

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 83/10  
5276039

BETWEEN JOSHUA GOLDING and  
SARAH HAMMOD  
Applicants

A N D ALAN PYE  
Respondent

Member of Authority: Helen Doyle  
Representatives: Tim Twomey, Counsel for Applicant  
Jeff Goldstein, Counsel for Respondent  
Investigation Meeting: 11 February 2010  
Submissions Received: On the day of investigation meeting  
Determination: 6 April 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Joshua Golding and Sarah Hammond have three employment relationship problems for determination by the Authority they say arose as a result of their employment as Managers of St Omer Lodge in Marlborough between 1 May 2008 and August 2009. They are as follows:

- The identity of their employer;
- Whether they were subjected to unjustified actions that caused them disadvantage in their employment;
- Whether they were unjustifiably dismissed.

[2] Alan Pye in his statement in reply and application to strike out does not accept that he ever employed Mr Golding and Ms Hammond when they managed St Omer

Lodge. He says they were employed by a company, St Omer Resort Limited of which he is a director.

[3] After the statement in reply and application to strike out had been lodged, the Authority held a telephone conference with Mr Twomey and Mr Goldstein on 13 October 2009. Two alternative paths forward were discussed. The first was that Mr Twomey obtain instructions from his clients as to whether the statement of problem be amended to reflect alternative respondents, Mr Pye and St Omer Resort Limited. The second was that the Authority deals with the issue as to whether Mr Pye was the employer of Mr Golding and Ms Hammond as a preliminary matter.

[4] Mr Twomey advised that his clients did not want to amend the application before the Authority and wanted a date to investigate whether Mr Pye was Mr Golding's and Ms Hammond's employer.

[5] The matter proceeded therefore on the basis of the information in the statement of problem and statement in reply and attached documents. Mr Goldstein handed in two very brief statements of evidence on the day in question and some additional documents. The Authority heard evidence about the commencement of the employment and considered the relevant documents provided and heard submissions from counsel.

### **The issue**

[6] The sole issue for the Authority to determine is the first employment problem that is, who employed Mr Golding and Ms Hammond.

### **Commencement of the relationship that led to employment**

[7] The owner of St Omer Lodge which provides tourist accommodation at Kenepuru, Marlborough Sounds is the Alan Pye Family Trust. Mr Pye is a trustee and beneficiary of the Trust.

[8] St Omer Resort Limited was incorporated on 15 February 2008. Mr Pye said that the company was to undertake the management of St Omer Lodge and employ Mr Golding and Ms Hammond.

[9] Mr Golding and Ms Hammond were never provided with a written employment agreement as required under the Employment Relations Act 2000.

[10] Ann Palmer undertook work for a number of companies of which Mr Pye was a director, including, after its incorporation on 15 February 2008, St Omer Resort Limited. Ms Palmer knew Ms Hammond before she commenced employment at the Lodge.

[11] In or about December 2007 Ms Palmer telephoned Ms Hammond and advised her that Mr Pye had purchased St Omer Lodge in the Marlborough Sounds and they were looking for staff for the Lodge. Following that discussion, both Ms Hammond and Mr Golding and Mr Pye and Ms Palmer met on two further occasions before employment commenced.

[12] There was some dispute about the exact date of the first meeting. Ms Palmer and Mr Pye relied on entries made in Ms Palmer's diary and both said the dates for the two meetings were Sunday 24 February and Thursday 27 March 2008. Mr Golding and Ms Hammond did not necessarily agree with those dates. Ms Palmer did not have her diary available with her on the day of investigation meeting. She agreed however to bring it into the Authority offices at an arranged time the day after the investigation meeting where I was, along with Mr Twomey, given the opportunity to check the entries and obtain copies of the entries that related to those particular dates. Ms Palmer keeps a very detailed diary.

[13] In all the circumstances, I accept that the diary is the best evidence about when the meetings took place and therefore I accept Ms Palmer's evidence about the meeting dates, which is confirmed by the diary entries.

### **Sunday 24 February 2008**

[14] I find that at this meeting the discussion about St Omer Lodge was fairly general. Ms Hammond recalled being shown a portfolio of St Omer Lodge and some pictures. She was aware that settlement of the property would be completed on 1 May 2008 and along with Mr Golding was interested in the position managing the Lodge.

[15] Mr Pye said that he advised Mr Golding and Ms Hammond that a company had been set up to run the Lodge. That was not accepted by Ms Hammond and Mr Golding. Mr Pye explained in his evidence that he does not employ anyone personally but has several companies. Under questioning from Mr Twomey he said that he had been a director of several companies over the span of about 50 years and put the number of companies at about 200.

[16] I find it is more likely, given the general discussion at this meeting, there was no specific mention of the company. I do not find however that an offer of employment was made at the meeting. It was an opportunity to discuss St Omer Lodge and ascertain if there was any interest from Ms Hammond and Mr Golding about the possibility of employment at the Lodge.

[17] After this meeting Ms Hammond and Mr Golding went to visit the Lodge at the Marlborough Sounds and stayed overnight.

[18] Following the visit both Ms Hammond and Mr Golding confirmed with Ms Palmer that they were interested in a position managing the Lodge.

[19] I find that there was then a further meeting between Ms Hammond, Mr Golding, Mr Pye and Ms Palmer on 27 March 2008.

#### **Thursday 27 March 2008**

[20] This meeting took place in a café in Darfield. There was discussion at this meeting about whether Ms Hammond and Mr Golding would be interested in a salary or being paid out of the profit in the business. Ms Hammond and Mr Golding recall the possibility of a joint venture being discussed, but were not interested in any arrangement other than as employees.

[21] I find there was also some discussion about salary at the meetings, although no finalisation of the salary to be paid at that time.

[22] Mr Pye denied that he ever held himself out as the proposed employer of Ms Hammond and Mr Golding at that meeting. He said that when there was discussion about an alternative to an employee arrangement it was along the lines that there could be a profit share arrangement in the company, St Omer Resort Limited.

[23] Ms Palmer said that when she referred to the company she, in all likelihood, only referred to St Omer, but she did record Mr Pye making reference to the company. Considering that matter carefully I conclude it more likely that Mr Pye did make reference to the company although I accept that this may have not been by its full name. I have formed this conclusion because the company had only recently been formed for the purpose I accept of managing St Omer Lodge and to employ Mr Golding and Ms Hammond. I also find that any discussion about profit share would

logically relate to the company. I find it less likely therefore that Mr Pye held himself out as the person with whom Mr Golding and Ms Hammond would be forming an employment relationship with at that meeting.

### **Salary discussions**

[24] After that meeting Mr Golding had a further discussion with Mr Pye about the salary and there was a reference made to a salary for both him and Ms Hammond of \$60,000.

[25] Ms Palmer then telephoned one or both of the applicants and suggested to them that Mr Pye may well have overstepped the mark with his salary offer. An email followed from Ms Palmer suggesting the figure of \$120,000 per annum was a little excessive, taking into account the live-in situation. There was a suggestion of a salary for Mr Golding of \$45,000 and for Ms Hammond of \$35,000 per annum.

[26] There was no reference in the email to a company although the email confirmed that there was still an opportunity for Ms Hammond and Mr Golding should they wish to become involved in the financial side of the business to be in receipt of a share of any profits.

[27] It was unclear when the positions were actually accepted by Mr Golding and Ms Hammond. Ms Palmer and Mr Pye were of the view that the offer had been made during the meeting of 27 March 2008 and accepted subject to finalisation of the salary level. Mr Golding and Ms Hammond, however, considered that it was not until they arrived at the Lodge on 1 May 2008 that there was acceptance of the employment offer.

[28] Given the fact that St Omer Resort Limited was incorporated before both meetings and the date of commencement of employment that matter assumes less importance.

[29] Mr Golding and Ms Hammond arrived to commence their employment on 1 May at different times. Ms Hammond was delayed and arrived later in the day on the 27th because she was obtaining a manager's certificate in Blenheim. I was not provided with a copy of that certificate. I find in all likelihood there was a handover and discussions that took place with Mr Golding and Ms Hammond about a variety of initial matters. I accept as inevitable there would have been a discussion about the

account to charge for services and supplies to the Lodge. Services and supplies to St Omer Lodge were paid from the St Omer Resort Limited bank account.

[30] Ms Hammond accepted that some, but certainly not all of these accounts, would have been sent to St Omer Lodge. Many of these, I accept, were sent directly to the registered office of St Omer Resort Limited for payment. It is clear from the accounts I was provided with that suppliers of food, general goods and services to St Omer Lodge were aware they were dealing with St Omer Resort Limited. None of the accounts referred to Mr Pye.

[31] Mr Pye had no further contact or communication with Mr Golding or Ms Hammond after 1 May 2008. During their employment when it was necessary to do so they communicated with Ms Palmer.

[32] Mr Golding and Ms Hammond said they never received any pay slips. Two were produced at the Authority's investigation meeting, which were headed *St Omer Resort Limited*. There was no reason for me not to accept Mr Golding's and Ms Hammond's evidence that they did not see these pay slips.

[33] Wages were paid by automatic payment from a bank account in the name of St Omer Resort Limited into Mr Golding's and Ms Hammond's bank accounts. They were recorded in their bank accounts as being payments made by St Omer Resort.

[34] A letter dated 25 January 2010 from the Inland Revenue Department to St Omer Resort Limited confirms that St Omer Resort Limited was registered as an employer from 1 May 2008 to 31 August 2009 and that the monthly schedules filed for this period included two employees Ms Hammond and Mr Golding. I accept it is likely that that when Ms Hammond and Mr Golding completed relevant Inland Revenue Department documents including a form to opt out of Kiwi Saver, the name of the employer was not filled in when Mr Golding and Ms Hammond filled in the relevant employee details.

[35] Mr Golding and Ms Hammond said they remained throughout their employment of the view that they were employed by Mr Pye who owned and operated the business. Mr Golding in fact said it was not until a written warning was sent to them in or about July 2009 headed *St Omer Resort Limited* that he was aware of that company.

[36] Mr Golding and Ms Hammond's employment was terminated in or about August 2009. A letter raising a personal grievance dated 23 July 2009 was forwarded to the directors of St Omer Resort Limited with respect to an alleged unjustified warning and the threat as described in that letter of dismissal. There was a response to that letter on 6 August 2009 from a firm of solicitors instructed by St Omer Resort Limited. The personal grievances raised in the letter of 23 July 2009 were not accepted and the letter further advised that St Omer Lodge was being placed on the market for sale and that the business had closed down because it was unable to sustain ongoing substantial losses as a result of poor income and large outgoing costs.

[37] On 21 August 2009 there was a further letter sent on behalf of the applicants by their solicitor. This letter was sent to Mr A Pye and in terms of the change from the earlier letter of the identity of the employer the letter stated:

*When we sent our letter to St Omer Resort Limited on 23 July 2009, we had not had an opportunity to meet with our clients and we assumed that the company was their employer when Sarah and Joshua sent us a copy of the written warning from St Omer Resort Limited. We note that Joshua and Sarah's response on 15 July 2009 was not addressed to St Omer Resort Limited.*

For completeness the 15 July 2009 letter from Mr Golding and Ms Hammond was written in response to the warning and was addressed to St Omer Resort.

### **Determination**

[38] The onus of establishing on the balance of probabilities that Mr Pye was their employer is on Mr Golding and Ms Hammond - *Colosimo v. Parker* [2007] 8 NZELC 98,622.

[39] In *Colosimo* Judge Perkins stated in para.[30]:

*Much has been made in this case of the fact that Mr Parker was never made aware that Taffy's Bar Limited was the employer. However, the real issue is whether Mr Colosimo ever held himself out to be the employer and if so, the circumstances which would entitle the Court to say he personally entered into binding legal relations with Mr Parker. While it is desirable that the true identity of the employer should be made known to the employee at the outset, that unfortunately is not always the case. That is so in the present case. The Court is then placed in the position of having to make an objective assessment.*

[40] *Colosimo* has some similarities to this matter. In that case the employee also maintained, and the Court accepted, that he was never aware the company was his employer. There was, however, in *Colosimo* contemporaneous documentation which the Court concluded confirmed the company paid the employee's wages, deducted PAYE, accounted to the Inland Revenue Department and in all respects carried out the functions and performed the responsibilities required in law as the employer.

[41] I am required to objectively assess in this case who would an independent but knowledgeable observer have said was Mr Golding and Ms Hammond's employer when they commenced employment – *Mehta v Elliott (Labour Inspector)* [2003] 1 ERNZ 451 at p 458 to 459.

[42] Mr Golding and Ms Hammond say that they were employed by Mr Pye. It is clear however that St Omer Resort Limited had been incorporated by the time of the first meeting between the parties in late February 2008. I am satisfied that it was so incorporated for the purpose of managing St Omer Lodge and with the intention of employing any staff. All supplies and services were paid from the company account for the running of the lodge as were Mr Golding and Ms Hammond's wages. I have found it less likely in circumstances where there was discussion during the second March 2008 meeting, albeit briefly, of the possibility of a profit share in the business that Mr Pye held himself out personally as Mr Golding and Ms Hammond's employer. Inland Revenue Department records confirm that Mr Golding and Ms Hammond were employed by the company and that the company deducted PAYE from their wages. Mr Pye also after 1 May 2008 had nothing further to do with Mr Golding and Ms Hammond on a day to day basis after they commenced employment.

[43] I am also of the view that the identity of their employer was not something that really concerned Ms Hammond and Mr Golding leading up to or during their employment. Mr Twomey may well have raised in the first letter the personal grievance against the company because instructions were given at a distance. It was nevertheless clear from the evidence that before that letter was sent it was confirmed as appropriate by Mr Golding and/or Ms Hammond. This followed on from Ms Hammond and Mr Golding not taking any issue to the identity of their employer when there was a warning given to them in the name of St Omer Resort Limited dated 13 July 2009.

[44] When I consider all the factors including the records of the Inland Revenue Department, the payment of Mr Golding and Ms Hammond from St Omer Resort Limited's bank account, the lack of contact with Mr Pye after 1 May 2008 and the payment of all services and supplies from the St Omer Resort Limited account, I find that it is more probable than not that Ms Hammond and Mr Golding were employed by St Omer Resort Limited rather than Alan Pye personally.

[45] In conclusion, therefore, I find the true employer of Ms Hammond and Mr Golding was St Omer Resort Limited from the commencement of employment until termination. The proceedings against Mr Pye therefore are dismissed.

### **Costs**

[46] I reserve the issue of costs although in doing so note the approach taken to costs in *Colosimo*.

Helen Doyle  
Member of the Employment Relations Authority