

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 348/09  
5166572

BETWEEN                      MARK POULTER  
   Applicant  
  
AND                              ANTIPODEAN GROWERS  
   LIMITED  
   Respondent

Member of Authority:      R A Monaghan  
  
Representatives:            M Poulter in person  
   H Wendelborn, counsel for Respondent  
  
Investigation Meeting:     31 August 2009  
  
Determination:              29 September 2009

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] Mark Poulter says his former employer, Antipodean Growers Limited (“AGL”) dismissed him unjustifiably and owes him unpaid wages.

[2] AGL denies there was an employment relationship. Accordingly this determination addresses whether the parties were in an employment relationship. An investigation into Mr Poulter’s substantive claims, as well as AGL’s counterclaim, was reserved pending the determination of the preliminary matter.

**Background to the parties’ relationship**

[3] The parties’ relationship centres on a block of rural land in West Auckland. Early in the 1990s Mr Poulter, who is a horticulturalist, took over a lease on the land from the existing tenant. Accommodation was available but otherwise, at the time,

the land was undeveloped. Mr Poulter cleared it, enhanced it as a place to live, and grew produce which he sold. He traded as Pinalta Farms.

[4] Noel McKenzie's family trust owned the land. During the early 1990s Mr McKenzie was based in Hong Kong, with his family returning to New Zealand in 1998. He would visit Auckland, and had discussions with Mr Poulter about what to do with the land. Neither had any particular plans for it, but as they came to know each other better Mr Poulter expressed ideas about how it could be used and Mr McKenzie became interested in furthering them.

[5] Of particular interest was a plan to erect a glasshouse to be used for growing flowers. The original plan was for a glasshouse of some 2000m<sup>2</sup>, but the final construction was 6000m<sup>2</sup>. Construction began in the mid-1990s and was completed in or about 1996. The construction of a packhouse was also incorporated in the project. Although flowers were grown at first, other crops followed.

[6] Mr Poulter had continued to grow his own produce on other parts of the land, and to sell the produce, but as the glasshouse project grew larger he began to devote his time solely to it to that project. He did so to the extent that he terminated another lease from which he was also generating income. Even so, he had no plan to enter into any permanent arrangement with Mr McKenzie or his interests. He saw his association with the project as temporary, until the business was established.

[7] Mr McKenzie caused AGL to be registered as a company in January 1995. He and his wife were the directors and shareholders. The company was to operate the glasshouse and packhouse business. Because he was based in Hong Kong Mr McKenzie gave Mr Poulter a company chequebook for the business' bills. Mr Poulter also engaged staff and paid them from that account. He forwarded employer monthly schedules in respect of employee PAYE payments, but did not include himself in the schedules.

[8] By about 1996 or 1997 although the association was continuing there was no formal written arrangement between AGL and Mr Poulter. Even the lease arrangement remained unwritten, and there was no suggestion it was ever formally terminated. However Mr Poulter needed an income after he began devoting his time

to the glasshouse project, although he obtained some income from renting his own equipment to AGL for use in the business and charging fees for work on the glasshouse. In or about 1996 or 1997 he asked Mr McKenzie for a shareholding in AGL, which was refused.

[9] On a date that was not clear but may have been in 1997 or early in 1998, there was a discussion in which remuneration of \$75,000 was discussed. At the time Mr Poulter believed a salaried manager's position should be created, although he still saw himself as working on the development of the business on a project basis and did not seek the position for himself. He also told Mr McKenzie he did not believe the business could sustain a salary of as much as \$75,000.

[10] Time passed, and by letter dated 1 April 1998 Mr McKenzie set out his views on 'how best to meet your expectations while we work together to get our business on a solid footing.' He proposed: annual remuneration at \$37,800; rent set at \$150 per week; a profit share scheme; and access to a vehicle.

[11] There was no other contemporaneous documentary information and no written agreement was entered into. Mr Poulter's claim for the failure to pay wages is based on a salary of \$37,800, so the amount of remuneration at least must have been agreed at the time. It appears there was also agreement as to rent and to the provision of a vehicle, which was subsequently registered in Mr Poulter's name. In the absence of any dispute about the matter I infer there was also agreement, in principle at least, on an entitlement to profit share.

[12] Although he had access to AGL's business bank account and could have ensured he received regular payments, Mr Poulter did not pay himself because he believed the cash flow would not support such payment. In addition Mr Poulter did not file tax returns for a considerable period, although returns had been prepared by the time of the investigation meeting. The returns were in the IR3 form required of self-employed individuals. They record business income calculated variously as sales less cost of sales (if any), or business income - less expenses. The expenses deducted included office expenses, vehicle expenses, depreciation on tools and machinery and other common deductions. The gross business income recorded for each year in respect of which this claim can be made was: \$19,006.13 (which AGL's accounts

show as 'management fees' of \$21,880); \$18,002.53; \$25,470.12; \$29,983.16; \$33,600.50; and \$22,722.22.

[13] The company's business bank account statement also showed that a modest payment was made to Pinalta Farms in February 2009. The statement of financial position for the year ended 31 March 2008 showed an outstanding loan to Pinalta Farms of \$21,152 was owed for that year, having been carried over from the year ended March 2007. Mr Poulter said the loan had been made at a time when the company did not have funds to meet its liabilities.

[14] In September 2007 the land was placed on the market, and was eventually sold by a mortgagee. By letter dated 6 June 2009 Mr McKenzie advised Mr Poulter that AGL would cease trading on 29 June 2009. He also advised that the land was required for vacant possession on that date.

[15] Mr Poulter subsequently enquired about leasing the glasshouse from the new owner.

### **Whether there was an employment relationship**

[16] In determining whether the parties' relationship was one of employment I apply s 6 of the Employment Relations Act 2000, which provides in part:

“6. Meaning of employee

- a. ...
- b. In deciding ... whether a person is employed by another person under a contract of service, the ... Authority ... must determine the real nature of the relationship between them.
- c. For the purposes of subsection (2) the Court or the Authority –
  - i. must consider all relevant matters, including any matters that indicate the intention of the persons, and
  - ii. is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.”

[17] I also apply the following passage from the judgment of the Supreme Court in **Bryson v Three Foot Six Limited (No 2)**<sup>1</sup>:

“ ‘All relevant’ matters certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. ‘All relevant matters’ equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law. It is not until the Court or Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental tests.”

[18] Mr Poulter acknowledged that the parties were not in an employment relationship when their association began. He said the relationship became one of employment in or about 1995 or 1996, being at or about the time he focussed his efforts on the glasshouse project and ceased his other income-earning activities. However that position is not based on evidence that, at the time, either or both parties turned his mind to changing the nature of their relationship or formalising it as one of employment. On the contrary, neither party turned his mind to the matter. Mr Poulter’s evidence was that, at the time, he still did not intend a permanent relationship and was working to establish the business rather than manage it as an employee.

[19] For those reasons I do not accept that the relationship changed to one of employment in or about 1995 or 1996.

[20] Nevertheless, Mr Poulter devoted his time primarily to AGL for the next 13 years. With reference to the principles set out above, it is relevant that the parties continued the relationship as before except that they discussed remuneration and other aspects in or about April 1998. Again, however, at the time neither sought to classify the relationship and Mr Poulter did not claim a position of employed manager.

---

<sup>1</sup> [2005] 1 ERNZ 372

[21] Regarding the terms summarised in the 1 April letter, there was a profound shortage of detail such that I regard the content as neutral as it affects the nature of the parties' relationship.

[22] Turning to the common law indicators of the nature of the relationship, Mr Poulter operated the business on a day to day basis with a very high degree of independence. He had complete control of how he used his time and there was nothing to indicate he was not permitted to devote time to his own business activities. Any choices he made in that regard were his own. This is an indicator that the relationship was not one of employment.

[23] Mr Poulter did not have overall financial control of the business, but this was not necessarily an indicator that he was an employee rather than a contractor. I do not accept the associated submission that he was restricted to basic administrative duties.

[24] Further, during the investigation meeting Mr Poulter was exercised by his views of the amounts allegedly drawn from the business and put to other uses over which he had no control. Again, however, such activity does not necessarily indicate he was an employee. Indeed, although it has had an adverse financial effect, his decision not to insist on his rights as an employee to receive the remuneration owed to him over a considerable period also supports a view that he did not consider himself an employee at the time and was not seeking to be treated as one. Moreover, his lending of money to AGL in order to meet a perceived cashflow shortage is not the action of an employee.

[25] As to whether Mr Poulter was in business on his own account, the sheer length of time during which he devoted his activities to developing AGL's business might arguably support a view that he became a part of that business and an employee of it. Even so, as the Employment Court has said, the mere fact that a contract (for services) has existed for many years does not per se convert the provider of services into an employee.<sup>2</sup> Here, the evidence suggesting there was no such conversion includes Mr Poulter's evidence that he had not wished to be an employee, but rather to remain

---

<sup>2</sup> **McGreal v Television New Zealand Ltd**, 5 February 2007, Judge Perkins, AC3/07

self-employed. Consistently with that, he acted in the ways discussed above, and portrayed himself to the IRD as self-employed in his tax returns even up to the year of the investigation meeting.

[26] In conclusion, I find there was no employment relationship.

[27] This finding means that Mr Poulter cannot pursue a personal grievance, and he will need to pursue AGL in another jurisdiction for the money owed to him.

### **Costs**

[28] Costs are reserved.

[29] If either party seeks an order for costs from the Authority the party shall have 28 days from the date of this determination in which to file and copy to the other party a written statement of what is sought and why. The other party shall have a further 14 days in which to file and copy a written reply.

R A Monaghan

Member of the Employment Relations Authority