

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA393/08
5116578

BETWEEN PETER GATENBY
Applicant

AND HYDROTECH (2006)
LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Mark Beech and Vicky Weinberg for Respondent

Investigation Meeting: 4 November 2008 at Tauranga

Determination: 18 November 2008

DETERMINATION OF THE AUTHORITY

[1] Peter Gatenby seeks to have the Authority investigate a personal grievance over what he says was his dismissal by Hydrotech (2006) Limited on 4 March 2008. He says Hydrotech was wrong to decide that, firstly, he had improperly used company credit and fuel cards and, secondly, that he had reacted unreasonably once it began looking into those allegations on 6 December 2007.

[2] Hydrotech questions whether Mr Gatenby has the right to have the grievance determined in the Authority. It says he was not an employee by those dates and the Authority has no jurisdiction to determine his claim.

[3] Mr Gatenby worked for Hydrotech under the title of Sales Manager and Sales Director. He was a director of the company from July 2006 until a resolution of the other two directors removed him from that role in January 2008. He was then, and remains now, a shareholder in Hydrotech.

[4] Hydrotech accepts Mr Gatenby was an employee of the company up until late October 2007. However it argues this status changed by a decision agreed with the two other directors at a board meeting on 31 October 2007. It says Mr Gatenby agreed his remuneration from that point on would be by way of drawings paid to him as a director rather than salary as an employee. It says the consequence was that the employment relationship ended then.

[5] During the company's formal investigation begun on 6 December 2007 into Mr Gatenby's credit and fuel card use, Hydrotech acted as if it were conducting a disciplinary investigation of an employee. The associated correspondence of its solicitors used language typical of such an investigation. However Hydrotech now says this was merely an agreed process to ensure fairness in how Mr Gatenby was dealt with and was not a concession that he was an employee.

[6] The preliminary issue determined here is whether Mr Gatenby was an employee from 31 October 2007 – and particularly on 6 December 2007 when Hydrotech began its investigation of his use of the credit and fuel cards. If Mr Gatenby's role was, by that time, solely as a director and shareholder, the Authority does not jurisdiction to investigate and determine his personal grievance application.

Investigation on the preliminary issue

[7] These four witnesses attended the Authority investigation meeting, and, under oath, confirmed written statements provided in advance and answered questions: Mr Gatenby, Hydrotech director Greg Jarvis, and accountants Michelle Malcolm and Felicity Lee of the firm WHK Gosling Chapman. Ms Malcolm and Ms Lee had attended the Hydrotech directors' meeting on 31 October 2007.

[8] There is a second current director of the company. He is Alan Canavan. He also, through what appears to be a trust, has the benefit of shares in the company. He did not attend the Authority investigation meeting.

[9] The company's solicitors had lodged an unsigned witness statement said to be from Mr Canavan. Prior to the investigation meeting I had advised the parties of the reasons that his attendance was expected, particularly for evidence he could give

about the 31 October 2007 directors' meeting and whether he had earlier prepared and signed a written employment agreement for Mr Gatenby.

[10] Hydrotech's solicitors advised before the investigation meeting of their client's instructions that Mr Canavan was "*not in a financial position*" to fly from Christchurch, where he lives, to attend the investigation meeting in Tauranga.

[11] I was provided with nothing other than bare assertion about Mr Canavan's financial position and I doubt the excuse given.

[12] As advised to the parties before the investigation meeting I am aware through reading a very recent determination of the Authority in a Christchurch matter that Mr Canavan similarly failed to participate in an investigation there although the distance between his Fendalton home and the Authority's Christchurch premises is considerably less distant and expensive to travel between than Christchurch and Tauranga.

[13] That Christchurch matter involved Evergreen Hydro Limited. The Companies Office register shows Mr Canavan and Mr Jarvis as present shareholders and directors of that company while Mr Gatenby is a former director and current shareholder.

[14] Mr Canavan's conduct in not attending either investigation has influenced conclusions I have drawn in weighing the evidence in this matter – specifically on the question of the existence of a written employment agreement, a point considered later in this determination.

The issues

[15] In determining whether or not the Authority may proceed to investigate Mr Gatenby's grievance application, the following issues must be resolved:

- (i) Was there an employment relationship between Mr Gatenby and Hydrotech up to the 31 October 2007 directors' meeting?
- (ii) If so, did that relationship change on or after 31 October 2007 and before what Mr Gatenby describes as his dismissal on 4 March 2008?

Nature of the relationship until 31 October 2007

[16] Hydrotech's initial position was that Mr Gatenby was solely a director and shareholder of the company and never its employee. However in his written and oral evidence Mr Jarvis conceded there was also an employment relationship between Hydrotech and Mr Gatenby up until 31 October 2007.

[17] Mr Jarvis says he has never seen the written employment agreement that Mr Gatenby insisted was prepared by Mr Canavan.

[18] Mr Gatenby says the agreement was prepared using a template system available through the Department of Labour. He says he signed that agreement in early 2007 and kept his copy in a filing cabinet at Hydrotech's offices. Mr Jarvis says no such agreement can be found among Hydrotech's records.

[19] In the absence of direct evidence from Mr Canavan on this point, I accept Mr Gatenby's evidence that he was an employee, as confirmed by a written employment agreement, although he also had other legal relationships with Hydrotech as a director and a shareholder.

[20] It is elementary that an individual may have concurrent relationships of employee, director and shareholder with a limited liability company: *Lee v Lee's Air Farming Ltd* [1959] NZLR 393 (CA). It follows that such an individual can pursue rights as an employee arising out of the employment relationship. However it is only those rights that can be addressed in the employment jurisdiction and not any issues or rights that arise from other concurrent status as a director or shareholder.

Did the relationship change from 31 October 2007?

[21] Hydrotech says there was agreement between Mr Gatenby, Mr Jarvis and Mr Canavan at their 31 October meeting for directors to receive drawings instead of salaries. This is said, effectively, to demonstrate a mutual intention to continue relationships with the company as directors and shareholders only and not as employees. Subsequent payments made to Mr Gatenby were labelled in the company's pay and accounting records as "*drawings*" and this is said to be conduct

confirming Mr Gatenby's agreement to the change. Hydrotech also points to some email correspondence between Mr Gatenby and the company's accountants as confirming that he understood any employment agreement was "*null and void*" from that point.

[22] The later treatment of Mr Gatenby "*as though*" he were an employee during a "*disciplinary*" investigation and his "*summary dismissal*" is said to have only been to ensure a "*fair and thorough*" process and not a concession as to employment status.

[23] Having considered the evidence of the witnesses and documents provided, I find on the balance of probabilities that there was no certain agreement for Mr Gatenby to end his employment relationship with Hydrotech from 31 October 2007 and that he remained an employee until his dismissal in March 2008. I come to that conclusion for the following reasons.

(i) Board Minutes

[24] At its 31 October directors' meeting Hydrotech formally decided to have its accounts dealt with by WHK Gosling Chapman. Ms Malcolm and Ms Lee attended that meeting.

[25] The accountants suggested that the two directors receiving salaries – Mr Gatenby from Hydrotech and Mr Canavan from Evergreen Hydro – should move to a scheme of payment by drawings only. The initiative for this change did not come from the directors. It was the accountants' proposal because it would "*alleviate cash flow issues associated with PAYE*". This is the sole reason for the change recorded in minutes of the meeting prepared by Ms Lee.

[26] All witnesses agree that there was no discussion at that meeting of whether a change in the employment status of Mr Gatenby and Mr Canavan was intended. Rather it was a device to reduce the amount of cash Hydrotech needed on hand to meet tax obligations.

[27] Both accountants had been involved with the company's affairs for only a few weeks and had assumed that Mr Gatenby and Mr Canavan were working directors

only. As Ms Lee and Ms Malcolm accepted in questioning at the investigation meeting, neither was aware at that time of Mr Gatenby's existing employment relationship with Hydrotech.

(ii) Subsequent emails

[28] An email from Mr Gatenby to Ms Lee and Ms Malcolm on 5 November demonstrates no mutual, concluded intention for an end to the employment relationship. It asks a number of questions about the effect that a change in the arrangements for paying for his work would have.

[29] Mr Gatenby's email stated that both he and Mr Canavan required "*some clarification regarding the drawings vs salary scenario*". He asked about pay for holidays and sick leave, whether the amount of drawings would be the same as "*net pay whilst on salary*" and whether "*[t]his would also mean the current employment contracts become null in (sic) void*".

[30] His use of the words "*scenario*" and "*would*" are both prospective and demonstrate no understanding of any fundamental change in the nature of the relationship.

[31] And Ms Lee's reply – an email of 7 November sent to Mr Gatenby, Mr Canavan and Mr Jarvis – includes the similarly tentative response that "*this would mean that employment contracts will become Null & Void*" (my underline emphasis).

(iii) Subsequent payments

[32] Evidence about how payments to Mr Gatenby were recorded in Hydrotech's operating accounts does not alter my conclusion. From mid-November internal accounting records (prepared by a Hydrotech administrator) labelled those payments as "*drawings*". Up until then the payments had been recorded as "*salary*". However through November and December the Hydrotech administrator continued to allocate funds for PAYE on those payments labelled drawings.

[33] That does not demonstrate the clear agreement on a change in status that is

now asserted by the company. At best the change in labelling in pay records while at the same time continuing to make provision for PAYE is equivocal.

[34] I note here too that the net amount of remuneration received by Mr Gatenby's did not change. That is consistent with what was noted in the Board minutes about a change to payment by "*drawings*". The minutes do not suggest that he was intended to get any benefit by not having PAYE deducted from his earnings. This was not a situation where an arrangement had been made for a person to receive their gross pay and then pay on GST on it as in the case of an independent contractor. There was, in short, no direct benefit to him of the change as discussed and recorded in the 31 October minutes. I infer none was intended. Any benefit was to be to the company's cash flow, not him.

(iv) Hydrotech's investigation from 6 December

[35] Hydrotech says its references to Mr Gatenby as an employee in the investigation and subsequent dismissal were merely a device expressly agreed in a meeting between the parties and their lawyers on 12 December 2007. It says using what might otherwise appear to be an employee disciplinary process was to reassure Mr Gatenby that a fair, open and known process would be followed. Further it says the parties understood this was not a concession by Hydrotech that Mr Gatenby was still an employee at that time rather than solely a director and shareholder.

[36] Mr Gatenby confirms that at the start of the 12 December meeting, the parties – as Mr Beech put it to him in a question at the Authority's hearing – agreed that "*there would be a process of investigation akin to an employee*".

[37] I accept Mr Gatenby's own evidence that Hydrotech, at least from 12 December, sought to reserve the issue of any dispute as to Mr Gatenby's status as an employee. I do note however that is not consistent with this passage from a 14 December letter to Hydrotech's solicitors from Mr Gatenby's solicitor at the time (who had attended the 12 December meeting):

We note that although our client has been suspended from his role as an employee pending the outcome of the investigation, that he remains a director of both Hydrotech (2006) Ltd and Evergreen Ltd.

[38] But what is decisive on this point are references to Mr Gatenby as an employee in letters to him from Hydrotech written well before reserving its position on 12 December.

[39] The first letter to him advising of an investigation into his credit and fuel card use was dated 6 December and headed: “*Disciplinary Meeting*”. A second letter that same day referred to his “*responsibilities as both director and employee of Hydrotech (2006) Ltd*”.

[40] A letter from Hydrotech’s solicitors to Mr Gatenby’s solicitor on 7 December again asserts the existence of an employment relationship:

Putting aside the director/shareholder issues, we are proceeding along the lines as though your client is an employee of Hydrotech (2006) Limited, based on the levels of control and integration within Hydrotech. However if you have a different view of the status of the “relationship” please advise.

We will ensure that a copy of the relevant employment agreement is sent to your offices shortly.

[41] This is consistent with how later letters of Hydrotech’s solicitors describe the situation, even allowing for their supposed reservation of the employment issue. For example a letter of 25 January to Mr Gatenby’s solicitor says:

With regard to the directors meeting that was held in your client’s absence, we wish to reiterate that your client’s capacity as a director is entirely separate from his capacity as an employee. It would be incorrect to treat them as being one in (sic) the same.

We suggest that whether your client remains a director of Hydrotech does not have any impact on the investigation process in respect of your client’s employment with Hydrotech.

[42] As is clear from its letters of 6 and 7 December, Hydrotech throughout accepted its relationships with Mr Gatenby at that time included one of employment.

(v) *Mr Gatenby’s conduct*

[43] Mr Gatenby resisted requests to fill in timesheets when he worked for

Hydrotech. I do not accept this demonstrates any belief on his part that he did not need to do so because he was only a director and not also an employee.

[44] Emails between him and Mr Jarvis in September 2007 show the reason that Mr Gatenby gave for not filling in timesheets was not because he was a director but because he was a salaried manager. He believed that such managers should be trusted on their time keeping. He declared that he had “[n]ever ... worked for a company where I have to fill in timesheets”.

[45] Neither do personal legal commitments he entered while a director of Hydrotech – involving guarantees and financial facilities used by Hydrotech to purchase assets of Evergreen Hydro – support a conclusion that, by those acts, he was not an employee. Such a conclusion would be inconsistent with the ability of an individual, noted earlier, to have concurrent status within a company as an employee, director and shareholder.

Next steps

[46] Having found that an employment relationship between Mr Gatenby and Hydrotech endured until 4 March 2008, it follows that the Authority has jurisdiction to investigate his personal grievance application.

[47] In light of this finding I consider it necessary to direct the parties to further mediation under s159(1)(b) of the Act. Mediation is to occur as soon as possible, but in any event by no later than 30 January 2009. If the matter is not resolved in mediation, Mr Gatenby is to promptly advise the Authority whether he wishes to withdraw his application or wishes the Authority to proceed with an investigation.

[48] Mediation is an opportunity, before any Authority investigation goes ahead, for each party to undertake a detailed risk analysis of their respective positions and attempt in good faith to reach an agreed settlement of their differences. Also, as I commented to the parties at the conclusion of the Authority investigation, there are commercial issues between them which cannot be addressed by the Authority but which they may be able to address and resolve in a holistic way with the assistance of a mediator (s144A of the Act refers).

[49] I emphasise too that finding an employment relationship existed has no direct bearing on how the Authority might eventually determine Mr Gatenby's personal grievance. Whether his dismissal by Hydrotech was justified or unjustified is a matter on which evidence has yet to be called for and tested.

[50] I record here two points of evidence that may be relevant if further Authority investigation proves necessary, particularly if remedies need to be addressed. Firstly, in response to an Authority question, Mr Jarvis said the assets of Hydrotech (2006) Limited, along with the assets of Evergreen Hydro Limited, have been sold to another company – Evergreen Hydro (2008) Limited. Mr Jarvis and Mr Canavan are directors and shareholders of that latter company.

[51] Secondly, it appears that Mr Jarvis has taken steps to have the benefit of a deed of debt owed by Mr Gatenby to him assigned to Hydrotech (2006) Limited.

Costs

[52] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority