

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 377
5518470

BETWEEN	PANFILO J ORDUNA JNR First Applicant
A N D	JOHN RYAN TACTAQUIN Second Applicant
A N D	RUTH NOLASCO RELLEVE Third Applicant
A N D	KIM DOTCOM Respondent

Member of Authority: James Crichton

Representatives: Paul Dale with Edwin Telle, Counsel for the Applicants
Ron Mansfield with Andrew Schirnack, Counsel for the Respondent

Investigation Meeting: 12 December 2014, 20 March 2015 13 April 2015, 30 –
31 July 2015, and 20 August 2015 at Auckland

Submissions Received: 8 September 2015 from Applicants
18 September 2015 from Respondent

Date of Determination: 1 December 2015

DETERMINATION OF THE AUTHORITY

History

[1] The applicants filed their Statement of Problem on 12 September 2014 and a Statement in Reply was filed by the respondent (Mr Dotcom) on 29 September 2014.

[2] As the proceedings were originally drafted, both Mr Dotcom and his estranged wife, Ms Mona Dotcom, were respondents and accordingly, a Statement in Reply was also filed on behalf of Ms Dotcom on 29 September 2014.

[3] Ms Dotcom's position, as set out in the Statement in Reply filed on her behalf, was that she was not the employer of the applicants at any time and in consequence it was not appropriate that she be a party to these employment proceedings where the applicants were seeking relief against their employer.

[4] A telephone conference was convened by the Authority on 9 October 2014 wherein, amongst other things, the question of whether the applicants would continue their proceeding against Ms Dotcom, was discussed.

[5] I convened a further telephone conference with counsel on 14 October 2014 at which counsel for the applicants confirmed that they were no longer intending to proceed against Ms Dotcom and accordingly the proceeding against her was forthwith discontinued.

[6] Notwithstanding that, counsel indicated that Ms Dotcom would be required to give evidence and a witness summons was prepared for her and a number of other persons who counsel considered could assist the Authority with its investigation.

[7] An amended Statement of Problem was filed on 14 November 2014 and with the December fixture date fast approaching, I was advised that Mr Dotcom was no longer represented by counsel. Subsequently, Mr Dotcom caused memoranda to be filed in the Authority, the burden of which was that he did not feel comfortable about proceeding without representation and accordingly sought to have the matter adjourned until he could arrange new counsel.

[8] In the meantime, the applicants who, consequent upon the termination of the employment in New Zealand, had returned to the Philippines (their home country), had already arranged to travel to New Zealand for the December fixture and so the adjournment request from Mr Dotcom had grave financial implications for the applicants as well as their obvious concern about the matter not being dealt with in accordance with the timetable originally decided upon.

[9] Those difficulties were overcome in part, and in the result, the matter proceeded in December but only on the footing that the evidence of the applicants was given and taken and the balance of the applicants' evidence from the summonsed witnesses, together with Mr Dotcom's evidence in response, was to be dealt with on a later date. That decision of the Authority to deal with the matter in that way was communicated to the parties on 21 November 2014 by email.

[10] When the first day of the Authority's investigation meeting took place on 12 December 2014, while Mr Dotcom was not represented by counsel and did not engage in any way with the proceedings, a solicitor acting for Mr Dotcom attended the Authority's investigation meeting, took notes of the proceeding, but was otherwise not involved in the investigation of the employment relationship problem.

[11] The delays in getting the second part of the investigation underway continued. Earlier intimations on Mr Dotcom's behalf indicated that he should be in a position to have counsel instructed and be ready to proceed by February 2015. A date was identified which suited the Authority and counsel for the applicants. The matter was then set down for that date and Mr Dotcom was advised that the matter ought to proceed on that date.

[12] The investigation meeting was set to recommence on 13 February 2015. On 10 February 2015, a memorandum was filed by new counsel for Mr Dotcom seeking a vacating of that date. There were various subsequent deferrals, all at the behest of Mr Dotcom or his counsel and the matter finally proceeded again on 20 March 2015.

[13] I should note for the sake of completeness that the requests for adjournment of the matter once Mr Dotcom's new counsel had been instructed were not, I am satisfied, activated by any improper motive. Counsel instructed (Mr Mansfield) was busy with other matters and needed to absorb a significant amount of material in order to prepare Mr Dotcom's response to the applicants' claims.

[14] When the matter finally proceeded again on 20 March 2015, a further issue had to be addressed before evidence could be given and taken. Mr Mansfield raised the question whether Mr Dale (counsel for the applicants) was able to continue acting because of an alleged conflict of interest thereby putting Mr Dale at risk of professional misconduct if he were to continue.

[15] The essence of the issue was that Mr Dale had previously acted for an individual who was to give evidence on behalf of Mr Dotcom and that individual considered that in continuing to act for the applicants, Mr Dale was potentially in a conflict of interest situation allegedly because Mr Dale would have possession of information from his previous association with the respondent's witness which he would not otherwise have been in possession of.

[16] The Authority was told that the witness had complained to the Law Society about Mr Dale continuing to act, that the Law Society was now seised of the complaint, and was dealing with it and the suggestion by Mr Mansfield was that the Authority should stay its hand meantime, not continue with its investigation of the applicants' claims, unless and until the Law Society had completed its investigations into the complaint.

[17] Mr Dale stoutly protested his innocence of any professional misconduct, denied there was any conflict of interest, pointed out that the witness concerned had in fact introduced the applicants to him and sought to have him act for the applicants and urged the Authority to proceed to deal with the matter.

[18] I indicated to the parties, having heard counsel, that I considered the proper course of action was to proceed with my investigation but on the footing that the evidence of the witness who had complained about Mr Dale would not be heard unless and until the Law Society had delivered its view on the complaint. Subsequently, I was advised the Law Society determined there was no impropriety. I was encouraged to reach the conclusion I did because I was not satisfied that the witness was especially material, either to the applicants' claim or indeed to Mr Dotcom's defence of that claim.

[19] I was also motivated by a desire to progress the matter on the footing that the greater the distance between the various parts of the hearing, the more difficult and challenging the decision-making process became, especially as the Authority did not record hearings but relied exclusively on the notes of evidence taken by the Member and of course the written briefs of evidence filed on behalf of parties.

[20] Mr Mansfield also wanted me to record his objection to some of the observations made by Mr Dale in responding to the request for adjournment, on the footing that Mr Mansfield considered that some of Mr Dale's observations about Mr Dotcom were uncharitable and ought not to have been advanced.

The disposition of this matter

[21] The three applicants (the applicants) have raised personal grievances and wages claims against the respondent (Mr Dotcom) in reliance on their conviction that Mr Dotcom was, at the relevant time, their employer. It is indisputable that the applicants were employed in New Zealand, working in what I will loosely refer to as

the Mansion but there is a dispute as to whether they were employed by Mr Dotcom, or exclusively by Mr Dotcom, and there is dispute as to whether New Zealand law is the appropriate forum by which any disputation between the parties is to be resolved.

[22] Accordingly, at the conclusion of the evidence in this proceeding which, as will be apparent from the intituling, was heard over six days spanning nine months, it was agreed between the parties and me that the so-called preliminary issues (effectively defences raised for Mr Dotcom) be dealt with first.

[23] It follows that this determination is concerned exclusively with those preliminary matters. The substantive matter remains for further investigation and determination if and only if, I decide the Authority is the forum of convenience for the matter to be decided.

[24] The preliminary matters are in turn first, a claim by Mr Dotcom that the proper jurisdiction in which these matters ought to be heard is Hong Kong and not New Zealand and second, an allegation that at the relevant time, Mr Dotcom was not the employer of the applicants, or at least was not the only employer.

[25] In that latter regard, it is suggested that if the Authority were to consider that Mr Dotcom was the employer, the Authority might still conclude that Ms Mona Dotcom was also the employer.

[26] If that conclusion were to be reached where Ms Dotcom was identified as one of the employers of the applicants, then of course the Authority would need to give her a proper opportunity to defend her position. It will be remembered that Ms Dotcom was originally a party to this proceeding as respondent but was not required to defend her position in that regard because of a decision taken by the applicants and advised to the Authority on 14 October 2014, wherein the applicants elected not to proceed against her.

Employment relationship problem

[27] The applicants (Mr Orduna and/or Mr Tactaquin and/or Ms Relleve) say that they were employed by the respondent (Mr Dotcom) from around 20 January 2012 down to late 2013, that they were unjustifiably dismissed from their employment and they are owed wages and holiday pay from that employment.

[28] Accordingly, the claims that they want the Authority to investigate are essentially claims of unjustifiable dismissal and wages arrears.

[29] Mr Orduna entered into an employment agreement with Kim Dotcom around 1 December 2010, such employment agreement being expressed to be subject to the law of Hong Kong. The employment agreement makes the usual provisions for remuneration and hours of work and describes Mr Orduna's role as one of butler.

[30] It is apparent that the intention was that the Dotcom family would effectively shuttle between Hong Kong and New Zealand, living in both jurisdictions for significant periods of time. That particular plan came to an abrupt end when Mr Dotcom, whose business acumen funded the whole enterprise, was arrested and taken into custody by a combination of the New Zealand and United States authorities and from the date of that event (known throughout this determination as "the raid"), Mr Dotcom was precluded by the terms of either his incarceration or subsequent bail conditions, from leaving the New Zealand jurisdiction. In consequence, Mr Orduna and the other applicants were also precluded from leaving the jurisdiction from time to time and returning to Hong Kong as was originally intended.

[31] Mr Tactaquin was employed as a personal assistant on about 1 July 2011 and like Mr Orduna, he executed a brief employment agreement with the usual provisions in it in regard to hours of work and compensation and again like Mr Orduna, the employment agreement expressly declares that the operative law for the agreement is the law of Hong Kong.

[32] Ms Relleve entered into an employment agreement with Mr Dotcom about 3 October 2011, signed an employment agreement in similar terms to the one signed by Mr Orduna and Mr Tactaquin which also expressed itself to be subject to the laws of Hong Kong.

A brief history of the employment

[33] As I have already noted, all three applicants were employed as part of the staff to look after the needs of the Dotcom family with Mr Orduna commencing employment in late 2010 while Mr Tactaquin and Ms Relleve were employed from the middle of 2011.

[34] All of the applicants signed written employment agreements which named Mr Dotcom as the employer and which contained the following clause:

7.1 Any item, which is an oversight in this employment agreement, will be handled according to the Hong Kong Labor law.

[35] At the time that these employment agreements were entered into, the Dotcom family's principal place of residence was Hong Kong. I have already referred to the original intention of Mr Dotcom to move between jurisdictions during the year and it was to that end that Mr Dotcom obtained premises for he and his family to occupy north of Auckland (the Mansion). The Dotcom family moved for the first time into the Mansion in January 2011 with the staff then working for the family which included Mr Orduna but not either Mr Tactaquin or Ms Relleve who joined the staff later in 2011.

[36] It is apparent that in the first half of 2011, the Dotcom family moved from jurisdiction to jurisdiction as was expected to be the future pattern, with trips from Hong Kong to New Zealand then back to Hong Kong and then an extended European trip before returning to the Mansion.

[37] All of the applicants say something to the effect that they did not pay any particular attention to the clause indicating that Hong Kong labour law applied when they signed their employment agreements, but all of them confirmed to me in their oral evidence that they knew that the employment agreement was subject to Hong Kong law.

[38] In his evidence to the Authority given by telephone on 31 July 2015, Mr Orduna went on to say:

We were never expecting to be based in New Zealand permanently. The Dotcoms should have prepared a New Zealand employment contract. We relied on the Hong Kong contract from the beginning of the employment to the end and expected to have the contract honoured, including the tax rate which would have applied in Hong Kong.

[39] The reference to the tax rate is because during the employment, there was an argument about how the incidence of income tax would change for staff given that, contrary to the original intention that the parties would shuttle from jurisdiction to

jurisdiction, after the raid that process had to cease. This meant that the incidence of Hong Kong income tax and Hong Kong income tax rates, came into question.

[40] It is clear to everyone associated with this matter that things changed fundamentally for the Dotcom family and its staff on and from 20 January 2012 when a raid of the Mansion by New Zealand authorities supported by American interests resulted in Mr Dotcom being taken into custody where he remained for a month.

[41] The consequences of this dramatic intervention by the authorities included a fundamental change in the income stream coming into the Mansion; with Mr Dotcom unable to work because of his incarceration, the ability to fund the Dotcom lifestyle stalled and Ms Dotcom was, according to the evidence of Mr Orduna for instance, forced to sell things in order to try to keep paying staff.

[42] Some staff left immediately on the raid happening and the staff who remained were not necessarily always paid, were not always paid on time, and were sometimes asked to accept part-payment with the balance later.

[43] Equally important was that with Mr Dotcom now facing reasonably dramatic legal problems (including the threat of extradition to face trial in the United States for a variety of serious commercial offences), the family lifestyle of travelling from jurisdiction to jurisdiction, changed forever and the family and the staff who decided to remain with them, had of necessity to remain in New Zealand.

[44] That meant that New Zealand tax law applied which had consequences for the total amount that staff were receiving, particularly relevant where the evidence is that staff were accepting less gross income because the Dotcom family could not afford to pay the original gross salaries.

[45] While Mr Dotcom was incarcerated, it is common ground that Ms Dotcom "*looked after the staff*" and even after Mr Dotcom was released from custody, I heard significant evidence to the effect that Ms Dotcom was more actively involved in staff issues, at least in part because of the suggestion immediately after Mr Dotcom's release from jail that he might become insolvent as a consequence of the pressure that the raid put on him and his business. It was suggested that given his status for immigration purposes (a New Zealand resident but not a New Zealand citizen), a financial decline might make it imprudent for him to be the employer of staff.

[46] A further consequence of these dramatic developments was the suggestion that, with the reduction in staff who departed because of the turmoil, continuing staff would need to work longer hours (although while that is part of the substantive claim before the Authority it is hotly disputed by the Dotcom family).

[47] There is a conflict in the evidence (which I must resolve) about whether, after the raid, Ms Dotcom became the employer or whether she simply assisted her husband in attending to practical matters to do with the employment.

[48] In any event, after the raid, there were a number of meetings between staff and Mr and Ms Dotcom to seek to resolve differences that had developed between the parties about issues such as the incidence of income tax, and the entitlement to wages for overtime allegedly worked.

[49] During this period, it is common ground that a variety of third parties were engaged to assist in developing appropriate documentation (including employment agreements) but there is dispute about whether that material was ever completed and if it replaced the earlier documentation.

[50] Both Mr Orduna and Mr Tactaquin say that they were unjustifiably dismissed from the employment and after the employment there was further engagement between lawyers for the Dotcom family and both Mr Orduna and Mr Tactaquin which the latter say were threatening in nature.

[51] Personal grievance proceedings were filed in September 2014 after what I am told were extensive negotiations between the parties.

Issues

[52] For the purposes of this determination of the preliminary issues only, I need to deal first with the question whether this Authority has any jurisdiction to deal with this matter and second with the question of who the employer is.

The *forum conveniens* argument

[53] Put simply, Mr Dotcom says that the employment relationships in question are governed by the laws of Hong Kong, and that fact determines a proper application of the *forum conveniens* argument resulting in the Authority having no jurisdiction to hear and determine the matter, because Hong Kong law applies.

[54] Implicit in this pleading is the claim that both parties to each employment agreement were of one mind, namely that the law of Hong Kong would apply and that in any event, given that none of the applicants are resident in New Zealand or have otherwise worked in New Zealand, and are now back in their home country of the Philippines, Hong Kong is a more appropriate jurisdiction.

[55] For their part, the applicants deny that Hong Kong is the *forum conveniens* because the work was performed in New Zealand, and their evidence was given and taken in New Zealand so, in effect, Mr Dotcom has condoned New Zealand being the *forum conveniens* for this matter. Moreover, given Mr Dotcom's present circumstances (his inability to leave New Zealand), he could not have travelled to Hong Kong to give his evidence in any event.

[56] Moreover, the applicants say that the contractual provision which Mr Dotcom relies upon, referring as it does to "*an oversight*" would only apply if there were an oversight and there is not. The applicants say that the provisions of the agreement are clear and ought to be applied according to their tenor.

[57] It appears to me plain on the evidence that both parties to each of the subject employment agreements expressly selected Hong Kong as the jurisdiction in which any "*oversight*" is to be addressed. That is what each employment agreement says and the evidence of each of the applicants in my investigation was clear that they knew that and indeed even sought to rely upon it as evidence for the application of Hong Kong tax law to the employment rather than New Zealand tax law.

[58] There is nothing in the evidence I heard from the three applicants which would suggest to me that they had a different intention from the intention of the employer on this matter. What is more, as I say, Mr Orduna anyway wanted to rely on the employment agreement to support the argument of staff that they were entitled to the benefit of Hong Kong income tax rather than New Zealand's more robust model.

[59] Moreover, as submissions for Mr Dotcom make clear, the employment agreement in each case is defective in our terms because it fails to deal with matters that are required to be covered in a New Zealand employment agreement, and it expresses itself in a way consistent with Hong Kong law, by for instance calculating remuneration in Hong Kong dollars. It is apparent also that until some date within the

period of the employment which is in dispute, income tax was paid in accordance with Hong Kong law rather than in accordance with New Zealand law.

[60] But what of the use of the word "*oversight*" in the employment agreement? What the applicants say is that there is no oversight here; all the important aspects of the employment relationship are covered in the employment agreement and so oversight refers to something minor, not fundamental, and ought not to be taken as conveying jurisdiction simpliciter.

[61] Conversely, submissions for Mr Dotcom interpret this word as meaning that if there is something that is not "*resolved*", then Hong Kong law will apply.

[62] The practical reality is that these employment agreements, expressed as they are in Hong Kong dollars, with Hong Kong tax provisions to apply, were created because the Dotcom family lived in Hong Kong; that was their home. It was the most natural thing to have employment agreements drafted so as to reflect their personal circumstances.

[63] The intention of both parties was that the majority of the work would be performed in Hong Kong and that pattern was well established by the Dotcom family in the early part of 2011 where, as a matter of law, I fancy that the domicile of the Dotcom family would have remained Hong Kong yet there was a wish to spend what amounted to holiday time in New Zealand, and indeed in other places.

[64] What I am being asked to decide here is whether the parties are bound to remain lock-stepped to the Hong Kong jurisdiction because the employment agreement, drafted for difference circumstances from those that subsequently applied, clearly evidences an intention for the jurisdiction to be Hong Kong.

[65] There can have been no real doubt in the applicants' minds about the issue when the employment agreement was first proffered. Both parties expected that their domicile would remain Hong Kong. Both parties expected that they would spend most of their time in Hong Kong. Both parties expected that the employment would be paid for in Hong Kong dollars and subject to Hong Kong tax.

[66] But for the raid on the mansion on 20 January 2012, that would have remained the position. But the effect of that raid was to make it impossible for Mr Dotcom to legally leave New Zealand, at least until the extradition proceedings were completed

in his favour, and thus the work that was to be done for Mr Dotcom and his family changed fundamentally from being primarily provided in Hong Kong (and in other jurisdictions) to being exclusively provided in New Zealand.

[67] While I think the evidence discloses that there were discussions and even some genuine attempts to complete the provision of new employment agreements, which would have reflected the new reality, the evidence is that did not reach a finite conclusion.

[68] So the question for the Authority is whether the fundamental sea change in the parties' relationship that the raid on the Mansion created, ought to drive a change to the forum of convenience. I am satisfied the parties agreed to the employment being covered by Hong Kong law in different circumstances to those that subsequently applied. Once the raid precluded Mr Dotcom from travelling, the employment was always going to be confined to New Zealand.

[69] In *Clifford v. Rentokil* [1995] 1ERNZ 407, Judge Palmer referred to the basis on which the proper law of a contract is to be determined. In essence, the factors in play are whether the parties have expressly selected the answer, whether that selection can be inferred by surrounding circumstances or whether judicial determination can identify the system of law for which the contract has the most tangible connection.

[70] Here it seems to me plain that, at its inception, the parties would have selected Hong Kong as the applicable system of law for the entirely sensible reason that that was the jurisdiction in which the bulk of the work was to be performed and was in truth, then the domicile of the parties.

[71] But it seems to me to do violence to the evidence I heard to suggest that such a conclusion was set in stone when the parties' mutual circumstances fundamentally changed through no fault of theirs and both parties set about striving to agree a new arrangement. I accept without reservation that a new arrangement was never consummated but that notwithstanding, it seems to me clear from the evidence that there were extensive discussions between the parties seeking to bring the employment agreement between them into a better relationship with the new reality.

[72] Amongst other things, it became clear that, whatever else was true, the incidence of income tax was on the New Zealand rates and not on the Hong Kong rates; this was not an oversight but a direct consequence of the parties being forced to

remain continuously in New Zealand. Moreover, payments of salary of necessity became payments in New Zealand rather than Hong Kong dollars and it is evident that efforts were made to draw up new employment agreements which would be subject to New Zealand law. That those new agreements were never executed is a fact but the process of creating them, initiated by the employer, or at least not initiated by the applicants, suggests to me it is difficult for the employer to seek to rest on the original Hong Kong agreements when the evidence is the parties were talking about new documents.

[73] In the particular circumstances of this case, I think I am required to consider the third factor by which the proper law of the contract can be inferred, namely the judicial determination of what Judge Palmer called “...*the system of law with which a transaction has the closest and most real connection...*”.

[74] Applying that precept, it seems to me while the law of Hong Kong may well have been the parties’ settled intention at the commencement of the engagement, after the raid at the Mansion, the system of law with the closest and most real connection is the law of New Zealand.

[75] The period in dispute is exclusively after the raid when the whole basis of the employment changed fundamentally; all the work in question was performed in New Zealand and it could not be otherwise. No work could be performed in Hong Kong, or indeed anywhere other than New Zealand. Despite the engagements between the parties during the period in dispute, matters were unable to be resolved and unhappy differences developed between them.

[76] Efforts were made, by direct negotiation to resolve matters but when they failed, it seems to me that the law of New Zealand has the most real and close connection to this employment dispute such that proceedings in New Zealand are the most convenient forum. Mr Dotcom is required to remain in New Zealand, as matters stand, and so could not give evidence in an overseas jurisdiction. Ms Dotcom is presently in New Zealand. The applicants in this proceeding have already given significant evidence to this Authority. They had to fly from the Philippines to do that; it seems inconceivable that it would be more convenient for them to give further evidence in another jurisdiction. Other relevant witnesses are based here.

[77] I am reinforced in those conclusions by the decision of Judge Colgan (as he then was) in the case of *Musashi Pty Ltd v Moore* [2002] 1ERNZ 203 where His Honour concluded that it was both more convenient and more just for Mr Moore's employment relationship problems to be dealt with by the New Zealand legal system than by that of the State of Victoria in Australia notwithstanding an employment agreement, and certain other documentation which identified Victoria as the appropriate legal jurisdiction. Factors influencing that conclusion were that Mr Moore was a New Zealand resident, the work was all performed in New Zealand, *Musashi* had chosen to operate here and Mr Moore's reduced financial circumstances might well preclude him proceeding in Victoria at all whereas he could proceed in this Authority even without representation if he chose to.

[78] In my view all of those influencing factors can be identified in the present case. I conclude that this Authority will be the most convenient forum for this present matter to be dealt with in, concerning as it does, both allegations of short payment of wages, payable in New Zealand, to then New Zealand resident employees, for work done in New Zealand and allegations of personal grievance.

[79] In my opinion, then, Mr Dotcom's claim that the relevant law is the law of Hong Kong, is not made out and accordingly, I conclude that Mr Dotcom's defence of the application before the Authority, on this ground, must fail.

Who was the employer?

[80] It is common ground that the employment relationship began as a relationship with Mr Dotcom as employer but Mr Dotcom says that he ceased to be the employer once he was incarcerated or, in the alternative, he ceased to be the sole employer.

[81] In *Mehta v. Elliott (Labour Inspector)* [2003] 1 ERNZ 451, Judge Colgan (as he then was) said at para.[22]:

The question of who was the employer must be determined as at the outset of the employment. If that changed during the course of the employment, there must be evidence of mutual agreement for that change.

[82] It follows from those observations of the learned Judge that the point at which an assessment is to be made as to who the employer is must be at the beginning of the employment relationship or presumably at the beginning of the putative change in the

identity of the employer. Moreover, there has to be “*evidence of mutual agreement*” of the change.

[83] Then, later on in the same paragraph, His Honour identifies the question as being the objective response to the inquiry who an independent but knowledgeable observer would have said was the employer.

[84] Considering the matter in terms of the legal principles just enunciated, I am not persuaded that there was ever a change in the identity of the employer.

[85] The first reason that I adduce for that conclusion is that, looking at the matter at the beginning of the putative new employment relationship, it is difficult to conclude that Ms Dotcom had become the employer. In his evidence to the Authority, Mr Dotcom says in so many words:

I was not the legal employer of the applicants from the time of my arrest on 20 January 2012 onwards. My wife Mona Dotcom was.

[86] But if the relationship is to be evaluated at the beginning of it, as the law requires, it is difficult to see how there could have been a sudden change at that point. At best, one would have imagined that the change was incremental as the affairs of the family became clearer, but I reject the contention that there was a sudden change at the point that Mr Dotcom alleges.

[87] Even if that argument is not persuasive, there simply is no evidence of any change at that point. As I say, if the change were more incremental over time, then the various aspects of Ms Dotcom’s efforts to put in place a new regime could be taken into account, but certainly not from the beginning of the putative change.

[88] Moreover, if the law requires there be “*evidence of mutual agreement*” of the change, then there is no evidence of that either, certainly at the beginning of the relationship. Indeed, all the evidence at that point suggests that there was simply a great level of confusion and understandable anxiety but there is nothing in the evidence I heard which would suggest a mutual agreement to change the employer.

[89] Moreover, I have not been persuaded that there was ever a mutual agreement to change the employer. I accept without reservation all the evidence which suggests that Ms Dotcom was assiduously working to produce fresh employment agreements consistent with the obligations of New Zealand law, that she had amongst other things

engaged accountants and human resources advisers as well as her own lawyers to progress those matters, and none of that is denied by the applicants, but I do not see any evidence that the applicants, or one of them, assertively committed to agreeing the change from Mr Dotcom to Ms Dotcom or even from Mr Dotcom to Mr and Ms Dotcom.

[90] In fact, there was no agreement at all; there was never a fresh employment agreement signed by any of the applicants, never any apparent meeting of the minds in respect of the terms of the new arrangement and indeed all of the discussion, even argument, about the employment relationship concerned the difficulties of making the Hong Kong agreement fit the new circumstances that now applied to an employment that was now exclusively in New Zealand.

[91] There were arguments about the incidence of New Zealand tax and about the payment of moneys which the applicants say were due and owing because of the extra hours that were being worked, but those arguments seem to me to be advanced on the footing that they were reliant on the underlying employment agreement.

[92] Indeed, as I have already observed, Mr Orduna certainly argued for the incidence of tax to be on a Hong Kong basis rather than on a New Zealand basis, and that of course is absolutely consistent with the Hong Kong agreement.

[93] But none of that suggests any evidence of an agreement to change employer. There is plenty of evidence that Ms Dotcom was working diligently to try to put together new arrangements having regard to the sudden change in the family's circumstances, but no evidence that the applicants agreed to change to have Ms Dotcom be their employer and in the absence of that agreement, I do not think that argument can be taken further.

[94] Moreover, while Ms Dotcom's behaviour can be interpreted as evidence of her having taken over the employment from Mr Dotcom, I consider that her behaviour is equally consistent with her having simply endeavoured to fulfil the obligations that Mr Dotcom, as a good and fair employer, would have wanted to undertake were he able to. At the point in question, Mr and Ms Dotcom were not estranged and it seems to me that the evidence of Ms Dotcom's work in this regard together with the supporting evidence of the people who she worked with on a contract basis, might evidence either conclusion.

[95] But in the absence of any evidence of agreement by the applicants that they accepted the new employer, I do not think the matter can be taken any further.

[96] Even if those conclusions are doubted, if I apply Judge Colgan's alternative test from *Mehta*, I reach a similar conclusion. The learned Judge said that the question was who would an independent but knowledgeable observer say was the employer and applying that test, I think it is likely that the independent but knowledgeable observer would conclude that Mr Dotcom remained the employer.

[97] Despite the evidence of Ms Laurence the accountant, Ms Robertson the human resources expert, and other incidental parties to the effect that they were working to create an alternative employment arrangement, it remains a fact that no such alternative employment arrangement was ever concluded, that there is no evidence at all that the employees in question definitively agreed to the change in employer and indeed ample evidence that the employees continued to regard Mr Dotcom as their employer for the very obvious reason that he, despite his personal difficulties, remained the head of the household and certainly before the unhappy differences came between the parties, appears to have been held in high esteem by his employees.

[98] Moreover, I agree with counsel for the applicants that because the employment relationship is a personal one, it cannot be assigned without agreement of both parties and that seems to further support my conclusion.

[99] I am not persuaded that the payment of wages in the name of Ms Dotcom is in anyway significant; it might well indicate no more than the fact that she was fulfilling her husband's obligations.

[100] A further factor, although I do not place too much weight on it, is the fact that Mr Dotcom was the employer for the purposes of the applicants' work visas.

[101] If as is contended, Ms Dotcom became the employer, it is difficult to see why Mr Dotcom would have attended the three meetings with staff which post-dated his release from prison, especially as what notes we have of those events suggest that he took an active role which, on the face of it, is frankly inconsistent with the suggestion now made that he has "*retired*" as employer.

[102] Mr Dotcom argues in the alternative that he and Ms Dotcom were jointly the employers of the applicants and it is suggested in support of that contention that the

evidence disclosing that Mr Dotcom was the employer is at least partially supportive of the conclusion that Mr and Ms Dotcom were both the employers.

[103] I do not accept that submission, nor am I attracted by the joint employer view. It seems to me that the facts in evidence are capable of a number of interpretations and that Ms Dotcom's behaviour in particular might be evidence of joint employment just as much as it might be evidence of her simply endeavouring to ensure that her husband fulfilled his legal obligations.

[104] Certainly, once Mr Dotcom was incarcerated and even after he returned from that unhappy state, it is apparent that Ms Dotcom undertook certain obligations which on the one hand might be consistent with joint employment, but might equally be consistent with her simply trying to ensure that Mr Dotcom fulfilled his obligations as a good and fair employer, a point that I have already made earlier in this determination.

[105] There is simply nothing in the facts that I heard which impel me to conclude that it is more likely than not that there was a joint employment than the alternative view which is simply that Ms Dotcom was trying to help her husband.

[106] What is more, the joint employment argument is presumably subject to exactly the same legal principles as would apply to the putative change to the employer during the employment and there is no evidence of any acceptance by the applicants of joint employment nor indeed any evidence of a concluded bargain or meeting of the minds which would suggest that that was even in contemplation.

[107] Accordingly I reject the suggestion that there was joint employment as I reject the contention that Ms Dotcom had replaced her husband as the single employer.

Determination

[108] Accordingly, I conclude that:

- (a) Mr Dotcom's reliance on the *forum conveniens* principle to resist the applicants' claims is not made out and accordingly the applicants' claims in this Authority may proceed; and
- (b) I am satisfied that the applicants' employer was Mr Dotcom for the reasons I have already enunciated.

Costs

[109] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority