

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 121
5431722

BETWEEN JOHN NIEZEN
 Applicant

A N D GREENSTONE GRAZING
 GROUP LP
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Simon Scott, Counsel for Applicant
 James W Allen, Advocate for Respondent

Investigation: On the papers

Submissions Received: 10 March 2014 from Applicant
 14 March 2014 from Respondent

Date of Determination: 02 April 2014

DETERMINATION OF THE AUTHORITY (No.1)

- A. Greenstone Grazing Group LP (Greenstone) was served with Mr John Niezen's Statement of Problem.**
- B. Greenstone's application to dismiss Mr Niezen's claim for want of service is declined.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr John Niezen was employed for about 6 years by Greenstone Grazing Group LP, (Greenstone) a Limited Partnership registered in Georgia, USA, to manage one of its dairy farms in Georgia. Following his resignation and while working out

his notice period, Mr Niezen was very upset to be presented with a number of concerns about his performance which had not been raised before.

[2] Mr Niezen felt the concerns raised to be unfair and attempted to resolve matters with Greenstone. Mr Niezen's attempts were unsuccessful and so through his Counsel, Mr Simon Scott, he raised a personal grievance with Greenstone and requested they both participate in a mediation using the mediation services provided by the New Zealand Ministry of Business Innovation and Employment (MBIE). Greenstone objected on the basis that the laws of New Zealand did not apply to its employment contract with Mr Niezen. This raises a preliminary matter as to whether the Employment Relations Authority (the Authority) has jurisdiction to determine Mr Niezen's personal grievance claim.

[3] On 10 September 2013, Mr Niezen filed his statement of problem in the Authority and on 29 October 2013, Greenstone filed an objection to the Authority's jurisdiction. The Authority directed that the parties attempt mediation but there was no response from Greenstone.

[4] A telephone conference was convened on 29 November 2013. A timetable for the exchange of affidavits in relation to the jurisdictional argument and the filing of legal submissions was agreed to by Mr Scott for Mr Niezen and by Mr Delic who is Mr Graeme Henderson's New Zealand lawyer. As explained later in this determination, Mr Henderson resides in New Zealand and is a member and manager of GGG Management LLC (GGG Management), the general partner of Greenstone. It was also agreed that the Authority would determine the jurisdictional issue on consideration of the papers filed.

[5] On 30 January 2014, Mr Niezen filed an affidavit in support of his application that the Authority has jurisdiction to determine his personal grievance claim. No affidavit has been filed by Greenstone. However, a Notice Regarding Ownership and Lack of Jurisdiction ("Greenstone's Notice") dated 28 February was filed on behalf of Greenstone.

[6] In Greenstone's Notice, Greenstone requested that Mr Niezen's claim be dismissed because it was asserted the Statement of Problem had not been properly served. Greenstone also disputed the jurisdiction of the Authority to deal with

Mr Niezen's claim which it asserts is subject to the laws of the State of Georgia, USA. Submissions were subsequently filed by both parties on these issues.

Issue

[7] In this determination, I intend dealing with the issue of service of the Statement of Problem on Greenstone.

Was Greenstone properly served with Mr Niezen's Statement of Problem?

[8] In Greenstone's Notice it is asserted that as a matter of law service of documents should have been upon the registered agent of Greenstone Grazing Group LP or GGG Management, LLC. Documents had not been so served and accordingly the claim should be dismissed.

[9] Greenstone's Notice attaches an unsigned copy of GGG Management's Operating Agreement and an unsigned copy of Greenstone's Limited Partnership Agreement (Partnership Agreement). The Operating Agreement records the formation of GGG Management as a limited liability company on 1 June 2006, that the initial members of GGG Management are Allan Titchmarsh, Graeme Henderson and the Nutmeg Trust and details of their individual capital contributions and percentage interest. The applicable law in both agreements is specified as that of the State of Georgia, USA.

[10] Pursuant to clause 5.5 of the Operating Agreement, Allan Titchmarsh, Graeme Henderson and Kerry Chestnut are deemed Managers of GGG Management. Pursuant to clause 5.1(b) of the Operating Agreement the Managers need not be residents of the State of Georgia.

[11] Clause 1.5 of the Operating Agreement sets out the purpose of GGG Management which is to:

... own a general partnership interest in and serve as the general partner of Greenstone Grazing Group, LP. The Company may engage in other activities and businesses incidental to the purpose of the Company as may be desirable, in the opinion of the Managers, to promote and carry out the principal purposes of the Company....

[12] Clause 5.1 of the Operating Agreement states in respect of the management of GGG Management:

- (a) *The responsibility for the operations and management of the Company shall be vested in the Managers...the Managers shall have such rights and powers of a manager as shall be permitted under the Act. The Managers shall be charged with the full responsibility of managing and promoting the Company's business....*

[13] The Partnership Agreement states in clause 5.1 that Greenstone's:

... assets, affairs, and operations, including but not limited to, the hiring and termination of employees, agents, and independent contractors...the sale, exchange, or lease of any or all of the Partnership's assets, shall be managed and controlled by the General Partner.

[14] In summary, the effect of the Partnership Agreement and Operating Agreement is that, subject to certain express provisions in those agreements, GGG Management manages and controls Greenstone's operations and assets.

[15] On 26 September 2013, the Authority directed that an owner of Greenstone be made aware of the proceedings lodged in the Authority by Mr Niezen. On 4 October, Mr Niezen's Statement of Problem was served personally on Mr Graeme Henderson, a member and Manager of GGG Management, the general partner of Greenstone. Mr Henderson resides in New Zealand. An affidavit of personal service of the proceedings on Mr Henderson at 717 KaraKariki Rd, R.D. 9, Hamilton, New Zealand was filed in the Authority on 9 October. On 29 October, an Objection to Court's jurisdiction document signed by Mr Henderson and dated 14 October, was filed in the Authority.

[16] Regulation 16 of the Employment Relations Authority Regulations 2000 (the Regulations) deals with service of notices and documents in the Authority. Regulation 16(3)(a)(iv) confers a discretion on the Authority to provide for service "*in such manner as the Authority or an officer of the Authority directs...*".

[17] I am satisfied that service of Mr Niezen's claim on Greenstone has properly been effected. Mr Henderson is a member and manager of GGG Management which is the general partner of Greenstone. Greenstone is aware of the proceedings filed by Mr Niezen. Greenstone's application to strike the claim out for want of service is dismissed.

[18] Greenstone objects to the Authority's jurisdiction to hear and determine Mr Niezen's claim. Greenstone asserts Mr Niezen's contract of employment did not

select New Zealand law to govern the relationship which is therefore governed by the law of his place of work which was Georgia, USA. This is an important conflict of laws issue. Mr Niezen has filed affidavit evidence that for a number of reasons, including it was always his intention that New Zealand law should apply to his employment contract. Greenstone has not filed any affidavit evidence in support of its claim that the Authority does not have jurisdiction to deal with Mr Niezen's claim and that the law of the State of Georgia applies to the employment contract.

[19] I am going to allow Greenstone a further opportunity to file affidavit evidence in support of its objection to the Authority's jurisdiction to hear and determine Mr Niezen's claim.

[20] Any affidavit evidence by Greenstone is to be filed in the Authority by **4pm Wednesday, 14 May 2014**. Mr Niezen will have until **4pm Wednesday, 25 June 2014** to file any affidavits in response. I will then determine the issue of whether the Authority has jurisdiction to hear and determine Mr Niezen's claim, on the evidence before me.

Costs

[21] Costs are reserved.

Anna Fitzgibbon
Member of the Employment Relations Authority