

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 10/08
5111049

BETWEEN

EMMA HENDERSON
Applicant

AND

ACACIA EMPLOYMENT
SERVICES LIMITED
First Respondent

MOMENTUM MEDIA
LIMITED
Second Respondent

Member of Authority: R A Monaghan

Representatives: Emma Henderson, in Person
Stephan Bosman, Counsel for Respondents

Telephone conference: 4 January 2008

Determination: 15 January 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Emma Henderson has applied for orders for the payment of outstanding wages, holiday pay and commission following the termination of her employment. The matters addressed and the orders to be made in this determination were discussed in a conference call between the parties on 4 January 2008.

Matters arising from the application as filed

1. The identity of the employer and joinder of party

[2] The Authority makes orders for the payment of wages and holiday pay against employers, and cannot make such orders against a person or organisation who is not a party to the relevant employment relationship.

[3] Here the statement of problem cited only Acacia Employment Services Limited (“AESL”) as the employer party, and Ms Henderson filed a written employment agreement also citing AESL as the employer. However a further document which Ms Henderson filed appeared to raise an issue about whether another company, Momentum Media Limited (“MML”), was the employer. MML has two directors, both of whom are also among the directors of AESL. MML’s shareholder is a third company Acacia Media Holdings Limited (“AMHL”). AMHL and AESL have the same directors and shareholders.

[4] Ms Henderson was employed in a business trading as M & V Creative. I was told MML operated that business, and that AESL was, in effect, a management company and employed the applicants. Its only assets were the contracts it had to supply staff to MML and to another company. Both MML and the other company have ceased trading.

[5] Management companies are not uncommon phenomena, and it may be that AESL was correctly cited as the only employer. Similarly, though, it is not unknown for an investigation of the detail of the operation of a management company to result in a lifting of the corporate veil¹ or a finding that, for other reasons, the true employer is an organisation other than the management company.

[6] I have formed no conclusion on the matter, but merely raised the identity of the employer as an issue that may require investigation. In the circumstances disclosed by the ensuing discussion I asked counsel whether both AESL and MML could be cited as the employer parties to any order made in respect of the monies owed. He subsequently sought instructions from both companies and advised of their consent to that proposal.

[7] Accordingly MML is joined as a respondent party to this application for the purposes of the orders I will make.

2. Wages and holiday pay owed to Ms Henderson

¹ The classic example of this in an employment situation is found in **NZ Seamen’s IUOW & Ors v Shipping Corporation of New Zealand Limited** [1989] 1 NZILR 6.

[8] Ms Henderson seeks the payment of wages and holiday pay, as well as commission. Her employment agreement provided for the payment of commission at 5% of all personal sales. She has filed a document headed 'Sales by Rep Detail October 2007' which lists total sales of \$52,501.44. Five percent of that sum is \$2,625.07.

[9] Section 8 of the Holidays Act 2003 includes commission payments in the definition of 'ordinary weekly pay' where the payments are a regular part of the employee's pay. Section 14 of the Act includes commission payments in the definition of 'gross earnings'. Since I have not been addressed on the matter leave is reserved to reopen it if necessary, but the material available to me indicates the commission payments attract holiday pay and that should be reflected in the order made in Ms Henderson's favour.

[10] The companies' agreement to the making of awards against them was expressed to be on the basis that the companies' financial position would not allow for the amount claimed by Ms Henderson to be challenged. I understand the reference to a challenge to the amount claimed as a reference to a dispute over whether certain sales qualified as 'personal sales'. I understand, too, the matter is not being pursued. Otherwise AESL and MML agreed to awards being made against them in the amounts Ms Henderson claimed.

3. The financial position of the companies

[11] As mentioned, counsel advised that MML and the second company contracting with AESL for the services of staff have ceased trading, with a flow on effect for AESL. The companies have not been placed in liquidation because there have not been funds available to pay a liquidator, although that may change. Statutory demands for payment have been or are to be served, including a demand from the IRD. Proceedings are expected to flow from the response to those demands. AMHL, too, has significant debts.

[12] That state of affairs has implications for Ms Henderson's ability to obtain the fruits of the orders she seeks. Some of the matters raised regarding the availability of

assets capable of being used to meet the obligations to pay are better raised in enforcement proceedings should such proceedings be commenced. These matters raise further legal issues and I have suggested that advice be sought on them in association with any enforcement proceedings.

Orders for payment

[13] Against that background I make the following orders by consent:

[14] AESL and MML, jointly and severally, are ordered to pay to Ms Henderson:

- (a) \$1,996.77 (gross) in respect of outstanding wages and holiday pay; and
- (b) \$2,625.07 (gross) plus holiday pay on that sum in respect of commission.

R A Monaghan

Member of the Employment Relations Authority