

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 557
5426961

BETWEEN

GREG HARRINGTON
Applicant

A N D

FLAVOUR CREATIONS PTY
LIMITED
First Respondent

BERNADETTE ERIKSEN
Second Respondent

Member of Authority: Rachel Larmer

Representatives: Claire Mansell and Matthew Beattie, Counsel for
Applicant
Shan Wilson, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 18 November 2013 from Applicant
25 November 2013 from Respondent
02 December 2013 from Applicant

Date of Determination: 06 December 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Harrington claims that he was employed by Flavour Creations Pty Limited (Flavour Creations) from 05 August 2012 until 21 June 2013 as the New Zealand Business Manager with responsibility for sales in New Zealand. Ms Bernadette Eriksen is the Managing Director of Flavour Creations. Mr Harrington reported to Mr Sean Gleeson, Flavour Creation's National Sales Manager.

[2] Mr Harrington claims he was subject to harassment and bullying from Ms Eriksen and Mr Gleeson which breached Flavour Creations good faith obligations

under the Employment Relations Act 2000 (the Act) and its duty to provide a safe workplace under the Health and Safety in Employment Act 1992 (HSEA).

[3] Flavour Creations terminated Mr Harrington's services on 21 June 2013. He claims that the termination of his employment was a substantively and procedurally unjustified dismissal. Mr Harrington also claims that Ms Eriksen wilfully aided and abetted a breach of his employment agreement by failing to deal with him in good faith and by failing to provide a safe working environment as required by s.6 of the HSEA.

[4] Flavour Creations says the Authority does not have jurisdiction to investigate Mr Harrington's claims because he was an independent contractor, not an employee. The jurisdiction issue will be dealt with at a preliminary investigation meeting which is to be scheduled with the parties.

[5] In the meantime Flavour Creations applies to have Ms Eriksen struck out as a party to these proceedings on the basis that at all material times she was acting as its employee. Flavour Creations also denies Mr Harrington's claims of bullying and harassment, breaches of good faith and failure to provide a safe workplace. It denies he was unjustifiably dismissed.

[6] Flavour Creations says Ms Eriksen should be struck out as a party to the proceedings on the basis that she is not personally responsible for and is not personally liable for Mr Harrington's health and safety in the workplace under the HSEA, that is she was not a party to the contractual arrangement between Mr Harrington and Flavour Creations, and that she was not in an employment relationship with Mr Harrington.

[7] Mr Harrington opposes the strike out application.

Outcome

[8] Mr Harrington is seeking that a penalty be imposed on Ms Eriksen personally for aiding and abetting Flavour Creation's alleged breach of his employment agreement.

[9] The Authority has not had an opportunity to hear or review any evidence about Mr Harrington's claims against either party. It is therefore too early for the Authority

to be able to conclude that there is no legitimate claim to be investigated against Ms Eriksen personally.

[10] Finally I note that if the jurisdiction issue is resolved in Flavour Creation's favour so he is not found to be an employee, then Mr Harrington will not be able to proceed against either party.

[11] I decline Flavour Creation's application to have Ms Eriksen struck out as a party to these proceedings.

Costs

[12] Costs are reserved and will be dealt with once the substantive issues have been resolved.

Rachel Larmer
Member of the Employment Relations Authority