



[3] The agreement to employ between Maxim and Innovations was expressly one of many terms of a shareholders agreement entered into by those two companies on 17 December 2007. The shareholders agreement also provided for Maxim and Innovations to hold equal shares in Blossom Wool 2007 Ltd.

[4] Mr Smith and Ms Lezlie Mearns were the directors of the respondent from its formation in December 2007. Mr Smith was a then sole director of Innovations, and remained so until that company was put into liquidation in December 2009, while Ms Mearns was a director of Maxim.

[5] The shareholders agreement provided that Innovations was to procure Mr Smith to enter into a Services Contract with Maxim, under which he would be paid fees in equal monthly instalments of \$5,416.67 plus GST, or \$65,000 per annum.

[6] The shareholders agreement, which was signed by both Mr Smith and Ms Mearns, provided for the future employment of Mr Smith as follows:

7.4 **Employment** *On termination or expiry of the Services Contract between Gerald Smith and Maxim, the Company [Blossom Wool 2007 Ltd] shall, subject to the necessary funding being available to the Company, employ Gerald Smith on terms no less favourable than those under the Services Contract for a period of 15 months (or such other terms/period as agreed by the Company and Gerald Smith).*

[7] There is no dispute that Mr Smith was engaged by Maxim under a Services Contract, as provided in the shareholders agreement, and that for nine months he was paid at least \$5,416.67 per month for the services he provided. Mr Smith claims that after he ceased being a contractor to Maxim, pursuant to the shareholders agreement he entered into an employment agreement with Blossom Wool 2007 Ltd.

[8] Ms Mearns claims that the employment never eventuated because the “necessary funding” referred to in clause 7.4 did not become available to Blossom Wool 2007 Ltd.

[9] Ms Mearns in an affidavit presented to the High Court confirmed that Maxim had contracted with Mr Smith for a period of nine months from February 2008, but she also swore in her affidavit that Mr Smith had never become employed by Blossom Wool 2007 Ltd. While there had been a plan for obtaining funding for that company to either engage Mr Smith or employ him, Ms Mearns swore that despite numerous

attempts there had been no implementation by Mr Smith of proposals for funding Blossom Wool 2007 Ltd.

[10] It cannot be inferred that an employment relationship simply materialised out of an expression of intention by Maxim and Innovations that Mr Smith was to be employed by Blossom Wool 2007 Ltd. Evidence is required that the undertaking between those two parties was performed.

[11] In addition to clause 7.4 of the shareholding agreement, as evidence of his employment Mr Smith pointed to a letter dated 2 December 2008 written under the letterhead of Blossom Wool 2007 Ltd, stating:

*To whom it may concern;*

*Gerry Smith is employed permanently by Blossom Wool 2007 trading as Godsown as a product specialist. His annual salary is \$65,000 per annum.*

*Kind regards*

*Che Mearns  
General Manager*

[12] Mr Smith said that the purpose of the letter had been to enable him to obtain a loan from his bank Westpac by way of mortgage on his house. The bank had wanted confirmation of his employment so he had asked Mr Mearns to provide this letter. Mr Mearns is the son of Ms Lezlie Mearns.

[13] Mr Mearns confirmed to the Authority that he had written and signed the letter. In doing so he had simply followed Mr Smith's instructions but without having any real knowledge as to whether or not he was then employed by Blossom Wool 2007 Ltd.

[14] I accept that was the situation, as Mr Mearns had only joined Blossom Wool 2007 Ltd and/or Maxim a few weeks earlier in October 2008. Not surprisingly Mr Mearns, without making enquiry, readily complied with Mr Smith's request to write the letter for the bank. Mr Smith was a director of Blossom Wool 2007 Ltd, and he and Ms Mearns were each a director of one of the two joint equal shareholding companies which had agreed that Mr Smith was to be employed by the respondent.

[15] There was no other evidence that Mr Smith became employed by Blossom Wool 2007 Ltd, apart from his statement that he had performed work for the company. His work was however little different from the development and marketing work he had been doing for Maxim under the Services Contract, for the future benefit of Blossom Wool 2007 Ltd.

[16] No records were produced to or found by the Authority indicating commencement of any employment of Mr Smith. No payments were received by him at all under the contended employment agreement and there was no written employment agreement or other documentation except invoices sent by Mr Smith, in the name of his family trust, for payment of \$5,416.67 per month. There was no indication that PAYE would be paid, as \$5,416.67 had been the gross amount provided under the Services Contract. GST was not included either in Mr Smith's invoices. The remuneration he sought of \$65,000 per year seems to have been regarded by him as non-taxable, a highly unlikely situation.

[17] Performance of the agreement to employ was expressed to be subject to the necessary funding being available to Blossom Wool 2007 Ltd. Ms Mearns' evidence was that Mr Smith through his company as a party to the shareholders agreement did not or could not provide the funding, so the employment did not proceed.

[18] Ms Mearns presented the notes from a shareholders meeting she had attended with Mr Smith at the end of 2008 or the beginning of 2009. The notes refer to a shareholder contribution at a maximum of \$200,000, with half to be contributed by Mr Smith.

[19] I am satisfied from the evidence of Ms Mearns that it was intended both shareholders, Maxim (her company) and Innovations (Mr Smith's company), would both contribute more funding to the company in 2008. This did not occur.

[20] In those circumstances I find it extremely unlikely that Ms Mearns on behalf of Blossom Wool 2007 Ltd would have offered Mr Smith employment pursuant to clause 7.4 of the shareholders agreement.

[21] Any failure to perform the shareholders agreement to employ is not a matter within the jurisdiction of the Authority. Also, the parties to that agreement are not parties to the claim before the Authority, and one of them is now in liquidation in any event.

[22] A failure to perform an employment agreement once entered into is a matter the Authority can investigate and determine, but I am satisfied that there was no such agreement reached with Mr Smith by Blossom Wool 2007 Ltd.

[23] Mr Smith's only concern had been to continue receiving remuneration at \$65,000 per annum, regardless of whether that was paid by Maxim to him for his services or by Blossom Wool 2007 Ltd for his service. When proceedings in the High Court to enforce payment became too expensive he turned to the Authority and claimed, as he had to, that he had been an employee. I find he was not.

### **Determination**

[24] Mr Smith did not at any time become an employee of Blossom Wool 2007 Ltd and there is therefore no basis for him to recover wages and holiday pay from that company.

[25] There is no issue of costs.

A Dumbleton  
**Member of the Employment Relations Authority**