IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 54/08
5084097

	BETWEEN	JONATHAN DAVIDSON Applicant
	AND	Y3K ENERGY PTY LTD First Respondent
	AND	Y3K ENERGY LTD Second Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Mark Ryan for Applicant Maria Dew for Respondents
Investigation Meeting:	31 January 2008
Submissions received:	6 February 2008 from Respondent, 11 February 2008 from Applicant
Determination:	20 February 2008

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] By agreement of the parties my investigation into this employment relationship problem has so far been confined to one preliminary matter: the issue of who employed Mr Davidson.

[2] The first respondent, Y3K Energy Pty Ltd, is registered in Australia. The second respondent, Y3K Energy Ltd (a wholly owned subsidiary of the first) is registered in New Zealand. The original statement of problem cited as respondent Y3K Energy Ltd notwithstanding the fact that the employment agreement which was attached to it named the first respondent as employer party. Conversely the statement in reply named as respondent Y3K Energy Pty Ltd despite attached correspondence which referred to the New Zealand entity as the employer.

[3] Subsequently, as set out in my Minute of 10 December 2007 (attached here) the parties reversed their positions on the issue. Each of the representatives now claims to have made an error in the way the respondent party was first identified. Both respondents now say that the second respondent employed Mr Davidson while he says the first did. The point has become critical because the second respondent has ceased trading and appears to be insolvent.

[4] In a telephone conference of 18 December Ms Dew advised that she acted for and could accept service on behalf of both respondents. Both representatives advised that depending on the outcome of the preliminary matter they would seek further instructions on the way in which the substantive issues should be progressed. I have therefore undertaken to determine the preliminary issue first.

Who employed Mr Davidson?

[5] When Mr Davidson has dealt with either of the respondent companies it has usually been through the agency of Michael Kirwan, who is a director of both. He and Mr Kirwan met when working together in Australia in 1996. When Mr Kirwan left their employer to establish what he describes as the *"Y3K Group*[1]*"* Mr Davidson did contract work for it from time to time. Then, between November 2003 and June 2004 he was a salaried employee of what Mr Kirwan describes as *"Y3K (Aust)."*

[6] In about June 2004 the two men and another associate set up a software development company together. Mr Davidson was a shareholder, director and initially a full time worker in that venture but after six months it could no longer sustain a full time role. In early 2005 Mr Davidson accepted Mr Kirwan's offer of a *"temporary caretaker role"* managing *"the New Zealand Y3K business"* instead.

[7] Although both men agree that the appointment was temporary, they told me different things about what they thought that meant. Mr Davidson told me he was looking after New Zealand on a temporary basis but understood that he had an ongoing relationship with the Group and would return to work for the Group in Australia after his New Zealand stint was over. Mr Kirwan said that he simply offered

[1] Referred to here as "the Group."

temporary employment in New Zealand, nothing more. At the outset of the employment there was no discussion of the legal entity for which Mr Davidson would be working, and no written employment agreement.

[8] Three or four months later, in July 2005, an employment agreement was executed. It was expressed to be between Mr Davidson and the first respondent, Y3K Energy Pty Ltd. It was signed by Mr Kirwan *"for and on behalf of Y3K Energy Pty Ltd."*

[9] Mr Kirwan said that it signalled a shift from temporary to permanent employment. Mr Davidson told me that he did not agree with this; he believed he was permanent all along and that the contract just formalised his New Zealand posting. He said he still had an expectation of returning to work in the Australian operation at some stage.

[10] Both representatives have argued that in determining the identity of the employer the Authority must follow the principles set out in a decision of the Employment Court in *Colosimo v Parker Judge Perkins 6 December 2006 AC 68/06.* These are:

i. The onus of proving who is the employer rests with the employee. The standard is the balance of probabilities;

ii. The question must be determined as at the outset of the employment. If that changed during the course of the employment, there must be evidence of mutual agreement to that change, and

iii. It is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties, including whether the alleged employer ever held itself out to be the employer.

[11] For the respondent Ms Dew argues that the oral agreement reached in early 2005 was with the New Zealand company. She says that this is evidenced by:

- Mr Kirwan's statement that Mr Davidson "*would be employed by the New Zealand business;*"
- The undisputed fact that the New Zealand business was operated by the second respondent trading as Y3K NZ;
- The undisputed fact that the second respondent paid Mr Davidson's wages, deducted PAYE, and accounted to the NZ Inland Revenue Department.

[12] Ms Dew argued that Mr Davidson well understood these circumstances, having had a long association with Mr Kirwan's business operations.

[13] Ms Dew conceded that the written agreement is inconvenient for the first respondent. She argued however that the explanation Mr Kirwan gave in evidence (that this was a mistake) was credible. He told the Authority that the Group had established separate legal entities in other countries to operate businesses and employ staff in those countries. It was not in dispute that other NZ staff were party to written employment agreements executed by Mr Davidson on behalf of the New Zealand company. Mr Kirwan also asserted that the form of agreement used for Mr Davidson's contract was adapted from a previous agreement drafted in the late 1990s and he had not taken advice on its contents or applicability to Mr Davidson's situation.

[14] Finally Ms Dew points to the conduct of the parties when Mr Davidson's employment ended. He was advised that he had been dismissed as an employee of the second respondent, and made no objection at the time to the employer being identified in this way.

[15] Mr Ryan argued that the fact that the second respondent was a valid trading entity operating in New Zealand was irrelevant. He noted Mr Davidson's evidence that he was told to go to New Zealand on a temporary basis to fill in for the previous

manager, whose written employment agreement had also provided that the First Respondent was the employer. Mr Ryan argued that the first respondent was the employer in relation to the temporary posting but even if it had not been, the formation of the written agreement contained express terms signifying clear mutual agreement to change the identity of the employer.

[16] The second respondent operated solely within New Zealand and there was no evidence to suggest that it has ever employed staff to work anywhere else. Mr Ryan noted however that a number of provisions within the agreement provided for the employment to be performed in a different country from that where the employer was domiciled. For example:

> *"2.2 The Employee hereby confirms that the Employee is a citizen of the relevant country of employment, defined in Schedule A, or has a valid work permit...*
>
> *2.3 The Employee hereby confirms that all criminal convictions that may affect the ability of the Employee to gain permission to work in the relevant country... have been disclosed...*
>
> *11.1 The Employee shall be entitled to three weeks paid leave per year, to be taken in accordance with the provisions of the appropriate legislation in the Relevant Country of Employment...*
>
> *12.1 The Employee shall be entitled to Public Holidays in accordance with Holiday legislation within the relevant country of employment...*
>
> *20.1 Personal Grievances and disputes will be dealt with in accordance with the appropriate primary, secondary or third party mediation legislation applicable in the Relevant Country of Employment..."*
>
> And
>
> *"Schedule A*

The relevant Country of Employment is New Zealand ..."

[17] Mr Ryan noted that the Australian parent company provided all staff manuals and other operational materials such as health and safety policies to the New Zealand manager and noted that the employment agreement provided:

> *"10.1 The Employer may issue, amend or withdraw staff manuals ... from time to time..."*

[18] It is not disputed that payroll, invoicing, general accounts, training and technical support were all provided to the New Zealand business by Australian "*head office.*"

Determination

[19] The written agreement identifies the first respondent as employer party. I do not consider that there is sufficient evidence to justify a departure from its express terms. Specifically:

i. the detail of the agreement (with its references to "the relevant country of employment") is consistent with an intention to employ staff to work outside Australia;

ii. the fact that the work was in fact performed in New Zealand is consistent with those provisions;

iii. there is no ambiguity or inconsistency in the words of the entire agreement. No difficulty arises from giving them their plain meaning;

iv. given this consistency and given that Mr Kirwan prepared the draft agreement it is not credible to suggest that it was a simple oversight on his part to have named the first respondent as the employer in the written agreement;

v. it is not relevant that Mr Kirwan now considers that he made a mistake in doing so;

vi. it is not determinative that Mr Kirwan described the second respondent as Mr Davidson's employer in correspondence to him. Mr Kirwan and Mr Davidson have each used both names at different times, taking the issue no further on balance; and

vii. The terms of the written contract signal a very clear mutual agreement which would supersede any earlier agreement if different.

[20] I conclude that the first respondent was Mr Davidson's employer, as set out in the written agreement. Y3K Energy Pty Ltd is the proper respondent in these proceedings. The investigation of the substantive issues may now proceed.

[21] In the meantime, the issue of costs is reserved.

Y. S. Oldfield.

Yvonne Oldfield
Member of the Employment Relations Authority

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	BETWEEN	JONATHAN DAVIDSON
	AND	Y3K ENERGY PTY LTD

Member of Authority:	Yvonne Oldfield
Representatives:	Mark Ryan for applicant Maria Dew for respondent
Date:	10 December 2007

MEMBER'S MINUTE

Background

[1] The original statement of problem, which was lodged on the 5 April 2007, cited as respondent "Y3K Energy Ltd" a New Zealand company incorporated in August 2003. However the employment agreement (which was attached) identified Mr Davidson's employer as "Y3K Energy Pty Ltd."

[2] No issue about the identity of the respondent was raised during my first telephone conference with the representatives (on 28 September 2007.) A timetable was set for the investigation of the matter, with witness statements to be lodged before Christmas and the Investigation Meeting to proceed on 31 January 2008. Ms Dew also advised that Y3K Energy Ltd was about to cease trading as the assets and business were to be sold the very next day.

[3] On 12 October an amended statement of problem was lodged containing further particulars of lost earnings. Then on 9 November a further amended statement of problem was lodged which substituted "Y3K Energy Pty Ltd" for "Y3K Energy Ltd" as respondent. I n the cover letter Ms Gendall advised of "*possible contentious issues arising in relation to filing of witness statements*" and asked for the timetable to be changed to provide for simultaneous filing of briefs.

[4] I arranged for a telephone conference with Counsel to discuss all the issues arising from the lodging of the amended statements of problem. Meanwhile, Ms Dew tabled a memorandum in which she advised:

i. Y3K Energy Ltd is a wholly owned subsidiary of Y3K Energy Pty Ltd,
ii. Notwithstanding that Y3K Energy Pty Ltd was identified as employer in the employment agreement, the New Zealand entity was in fact the employer;

iii. The identity of the respondent should be determined as a preliminary matter in order to limit costs, and
iv. The respondent(s) sought disclosure of documents relating to post dismissal earnings.

Telephone conference 7 December 2007

[5] The following records the outcomes of the conference call.

Joinder of Second Respondent

[6] The first issue for determination will indeed be which entity employed Mr Davidson. Since Y3K Energy Ltd declares itself to be the employer I am satisfied that it should be joined to the proceedings once again and now do so of my own motion pursuant to s. 221 of the Employment Relations Act 2000. Y3K Energy Ltd therefore becomes second respondent to this employment relationship problem.

Service

[7] My next concern related to service. Ms Dew has confirmed that she has been instructed by her instructing solicitors (Carson and Co Law) to act for both the first and second respondents. However there was some uncertainty as to whether the further amended statement of problem (citing Y3K Energy Pty Ltd) had been properly served as yet.

[8] Ms Dew advised that she expected that Carson and Co Law will be able to accept service on behalf of both respondents. I now direct therefore that the further amended statement of problem, together with this Minute, be served on Carson and Co Law (at level 4/34 Mahuhu Crescent Parnell) on behalf of both respondents.

[9] In case Carson and Co Law are not prepared to accept service for the first respondent I also brought to the representatives' attention clause 4A of the Second Schedule of the Employment Relations Act 2000 and Regulations 19A and B of the Employment Relations Authority Regulations 2000. These provide that leave of the Authority must be sought before service outside New Zealand may proceed and that (once served) the overseas party may lodge an objection to the Authority's jurisdiction in the proceedings. Jurisdiction may be declined on specified grounds. Should Carson and Co decline to accept service these provisions will come into play and Mr Ryan's first step should be to seek the leave of the Authority to serve out of the jurisdiction.

Timetabling

[10] The original timetable in this matter was agreed with Counsel in a telephone conference on 28 September. It provided for witness statements to be lodged on 7th and 21st December respectively in preparation for an investigation meeting on 31st January. The recent addition of the first respondent to the proceedings and the introduction of a preliminary issue about who employed Mr Davidson have made it impossible for the investigation into the substantive matters to proceed according to this timetable. It is therefore vacated.

[11] However should Carson & Co accept service on behalf of the first respondent one possibility might be to use the 31st of January to determine the issue of the identity of the employer.

[12] Mr Ryan has confirmed that he will take further instructions as to whether that issue should be determined as a separate preliminary matter. In the meantime I will hold 31st of January in my diary.

Disclosure

[13] The amended statement of problem included a claim for nine months' lost earnings. Ms Dew seeks disclosure of the applicant's bank statements for the relevant period in order to confirm his lack of earnings. I have declined any such order as premature in the circumstances. I have also reminded Mr Ryan of the need for such a claim to be supported by evidence of attempts to mitigate loss.

Follow up conference call

[14] This matter went to mediation in August before being referred back to the Authority for the timetabling of the investigation. It is now, by the standards of this institution, a long time since it was lodged. The investigation should now proceed as soon as possible. The representatives should expect a further telephone conference before Christmas to address timetabling issues, and should ensure that they have taken instructions as necessary.

Y.S. Oldfield

Yvonne Oldfield
Member of the Employment Relations Authority