

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 156/09
5158600

BETWEEN	MARITIME UNION OF NEW ZEALAND Applicant
AND	C3 LIMITED Respondent

Member of Authority: Marija Urlich

Representatives: Simon Mitchell, Counsel for Applicant
Phillipa Muir and Katherine Burson, for Respondent

Investigation Meeting: 1 May 2009

Determination: 15 May 2009

DETERMINATION OF THE AUTHORITY

[1] This determination deals with the following preliminary issue – does the applicant Union, MUNZ, have sufficient interest in the collective agreement it seeks to challenge?

[2] Members of MUNZ who work at the Port of Tauranga are employed under a collective employment agreement. The parties to that CEA are TLNZ Limited and MUNZ (“the MUNZ agreement”). Members of the Rail and Maritime Union (“RMTU”) also work at the Port of Tauranga. Their employment is covered by a collective employment agreement between C3 Limited and RMTU (“the RMTU agreement”). MUNZ says the C3 agreement undermines its agreement.

[3] MUNZ applied to the Authority for a range of orders against C3 Limited. C3 Limited responded that the orders sought could not be made because there is no employment relationship between MUNZ and C3 Limited.

[4] I have received affidavit evidence in support of the respective positions and heard submissions from the parties. In the interests of disposing of this matter quickly I have not set out the evidence received or submissions presented in detail. It should not be taken from this that what has been received and presented to the Authority was not relevant to the issues for determination.

Background

[5] C3 Limited is a holding company with a number of subsidiary companies one of which is TLNZ Limited.

[6] In October 2007 MUNZ received a letter from C3 Limited's Chief Financial Officer advising:

*I would like to introduce you to **C3 Limited** – the new name for Toll Owens Limited.*

C3 has been developed as a new brand that we hope can encapsulate the proud achievements of our long history on the New Zealand waterfront and provide s focal point for our future.

If you have any accounts in any of the following names please change them, effective from 29 October 2007, to C3 Limited:

...

- *TLNZ Limited*

...

[7] In December 2007 MUNZ and TLNZ entered the MUNZ agreement, the term of which is 10 December 2007 to 1 March 2010. The MUNZ agreement was expressly executed on behalf of TLNZ Limited by C3 Limited's CEO.

[8] In January 2009 the contract to perform lashing and hatch work services at Sulphur Point (part of the Port of Tauranga) was transferred from one C3 Limited subsidiary to another. MUNZ members performed that lashing and hatch work. C3 Limited held discussions (independently) with MUNZ and RMTU to secure more flexibility in the respective CEAs. Subsequent to these discussions C3 Limited and RTMU reached agreement to vary the RMTU agreement and the lashing and hatching

work at Sulphur Point has been offered to workers under the terms of the RMTU agreement.

[9] MUNZ members who have been offered lashing work at Sulphur Point have now joined the RMTU. They have not resigned from MUNZ.

MUNZ's submissions

[10] MUNZ members, who are employed to complete lashing work at Sulphur Point, say they are employed by C3 Limited and that C3 Limited holds itself out as their employer. They seek to rely on the following evidence in support:

- (i) they work in C3 Limited emblazoned clothing;
- (ii) they receive direction from C3 Limited management;
- (iii) they are paid by C3 Limited and receive payslips named C3 Limited;
- (iv) their Union fees are remitted by C3 Limited with advice from C3 Limited;
- (v) C3 Limited correspond with MUNZ referring to C3 and not TLNZ;
- (vi) Notice of dismissal has been communicated by C3 Limited.

[11] Mr Mitchell, for MUNZ, submits that C3 Limited is estopped from denying it is the employer under the provisions of the MUNZ agreement. He submits that C3 Limited has acted as employer and taken the benefits associated, that it has lead MUNZ to believe it is the employer and that MUNZ has relied on this and dealt with C3 as the employer. He submits that it is inequitable for C3 Limited to refuse to apply the MUNZ agreement to Sulphur Point employees when it has had the benefit of that CEA.

[12] The second broad submission concerns the variation to the RMTU agreement. Mr Mitchell submits that variation has no legal effect and that section 18 of the Act entitles MUNZ to represent its members in any matter involving their collective interest.

C3's submissions

[13] Ms Muir makes two broad submissions – the first, that there is no employment relationship between MUNZ and C3 Limited (ie, the Authority has no jurisdiction to deal with the substantive application), the second, MUNZ is not a party to the RMTU agreement (ie, it has no standing).

[14] With regard to the jurisdiction issue, Ms Muir submits the MUNZ agreement governs the relationship between TLNZ and MUNZ and there are no grounds (sham or façade) to lift the “corporate veil” and declare TLNZ and C3 indistinguishable – the two companies maintain separate accounting systems, TLNZ has existed as a separately incorporated entity since 1993, the C3 corporate structure has been in place since 2004, well before this dispute arose, TLNZ operates as a genuinely separate business and is not operating as an agent for C3 Limited and MUNZ is free to initiate bargaining on behalf of its members who take up employment at Sulphur Point.

[15] Ms Muir’s second broad submission concerns MUNZ’s standing to challenge the RMTU variation. She submits the RMTU agreement cannot give rise to an employment relationship problem between the parties because MUNZ is not a party to that agreement – the problem does not arise from an employment relationship between the parties¹.

Determination

- (i) Is C3 Limited the employer?

[16] MUNZ entered a CEA with TLNZ in December 2007 in full cognisance of the corporate structure in which it stood. I am not persuaded that that structure is a sham or façade. The respondent’s desire for brand coherence may have introduced the potential for some confusion to arise but, I find, this does not displace the clear understanding between the parties that TLNZ Limited was the employer. The evidence does not establish that the employer has changed since the parties entered the TLNZ agreement.

¹ Section 5 Employment Relations Act 2000

- (ii) Can MUNZ challenge the variation to the RMTU agreement?

[17] The employment relationship problem MUNZ seeks to have resolved does not arise from an employment relationship between the parties. Standing is denied.

Costs

[18] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If this is not possible then application may be made within 28 days of the date of this determination for a timetable to be set.

Marija Urlich

Member of the Employment Relations Authority