

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 752
3175503

BETWEEN MICHAEL JOHNSTON
Applicant

AND YOUTAP LIMITED
Respondent

Member of Authority: Peter Fuiava

Representatives: Rebecca White, counsel for the Applicant
Dean Organ, advocate for the Respondent

Investigation Meeting: 12, 14 April, 31 July, and 1 August 2023

Submissions and information received: 1 August and 15 September 2023 from the Applicant
1, 8, 15, 22 and 29 August 2023 from Respondent

Determination: 15 December 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

What are the preliminary issues?

[1] Michael Johnston, a former senior technology executive, has asked the Authority to investigate personal grievances of unjustified disadvantage, unjustified dismissal, and salary and holiday pay arrears. Youtap Limited (Youtap) is a New Zealand-based software developer and operator of financial applications across the *motu* and globally.

[2] Before the Authority can investigate Mr Johnston's substantive claims, it must first decide as a preliminary issue who his employer was. Mr Johnston says he was an employee of Youtap. This is denied by the respondent who says he was an employee of a subsidiary company domiciled in Singapore, Youtap Mobile Money Asia Private Limited (YMMA).

[3] This preliminary determination deals only with the identity of Mr Johnston's employer. As will be seen, this requires a contextual assessment of the real nature or reality of the parties' relationship. If it is determined that Mr Johnston was an employee of Youtap, the Authority will continue to investigate his substantive claims in the usual way.

[4] However, if Mr Johnston is found not to have been employed by Youtap, the Authority will need to consider in the alternative whether Youtap was nevertheless a 'controlling third party' to the relationship as this term is defined by s 5 of the Employment Relations Act 2000 (the Act). For reasons that will become clear, it has not been necessary for the Authority to take this further.

How has the Authority investigated?

[5] For the Authority's investigation, written witness statements were lodged by Mr Johnston and Matthew Waters a former employee of YMMA. For Youtap, witness statements were received from its Chief Executive Officer, Christopher Jones, former Youtap Chief Operating Officer, Grant McGough, Vice President Commercial, Mark Wilkinson, and IT manager, Nicholas Howard. All witnesses answered questions under oath or affirmation from me and the representatives who also made oral closing submissions.

[6] As permitted by s 174E of Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What are the relevant facts?

[7] Mr Johnston has more than 30 years' experience in developing and launching products for the telecommunications and financial sectors. He has a PhD in Nuclear Physics from Manchester University and early in his career worked in medical research including breast cancer research.

[8] Mr Johnston moved to New Zealand from the United Kingdom in around 1989. In approximately December of that year, he met Christopher Jones, Youtap's founder and CEO. Mr Johnston commenced working for Mr Jones in around 1990. In 2007, Mr Jones established Mobilis Networks Limited (Mobilis) which would later be

renamed Youtap in April 2015. Mr Johnston joined Mobilis as its Chief Technical Officer (CTO) in late 2007 signing an individual employment agreement in December.

[9] Youtap is the owner of a number of subsidiaries in New Zealand and offshore. It says that Mr Johnston's employment with it continued until, by mutual agreement, he commenced employment with YMMA on 1 November 2015. Consequently his employment with Youtap came to an end although this is disputed by Mr Johnston who says he remained a Youtap employee.

[10] In October 2012, Verifone Mobile Money Limited was incorporated in New Zealand as a limited liability company. In May 2017, it changed its name to Youtap Mobile Money Limited and at some point partnered with Verifone Incorporated in Singapore for the purpose of bringing mobile money solutions to mobile operators in emerging markets in Asia.

Expansion into Singapore

[11] With that objective in mind, Mobilis as it was then called incorporated Verifone Mobile Money Asia Private Limited (VMMA) which later became Youtap Mobile Money Asia Private Ltd (YMMA) in 2017 when the naming rights for 'Verifone' expired. YMMA's purpose was to grow regional sales and services support for local customers in Singapore and across Asia.

[12] YMMA was an integral part of Youtap's planned expansion into Singapore, Indonesia and Asia generally. In 2017 the company had two directors, Mr Jones, who was also CEO of Youtap, and Mr Johnston until his dismissal by Mr Jones on 9 March 2022. In cross-examination, Mr Jones was asked whether Mr Johnston was made a director because a Singapore-domiciled director was required. Mr Jones's response was "yes".

[13] So by early 2015 the decision was made for Youtap to expand into Singapore. An email from Mr Jones (15 April 2015) noted that Mr Johnston would be moving there in the coming months to 'spearhead' the Asia-based initiatives. To be clear, Mr Johnston had also agreed to relocate to Singapore as he was travelling a lot at that time between New Zealand and Singapore and Indonesia. He says that he was chosen because it was important for Youtap to have someone with his seniority and experience

“on the ground”. Mr Johnston stated that there was some discussion in 2015 whether he would be employed by YMMA but nothing was ever finalised.

[14] In order for Mr Johnston and his family to live and work in Singapore, an Employment Pass (ePass) from Singapore’s Ministry of Manpower (MOM) was required. Mr Jones says that, under Singaporean law, expatriate workers needed to be employed by a local company in order to obtain an ePass. He further stated that Mr Johnston was aware of this because he had emailed the then director of YMMA, Lisa DeCoek, and Mr Jones in October 2015 to request:

- (i) that he needed to set aside a little time to sort out the details of his employment as he needed to be employed by the ‘Singapore Entity’;
- (ii) his agreement needed to be an employment contract and not a contractor’s contract;
- (iii) that a good start date might be 1 November; and
- (iv) that he wished to make contributions to his KiwiSaver as an individual rather than through the ‘New Zealand entity’ for whom he would no longer be employed.

[15] Mr Johnston further stated that there would be additional expenses such as school fees for his daughter, apartment rental and transport which he hoped to discuss with Mr Jones and Ms DeCoek. For the investigation meeting, I was not provided with any information or evidence indicating that an agreement around the payment of the above expenses by Youtap was made.

[16] During direct-examination, Mr Johnston advised that it was sufficient for him to have been *sponsored* rather than employed by a local employer in Singapore provided the employing entity had a director who lived there. However, that evidence contrasted with the understanding of Youtap’s VP of Commercial Mark Wilkinson who claimed that ePasses were provided to employees of Singapore-based entities only.

[17] A copy of Mr Johnston’s ePass was provided which recorded that his employer was YMMA and that his occupation was that of Chief Technology Officer. However, there was nothing on Mr Johnston’s ePass that indicated that a sponsoring Singaporean

entity rather than a local employer would have been sufficient for immigration purposes.

Alleged deleted emails and access to laptop

[18] In response to Mr Johnston's email noted above, Mr Jones replied on 22 October 2015 stating "Sure, KPIs?" When Mr Johnston was asked whether he had responded to that question, he stated that he may have. However, there is nothing to indicate that he did. During direct-examination, Mr Jones claimed for the first time that the reason there was no response was because Mr Johnston had deleted his emails. While Mr Johnston accepted that he had deleted some emails that he forwarded to himself, he denied a blanket deletion of work emails and files in their entirety.

[19] It was the evidence of Youtap IT manager Nicholas Howard that on or about 8 March 2022, Mr Johnston had deleted 45,660 files from his work email account. While the clear majority of these emails were successfully retrieved, some 5,944 files remain outstanding and can no longer be recovered from Microsoft as it has been over 12 months.

[20] However, included in the files recovered by Mr Howard were Skype messages between him and Mr Johnston and I accept that they respected each other and were collegial. The messages showed that Mr Howard was aware of Mr Johnston's usual email password which Mr Johnston had shared with him so that Mr Howard could authenticate and complete work-related purchases from Adobe and Apple.

[21] When I asked Mr Howard whether it was possible that a response to Mr Jones's question regarding KPIs had been deleted, Mr Howard stated that this was unlikely because the email (if one was sent) ought to have been recoverable. The most plausible explanation therefore was that Mr Johnston had not responded to Mr Jones' question.

[22] One email that was found in Mr Johnston's private email was from Mr Jones dated 12 May 2022. It is not clear how that email was sent to Mr Johnston especially as he was dismissed two months earlier and no one in Youtap appeared to have forwarded the email to Mr Johnston. It was Mr Howard's view that Mr Johnston was responsible by leaving a mailbox rule in Mr McGough's work laptop which automatically forwarded Mr Jones' email of 12 May to Mr Johnston. I am not

persuaded by this as I would expect Mr McGough's laptop to have been reformatted once he left Youtap in late 2019, which was some two-and-a-half years prior to Mr Johnston's dismissal in March 2022.

[23] Mr Johnston's monthly salary was paid by a transfer of funds into YMMA's bank account. Funds came from Youtap or another related entity such as Youtap Technology Limited (Youtap Technology). This pattern of payment continued until his employment ended.

[24] On 2 November 2015, finance manager Nadia Trigouzova emailed Ms DeCoek with advice that Mr Johnston was happy to 'transfer' to the Singapore entity and for that to happen on 1 November with his October salary paid as usual. Mr Johnston says that by 'transfer' Ms Trigouzova was speaking from an accounting perspective and that "Verifone" and "Youtap" were names that were used interchangeably by staff across Youtap especially as an email signature.

BDO Audit

[25] In December 2016, an audit of YMMA by BDO occurred. Mr Johnston explained that this was mandatory particularly as the company was changing its end of year filing date from July-to-June to January-to-December. During the audit, BDO requested Mr Johnston's "employment letter" but was instead provided agreement with his Mobilis individual employment agreement from 2007.

[26] BDO's January 2017 audit report of YMMA (then called VMMA) was signed off by Ms DeCoek and Mr Johnston. It was noted that the company owed USD410,137 to Youtap and that Youtap had agreed to provide continued financial support to YMMA and had also agreed to forgo recalling any amounts owed until YMMA had first paid its creditors.

[27] Mr McGough former COO for YMMA confirmed that the company had never been without the financial support of its parent company, Youtap. It is understood that presently YMMA has no employees and is no longer actively trading in Singapore.

[28] Mr Johnston stated that, in 2016, he was the only employee on YMMA's payroll and that the BDO auditor had expressed the concern that as the company's only

employee, it did not have an employment agreement with him. There was a risk of non-compliance by YMMA with the Singapore Employment Act. It was recommended that it was in YMMA's interests that it incorporate a "supplementary letter within its current employment letter" to mitigate any non-compliance risk. For Mr Johnston, the consequence of non-compliance was cancellation of his ePass which was essential for him and his family to maintain a valid visa status in Singapore.

[29] Matthew Waters, a former employee of YMMA, gave evidence for Mr Johnston stating that the auditors would have wanted his employment agreement because as a director of YMMA, Mr Johnston's remuneration was a disclosure note in the financial accounts. It is noted that Mr Waters joined YMMA as Commercial Director – Infrastructure in June 2018 and was employed by Mr McGough. However, he was not provided with an employment agreement until November or December 2018 which was backdated to the start date of his employment.

[30] Mr Waters stated that he was involved with the BDO auditors and had responded to their queries including the lack of an employment agreement for Mr Johnston. It was Mr Waters' evidence that he forwarded a document to BDO that, from a quick glance of the first page, appeared to be an employment agreement between Mr Johnston and YMMA. He did not forward the document to Mr Johnston himself. This is relevant because the first time Mr Johnston appears to have received a copy of the document was in March 2022 as a result of an information request made by his lawyer in Singapore to YMMA's counsel.

[31] It was Mr Waters' recollection that Mr Johnston spent more time outside Singapore during the week; in New Zealand, Indonesia and other parts of Southeast Asia.

YMMA employment agreement

[32] In October 2018, a written employment agreement between Mr Johnston and YMMA was entered into and apparently backdated to 1 November 2015 as a start date for him. Mr Johnston has no recollection of signing the agreement but cannot discount the possibility of doing so as there were many documents he was required to sign as a result of the BDO audit.

[33] The employment agreement contains relevant clauses around location (specifically 20 Collyer Quay Singapore), eligibility in that Mr Johnston had to have the legal right to live and work in Singapore, and completeness in that the agreement replaced any previous contract. The agreement further recorded Mr Johnston as the CTO, required him to attend YMMA's place of business, listed various public holidays in Singapore, and referred to its superannuation scheme, the Central Provident Fund.

[34] While Mr Johnston says that he has no recollection of signing the individual employment agreement with YMMA, Mr Jones, who also signed the agreement, has no specific recollection of doing so either. The agreement bears both their handwritten signatures and initials with the latter alternating position across different pages. The metadata related to the employment agreement indicates that it may have been created on the morning of 9 October 2018, scanned, and backdated to 1 November 2015. This was supported by Mr Wilkinson who stated that while Youtap would have had an electronic signature for Mr Johnston, it would not have had his initials.

[35] The employment agreement contains the following errors:

- (i) it referred to a trial period under s 67A of the Act which Mr Johnston stated he would not have agreed to;
- (ii) the formatting used for the placement of the initials was not consistent which Mr Wilkinson stated was not a good look;
- (iii) referred to New Zealand legislation and its personal grievance procedure which was out of place in Singapore;
- (iv) Mr Johnston's salary was expressed in NZD not USD;
- (v) his last name was misspelt "Johnson";
- (vi) the agreement stated that it was with YMMA which did not exist under that name in 2015 when the agreement was dated; and
- (vii) recorded an incorrect physical address for the business as of 1 November 2015.

[36] Despite the errors, Mr Wilkinson stated that Mr Johnston had initialled and signed the agreement. Mr Jones also stated that the employment agreement remained a valid contract and that YMMA had to operate ethically in Singapore because of the vigilance of its authorities.

[37] Mr Johnston maintains that he has no recollection of signing and/or initialling the agreement. He believes that the document may have been signed in a rush because of the concern raised by the BDO auditor as noted above.

Decline of ePass

[38] In October 2016, Mr Johnston had his renewal application for a further ePass declined by MOM. An email from Mr Payton from HR shows that he emailed YMMA's lawyer seeking clarity as to what was needed to have the issue resolved. Although the decision to decline was challenged, the appeal was unsuccessful.

[39] By letter of 27 October 2016, Mr Jones wrote in support of Mr Johnston's appeal advising MOM that the role of CTO was critically required in Singapore to provide strategic planning, guidance, and technical support to business partners and customers. In addition to his letter of support, Mr Jones interceded on Mr Johnston's behalf by speaking to the Singapore ambassador in Wellington. While it is not known what was said between them, Mr Jones' advocacy would have contributed to Mr Johnston being issued another ePass.

[40] When I asked Mr Jones why he had intervened for Mr Johnston, he stated that there was complexity around obtaining ePasses and that it was important that YMMA had a base of operation in Singapore and that to do that Mr Johnston was made a director.

YMMA and Youtap

[41] Mr Johnston says that YMMA was part of a number of subsidiary and related entities, all of which operate as a group under the control of Youtap's board of directors. YMMA was heavily reliant on funding from Youtap and Youtap Technology. For example, YMMA's bank account showed that at the beginning of 2021, money would arrive in US dollars from one of Youtap's entities and converted to Singaporean dollars which was then used to pay YMMA staff, including Mr Johnston's salary.

[42] It was Mr Waters' evidence that, as an entity, YMMA had very little income during the eight months he worked for it. He recalled there being one primary customer but not much by way of invoicing. Mr Waters further stated that funds were transferred

into YMMA from Youtap on a monthly basis to cover payroll and other expenses such as rent because it did not generate enough cash flow to cover its own expenses.

[43] Mr Waters' evidence is consistent with Mr Wilkinson who stated that while YMMA was created to obtain contracts in Singapore, it was not financially sustainable and never achieved the level of revenue to cover its own costs. While it was financially supported by Youtap, Mr Wilkinson stated that this was not unusual and was something that a parent company would do in any event.

[44] During cross-examination, Mr Johnston was asked to whom he reported. He pointed to Mr Jones. While he had reasonable autonomy in Singapore, Mr Johnston stated that he was not left to his own devices. There were conference calls, emails, business planning meetings with Mr Jones. Further, Mr Johnston was reimbursed by Youtap for purchases he made for office supplies and equipment using his own credit card. However, Mr Jones commented that Mr Johnston acted on his own accord. He was a senior employee for YMMA, responsible for local hires, and was familiar with Singapore. While there were meetings between them, they were not every day.

[45] Mr Johnston stated that he was consistently held out as Youtap's CTO and that his work was for the benefit of the wider Youtap group. A letter (27 May 2019) from Mr McGough records Mr Johnston as being employed by YMMA but still holding the position of Chief Technology Officer of Youtap. It is further noted that a shareholder prospectus/investor memorandum dated November 2021 recorded Mr Johnston as CTO and part of the Youtap "management team".

Holiday leave and tax

[46] Mr Johnston says that his holiday leave entitlements from Youtap was not carried over to YMMA's books. Instead his annual holiday balance (valued at approximately USD\$130,000) was "migrated" from Youtap to YMMA and then written off in October 2021. In cross-examination, Mr Jones maintained that Mr Johnston's holiday pay was transferred from Youtap to YMMA and that if had an issue about payment, he needed to take it up with YMMA and not Youtap.

[47] Mr Johnston paid income tax in Singapore and was resident there for tax purposes. He says that tax was payable regardless of where the taxpayer's employer was based. As an expatriate worker, Mr Johnston was entitled to claim income tax

deductions under Singapore's Not Ordinarily Resident Scheme (NOR) if his work-related travel resulted in him spending 90 days or more outside the country.

[48] To benefit from the NOR scheme, it was Mr McGough's evidence that Mr Johnston had to file a yearly tax return that recorded his gross salary and the number of days spent outside Singapore. However, I questioned Mr McGough where his understanding had come from and he stated that he was relying on advice from an external contractor who did immigration work for the company. Mr McGough acknowledged that he himself was not a tax expert.

[49] Mr Johnston stated that to receive a NOR deduction, he was not required to be employed by a Singaporean-based company for business. It was sufficient for him to have tax residence in Singapore. That claim is to be contrasted with the evidence of Mr Wilkinson who provided a summary of individual tax rates in Singapore. While possessing no expertise in Singaporean tax law himself and relying on website information, Mr Wilkinson stated that there were significant tax savings of 5.8 percent of Mr Johnston's annual gross income if he qualified for a NOR deduction.

[50] Mr Johnston's 2019 tax form with the Inland Revenue Authority of Singapore was signed by Mr McGough as Chief Operating Officer for YMMA. However, the tax form stops short of stating that Mr Johnston was employed by YMMA.

[51] In explanation for being outside Singapore for over 90 days, Mr Johnston stated in re-examination that, as CTO, he visited New Zealand for business and planning purposes where he had a desk at Youtap's head office in Auckland. The desk had his name on it. Mr Jones denied Mr Johnston had his own desk in Auckland stating that he shared a "hot desk" with other staff.

[52] In September 2021, Youtap Technology was created as a limited liability company. This resulted in the transfer of employees from Youtap to Youtap Technology. The employees of YMMA, including Mr Johnston, remained employed by YMMA.

Dismissal and personal grievances raised

[53] By letter of 8 February 2022, Mr Jones as CEO and director of YMMA and as CEO of Youtap Technology terminated Mr Johnston's employment in accord with

sch 1 cl 5.1 of his employment agreement with YMMA. He was given one month's notice and his last day of employment was 8 March 2022.

[54] On 9 March 2022, Mr Johnston's lawyers in Singapore raised a claim of wrongful dismissal with YMMA whose counsel responded on 18 March 2022 referring to the employment contract between them. That same day, Mr Johnston's lawyer requested a copy of the employment agreement which was subsequently provided.

[55] On 11 May 2022, Mr Johnston's representatives in New Zealand raised a personal grievance with Youtap stating that he was never an employee of YMMA, did not agree to being employed by that entity, and that no employment agreement existed.

[56] When cross-examined on this point, Mr Johnston accepted that he had not advised his New Zealand representatives about the existence of his employment agreement with YMMA which he received some seven weeks earlier. This was because things in his life were fragmented at that time. He had a lot going on including keeping his daughter at school and applying for another visa in Singapore.

What is the relevant law?

[57] The first step is for the Authority to determine who Mr Johnston was employed by. Relevantly stated, s 6 of the Act provides the following direction:

6 Meaning of employee

...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority—

(a) must consider *all relevant matters*, including any matters that indicate the intention of the persons; and (emphasis added)

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[58] The Supreme Court's decision in *Bryson v Three Foot Six Limited (No.2)* is the leading case on s 6.¹ Briefly stated, "all relevant matters" was interpreted by the court as including the written and oral terms of the contract between the parties and the way

¹ *Bryson v Three Foot Six Limited (No.2)* [2005] ERNZ 372.

it operated in practice. Regard was to be given to the features of control and integration and whether the contracted person was effectively working on his or her own account (the fundamental test).²

[59] In *Pilgrim v Attorney-General* Chief Judge Inglis recently stated:³

[41] The position adopted by the parties revealed an interpretative tension which can be summarised as follows. Section 6(1) requires the existence of a contract of service. Does that mean the Court must be satisfied that there was a common intention to create legal relations and to enter into an enforceable contract? (what I call the contract-centric approach to s 6). Alternatively, is the Court required to assess the real nature of the relationship having regard to a range of common law indicia (including any matters indicating the intention of the parties) to determine whether a contract of service is deemed to exist? (what I call the relationship-centric/purposive approach to s 6).

...

[44] Drawing the threads together, determining whether a person is employed under a contract of service does not require the Court to first ascertain whether there was an intention to create a contractual relationship, or a contractual relationship in the nature of a contract of service. Rather it requires the Court to undertake a broad contextual enquiry to ascertain what the real nature of the relationship between the parties was. To do this, the Court must have regard to “all relevant factors”. The factors that will be relevant may well vary between cases, particularly in cases which do not fall squarely within the traditional mould. Party intention is a mandatory factor to weigh into the mix (as s 6(3) (a) makes clear), but it is not determinative and is to be objectively determined. All of this underscores the key point that ascertaining the true nature of working relationships is not susceptible to conventional contractual analysis, and the task is not to be approached in that way...

[60] Her Honour’s ‘relationship-centric/purposive approach’ means that every s 6 inquiry will be intensely fact-specific resulting in outcomes that will inevitably vary from case to case.

[61] Arising from the case law over the years are well-established tests including:

- (i) *The intention test* which concerns what the parties intended their working relationship to be;
- (ii) *The control test* which focuses on the degree of control or supervision exercised over a person’s work and requires an analysis of the level of control one party has over the work of the other and how that work is done.

² At [32].

³ *Pilgrim v Attorney-General* [2023] NZEmpC 105.

- (iii) *The fundamental or economic reality test* which requires a general analysis of the work relationship to determine its economic reality. An employment relationship will show an employee's work will benefit the employer. Alternatively, a self-employment situation will show a person to be in business on their own account.
- (iv) *The integration test* which considers whether the work performed by the employee is integral part of the business and whether he or she has effectively become part and parcel of the organisation.

Analysis

The intention test

[62] The main plank of Youtap's defence is Mr Johnston's employment agreement with YMMA which on its face suggests he commenced his employment with that entity on 1 November 2015. It was further contended that the agreement was knowingly entered into, signed, and initialled by Mr Johnston, an intelligent man who knew what he was doing and who represented himself to the immigration authorities in Singapore that he was employed by a Singaporean company.

[63] As the Chief Judge in *Pilgrim & ors* makes clear, the intention of the parties is a relevant factor, but not determinative of the relationship. While there is correspondence from 2015 recording an intention by Mr Johnston to move to Singapore and to be employed by YMMA, that did not immediately happen. No contemporaneous employment agreement was entered into by YMMA and Mr Johnston in 2015, 2016, or 2017. Although an employment agreement appears to have been agreed to, it comes some three years later in October 2018 after an independent audit has identified a non-compliance risk for YMMA for not having an employment agreement with Mr Johnston.

[64] Mr Johnston's evidence at [13] that nothing was finalised with YMMA and there being no response by him to Mr Jones's email regarding KPI's (see [21]) leaves me with no confidence that the parties were *ad idem* when it came to Mr Johnston being employed by YMMA. There is a difference between an intention to do something and

the actual performance of that intention. One must also not treat as determinative any statement that describes the nature of the parties' relationship.⁴

[65] I have reservations concerning the written employment agreement between YMMA and Mr Johnston because it records an incorrect salary figure and currency for Mr Johnston, misspells his last name, has Mr Jones signing the agreement on behalf of Youtap, and refers to trial periods in New Zealand and the requirement to raise a personal grievance within 90 days. The number and extent of these errors are such that the employment agreement must be approached with caution.

[66] It is clear that the document was created in haste because of its multiple errors and internal inconsistencies. I am satisfied that Mr Johnston signed and initialled the YMMA employment agreement because it is, on the balance of probabilities, unlikely that Youtap kept an electronic copy of his initials. Certainly, there was no evidence put before me of a prior occasion where Youtap had inserted his initials into a document. However, Mr Johnston's signature and initials are not determinative of an intention to create legal relations given the BDO audit which identified a non-compliance risk for YMMA as noted above. I cannot rule out as a real possibility that the employment agreement was entered into to address an immigration consequence for Mr Johnston and his family as opposed to a mutual intention with YMMA to enter into an employment relationship.

[67] I find the employment agreement not determinative of who Mr Johnston's employer is.

The remaining tests

[68] However, Mr Johnston travelled regularly to New Zealand and across Asia for business-related work that benefitted Youtap. He had been placed in Singapore to spearhead Youtap's expansion into Singapore and the Asia region generally. Although he had considerable autonomy and was responsible for local hires in Singapore, this is to be expected of a senior executive who was held out by Youtap as its Chief Technical Officer and a member of its management.

⁴ The Act, s 6(3)(b).

[69] Although Mr Johnston did not have his own office and apparently shared a hot desk when he visited Youtap's head office in Auckland, that he had ongoing in person meetings and conference calls with Mr Jones and other Youtap executives establishes that he remained an integral part of Youtap.

[70] Without ongoing financial support from Youtap and/or Youtap Technology, Mr Johnston would not have been paid for his work in Singapore because the preponderance of information and evidence before me shows that YMMA was never in a position to pay its own expenses. While it may be expected for a parent company to provide financial support for a subsidiary, that is not always the case. The fact that Youtap and/or Youtap Technology did so for a sustained period of time demonstrates Mr Johnston's importance to Youtap particularly as he was, at various times, the only employee on YMMA's payroll.

Conclusion

[71] Pulling the strands together and noting the various case law indicia noted above, I am satisfied that the real nature of the relationship was that Mr Johnston's employment was with Youtap.

Costs

[72] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority