

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 343

5437517

BETWEEN	ROBERT DUNCAN KENT Applicant
AND	BARKERS PARK LIMITED First Respondent
	P & K NZ LIMITED Second Respondent
	SUNG HO PARK Third Respondent

Member of Authority:	Rachel Larmer
Representatives:	Applicant in Person Brian Foote Counsel for Respondent
Investigation Meeting:	On the papers
Date:	20 August 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Kent claims he was employed by all three respondents. The respondents deny that and say Mr Kent was only ever employed by Barkers Park. P & K NZ Limited (P&K) seeks to be struck out as a party on the grounds the Authority does not have jurisdiction to hear claims against it in the absence of an employment relationship with Mr Kent.

[2] Mr Kent has penalty claims against Mr Park personally for allegedly aiding and abetting breaches of Mr Kent's employment agreement. That means that if Mr Park is not found to have personally employed Mr Kent, he will remain a party because the Authority has jurisdiction to investigate the aiding and abetting claims against him.

[3] By consent the jurisdiction issue involving P&K and the issue of whether Mr Park ever personally employed Mr Kent has been determined on the papers after both parties filed evidence on the existence or otherwise of an employment relationship.

[4] There is no dispute that Mr Kent was employed by Barkers Park as its Chief Executive Officer under an individual employment agreement signed by him on 20 October 2011. Mr Kent's duties included "*such other duties as requested by the Director*" (i.e. Mr Park). Mr Kent received his salary from Barkers Park. He has never received remuneration from P&K or from Mr Park personally.

[5] Under the terms of this employment agreement Mr Kent worked at 171 Fairy Springs Road, Rotorua. This is known as "Barkers Park" and it describes the businesses that are run by Barkers Park from the location of a rural property located on the outskirts of Rotorua which is owned by P&K.

[6] Mr Kent argues that a letter he received from P&K dated 26 September 2011 giving him authority to represent P&K in dealings with its tenants and the Rotorua District Council over building consent applications and resource consents created an employment relationship with P&K. Mr Kent also believes that because he did work on the Barkers Park property and such work benefited P&K as the owner of the property then that supports the existence of an employment relationship.

[7] Around late January/early February 2013 Mr Park and Mr Kent discussed the work he was doing on the Barkers Park property which benefited P&K as the owners of that property. Mr Park asked Mr Kent if he expected to be remunerated for it and Mr Kent expressed the view that he did not because he believed any such activities were part of his normal duties under the terms of his employment agreement with Barkers Park, so as such were already covered by his existing salary.

[8] Mr Kent says he cited all three respondents to avoid Mr Park liquidating Barkers Park if he (Mr Kent) succeeds with his substantive claims and is awarded compensation.

[9] I find that Mr Kent was employed by Barkers Park only. He was never employed by P&K or by Mr Park in his personal capacity. None of the normal essential elements of contract formation are evident in respect of any of Mr Kent's engagements with Mr Park personally or with P&K.

[10] Mr Park did not offer to personally employ Mr Kent either by his words or actions. I consider their interactions were in Mr Park's capacity as owner (director and shareholder) of Barkers Park which was the legal entity which had entered into an employment relationship with Mr Kent.

[11] Nor was there any offer of employment ever made by P&K much less an offer that was capable of acceptance by Mr Kent. I consider that any work Mr Kent did that may have benefited P&K was done in Mr Kent's capacity as Barker Park's employee. This includes liaising with the Council over permits and consents that were needed for Barker Park's business activities on the property owned by P&K.

[12] There was no evidence of any mutual intention between Mr Kent and Mr Park to create legal relations in terms of the former being personally employed by the latter and not solely by Barkers Park. Nor was there a mutual intention to create legal relations between Mr Kent and P&K.

[13] I find that Mr Kent and Mr Park (personally as opposed to as owner of Barkers Park) did not act as if they were in a direct employee/employer relationship. Nor did Mr Kent and P&K. I also find that Mr Kent's interactions were with Mr Park in Mr Park's capacity as owner of the entity (Barkers Park) which employed Mr Kent. They had direct communications because Mr Kent was the most senior employee so he was effectively running the business in accordance with the remote owner's (Mr Park's) instructions.

[14] There was also a complete absence of any agreed terms between Mr Kent and Mr Park (in his personal capacity) or between Mr Kent and P&K, much less certainty of terms. I also find there was an absence of consideration between Mr Kent and P&K and between Mr Kent and Mr Park (in his personal capacity) which supports my

finding that the parties were not in a direct contractual relationship, much less an employment relationship.

[15] Mr Kent bears the onus of establishing on the balance of probabilities that he was employed by Mr Park in his personal capacity and/or P&K. I find he is unable to discharge that onus. There was no offer or acceptance of employment, no intention to create legal relations, no agreed terms, no certainty of terms, no mutual of obligations, and no consideration exchanged between the parties. I therefore find that none of the required contract formation requirements are present in this case.

[16] Furthermore neither Mr Kent, Mr Park (in his personal capacity) and/or P&K ever acted as if they were in an employment relationship. The fact that Mr Kent undertook as part of his normal employment duties with Barkers Park work that may have been of benefit to P&K does not of itself create a legally binding employment relationship. Nor does the fact that P&K authorised Mr Kent to represent it in his dealings he was having with the Council as part of his employment with Barkers Park.

[17] Accordingly, P&K is struck out as a party to the substantive proceedings. Any claims involving Mr Park personally are limited to Mr Kent's penalty claims arising from Mr Park allegedly aiding and abetting breaches of Mr Kent's employment agreement with Barkers Park. Mr Kent's substantive claims regarding issues that occurred during his employment and surrounding the termination of his employment only involve Barkers Park, as this is the only person/legal entity which employed him.

Costs

[18] Costs are reserved pending the resolution of the substantive proceedings.

Rachel Larmer
Member of the Employment Relations Authority