 31 December 1995.

[19] The evidence of Mr Antram is that he was not offered a new contract with AFFCO New

Zealand Limited for 1996 and was left to negotiate directly with the subsidiary companies. Mr Antram says that he did this and maintained his hours with IPF and with Wanganui Abattoirs. He was also the Chairman of the Board of Wanganui Abattoir Limited.

[20] However, I note the content of a letter dated 3 October 1997 from Mr Manson to Mr Antram. The letter is addressed to “R M Antram & Associates” and confirms a conversation that took place between the two men on 30 September 1997; [“during which we reviewed and clarified the level of service required by the AFFCO Group of Companies from you and your company in the foreseeable future.”

Mr Manson confirmed that the agreement for Mr Antram to provide services to IPF would continue until 31 March 1998, or an earlier date should the business be sold or discontinued beforehand. “In particular, you will perform general management duties for 21/2 days per week at a per diem rate of \$560.00 plus GST. Payment will be made by IPF Limited.”

[21] It was also confirmed that Mr Antram continued as a director of Wanganui Abattoir Limited and be paid director’s fees of \$12,000 per annum from 1 January 1998.

[22] The letter concluded:

“Your contract with AFFCO New Zealand to provide consultancy services for six days per month will terminate on 31 December 1997. Where agreed with individual Group General Managers, you will provide consultancy services on an as required basis at the rate of \$560.00 per day plus GST.”

### **Evidence of contracts with AFFCO subsidiaries**

[23] Produced to the Authority is a contract dated 1 February 1996. The parties to the contract are: International Pet Foods Limited (the “Contractee”) and R M Antram and Associates (the “Contractor”).

Clause 5 of the contract provides that:

“The Contractor will be free to provide services to any other party during the term of this Agreement provided that party does not carry on a business anywhere in the world in competition, direct or otherwise, with that of the Contractee.”

Then, at Clause 6 of the contract it is provided that:

“The Contractor acknowledges that, as a contractor, he has no authority to commit International Pet Foods Limited to any contracts, nor do or cause anything to be done that is not in the ordinary course of the Contractee’s business. The parties agree that this Agreement will not give rise to a partnership or employment relationship between them.”

[24] This contract was renewed on 14 December 1998 and again on 2 February 2000. There is common terminology used throughout all three contracts.

[25] There is a further document before the Authority dated 26 March 1998. It begins:

“This document records the contractual agreement between R.M. Antram & Associates Ltd (the “Contractor”) and AFFCO Foods Group (the “Company”) in relation to the provision of on-going services by the Contractor as set out herein.”

The services to be provided to the Company relate to the provision of an audit programme to verify AFFCO New Zealand’s compliance to the Quality Mark.

Clause 11 of the document provides that:

“The signing of this contract does not prohibit the Contractor from carrying out other projects or assignments within the AFFCO Group. Such events would be subject to separate contractual arrangements.”

### **A new employment agreement**

- [26] On 6 August 2001, Mr Antram signed an employment agreement with AFFCO New Zealand Limited. He was employed as the General Manager of International Pet Foods effective from 1 August 2001. The evidence of Mr Antram is that “in 2001” he was approached by the Chairman of the AFFCO Board, Mr Sam Lewis and was advised by Mr Lewis that because all of the income that Mr Antram received was derived from an AFFCO source, the Inland Revenue Department had advised that AFFCO must deduct PAYE from his consultancy fees. Mr Antram says that it was then agreed that he should go back onto a salary, hence the coming into force of the employment agreement.
- [27] However, the evidence of Mr Lewis is that he has no recollection of having a discussion with Mr Antram as claimed. Mr Lewis goes further and says that he does not believe that this conversation took place. The further evidence of Mr Lewis is that the reason for Mr Antram becoming an employee again was that there had been a general “clampdown” on the use of consultants within AFFCO for economical reasons and AFFCO required Mr Antram to more accountable for IPF and this was not possible unless he was an employee.
- [28] It is not necessary for the Authority to determine which version of the above evidence is most probable. It is enough that both parties concur that an employment agreement came into existence. Whilst Mr Antram was employed in the position of General Manager of International Pet Foods Limited, it is accepted that the employment relationship was between Mr Antram and AFFCO New Zealand Limited.

### **What was the contractual status of Mr Antram from 1 February 1994 until 31 July 2001?**

- [29] Mr Antram acknowledges that while he entered into various agreements to provide services as an independent contractor to AFFCO New Zealand Limited, and its subsidiary companies, those contracts were, in Mr Antram’s words, “a sham of convenience.” Mr Antram says that the contracts for him to provide services as a consultant were entered into simply to satisfy AFFCO’s desire to have him retained as an employee, and his desire to obtain his superannuation benefits.
- [30] On the other hand, AFFCO says that Mr Antram was definitely engaged as an independent consultant and it was always understood by all concerned that this was his status.
- [31] There is also the additional factor that while the cited respondent in this matter is AFFCO New Zealand Limited, Mr Antram also provided and charged for his services to International Pet Foods Limited, Landcorp Meats Limited, The Wanganui Abattoir Company Limited, AFFCO Foods Group and AFFCO Holdings Limited. While the latter entities, apart from Landcorp Meats Limited,<sup>1</sup> are subsidiaries of AFFCO New Zealand Limited, they are or were, legal entities in their own right and the evidence shows that in addition to AFFCO New Zealand Limited, Mr Antram had contractual arrangements with International Pet Foods

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<sup>1</sup> The Authority understands that Landcorp Meats Limited supplied meat to Wanganui Abattoir and had no connection to AFFCO.

Limited and AFFCO Foods Group. The point being, that if Mr Antram's position is accepted, AFFCO New Zealand Limited is the only legal entity that could have been his employer and then, if so, most probably only until 31 December 1997.<sup>2</sup>

[32] However, the substance of the evidence available to the Authority does not support the position advanced by Mr Antram. That evidence points clearly to a conclusion that he was indeed in business on his own account and that this was the means by which he was able to meet his requirements to access his superannuation benefits, and at the same time, provide his ongoing expertise and knowledge to both AFFCO New Zealand Limited and its subsidiary companies.

The particular evidence that points to that conclusion is:

- (a) The specific nature of the various contracts that were entered into and the unambiguous language used.
- (b) The formation of a registered company – R M Antram and Associates Limited.
- (c) The financial records of R M Antram And Associates Limited, including the *Statements of Financial Performance* and the invoice books. The records clearly show that Mr Antram was operating a consultancy business and obtaining the taxation benefits associated with off-setting income related costs, such as operating and administration expenses and depreciation. He also provided his own transport and other business hardware.
- (d) Mr Antram's company was registered for GST. The invoices he sent have a GST component and they were generated by Mr Antram as the proprietor of the business.
- (e) Mr Antram was free to contract his services to other businesses and was free to conduct his business affairs as he wished, provided he met his contractual undertakings to the respective AFFCO companies.
- (f) Mr Antram never received or claimed any of the statutory entitlements, such as holiday payments and special leave that an employee would receive. Indeed, his own proposal of 18 November 1993 made it expressly clear that AFFCO would have no responsibility for such entitlements.

[33] While Mr Antram would appear to agree with all of the above points, he also says regardless of all of that, the contractual arrangements were all a sham and it was always intended that his employment would remain continuous. I am unable to accept that proposition. I find that that at all relevant times Mr Antram intended to and did, provide his services by being in business as a consultant on his own account.

[34] In reaching that conclusion I have also taken into account those factors that could be taken to point to an employment relationship such as the use of the title "General Manager" and his integration into the respective businesses, particularly International Pet Foods Limited. Nonetheless, I find that the substance of the evidence can only lead to the conclusion that Mr Antram's employment with AFFCO terminated on 31 December 1993. At that point he had nearly 24 years of continuous employment with the Company.

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<sup>2</sup> See paragraph 22 of this determination.

- [35] I find that from 1 February 1994, Mr Antram was in business on his own account providing services to AFFCO and its subsidiary companies. The business relationship continued until approximately the end of July 2001. Mr Antram resumed an employment relationship with AFFCO as General Manager of International Pet Foods from 1 August 2001 and continued his employment until 31 May 2004, when following the sale of International Pet Foods, Mr Antram had his employment terminated on the grounds of redundancy.
- [36] My impression of Mr Antram is that he is an experienced and capable manager and is most familiar with business operations and structures and that he was happy to be engaged as a consultant and hence continue to maintain a healthy income stream from AFFCO while also obtaining the accumulated benefits from his superannuation scheme. Indeed, it seems that there were mutual benefits for both parties. Mr Antram is to be commended for his astuteness in being able to arrange his affairs as he did and I found him to be earnest in his belief as to his claims, but the weight of the evidence pertaining to his contractual arrangements does not support that belief. I find that he did not have a continuous employment relationship with AFFCO as he claims.

## **Determination**

- [37] For the reasons given above, I find that Mr Antram is not entitled to be paid the sum of \$59,922.86 as further redundancy compensation as he did not have the necessary continuous service as an employee to qualify, hence Mr Antram has no entitlement to any further sum of money related his service from 1970 to 1993, or from 1994 to 2004.
- [38] In regard to the further claims of unjustified disadvantage and unjustified dismissal advanced for Mr Antram, I heard no evidence from Mr Antram concerning these claims and no submissions were made on his behalf. Indeed, I gained the impression that Mr Antram was not seriously pursuing these claims, but if I am mistaken about that, I now record that there is no evidence that would support either of those claims and I now dismiss them on that basis.
- [39] I also find that while Mr Antram was very close to having an entitlement to a payment for 25 years service with AFFCO (April 1970 to December 1993), but given my findings above he does not quite qualify. In any event, Mr Antram is barred from pursuing any claims emanating from that period by s4 of the Limitation Act 1950.

## **Costs**

Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 28 days of the date of this determination.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**