

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 96  
5574934

BETWEEN            AHMED YOUSSEF  
                                 Applicant

A N D                    iP3 SYSTEMS PTY LIMITED  
                                 Respondent

Member of Authority:    James Crichton

Representatives:        Claire Mansell, Counsel for Applicant  
                                 Oliver Carton, Counsel for Respondent

Investigation Meeting:    On the papers

Submissions Received:    24 February 2016 from Applicant  
                                 16 March 2016 from Respondent

Date of Determination:    30 March 2016

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**SECOND DETERMINATION OF THE AUTHORITY**

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**History**

[1]     In the first determination of the Authority issued on 12 January 2016 as [2016] NZERA Auckland 14, I determined that Mr Youssef was employed by the Australian entity, iP3 Systems Pty Limited (“iP3”).

[2]     That first determination also discussed, without deciding the matter, the *forum conveniens* issue and invited the parties to seek to resolve the matter on their own terms, given my determination that Mr Youssef was employed by the Australian entity and not the alternative New Zealand entity.

[3]     In the result, the parties were unable to resolve matters on their own terms and in accordance with the decision I made in the first determination, the matter now reverts to me to decide the question.

**What is the *forum conveniens*?**

[4] I am satisfied that the *forum conveniens* that has the most real and substantial connection to Mr Youssef's claim is New Zealand and I reach this conclusion for a number of reasons.

[5] I follow the pattern of the submissions helpfully filed by the parties which revolve around the principles enunciated in the Laws of New Zealand as they relate to the conflict of laws.

[6] The first principle then is the cost and convenience of proceeding in each jurisdiction. On the face of it, there are attractions in respect of both jurisdictions. There are company witnesses in Australia while Mr Youssef remains in New Zealand. However, a key party for the employer is Dr Raj Bhole who is a director of iP3 and a significant shareholder. Effectively, he is a principal protagonist in the employment relationship problem. Dr Bhole is an American resident and apparently has other interests in New Zealand. In any event, the short point is that Dr Bhole would have to travel from his home in America either to Australia or New Zealand in order to deal with the matter.

[7] Of most significance though for both cost and convenience is the fact that Mr Youssef has significant health issues which preclude him traveling to Australia and while iP3 helpfully concede that Mr Youssef could give his evidence by video link from New Zealand if the matter were dealt with in Australia, I conclude that as one of the principal protagonists is here (Mr Youssef) and the other is not based in either Australia or New Zealand, there is no particular advantage, on this principle, of the proceeding being in Australia.

[8] Turning now to the location of witnesses and documentary evidence, this factor seems to me to be balanced as between the two jurisdictions; there are witnesses in both Australia and New Zealand (but also America) and there is dispute between the parties about where the relevant documentation is.

[9] The third factor concerns whether there is litigation in the other jurisdiction; as I noted in the first determination of the Authority, Mr Youssef initially filed proceedings with Fair Work Australia but those proceedings have subsequently been discontinued and the only extant proceeding is the current one before this Authority.

[10] The next factor is the law to be applied and given that the employment agreement specifically refers to the laws of New Zealand, it is difficult to conclude that the law of any other jurisdiction ought to apply. This conclusion is supported by the fact that Mr Youssef provided the bulk of his service to the employer from a New Zealand base. Put another way, Mr Youssef provided his services as an employee working in New Zealand.

[11] The next factor is whether the claim is strong or not and because this particular aspect is central to the substantive claim and hotly contested, I choose not to rely on it for the purposes of this present decision. I observe that I have heard no evidence on the point and simply note the existence of a dispute which would appear to involve a significant sum of money.

[12] The next factor is whether the judgment (if any) could be enforced and as counsel for Mr Youssef correctly observes, the effect of the Trans-Tasman Proceedings Act 2010 is to allow a New Zealand judgment to be enforced in Australia.

[13] The next principle identified requires a judgment about whether the objection to jurisdiction is for tactical reasons and I decline to form any view on that matter. I simply observe that on the basis of the submissions I have heard, the dispute between the parties is contested and the contention by Mr Youssef that iP3 is seeking to delay matters by its approach to the *forum conveniens*, is not accepted by the former employer.

[14] Finally, work was carried out in New Zealand and indeed, the evidence seems to suggest that Mr Youssef was, at best, an infrequent visitor to Australia.

### **Determination**

[15] I conclude that the *forums conveniens* for the hearing and determining of Mr Youssef's claim against iP3 is New Zealand because it is the New Zealand jurisdiction that has the most real and substantial connection to the claim.

[16] I am most influenced to reach that conclusion by the clear election that the parties have made in the employment agreement they entered into, the fact that the work seems to have been principally performed in New Zealand, the fact that one of the two principal protagonists is by reason of ill health forced to remain in New

Zealand and the other principal protagonist is not resident in Australia and would have to travel internationally for a hearing, in any event.

[17] There may also be force in the argument advanced for Mr Youssef that if this Authority does not claim jurisdiction in the matter, he will be denied a remedy by virtue of the risk that an Australian Court or Tribunal might decline jurisdiction because of the parties' express election to conform to the laws of New Zealand in the employment agreement.

[18] In the same general connection is the submission made for Mr Youssef that, as one of his claims is for annual leave pursuant to the Holidays Act 2003 (New Zealand), such a proceeding could not be entertained in Australia, although arguably that submission is really just a subset of the wider proposition that the laws of New Zealand should apply.

[19] My Authority Officer will contact counsel 28 days after the date of this determination, assuming there is no challenge, to make arrangements for a substantive investigation of Mr Youssef's employment relationship problem.

James Crichton  
Chief of the Employment Relations Authority