

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 357
5353422

BETWEEN PETER LORIGAN
Applicant

A N D INFINITY AUTOMOTIVE
LIMITED
First Respondent

A N D SIME DARBY MOTOR
GROUP (NZ) LIMITED
Second Respondent

[2015] NZERA Auckland 357
5404586

BETWEEN INFINITY AUTOMOTIVE
LIMITED
Applicant

A N D PETER LORIGAN
Respondent

Member of Authority: James Crichton

Representatives: Applicant (Peter Lorigan) in person
Rob Towner and Susannah Maxfield, Counsel for
Infinity Automotive Limited and Sime Darby Motor
Group (NZ) Limited

Investigation Meeting: On the papers

Submissions received: 25 September 2015 from Peter Lorigan
10 September 2015 from Infinity Automotive Limited
and Sime Darby Motor Group (NZ) Limited

Date of Determination: 13 November 2015

SECOND DETERMINATION OF THE AUTHORITY

History

[1] In my determination of 12 June 2015 issued as [2015] NZERA Auckland 169, I dealt with an application by Mr Lorigan to remove this matter to the Employment Court, which I rejected, and a joint application for consolidation of the two matters referred to in the intituling above, which I agreed to.

[2] Having rejected Mr Lorigan's application for both matters to be referred to the Employment Court for disposition there, the Authority's obligation is to investigate the consolidated matter and deal with it in accordance with the Authority's usual process.

[3] To that end, I convened two telephone conferences with the parties in August 2015 at which it was agreed that three preliminary legal questions would be dealt with first and, depending on the outcome of that disposition, the substantive dispute could then be investigated (or not) in the Authority's subsequent process. I observe for the sake of completeness that during those two telephone conferences in August 2015, Mr Lorigan was represented by able counsel.

[4] Counsel for Mr Lorigan in August 2015 argued strongly for a hearing in person to enable counsel to elaborate on the legal arguments that were to be advanced in respect to the three preliminary issues.

[5] While I did not consider a hearing in person to be in any way necessary, believing the matter could be easily and more expeditiously dealt with on the papers, I was happy to entertain counsel's request even though counsel for Infinity and Sime Darby were also unenthusiastic about a hearing in person.

[6] The matter was then set down for a hearing on 4 November 2015 where I was explicit that the only matters in play were the three preliminary issues and the legal argument in respect to those preliminary issues. Evidence was to be filed and served by affidavit and there was to be no further evidence given and taken orally. I allocated time for the hearing on that explicit basis. Submissions supported by affidavit evidence were duly filed and served, in accordance with that timetable.

[7] Then, by memorandum dated 22 October 2015 (some 10 days before the fixture), counsel for Mr Lorigan withdrew. Forthwith on receipt of that notification, counsel for Infinity and Sime Darby filed an application to vacate the fixture set for

4 November 2015 on the footing that as the only person who sought the hearing in person was no longer involved, the matter could be more expeditiously dealt with on the papers.

[8] Mr Lorigan, now acting for himself, vehemently disagreed but made it clear in doing so that he sought to be heard on the substance of the underlying dispute, rather overlooking the fact that this hearing was exclusively to hear legal argument about the three preliminary issues.

[9] I took the view that Mr Lorigan, as a lay person, was in no position to assist me by way of legal submissions and that allowing the hearing to proceed with Mr Lorigan acting for himself was effectively going to give Infinity and Sime Darby an unfair advantage as they were represented by counsel.

[10] Moreover, I discerned from Mr Lorigan's emails on the point that he wanted an opportunity to give evidence in person which, given that Infinity and Sime Darby were not prepared for that eventuality (the nature of the hearing having been already determined), would effectively give Mr Lorigan an unfair advantage too. Accordingly, I vacated the fixture.

[11] Mr Lorigan has continued to protest that decision and amongst other things has asked that I recuse myself from dealing with the matter. There is no proper basis on which I should do that; my decision to vacate the hearing has been made exclusively on a proper basis designed to ensure an equal playing field between the parties and to first preclude the possibility of advantage to Infinity and Sime Darby because they are legally represented, and second to ensure that Mr Lorigan does not have an improper opportunity to give evidence when the responding parties are not equally prepared for the same purpose, given the earlier decision of the Authority that the matter for consideration at the November hearing was exclusively legal argument around the three preliminary issues.

What are the three preliminary issues?

[12] In anticipation of the August 2015 telephone conferences that I have already referred to, counsel for Infinity and Sime Darby asserted that the Authority ought to deal with the three preliminary matters first before the parties addressed the substance of the dispute between them, if only because the essence of those preliminary issues, if found to favour Infinity and/or Sime Darby, would effectively bring the proceeding,

in respect to one or other of those parties, to an end, at least so far as the Employment Relations Authority was concerned.

[13] Counsel for Mr Lorigan (then instructed) agreed to the three preliminary issues being dealt with first and I have already described what was agreed about how the preliminary issues were to be disposed of.

[14] Excellent submissions and supporting affidavit evidence have now been filed by both parties and this determination addresses the three preliminary issues and disposes of them so far as the Authority's process is concerned.

[15] The three preliminary issues for disposition in this determination are:

- (a) An argument that there is an accord and satisfaction between Mr Lorigan and Infinity which precludes any further claim relating to the employment from Mr Lorigan or in the alternative that there is a binding agreement between the parties which has the same effect; and
- (b) That while it is common cause that Mr Lorigan raised a personal grievance for unjustified dismissal within time, it is the position of Infinity and Sime Darby that no personal grievance for unjustifiable disadvantage was ever raised by Mr Lorigan within time; and
- (c) That Mr Lorigan never had an employment relationship with Sime Darby and therefore the claim against Sime Darby ought to be dismissed.

Factual background

[16] Sime Darby Motor Group (NZ) Limited has significant involvement in the motor trade in this country and operates through a number of wholly owned subsidiaries, one of which is Infinity.

[17] Sime Darby and Infinity say that in the period from 20 October 2008 down to 23 March 2009, Mr Lorigan was an independent contractor to one of Sime Darby's wholly owned subsidiaries. Conversely, Mr Lorigan maintains that a proper construction of those relationships means that he was in fact an employee and not a contractor at the relevant time.

[18] However, it is common cause that on and from 24 March 2009, Mr Lorigan became an employee of a wholly owned subsidiary of Sime Darby which, within a matter of months of Mr Lorigan's employment, was amalgamated with other like entities to become Infinity.

[19] Then, as a consequence of changes made by the vehicle franchise that Infinity sold (Nissan), a restructuring process was required one of the effects of which was that two sales positions (one of which was occupied by Mr Lorigan) were to be disestablished and only one position was created in its place.

[20] In consequence of that restructuring, Mr Lorigan was not successful in his quest to be retained in the employment and he was made redundant with effect from 31 January 2010.

Accord and satisfaction

[21] Infinity and Sime Darby maintain that there is an accord and satisfaction between the parties which has the effect of precluding Mr Lorigan from pursuing his claim against Infinity. Mr Lorigan resists that claim.

[22] The parties agree about the applicable law but disagree about its application. Infinity relies on a number of leading judgments of the Employment Court and refers in particular to *Graham v. Crestline* [2006] ERNZ 848.

[23] As submissions for Mr Lorigan enunciate, the principles of an accord and satisfaction are that:

- (a) There must be a genuine dispute between the parties; and
- (b) Whether there is an accord and satisfaction is a matter of fact requiring the tribunal to assess if there has been a meeting of minds or if one party has behaved in such a way as to induce the other to think the claim is satisfied; and
- (c) There must be consideration.

[24] It is apparent from decided cases that no particular formality is required to record an accord and satisfaction understanding and it is equally clear that the effect

of an accord and satisfaction is to prevent a party suing the other party because the law regards the matter as having been effectively resolved by agreement.

[25] What happened in the instant case is that Infinity made an offer to pay Mr Lorigan a gross sum of \$4,038.46 on 22 December 2009 in the context of a letter of that date to Mr Lorigan indicating that his employment was terminated for redundancy. Infinity say this offer was gratuitous while Mr Lorigan says he was entitled to the payment by force of contract and so there was no prospect of it being an accord and satisfaction.

[26] Mr Lorigan says that he made no “*formal*” intimation of a dispute concerning the redundancy until approximately a month later when he caused his then lawyers to write to Infinity under letter dated 28 January 2010 raising a personal grievance for unjustified dismissal. In the course of that personal grievance letter, Mr Lorigan also caused his lawyers to make abundantly clear that the payment was not accepted as in full and final settlement of all matters, as if the raising of the personal grievance in the same letter was not evidence enough of that point.

[27] Mr Lorigan says in his affidavit that he told Infinity managers on 25 November 2009 that he had been disadvantaged in his employment and that the redundancy process “*was a sham*” and that was fully a month before the offer contained in Infinity’s 22 December 2009 letter.

[28] Moreover, there is a hearsay reference in the affidavit in support from Infinity to the effect that a human resources manager at Infinity had told the deponent that Mr Lorigan was alleging that the selection process which followed the restructure was predetermined.

[29] While it is right to say that this last mentioned piece of evidence is hearsay, it is also fair to note that the passage of time has made it difficult for the responding party particularly (Infinity) to marshal its defence because staff who were involved at the time of the events complained of have moved on and are no longer readily available to Infinity. Moreover, the hearsay evidence is consistent with Mr Lorigan’s own evidence that he informally raised protests about the process by which he eventually lost his role at Infinity.

[30] I conclude then on the balance of probabilities that it is more likely than not that Mr Lorigan did raised a genuine dispute about the restructuring process and its

consequences although it is plain that this raising of the dispute was informal rather than formal (at least until a month after the tendering of the proposed settlement by Infinity). The point here is that it seems to me unrealistic to conclude that Infinity was oblivious of Mr Lorigan's unhappiness when it made its settlement proposal to him; indeed, I think it more likely than not that the settlement proposal was informed by the imminent prospect of a dispute being progressed.

[31] That is the explicit basis on which the head of human resources for the Sime Darby Group, Mr Peter Leathley, puts the subject payment to Mr Lorigan. It is apparent on the face of the affidavit that Mr Leathley himself made the key decisions. At para.13 of his affidavit, he says:

I was aware that Mr Lorigan had raised an allegation that the selection process was predetermined, and I drafted the wording to be put in the letter stating that the payment was offered on the condition that it was in full and final settlement of any issues relating to his employment or the termination of it.

[32] The wording that Mr Leathley put in the letter was in the terms that:

... if compensation is paid by the company, you accept that it is in full and final settlement of any issues relating or that may relate to your employment or the termination of it.

[33] It is apparent from the affidavit of Mr Leathley that the payment was not actually lodged to Mr Lorigan's bank account until fully a month later on 29 January 2010, ironically contemporaneously with Mr Lorigan's personal grievance letter being received by Infinity.

[34] I conclude there was a genuine dispute raised between the parties (albeit informally) and that that fact informed Infinity's decision to offer Mr Lorigan a payment in full and final settlement.

[35] Mr Lorigan maintains that he was entitled to the compensation proffered by Infinity because he says that he had "*effectively been employed with City Nissan [Infinity] and Sime Darby from 28 October 2008 ...*" and had therefore been in the employment for more than 12 months and was therefore entitled to redundancy compensation as of right.

[36] What Infinity and Sime Darby say is that Mr Lorigan had no entitlement to redundancy compensation because he had only worked for Infinity from 24 March 2009 and accordingly by the time his employment terminated on 31 January 2010, he had worked for less than 12 months and the employment agreement was absolutely explicit that redundancy compensation was only payable for completed years of service. In consequence Infinity and Sime Darby say that Mr Lorigan had no entitlement to redundancy compensation and that the intention that Infinity had in making the payment to Mr Lorigan was to try to settle matters that had been foreshadowed by Mr Lorigan with the payment of that gratuitous sum.

[37] The question of whether Mr Lorigan was employed earlier than 24 March 2009 (by common consent his start date in the employment of Infinity) I will deal with in a subsequent section of this determination. It is enough for me to say at this point that Infinity and Sime Darby maintain first that Sime Darby never employed Mr Lorigan and second that Mr Lorigan's previous engagement with the Sime Darby Group was invariably as a contractor prior to 24 March 2009.

[38] My conclusion then in relation to the accord and satisfaction argument is that save for the question whether Mr Lorigan had entitlement as of right to the redundancy compensation (about which more later), Infinity and Sime Darby's claim for an accord and satisfaction is not made out.

[39] While I have concluded that there was a genuine dispute between the parties (albeit informally raised by Mr Lorigan) and that dispute was sufficiently significant to encourage Infinity to seek to try to settle matters with Mr Lorigan, even allowing for the presence of consideration (here making the assumption that Mr Lorigan is not entitled to redundancy compensation and thus the payment to him was gratuitous) it cannot be said that there was a meeting of minds or even that Mr Lorigan's behaviour was such as to induce Infinity to think the matter was settled.

[40] This is for the self-evident reason that Mr Lorrigan caused his personal grievance letter to make as plain as can be that he did not accept the settlement proposal on the basis it was tendered; indeed the very fact of the raising of the personal grievance gives the lie to any suggestion the matter is settled.

[41] I dismiss the accord and satisfaction argument accordingly and record that Mr Lorrigan can proceed to have the personal grievance he raised by letter dated 28 January 2010, investigated by the Authority.

Was a disadvantage grievance ever raised?

[42] It is common ground that Mr Lorigan raised a personal grievance for unjustified dismissal by letter dated 28 January 2010. There was a subsequent letter from Mr Lorigan's then solicitors dated 8 July 2011 and yet another letter dated 15 July 2011. Accordingly to Infinity and Sime Darby, it was not until the 15 July 2011 letter that Mr Lorigan's then lawyers purported to raise a disadvantage grievance.

[43] Mr Lorigan rejects that analysis and says that the initial letter on 28 January 2010 raised both a disadvantage grievance and a grievance for unjustified dismissal.

[44] The law on this matter is clear enough. The obligation of the employee is to raise her or his grievance with a sufficient degree of particularity to enable the employer to address it and resolve it if that were possible.

[45] As Chief Judge Colgan said in *Creedy v. Commissioner of Police* [2006] ERNZ 516, it was not enough for an employee to simply specify the statutory type of personal grievance because the employer must know what to address.

[46] I have carefully studied the 28 January 2010 personal grievance letter and am at a loss to understand how it could be contended that that letter raises anything other than a claim for unjustified dismissal and breaches of good faith.

[47] There appears to be one reference in the letter to a personal grievance for unjustified dismissal and several references to alleged breaches of good faith, but no suggestion whatever of any other personal grievance and indeed no commentary in the letter which would suggest that the grievant is concerned with anything other than what he regarded as an unjustified dismissal.

[48] All the discussion relates to the complaints Mr Lorigan had with the process by which Infinity disestablished his position and the subsequent selection of another employee to fill the single vacancy to which Mr Lorigan himself aspired.

[49] It was not until 18 months later in a letter dated 15 July 2011 that there was a reference to an unjustified disadvantage grievance, but only in respect to one aspect.

[50] Then in the amended Statement of Problem filed for Mr Lorigan on 19 December 2012, there were 15 separate allegations purporting to be unjustified actions causing Mr Lorigan disadvantage which included the single allegation enumerated in the 15 July 2011 letter.

[51] None of those several allegations were raised with Infinity or Sime Darby within the statutory justiciable period, Infinity and Sime Darby refused to consent to those matters being raised now and there is no application before the Authority for leave to raise them out of time.

[52] I have no hesitation in concluding that the alleged personal grievance in respect to unjustified actions of the employer purportedly causing Mr Lorigan disadvantage have not been raised within time and Mr Lorigan is therefore not entitled to pursue those matters further.

Who was Mr Lorigan's employer?

[53] Infinity and Sime Darby say unequivocally that Mr Lorigan was only ever employed by Infinity and then only for the relatively short period from 24 March 2009 down to 31 January 2010. Infinity and Sime Darby are very clear that Mr Lorigan was never employed by any other entity within the Sime Darby Group (including in particular Sime Darby itself) and that his previous engagements with the Sime Darby Group (that is prior to 24 March 2009) were exclusively as an independent contractor. Moreover, Infinity and Sime Darby are explicit that because Mr Lorigan was not employed for a full year by Infinity, he had no entitlement as of right to redundancy compensation and the compensation paid to him at the conclusion of the employment was in fact a gratuitous payment and therefore the accord and satisfaction argument avails.

[54] For his part, as I have already noted, Mr Lorigan maintains that he was effectively jointly employed by Infinity and Sime Darby and that a proper construction of the independent contractor agreements entered into by Mr Lorigan on the one hand and various of the Sime Darby companies on the other would result in a conclusion that he was actually employed throughout his association with the Sime Darby Group.

[55] As I have already noted, Sime Darby is a large motor dealer which trades through a number of wholly owned subsidiaries. Each of those subsidiaries is a separate business and has a separate profit centre but the Sime Darby Group has oversight over the whole operation and performs some corporate functions for the whole group such as senior management, payroll and human resources and IT. Critically for Mr Lorigan's claim that he was ever employed by Sime Darby, I am satisfied on the affidavit evidence from Mr Leathley that the only people actually employed by Sime Darby are people involved in the functions that I have just referred to, namely senior managers, HR and payroll, and IT. Given that Mr Lorigan is a sales manager, it seems inconceivable that he could fall within any of the categories just referred to.

[56] The parties are in agreement on the legal principles that need to apply. These are:

- (a) That the employee bears the onus of proving who the employer is; and
- (b) The legal test of whether person A is employed by person B requires the Authority to determine "*the real nature of the relationship*"; and
- (c) In considering the evidence about the identity of the employer, the question is whether an independent but knowledgeable observer would have identified the employer correctly at the point at which the employment commenced: *Mehta v. Elliott (Labour Inspector)* 1 ERNZ 451 per Colgan J; and
- (d) The point at which the identity of the employer is decided is at the beginning of the employment relationship.

[57] As I have already noted, so far as Infinity and Sime Darby are concerned, Mr Lorigan was employed by Infinity alone for the period from 24 March 2009 down to 31 January 2010; conversely, Mr Lorigan says both that he was employed by Sime Darby as well as Infinity and that his employment predated 24 March 2009 because of his conviction that he had been employed for more than one year and was therefore entitled to the redundancy payment as of right and accordingly, did not receive it as a gratuitous payment.

[58] I deal first with the question whether Mr Lorigan was employed within the Sime Darby Group before 24 March 2009.

[59] Mr Lorigan says that he approached a senior manager in Sime Darby in June 2008 looking for fleet sales manager roles within the Sime Darby Group. He says he was particularly interested in working within the Sime Darby Group because of its large reach in the motor industry and because he wanted to further his career.

[60] Because of the global financial crisis that was then in full swing, Mr Lorigan's evidence is that he was told that employment opportunities were limited but it seems that discussions continued until a meeting on 17 October 2008 where a number of the dealer principals within the Sime Darby Group met with Mr Lorigan in attendance.

[61] Attached to Mr Lorigan's affidavit is a document styled "*Contract Heads of Agreement between North Shore Motor Group (Sime Darby Automotive Group Limited) and Peter Lorigan*". That document is dated 17 October 2008, the same date as the meeting I have just referred to and while not signed, would appear to have been generated by Mr Lorigan himself.

[62] Mr Lorigan's evidence is that his contract heads of agreement document was "*accepted and adopted by all present*". For our purposes, I note that this agreement, drafted as it is by Mr Lorigan, expresses itself to propose that Mr Lorigan's income "*will be by way of GST invoice only based on sales achieved*" and under the heading "*income*" are the words "*invoiced commissions will be set at 35% of Gross Retain (after distributor kick back where applicable), with a minimum of \$200 plus GST per unit sold*".

[63] I observe that that document would appear to be seeking to create a contractor/principal relationship rather than an employment relationship and I am entitled to take account of the fact that the document was drafted by Mr Lorigan and according to his evidence was accepted by Sime Darby's dealer principals at the meeting described. That suggests to me that at the start of the relationship between Mr Lorigan and Sime Darby, the parties' intention was to have a contractual rather than an employment relationship. Certainly, Mr Lorigan's document is absolutely consistent with the subsequent contractor agreement entered into between himself and one of the Sime Darby companies three days later on 20 October 2008.

[64] Moreover, that contractor agreement appears to pick up many of the salient elements in Mr Lorigan's own document.

[65] That agreement was superseded by another agreement dated 24 November 2008 which is in similar terms to the earlier document. It appears that these contractual arrangements were extended on a month-by-month basis and according to Mr Lorigan, the reason that there was not a more permanent arrangement in place was because of the global financial crisis although that evidence is disputed by Sime Darby.

[66] Despite the appearance of these documents as contractual agreements consistent with Mr Lorigan's own proposal, his affidavit stoutly maintains that he regarded himself as being a "*full time employee*" despite the evidence to the contrary of the parties' actual intentions.

[67] Moreover, the terms of the two contractor agreements before me, as well as being consistent with Mr Lorigan's own proposal, contain the express terms that I would expect to see in a contractual rather than an employment agreement. Amongst other things, there are no terms within either document which would indicate an employment relationship (for example no provision for holiday leave or any of the other normal incidences of employment), while the references throughout are to Mr Lorigan being a contractor and the payment being expressed on a "*fees and allowances*" basis which are defined broadly in terms of volume sales. The fees and allowances are to be paid on receipt of a monthly invoice from Mr Lorigan.

[68] Given the fact that this contractor arrangement was renewed more than once over a very short timeframe, it is difficult to see why Mr Lorigan would now maintain that this was all a fiction and that in truth he was actually employed during this period. This is so particularly as his evidence is that he understood that he would be employed as soon as the employer was in a position to offer employment and that is in fact precisely what happened when he was offered employment in March of 2009.

[69] However, I am satisfied a proper construction of the various common law tests for the existence of an employment relationship might well suggest a different outcome. The very limited evidence before me suggests that Mr Lorigan was during this early period prior to March 2009, effectively controlled by his principal, integrated into his principal's business, part of his principal's organisation, and in

terms of the economic reality test or indeed the fundamental test, with more evidence available one might well conclude that, notwithstanding the apparent intention of the parties (reference Mr Lorigan's own document) and notwithstanding the clearest documentation, in reality there was or may have been an employment relationship.

[70] But that tentative assessment would only assist Mr Lorigan if these earlier arrangements involve the same legal entity or entities as the later arrangement. All of the contractor agreements are between Mr Lorigan and North Shore Motor Holdings Limited whereas it is common cause that Mr Lorigan was employed by Infinity Automotive Limited, although the employment agreement is expressed to be with Perry's Automotive Group (North Shore) Limited which was Infinity's predecessor. Perry's joined two other companies and became Infinity in May 2009.

[71] Mr Lorigan's argument is that he was employed not just by Infinity but also by Sime Darby but even if I were to find that that was the case, that does not avail him given that his earlier engagement (whether employment or contractual) is with North Shore Motor Holdings Limited. It cannot be right that just because North Shore Motor Holdings Limited and Infinity are members of the Sime Darby Group of companies, any employee of one is somehow also an employee of the others.

[72] Turning to look at the nature of the relationship between Mr Lorigan and Infinity, neither party contends that that was not an employment relationship; what Mr Lorigan says is that as well as being employed by Infinity, he was also employed by Sime Darby. But as I have just said, even if I were to accept that proposition (and for reasons that I will outline shortly I do not), that still does not get him to the point where he is able to contend that he had earlier employment that was continuous for the purposes of an entitlement to redundancy compensation, thus negating the claim made by Infinity and Sime Darby that their payment to him at the end of the employment was gratuitous rather than pursuant to contract.

[73] Mr Lorigan entered into an employment agreement with Perry's (now Infinity) and there is no evidence that Sime Darby was a party to that agreement. It is the case that Infinity is part of the Sime Darby Group and indeed the employment agreement mentions that very fact, but that is not sufficient to make Sime Darby somehow a party to the agreement.

[74] I am satisfied on the evidence from Mr Leathley that Sime Darby has a group structure, that it provides corporate services to the group of companies, that Sime Darby's only employees are in a defined group of specialist roles which exclude Mr Lorigan's area of expertise, and that Infinity along with all the other members of the Sime Darby group of operating companies, made its own decisions, ran its own profit centres and was to all intents and purposes separate legal entities.

[75] Moreover, given that I am required to determine the identity of the employer at the commencement of the relationship, it seems clear even on Mr Lorigan's evidence that he was directed to a particular role in a particular member of the Sime Darby Group and in terms of his affidavit, the evidence is very clear that he was to be part and parcel of the Infinity business and not part and parcel of any other business within the Sime Darby Group.

[76] Furthermore, Mr Lorigan was integrated within the Infinity business, was directed by Infinity management and had precious little to do with anybody from the Sime Darby Group. So much so that Mr Leathley's evidence is that he only ever met Mr Lorigan once and that was at a Christmas function.

[77] Mr Lorigan carried out his duties under the control of Infinity and notwithstanding his evidence to the contrary, I have not been persuaded that he received instructions from anyone other than his immediate Infinity manager.

[78] Moreover, I accept Mr Leathley's evidence to the effect that Sime Darby would have had no day-to-day knowledge of what Mr Lorigan was doing or indeed the way in which he was performing his role. As a matter of fact, Sime Darby had virtually nothing to do with Mr Lorigan day-to-day.

[79] It is the case that Mr Lorigan, along with other employees of Infinity, was paid from the Sime Darby Group but nothing turns on that because the case law is clear that that is a neutral factor in the equation. As I have already made clear, Sime Darby managed payroll for all of the group companies so it is inevitable that the actual payment will emerge from a Sime Darby account. It is equally apparent on the evidence of Mr Leathley though that such payment would have been allocated against the Infinity costs centre because Infinity was responsible for Mr Lorigan's remuneration.

[80] All of the normal incidences of the employment were the responsibility of Infinity. It ran the restructuring process which resulted in Mr Lorigan being dismissed from the employment for redundancy and all of the decisions pertaining to the restructuring were made by Infinity. It is true that Infinity used group human resources which came from Sime Darby but the decisions were made in-house.

[81] Further and finally, I note that the suggestion that Sime Darby was somehow an employer of Mr Lorigan is a recent one; there was no suggestion in the original correspondence on Mr Lorigan's behalf immediately after the employment ended that Sime Darby was somehow also his employer.

[82] Accordingly, I have concluded that Mr Lorigan has not satisfied me that he was ever employed by Sime Darby and the parties' intention was always that Infinity be the employer and Mr Lorigan the employee. Applying *Mehta*, I must conclude that an independent but knowledgeable observer would identify that Infinity was Mr Lorigan's employer and that Mr Lorigan was never employed by Sime Darby and that that judgment, while clearly possible at the beginning of the employment, would have been possible throughout the employment as well. It is even fair to say that so far as Mr Lorigan's lawyers were concerned immediately after his dismissal for redundancy, there was no suggestion that Sime Darby was involved until some years after the employment ended.

Determination

[83] I conclude first that there is no accord and satisfaction as between Mr Lorigan and Infinity and in consequence, Mr Lorigan can proceed with his personal grievance claim as that claim is articulated in his lawyer's letter of 28 January 2010. This is because although he has accepted a gratuitous payment from Infinity which was expressed to be in full and final settlement of any claims arising out of the employment he made it abundantly clear the payment was not accepted in full and final settlement. So even although I find there was consideration, because the payment made to Mr Lorigan was actually gratuitous, there was no accord and satisfaction on the facts.

[84] Secondly, I am satisfied that Mr Lorigan has not raised any grievance for disadvantage as a consequence of unjustifiable actions of the employer and therefore those claims he makes of 15 such unjustifiable actions causing disadvantage must be

dismissed, especially because there has never been any application, timely or otherwise, for leave to proceed out of time.

[85] Thirdly, I am satisfied that Mr Lorigan was never employed by Sime Darby Motor Group (NZ) Limited and as a consequence the claim against Sime Darby Motor Group (NZ) Limited is now struck-out.

Costs

[86] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority