

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 204
5370320

BETWEEN	REUBEN MILLER Applicant
A N D	SPRINGFREE NEW ZEALAND LIMITED First Respondent
A N D	DONGGUAN SHENG HUI FITNESS EQUIPMENT CO LIMITED Second Respondent

Member of Authority: Helen Doyle

Representatives: Glenn Cooper, Counsel for Applicant
Christy Corlett, Counsel for Respondents

Investigation meeting: 16 August 2012 at Christchurch

Date of Determination: 21 September 2012

DETERMINATION OF THE AUTHORITY ON PRELIMINARY ISSUES

Employment relationship problem

[1] Reuben Miller has lodged a claim that he was disadvantaged in his employment by the unjustified actions of the first and second respondents. Further, he says that he was unjustifiably constructively dismissed. Mr Miller seeks compensation, a penalty, payment on a pro rata basis of an annual hardship allowance, a bonus and annual performance bonus together with payment of annual leave and costs. Mr Miller says that he was employed jointly by the first and second respondents.

[2] Springfree New Zealand Limited says that Mr Miller was not its employee after April 2009. After that time it says Mr Miller was employed by Dongguan Sheng

Hui Fitness Equipment Co. Limited (DGSB). I shall refer to Springfree New Zealand Limited from hereon as SFNZ.

[3] DGSB lodged an appearance under protest to jurisdiction and says that New Zealand is not the appropriate jurisdiction to hear this matter for the following reasons:

- (a) DGSB is an incorporated company under the laws of the Peoples' Republic of China. It is registered in China and does not carry out any business in New Zealand;
- (b) DGSB does not submit to the jurisdiction of the New Zealand Courts;
- (c) The New Zealand Employment Relations Authority is *forum non conveniens*;
- (d) The applicant was employed in China by a Chinese company, was granted a working visa and signed a Chinese employment agreement;
- (e) The applicant's employment has its closest and most real connection with China.

[4] It was agreed with counsel for the applicant and for the first and second respondents that the Authority would determine the preliminary issues about the identity of Mr Miller's employer and the protest to jurisdiction filed by DGSB.

The investigation process

[5] The Authority held an investigation meeting on 16 August 2012. Prior to the meeting, Mr Miller and Ralph Douglas Hill (Doug), a director of both SFNZ and DGSB, provided a statement of evidence about the preliminary matters.

[6] On the day of the investigation meeting, Mr Miller was in China but was connected for the whole of the investigation meeting by telephone. He made an affirmation and answered questions from the Authority and Ms Corlett about his view of the preliminary issues in his statement of evidence. Mr Hill gave evidence in person at the investigation meeting. At the conclusion of the evidence the Authority heard submissions.

The issues

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

- (a) Was Mr Miller employed by DGSH or SFNZ and DGSH jointly;
- (b) Does the Authority have jurisdiction to hear the claim against DGSH or would that claim be required to be brought in the Peoples' Republic of China?

Was Mr Miller employed by DGSH or SFNZ and DGSH jointly?

[8] Springfree trampolines are a unique brand of trampolines. As the name suggests, it does not use springs. The technology for the trampolines was invented in New Zealand at the University of Canterbury and commercialised by the University business unit, Canterprise, where Mr Hill worked.

[9] I shall set out the various companies who are involved in Springfree trampolines and Mr Miller's involvement with Springfree trampolines as an engineer from 2004 through to when he resigned in November 2011.

[10] Board and Batten International Inc (Board and Batten), a Cayman Islands company, owns all of the Springfree intellectual property and acquired the exclusive worldwide licence to distribute Springfree trampolines from Canterprise in 2002.

[11] SET Technology Inc (SET), a Cayman Islands based company, bought the licence to use the intellectual property from Board and Batten and the right to commercialisation of the trampoline project including product design and development from about 2003.

[12] The first and largest distributor of Springfree trampolines is a Canadian company Springfree Trampolines Inc (SFT). The President and CEO of SFT is Steven Holmes who is a first cousin of Mr Hill.

[13] SFNZ was incorporated on 6 May 2008 and has its registered office in Christchurch. Mr Hill described the company as a minor distributor of Springfree trampolines covering New Zealand, South East Asia, the Middle East and Eastern Europe.

[14] DGSB is a wholly owned subsidiary of SFNZ and is the entity through which SFNZ runs its China-based manufacturing operations. A foreign company cannot establish in China as a legal presence to manufacture unless it first establishes a Chinese subsidiary.

[15] Mr Miller started with Springfree trampolines in June 2004 as an engineer while he was still at university undertaking his Masters degree at the invitation of Mr Hill. This was before the incorporation of SFNZ. There is a dispute whether Mr Miller was employed or engaged between 2004 and 2008 and by whom. The only written document in 2004 about the terms of employment or engagement was a one page written statement headed up *Contract Statement* dated 9 June 2004. The document provides that Mr Miller *is to be employed by Springfree Trampolines in Xiamen, China as an engineer for a period from 12 June to 12 July*. I have taken that to be a one month period in 2004 but the relationship then continued. Mr Miller agreed that the statement confirmed what he was to receive when he went to work in China for his pay rate, daily allowance, accommodation and bonus. Although it described Mr Miller as employed by Springfree trampolines there was no evidence to suggest Springfree trampolines is a legal entity. Mr Hill says that Mr Miller was contracted by SET from when he started in 2004. There is no dispute Mr Miller was paid by SET.

[16] In early 2005 Mr Miller was advised, I find more likely than not by Mr Hill, to set up a company to enable payments to continue to be made to him from SET. It is likely that Mr Hill paid for some accountancy advice for Mr Miller at that time. Mr Miller set up a company and payments continued to be made from SET to that company. Although it is Mr Miller's view that he was employed throughout from 2004 by SFNZ I find that unlikely. SFNZ was not incorporated until 2008 and it is less likely from 2005 given the payments to Mr Miller's company that Mr Miller was an employee. I cannot be satisfied Mr Miller saw, before proceedings were lodged with the Authority, the consultancy agreement produced by Mr Hill between Reuben Miller Engineering Limited and SET and Broad and Batten dated 1 January 2005. It was never signed on behalf of Reuben Miller Engineering Limited.

[17] There is a lack of clarity about who Mr Miller was either employed or engaged by between 2004 and 2008 when he worked at Springfree trampolines. Mr Miller thought for example he was establishing a company simply for ease of payment by

SET and that it suited Mr Hill and Mr Holmes for him to be paid by SET. There was though consistency about who Mr Miller dealt with from 2004. For day-to-day issues Mr Miller dealt primarily with Mr Hill but also with Mr Holmes.

[18] After SFNZ was incorporated on 6 May 2008, Mr Miller became an employee of the company. The pay records record that his first payment from SFNZ was received on 8 October 2008. Mr Miller never entered into a written employment agreement with SFNZ.

[19] There were manufacturing problems with the American owned factory in China and a need to establish a reliable factory. Mr Hill proposed to SET which had controlled the supply and manufacture of rods to the factory in China that he establish a new Chinese manufacturing operation. SET agreed that Mr Hill would establish a new Chinese manufacturing operation. In return, SET gave the Chinese company exclusive global manufacturing contracts for Springfree trampolines. DGSH was formed.

[20] From 2004 Mr Miller had made regular visits to China and this continued while he was employed by SFNZ to provide engineering services. In early 2009, Mr Miller became tired of the travel and the impact it was having on his family. There were several discussions with Mr Hill including a proposal that he relocate to China and work as an engineer at the DGSH factory. This was agreed to.

[21] In late April 2009 Mr Miller went to China and worked at the DGSH factory as an engineer.

[22] On 9 November 2011, Mr Miller resigned from his employment by way of email sent to Mr Hill and Mr Holmes advising amongst other matters that he could no longer work for "Springfree".

[23] Following Mr Miller's resignation in November 2011, he was provided with a number of draft documents on which he relies as showing that the first and second respondent are inextricably intertwined. SFNZ does not accept that interpretation can be placed on them.

[24] Mr Miller then lodged proceedings in the Authority against both SFNZ and DGSH.

Identity of the employer

[25] Section 6 of the Employment Relations Act 2000 (the Act) defines *employee*. The Authority must determine *the real nature of the relationship* between the parties. It must consider all relevant matters, including any matters that indicate the intention of the persons to the relationship and not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[26] Mr Miller maintains that he was employed jointly by both DGSH and SFNZ. The Employment Court judgment in *Orakei Group (2007) Ltd v. Doherty* [2008] ERNZ 345, confirms that a person may be employed in the same employment by two or more companies but more is required than two unrelated employers. There must be a sufficient degree of relationship between the legal entities contended to have the status of joint employers. Common control by the joint employers is an element which is usually found where there is a joint employment relationship. In *Orakei* it was held that the fact there was the same director was the source of common control over each company as it affected the employee's employment.

[27] In *Orakei* it was held that the onus is on the employee, on the balance of probabilities to identify the employer at the outset of the employment. The role of the Authority is to make an objective assessment of the evidence about the identity of Mr Miller's employer including whether SFNZ was a joint employer with DGSG.

[28] I was also referred to the Authority's determination of *Hutton & 113 others v. Provencocadmus Ltd (in receivership)* [2011] NZERA Auckland 482 and the referral in that case to the decision of the Federal Court of Australia in *Gothard, In the Matter of AFG Pty Ltd (in receivership and in liquidation) v. Davey* [2010] FCA 1163 as providing relevant principles of law in determining the identity of a disputed employer.

[29] Mr Miller was employed from in or about October 2008 by SFNZ although prior to that had been associated with the Springfree Trampolines from mid 2004. The terms and conditions of his employment with SFNZ were never reduced to writing. As part of his employment with SFNZ he performed on a regular and ongoing basis a large proportion of his engineering duties in China. There were discussions and agreement with Mr Hill from early February 2009 that Mr Miller

would relocate to China and work in the factory operated by SFNZ's wholly owned subsidiary company DGSH.

[30] Mr Miller's ability to perform the engineering work was well known to Mr Hill. Mr Miller negotiated terms with Mr Hill, the director of both SFNZ and DGSH, a relocation package to China with compensation and remuneration.

[31] An overview of the package agreed to is found in a document dated 25 February 2009. It records Mr Miller was to receive a salary of NZ \$160,000 per year together with a monthly allowance of RMB 6,000. He would also receive a yearly payment of \$10,000 for New Zealand associated expenses relating to flights and student loan and an annual performance bonus of NZ\$15,000.

[32] Mr Miller's total remuneration package was a significant increase to that which he had received in New Zealand. It was recognised that he would need to be compensated as his wife would have to leave her job in New Zealand and would struggle to find a similarly paid position in China. He did not want to be worse off by relocating. Mr Miller filed an IR866 with the New Zealand Inland Revenue Department and became a tax non-resident for New Zealand. He said that in doing that he was relying on advice received from Mr Hill's tax accountant. I accept that evidence. Emphasis is placed by Ms Corlett on the filing of the IR866. It is a factor to be considered although not on its own determinative of the relationship.

[33] Mr Miller received what SFNZ regard as his final pay cheque on 20 April 2009 before he went to China. SFNZ say that that was the end of Mr Miller's employment with the company and thereafter he was employed by DGSH. Mr Miller asked Mr Hill for payment to him at this time of his annual leave that was outstanding but Mr Hill was not prepared to make the payment for financial reasons at that stage. The three week leave entitlement simply carried over to DGSH - email dated 23 September 2011. That is a factor that could support either the employment relationship between SFNZ and Mr Miller did not end and/or the intertwined relationship between SFNZ and DGSH.

[34] There is a dispute as to whether Mr Miller actually resigned from SFNZ or not in April 2009. Mr Hill said in his evidence that he did. Mr Miller said that he never resigned from SFNZ. There was no documentary evidence to support a resignation and I am not satisfied there was a formal resignation by Mr Miller from SFNZ.

[35] Mr Miller signed an employment contract with DGSH on 11 May 2009. It was common ground that he did so for work visa/residency purposes. When proceedings were lodged in the Authority, a copy of the DGSH employment contract was translated into English. I am not satisfied that anyone translated the contract for Mr Miller at the time he signed it. I accept as likely that he couldn't read much of what was written in the contract.

[36] The employment contract with DGSH did not contain the same terms as those negotiated between Mr Hill and Mr Miller prior to his starting work at DGSH. The DGSH contract is specified to be for a fixed term for the period 16 April 2009 to 15 April 2010 whereas the 25 February 2009 memorandum proposed a term of three years. The DGSH agreement provides that Mr Miller was to receive RMB10,000 per month. That was only a portion of Mr Miller's actual remuneration, about New Zealand \$2000 and a monthly living allowance of RMB 6000. There is no mention of any bonus, hardship allowance, paid flights or the balance of the salary. Mr Hill in his evidence said that there was a reference in the DGSH contract to the ability to have to supplemental agreements signed for other issues. My reading of the translated agreement was that if there were such agreements they should have been attached to the main contract – page 13 under *Others*.

[37] Ms Corlett correctly in submissions referred to execution of a contract often being significant in establishing intention at the outset of employment with respect to the employer - *Provincocadmus Ltd*. The reality of the contractual arrangements with Mr Miller was I find on the basis put by Mr Hill in an email to Mr Miller and copied to Mr Holmes dated 18 October 2011. Mr Hill stated in his email *the terms of the current arrangement are contained in various correspondence between us, vs any kind of formal contract. The weakness of this as you note is that there are lots of details that would be in a contract that have been left out – mainly as a result of oversight and expediency*. I do not conclude in the circumstances of this case that the signing of the contract with DGSH is conclusive evidence that the intention was for Mr Miller to be employed by DGSH alone. The contract was signed to obtain a work visa/residency. It did not reflect the agreement negotiated earlier between Mr Hill and Mr Miller and objectively assessed little, if any, reliance was placed on the DGSH contract in terms of what the arrangements were at the material time Mr Miller was working with DGSH.

[38] After the signing of the DGSH contract remuneration and annual leave entitlements for Mr Miller were renegotiated with Mr Hill and set out in a further memorandum into which Mr Holmes was copied dated 3 August 2010 for the period 30 August 2010 to 7 July 2012.

[39] I will use the agreed August 2010 remuneration package to show how the various components of the package were paid to Mr Miller when he worked for DGSH. The payments were split between the companies in a similar way prior to August 2010:

- DGSH paid RMB18,000 per month as partial salary to Mr Miller's Chinese bank account.
- SET paid the balance of the agreed salary package of \$90,000 US per annum one month in advance and one in arrears into Mr Miller's Hong Kong bank account.
- DGSH paid RMB 14,000 per month to Mr Miller's Chinese bank account to cover housing in Dongguan.
- SFNZ paid \$5000 per annum hardship equivalent to compensate for loss of student loan interest free benefit to Mr Miller's Hong Kong bank account.
- SFNZ paid a bonus of up to NZ \$15,000 per annum to Mr Miller's Hong Kong bank account.
- SFNZ paid for 2 return economy flights from Hong Kong to Christchurch per annum for Mr Miller and family.
- SET paid for Insurance.

[40] There were three different companies contributing towards payment of Mr Miller whilst he was working for DGSH. Payment of an employee by another company is not always conclusive evidence that it was the employer. It is for the companies to decide who pays what. The payment of bonuses though, the full amount of which was at risk, by SFNZ goes to support the close association and relationship between it and DGSH. Mr Hill as director of both SFNZ and DGSH determined the amount of Mr Miller's at risk bonus for his work at DGSH and that amount was then paid by SFNZ.

[41] Throughout the time with DGSH Mr Miller continued to be under the control of Mr Hill and Mr Holmes. Mr Hill said that when he talked to or emailed Mr Miller at DGSH he was doing so as a director of DGSH. Mr Miller accepted that that could have been so when questioned by Ms Corlett. Objectively assessed I am not satisfied a clear separation would have been apparent. I record in emails Mr Hill's address was usually the SFNZ one and Mr Miller's the DGSH address. As to why Mr Holmes continued to be involved with Mr Miller, Mr Hill said that Mr Holmes was a *deemed director* of DGSH by agreement. He explained that Mr Holmes had made a personal loan to Mr Hill to set up DGSH and that whilst that was outstanding it was agreed he would have the rights of a *deemed director*. I am not satisfied Mr Miller understood this connection. I find that the control of Mr Miller continued as it had done from the time Mr Miller started with Springfree trampolines to when he worked at DGSH.

[42] If Mr Miller proposed taking leave, then he generally confirmed that with the office manager Kim at SFNZ in Christchurch by way of a leave application form and/or discussed with Mr Hill.

[43] In or about September 2011 some issues arose about annual and sick leave. Mr Miller in an email dated 13 September 2011 noted that Mr Hill had mentioned a few months earlier that *he would send a standard employment agreement after some discussion regarding confusion over sick leave*. Mr Hill in response provided Mr Miller with the latest version of the SFNZ employment agreement and said in an email dated 23 September 2011 about leave – *I have understood that you are operating under the same terms as employees here in NZ....* Mr Miller then asked Mr Hill for some amendments to the clauses in the agreement.

[44] Mr Hill said in his evidence that he sent the SFNZ agreement for comparative purposes and at no time advised that any contract would be entered into with SFNZ. It was simply sent to provide an overview of the leave provisions. In terms of operating under the same terms as employees in New Zealand he said that Mr Miller never wanted to be worse off than he had been when working in New Zealand. Mr Hill was concerned that some of the 2011 communication with Mr Miller was after Mr Miller had taken legal advice and that he was ambushed or set up. In assessing the evidence I am alive to the importance of not focusing unduly on matters for which there may be a perfectly valid explanation but rather objectively assessing the evidence as a whole. I find that the sending of the SFNZ employment agreement

to Mr Miller as a basis for future negotiation of terms and conditions supports some common managerial/operational control about Mr Miller's employment from SFNZ and DGSH.

[45] In terms of any ambush I note that Mr Miller in an email dated 18 March 2010 that predated the legal advice sent to Mr Holmes and Mr Hill referred to having worked for Springfree for over 6 years. Even though SFNZ was not incorporated until 2008 six years from 2004 included the almost one year at DGSH when the email was sent.

[46] Mr Miller in an article produced by Mr Hill to support that Mr Miller knew he was working solely for DGSH said; *The first 4 years I worked for Springfree I travelled between Xiamen and Christchurch, but in 2009 I came over permanently to work for the Chinese company which has set up to manufacture here in Dongguan.* I am not satisfied that that part of the article supports that Mr Miller did not still regard himself as employed by SFNZ or the wider Springfree group as opposed to simply DGSH.

[47] Mr Miller was provided power of attorney dated 21 September 2010 to sign customs documents. The authorisation document was signed for and on behalf of both DGSH and Springfree. Mr Hill said that Mr Miller was only authorised to sign on his behalf as director of DGSH and not Springfree. I accept that Mr Hill could limit Mr Miller's powers to sign as a director of DGSH. Mr Miller could not recall if he ever had to sign for such documents. Nevertheless what can be taken from the document is the close and interlinked relationship between DGSH and SFNZ.

[48] When Mr Miller worked in China he requested an iPad for business purposes. It was agreed with Mr Hill that Mr Miller could purchase the iPad for business use and be reimbursed. He was reimbursed by SFNZ who included the iPad in its asset register. Mr Hill explained that it was unlikely that DGSH would ever use one and he thought that SFNZ could use it after Mr Miller's contract with DGSH finished. Whilst I accept Mr Hill's evidence this is an example in my view of the relationship between DGSH and SFNZ. Mr Hill as director of both companies could make a decision that one company reimburse Mr Miller for an iPad that he would use in the work of another company.

[49] After Mr Miller resigned a reference written by Mr Hill referred to Mr Miller having been associated with the Springfree project for over seven years. Mr Hill signed it as Managing Director of SFNZ and Director of DGSH. Mr Miller was also provided with some draft documents after resignation. These were a termination agreement between DGSH and Mr Miller, a memorandum on terminating the employment contract describing the employer as DGSH and a settlement agreement between SFNZ and Mr Miller. The draft settlement agreement between SFNZ and Mr Miller contained restraint of trade and non solicitation covenants. The draft documents again support the close relationship between DGSH and SFNZ and some common control over Mr Miller.

[50] I have objectively considered the evidence in determining the identity of the employer including the large number of documents. DGSH is a wholly owned subsidiary of SFNZ. Mr Miller had from 2004 spent a lot of time in China working as an engineer and this continued after the incorporation of SFNZ and its employment of Mr Miller in 2008. Mr Miller then relocated to China from 2009 and worked at DGSH. I have not found that he formally resigned and leave was carried across. DGSH and SFNZ had a closely associated purpose with the manufacture and distribution of Springfree trampolines. The source of control over Mr Miller's employment continued unchanged whilst he worked for DGSH. Mr Hill in particular, but also Mr Holmes, had common operational control over both SFNZ and DGSH and over Mr Miller's employment. They made decisions about Mr Miller's remuneration and other matters that affected his employment. Mr Miller communicated with Mr Hill and Mr Holmes about any concerns in the role. Mr Miller recorded leave with SFNZ's office and SFNZ's draft employment agreement was used as a basis for negotiation of terms and conditions of employment.

Determination of identity of the Employer

[51] I find for all the reasons above that SFNZ was the joint employer with DGSH of Mr Miller.

Does the Authority have jurisdiction to hear the claim against DGSH or would that claim be required to be brought in the Peoples' Republic of China?

[52] The contract Mr Miller had with DGSH which has been translated into English provides on page 3 that it is under the PRC Labour Law and relevant national and

provincial regulation. It also contains a dispute provision. This involves initially a mediation committee. One of the parties can request a labour arbitration committee for arbitration. If that fails the party may bring the case to a people's court.

[53] DGSB say that the proper governing law of its contract with Mr Miller is the Peoples Republic of China (PRC).

[54] The Employment Court in *Clifford v Rentokil Limited* [1995] 1 ERNZ 407 held that the rules for determining the proper law of contract are:

- a. By express selection;
- b. By inferred selection from the circumstances;
- c. Judicial determination of the system of law with which a transaction has the closest and most real connection.

[55] The contract signed by Mr Miller with DGSB expressly provides that the governing law is the PRC. The only matter then to consider is whether Mr Miller has expressly selected the proper law of the contract when the contents of the contract were not translated for him before he signed it.

[56] I am not satisfied that the fact Mr Miller did not read the contract in circumstances where he provided it to officials in China in order for work visa/residency purposes prevents a finding that there was an express selection by the parties that the proper law of the contract is the PRC.

[57] There was an express intention by Mr Miller and DGSB that the governing law of the contract was that of the PRC. I do not find that the Employment Relations Authority has jurisdiction to hear Mr Miller's claims against DGSB.

Determination with respect to Jurisdiction

[58] The Authority does not have jurisdiction to hear the claim against DGSB.

Next Step

[59] Mr Miller's claim against SFNZ remains a matter before the Authority. The file will be given now to another member of the Authority and a further telephone conference will take place with a view to progressing that matter.

Costs

[60] I will reserve the issue of costs. Both parties have had a measure of success however the proceedings against DGSH are at an end and costs could be determined at this stage in respect of that matter. It may be that agreement is able to be reached failing which Ms Corlett has until 12 October to lodge and serve submissions as to costs and Mr Cooper has until 2 November 2012 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority