IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 51/10
5165205

BETWEEN	STEVEN JOHN PHILLIPS First Applicant	
	DEAN GEORGE PHILLIPS Second Applicant	
AND	CRITERION GROUP LIMITED Respondent	

Member of Authority:	Alastair Dumbleton
Representatives:	Carrick Courtney, advocate for Applicants Richard Upton, counsel for Respondent
Investigation Meeting:	18 September 2009
Submissions Received	24 and 28 September 2009
Determination:	8 February 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants, Mr Steven Phillips and Mr Dean Phillips, claim that they agreed with two directors of the respondent, Criterion Group Ltd, to enter into an employment relationship but that a few days later the existence of any such agreement was denied by Mr Brian Smaill and Mr Walter Smaill, the directors.

[2] The Phillips lodged an application with the Authority seeking as a resolution of their problem payment to each of them of $300,000 in total. This comprises salary for a two year period, compensation for the loss of a share of profits in the business the Phillips claim they agreed to be employed in, and compensation for hurt feelings, humiliation and distress.

[3] Until the beginning of 2009 the Phillips had been co-directors and co-owners of Kitchenhouse Ltd, a manufacturer and seller of kitchens and a business they started and had built up over some years. In February 2009 the company went into receivership.

[4] While exploring ways of preserving or restarting the business the Phillips made contact with the Smaills. For about 40 years the Smaills have been involved in the Criterion business which more recently has become owned and operated by Criterion Group Ltd. The Smaills are directors of that company, Brian Smaill being the CEO and Walter Smaill the Executive Director.

[5] From time to time in the last few years Criterion Group Ltd has bought other companies and continued to run all or part of their businesses.

[6] The Phillips claim that interest shown by the Smaills in the Kitchenhouse business grew to a point where, on 13 March 2009 at a meeting between the Phillips and the Smaills, an offer of employment was made and was accepted for the Phillips to continue working in the Kitchenhouse business as employees of Criterion Group Ltd.

[7] The Smaills deny that they made the Phillips any offer of employment on 13 March or any other time. They acknowledge only that they were interested in acquiring the Kitchenhouse business and discussed with the Phillips on several occasions in March and April 2009 the possibility of employing or engaging them.

[8] The Kitchenhouse business was eventually acquired by CGKH Limited, a company incorporated on 25 March 2009. The Smaills are directors of that company and Criterion Group Ltd is or was a shareholder of it.

[9] There is no dispute that if an offer of employment was made and accepted, that occurred on 13 March 2009 at the meeting between the Phillips and the Smaills which took place at Criterion's offices.

[10] A few days earlier at the invitation of the Phillips the Smaills had been shown over the Kitchenhouse factory. After that there was a meeting on 12 March at which were present the Phillips and the Smaills. Also there was Mr David Sixton who had been a business adviser to Kitchen House Limited and the chairman of its board.

[11] I accept Mr Sixton's description of the 12 March meeting as being a *"conceptual discussion,"* being *"broadly"* to explore the idea of the Phillips running the Kitchenhouse factory if the business was eventually acquired by the Smaills.

[12] Mr Sixton said in evidence that it appeared to him from the discussion at the 12 March meeting that the Smaills and the Phillips had an intention to come to terms.

[13] The Phillips claim that terms of agreement were settled next day, 13 March, with the offer of employment at remuneration of $120,000 per annum for each brother made to them by the Smaills.

[14] As submitted by Mr Upton, counsel for Criterion Group Ltd, for the Phillips to establish their claims it is not enough that they intended to work for Criterion Group Ltd or for the Smaills. Although under the Employment Relations Act 2000 the definition of *"employee'* includes persons *"intending to work,"* that intention must be present in conjunction with a contractual relationship formed between the parties before any person can claim to have become an employee and seek to resolve an employment relationship problem in the Authority.

[15] Mr Upton submitted that for a contractual relationship to be formed there must be present:

- An offer;
- Acceptance of that offer;
- Certainty of terms.

[16] The presence of these and the formation of a contractual relationship, must be determined by the Authority objectively. They are questions of fact that must be determined primarily from the evidence of what was said and done by the Phillips and the Smaills at the meeting rather than, as some of the submissions suggested, from predictions of how people having the business experience of the Smaills and the Phillips would have behaved in the circumstances. I am concerned with the question of what they did, rather than what was in or out of character or type for any of them to have done.

[17] The best evidence of what occurred at the meeting on 13 March 2009 is that of its four participants.

Steven Phillips

[18] His evidence was that on 13 March the terms of agreement discussed the day before were confirmed. The need for this to be done, he said, was because there had been another proposal the Phillips had been exploring to purchase the assets of Kitchenhouse themselves. He said that Mr Brian Smaill had asked what the Phillips' pay expectations were and they had stated $120,000 per annum each. After some discussion about a lower figure wanted by Mr Brian Smaill, salary for each of $120,000 was agreed to.

[19] Mr Phillips said that Mr Brian Smaill had then stated that Criterion would require an initial two year agreement from the Phillips but that if things did not work out for any reason for either party during that period, Criterion would pay out the balance of the term of the Phillips' agreements.

[20] Mr Steven Phillips evidence was:

> *We all agreed to these conditions. I was very clear that Brian Smaill was offering me an employment agreement, which I accepted.*

Dean Phillips

[21] His written evidence was almost word-for-word the same as that of his brother Steven. On the point of whether agreement had been reached, he said:

> *Steve and I agreed to these conditions. I was very clear that Brian Smaill was offering me an employment agreement, which I accepted.*

Brian Smaill

[22] His evidence was that the meeting of 13 March 2009 was held principally to discuss the potential acquisition of the Kitchenhouse business in more depth. He agreed that in the course of the discussion the Phillips were asked what their expectations were regarding remuneration and they confirmed that they were seeking $120,000 per annum each. Mr Smaill said this was above the figure he had in mind which was about $80,000 net per annum for each of the Phillips.

[23] Mr Smaill said that he had explained that employment of the Phillips would need to be through a third party or an entity such as a family trust. This was significant because of a possibility that one or both of the Phillips would be bankrupted and would not then receive any remuneration earned for working in the Kitchenhouse business.

[24] Mr Smaill also said that he had been at pains to emphasise to the Phillips that no firm commitment could be made because of other issues that needed to be resolved such as, in particular, the receiver's role in administering the assets of Kitchenhouse Ltd. Mr Smaill said that he repeated several times that it would not be proper for Criterion to make any commitment to employing the Phillips without first involving the receiver. His evidence was:

> *I certainly did not make any offer of employment to them. The discussion about how the relationship would be structured reflected that if a relationship was formed, this could be potentially an independent contractor relationship, providing services through a third party or via a trust. There was absolutely no certainty about what form a relationship might take, let alone whether one would actually be formed.*

[25] Mr Brian Smaill denied the evidence of the Phillips that he had confirmed $120,000 as being the agreed remuneration. Further, he denied that he had agreed to provide that remuneration for a two year fixed term, so that if the relationship was brought to an end early any balance would be owed to each of the Phillips.

Walter Smaill

[26] Mr Walter Smaill agreed with the evidence of his brother Brian as to what had occurred at the meeting on 13 March. He noted that on 13 March neither Criterion Group Ltd nor the Smaills had ownership or any control of the Kitchenhouse business, which remained under administration by the receiver appointed. His evidence was that during the meeting Brian had made it clear that it would be improper for Criterion to make any commitment to the Phillips brothers before dealing with the receiver over the acquisition of the Kitchenhouse business.

[27] He also agreed that Brian had rejected the expectation of $120,000 per annum by the Phillips in favour of $80,000 per annum net, and he confirmed that his brother had emphasised the need for any remuneration arrangement to be tax effective. In this regard Brian had suggested that the Phillips seek professional assistance and advice as

to how they could structure income streams through a third party. He said that his brother had explained that this would be a measure to protect their remuneration from being used to pay any of the Kitchenhouse creditors in the event of either Phillips becoming bankrupt.

[28] His evidence was that on 13 March his brother had explicitly stated that many conditions had to be satisfied before any offer of employment or other arrangement could be made by Criterion Group Ltd. Also, he said there was no discussion about essential or important terms usually associated with a formal relationship, such as those about the work that each of the Phillips would undertake, the hours they would work, annual leave, whether they would be engaged for any fixed term, redundancy, restraint of trade provisions, and use of a company supplied vehicle.

[29] His evidence was:

> *I recognise that the Phillips believe that an employment relationship was formed in this meeting. They are mistaken. I am extremely clear about the fact that employment wasn't even mentioned, let alone agreed.*

Determination

[30] I prefer the evidence of the Smaills to that of the Phillips as to what was said and done at the meeting on 13 March 2009.

[31] The Smaills' evidence of what they said must be considered not in isolation but in the context of everything that was said or done at the meeting. I find that viewed objectively there was no offer of employment made by the Smaills to the Phillips. No other form of engagement was offered either.

[32] I find that the communications between the parties at the meeting were not in the nature of offer and acceptance of contractual terms but were expansions of the concept or idea whose development had begun at the previous day's meeting. Both Phillips said they had expected the terms of their employment would be confirmed in writing to complete the arrangements they had made with the Smaills, although they considered the bargain had been concluded with the shaking of hands that took place at the end of the meeting.

[33] I find it was not clear from what was said on 13 March who the Phillips employer was or would be. Mr Steven Phillips said he did not know this. I accept

that Mr Brian Smaill clearly expressed his intention that any arrangement would not be with the Phillips directly but through a third party such as a company or family trust. Mr Walter Smaill confirmed that his brother had expressly made this clear to the Phillips, or at least tried to.

[34] I find there was uncertainty as to the terms of the contended agreement, the form of it and also the identity of the contended contracting party represented by the Smaills.

[35] The offer the Phillips believed was made to them was a phantom.

[36] Accordingly, the determination of the Authority is that no employment relationship was formed between the Phillips and Criterion Group Ltd, whether on 13 March 2009 or at any other time. There is no basis for making any of the orders sought by the Phillips.

[37] Any problems that they had arising from their association with Criterion Group Ltd or the Smaills are not able to be resolved by the Employment Relations Authority.

Costs

[38] Costs are reserved. As usual the Authority expects that on behalf of the parties, the representatives will try to resolve any issues themselves. Any application to the Authority is to be made within 14 days of the date of this determination, and any reply within a further 14 days.

A Dumbleton
Member of the Employment Relations Authority