IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 139/10
5157623

	BETWEEN	DEAN HOPPER Applicant
	AND	ABOVE GROUND LIMITED trading as SOULSCAPE Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Jeffrey Poole for Respondent
Investigation Meeting:	23 September 2009
Determination:	25 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Dean Hopper says he was employed as a business development manager by Above Ground Limited (AGL) on 4 February 2009. He seeks six weeks' wages, allowances for phone and car costs and two weeks redundancy pay which he says he is owed after his employment was terminated on 11 March 2009.

[2] Mr Hopper says he signed a "*terms of employment*" document with Steve Foley whom he understood to be acting on AGL's behalf at the time.

[3] AGL's director Jeff Poole says Mr Foley was engaged as a consultant to the company but was never authorised to employ Mr Hopper on AGL's behalf. Mr Poole says he made plain to Mr Hopper by no later than 18 February that he was not AGL's employee after discovering only that day that Mr Hopper believed Mr Foley had been authorised to make an employment agreement on the company's behalf.

The legal framework

[4] AGL is liable for the costs of ending an employment relationship with Mr Hopper if that relationship was entered into by an agent acting with its actual or apparent authority. That apparent authority – also referred to as ostensible authority – is regarded by the law as existing if AGL put Mr Foley in a position where he seemed to be authorised to act on its behalf or it appeared to accept particular arrangements it knew that he had made on its behalf.

[5] The legal principles have been summarised in this way:

> *"Ostensible authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation. The principal in these circumstances is estopped from denying that actual authority existed. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured the transactions arising out of it. Ostensible general authority can, however, never arise where the contractor knows that the agent's authority is limited so as to exclude entering into transactions of the type in question, and so cannot have relied on any contrary representation by the principal."*[1]

[6] The potential effect on AGL is identified in this doctrine stated in a nineteenth century case:

> *" … [W]here one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that other person is about to act on that behalf, then, unless he interposes, he will, in general, be estopped [prevented] from disputing the agency, though in fact no agency really existed."*[2]

The issues

[7] The issues for the Authority to determine are:

(i) whether Mr Foley's actions in negotiating terms of employment and signing an agreement with Mr Hopper are binding on AGL; and

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[1] *Armagas Ltd v Mundogas SA* [1986] AC 717 per Lord Keith at 777 followed in *Building Traces Union v Ebert Bros* [1991] 3 ERNZ 1004 at 1013 (EC, Goddard CJ).
[2] *Pole v Leask* [1861-73] All ER Rep 535, 514 per Lord Cranworth LC cited in *Building Trades Union*, above, at 1007.

(ii) if so, whether the employment relationship ended on 18 February 2009 when Mr Poole spoke to Mr Hopper or on 11 March 2009 when Mr Foley told Mr Hopper that his "*contract*" with AGL was "*over*" and "*gone*"; and

(iii) whether AGL owes Mr Hopper any wages or other payments?

The investigation

[8] The investigation meeting was set down after AGL had not complied with two directions to mediation – on 15 May and 3 August 2009. Numerous attempts by the mediation service failed because Mr Poole insisted the matter was something for Mr Foley to deal with but Mr Foley had no authority to represent or settle matters on behalf of AGL.

[9] Mr Foley was due to travel overseas on business on the day of the investigation meeting. He agreed to attend an interview with the Authority member on the day before. The interview was recorded and played at the investigation meeting.

[10] Mr Hopper and Mr Poole attended the investigation meeting. Under oath they each answered questions, had an opportunity to ask additional questions and provided an oral closing summary of their respective positions.

The business background

[11] From the evidence of Mr Hopper, Mr Foley and Mr Poole, I find the following facts regarding the business context in which this matter arose.

[12] Mr Poole met Mr Foley in 2008 when he was seeking advice about developing his business, which provided landscaping services and employed four staff. The business had operated through a company called Soul Holdings Limited that eventually went into liquidation on 27 February 2009.

[13] In December 2008 Mr Poole had AGL registered as a company. He was its sole director. The shares were held by him, his wife and another company in which

he and Mrs Poole were the shareholders. From that time the landscaping business, trading as 'Soulscape', operated through AGL.

[14] Around this time Mr Foley was engaged as a consultant. He and Mr Poole had talked about a proposal for Mr Foley to invest in the business. It was a proposal which never came to fruition.

[15] Mr Hopper met Mr Foley through a relative in January 2009. Mr Foley told him of a job opportunity as a business development manager with AGL. In an email on 27 January 2009, Mr Foley described AGL as "*a business that I am in partnership with a guy by the name of Jeff Poole*". Mr Foley also told Mr Hopper he was not a shareholder and director of the business at that stage as he did not want to be implicated in the upcoming liquidation of Soul Holdings Limited.

[16] Neither statement was strictly correct. Mr Foley was not a partner in the business in any real legal or financial sense. And he could not legally have been a director of AGL at that time in any event as he was subject to a prohibition under s385 of the Companies Act 1993. He appeared on the Companies Office register of banned directors and managers with a prohibition running through until 6 July 2009.

[17] In an exchange of emails in late January Mr Foley and Mr Hopper discussed a salary package of $65,000 with a car, phone, laptop and performance bonuses for a business development manager job with AGL. On 4 February they met and Mr Foley signed a document prepared by Mr Hopper setting out those details and headed "*Terms of Employment*" with the employer identified as AGL. That day Mr Foley sent Mr Poole an email in which he referred to Mr Hopper as being "*on board*" and describing his role as "*to help grow the business*".

[18] Mr Poole was not introduced to Mr Hopper until 9 February when he then made arrangements for him to visit one of the landscaping jobs and to meet with a client about a quote.

[19] It was not until a meeting with Mr Hopper on 18 February that Mr Poole discovered Mr Hopper understood he was directly employed by AGL rather than operating as a consultant to the business with Mr Foley. Mr Poole made clear at that

meeting – at which Mr Foley was not present – that no employment agreement had been authorised by him.

[20] Mr Hopper insisted that he had agreed terms of employment with Mr Foley whom he understood was acting on AGL's behalf. He says he continued to carry out work for the company until 11 March when Mr Foley said the contract was over.

Are Mr Foley's actions binding on AGL?

[21] Mr Foley accepted in his evidence to the Authority that he was at no stage directly authorised by Mr Poole to employ Mr Hopper. At best he described the arrangement as "*vague*".

[22] The question for the Authority is whether – although Mr Foley clearly exceeded whatever authority he may have had as a potential investor and a consultant on developing AGL's business – Mr Poole knew or acquiesced to those employment arrangements being made with Mr Hopper or otherwise engaged in conduct that suggested Mr Foley had the authority to employ Mr Hopper. If so, AGL would be 'estopped' or prevented from denying its responsibility for representations made to Mr Hopper by Mr Foley.

[23] Two aspects of AGL's conduct, through Mr Poole's actions, arguably point to such a conclusion. Firstly, Mr Hopper was asked to visit a potential client about a quote and Mr Poole knew he was contacting suppliers about costings of materials supplied to the firm. Secondly, when Mr Foley sought payment of $2500 to Mr Hopper in March Mr Poole offered to pay him $1000 for work done.

[24] I find neither aspect establishes the sufficiently "*precise and unambiguous*" representation necessary to create an estoppel.[3] The work on quotes and material costs is what might be expected by a consultant looking at business systems and practice in order to advise on improvements. It does not necessarily indicate Mr Poole must have known Mr Hopper thought he was acting as an employee. Mr Foley's reference to Mr Hopper being "*on board*" does not mean Mr Poole knew from

[3] See authorities cited at *Building Trades Union*, above, at 1016.

that point Mr Hopper was purportedly engaged as an employee. It is a phrase that could apply to a consultant working business plans.

[25] Similarly the offer to pay Mr Hopper $1000 in March was, I accept, an attempt to resolve a dispute by paying for work done as a consultant rather than a tacit acknowledgement of an employment relationship.

[26] It is clear that Mr Poole was unequivocal in his denial of any employment relationship when he and Mr Hopper met on 18 February, some 14 days after Mr Hopper believed he had started work for AGL. It was also difficult to discern from Mr Hopper's evidence what tangible work he believed he had done for AGL in that period, far less the subsequent period through to the day of 11 March when Mr Foley told him that the "*contract*" was "*over*". Apart from one visit to an AGL client, he had collated price information from some suppliers of landscaping materials onto a spreadsheet.

Determination

[27] Returning to the issues identified for determination, for the reasons given above I find:

(i) Mr Hopper has failed to meet his burden of proof in establishing that the statements or conduct of AGL through Mr Poole were such that he was entitled to rely on the authority which Mr Foley purported to exercise on the company's behalf. To the extent Mr Hopper subject to misrepresentation on which he innocently relied, Mr Foley was at fault and not AGL. It is to Mr Foley and not AGL that Mr Hopper must look if there is any compensation he can legitimately claim.

(ii) No employment relationship existed between Mr Hopper and AGL.

(iii) AGL owes no wages or other payments to Mr Hopper.

Costs

[28] No costs were sought by AGL. It was represented by its director Jeff Poole throughout this matter. I do not know if the company incurred legal expenses in

replying to Mr Hopper's claim but if so I would be unlikely to make any order requiring him to make a contribution towards those costs. I take that view because AGL did not comply with two directions to mediation. In part this was because Mr Poole was distracted for some of that time by the understandable difficulty of one of his children being seriously ill. However it is also the case that attending mediation earlier may well have disposed of this matter with considerably less drama and delay. Any costs are to lie where they fall.

Robin Arthur
Member of the Employment Relations Authority