

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2025] NZEmpC 90
EMPC 19/2024**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN YOUTAP LIMITED
 Plaintiff

AND MICHAEL JOHNSTON
 Defendant

Hearing: 10-12 February 2025
 (Heard at Auckland)

Appearances: P Skelton KC, counsel and D Organ, advocate for plaintiff
 S Langton and M Povey, counsel for defendant

Judgment: 9 May 2025

JUDGMENT OF JUDGE J C HOLDEN

[1] This judgment resolves a challenge to a preliminary determination of the Employment Relations Authority that found that the defendant, Michael Johnston, was employed by the plaintiff, Youtap Ltd.¹

[2] Youtap Ltd says it was not Dr Johnston’s employer at the time his employment ended. It says his employer was its Singapore-based subsidiary Youtap Mobile Money Asia Pte Ltd (YMMA).

¹ *Johnston v Youtap Ltd* [2023] NZERA 752.

Dr Johnston's employment

[3] Dr Johnston moved to New Zealand from the United Kingdom in around 1989. Since moving from the United Kingdom, his career has focussed on developing software, technical strategy, and developing digital mobile payment solutions in the startup context. Dr Johnston met Chris Jones in around December 1989 and started working with him in 1990 in various companies in which Mr Jones had an interest. In around 2007, Mr Jones founded a new company, then called Mobilis Networks Ltd, and Dr Johnston was employed as the chief technical officer. Mobilis Networks Ltd changed its name to Youtap Ltd in April 2015 and Dr Johnston remained employed by Youtap Ltd under his original individual employment agreement.

[4] YMMA was incorporated in 2015 under the name "Verifone Mobile Money Asia Pte Ltd" (VFMM Asia Pte). It changed its name to YMMA in April 2017. It is wholly owned by Youtap Mobile Money Ltd, a New Zealand-registered company, which itself is wholly owned by Youtap Ltd (also registered in New Zealand). Mr Jones was the chief executive and director of YMMA as well as of Youtap Mobile Money Ltd and Youtap Ltd.

[5] YMMA was incorporated in Singapore as part of a planned expansion of the Youtap Group into Asia and Africa. Singapore was considered a regional hub with easy access to the whole of Asia.

[6] Dr Johnston agreed to relocate to Singapore to spearhead the expansion. Given the value of the contracts that the Youtap Group hoped to win, it was important to have somebody with his seniority and experience "on the ground" there.

[7] At that time, Dr Johnston investigated what would be required for him to move to and work in Singapore. By email dated 22 October 2015, Dr Johnston advised Mr Jones:

I need to set aside a little time to sort out the details of my employment. Currently my salary is expressed in NZ Dollars and paid in NZ at what I think

was a USD rate converted at the time of the increase. I will get some local accountant's advice here but off the top of my head:

1. I need to be employed by the Singapore Entity – this, in fact, is part of my E-pass approval, and is mandatory. This needs to be an employment contract not a contractor's contract. Suggest a good start date might be 1 November.
2. Salary should now be paid in SGD (or USD?) I will aim to set up a local account with HSBC.
3. It should be paid gross as in Singapore individuals file their own tax returns – however, under some circumstances the Tax Department can require the company to pay a monthly percentage directly (to prevent escaping short term employees leaving before filing a return). Cross that bridge if it arises.
4. I will continue making KiwiSaver contributions but will probably need to do this as an individual rather than through the NZ entity as I will no longer be employed by the company and any 'partial' employment is likely to present me with an unwanted tax liability.
5. I will be resident director of the Asian entity – and thus try to facilitate future E-pass/S-pass applications etc. without the hassles involved with my own. I spoke to [name redacted] today – his approval took 2 days!
6. Additional expenses here will be offset to some extent by reduced tax but they comprise:

School Fees for [child's name]

Apartment rental

Transport

In any case this can all wait for a suitable window to discuss.

Cheers

MJ

[8] Dr Johnston was proceeding on the understanding he and others had that he needed to be employed by a Singaporean company to obtain an employment pass, issued by Singapore's Ministry of Manpower, colloquially called an "E-pass".

[9] The Court heard expert evidence from a senior Singaporean employment lawyer, that confirmed that Dr Johnston's understanding was generally correct –

except in limited circumstances, the Singaporean employer who employs the foreign candidate is responsible for applying for an E-pass on behalf of the foreign candidate.

[10] Being employed and paid by a Singaporean company, while working in Singapore under an E-pass, would also give Dr Johnston a significant tax advantage. Mr Jones says that he understands that the effective base taxation rate for Singapore was around 14 per cent. He also gave evidence that Dr Johnston could further reduce his tax to 10 per cent if he qualified for the Singaporean Not Ordinary Resident scheme.

[11] Dr Johnston says his suggestion that he become a director of YMMA was because Singapore law requires that at least one director of a company registered in Singapore resides in Singapore.

[12] It seems there were no further discussions about the arrangements, and no push back from Mr Jones. The arrangements proposed by Dr Johnston were simply implemented, including that the directors of YMMA became Mr Jones (resident in New Zealand) and Dr Johnston.

[13] Dr Johnston repeatedly signed official documents, including audit documents for YMMA, and tax declarations and other documents for Singaporean authorities, in which he confirmed that he was employed by YMMA. In evidence, Dr Johnston said that, at the time, he understood that was required, and that he was quite prepared to do whatever was required. He said he was employed by YMMA “in principle”, because that was “expedient”; that putting a foreign company as your employer would have just created waves that would have made things more difficult. In evidence, he said he continued to assume through all of this that he remained employed by the Youtap Group and that he treated his employment as continuous because “nothing really changed”. He refers to YMMA as a “device” for employing anyone who needed to be in Singapore and that no one was doing anything specifically for one or the other companies.

[14] In court, Dr Johnston agreed that he was aware that it is an offence under Singaporean law to provide false or misleading evidence to the Singapore Ministry of

Manpower and to the tax authority, and that he was someone who would not normally wish to break the law.

[15] The businesses of Youtap Ltd, YMMA and other Youtap entities were intertwined. Dr Johnston was paid in Singaporean dollars by YMMA into his Singaporean bank account. YMMA would, however, receive funds from Youtap Ltd (or one of the other New Zealand Youtap entities) because it otherwise would not have had the funds to make those payments. Dr Johnston accrued annual leave in YMMA's books.

[16] Mr Jones rejected that there were no changes to Dr Johnston's role and work following the relocation. He accepted that Dr Johnston retained the responsibility of being the Youtap Group's chief technical officer and was still part of the Youtap Group senior management team, but says, however, that the focus of Dr Johnston's work was growing YMMA's business in the wider Asian market.

[17] While Dr Johnston still reported to Mr Jones, his role with YMMA was largely autonomous. He was able to travel, hire and fire staff, manage the Singaporean office, move office premises, employ contract staff, perform administrative functions, and act as the authorised company representative on the Ministry of Manpower site. In dealing with potential clients or other third parties, he held himself out as being employed by YMMA as the chief technical officer.

[18] In December 2016, YMMA's then auditors asked for a copy of Dr Johnston's employment agreement with YMMA. This was in part for the purpose of meeting the conditions determined by Singapore's Accounting and Corporate Regulatory Authority, which require annual financial statements to be audited. The issue was raised with Dr Johnston by Youtap's HR manager by email dated 14 December 2016, who advised Dr Johnston that the auditors were asking to see his "employment letter" and then asked "Did you ever receive a copy of your ePass? And when you moved over were you employed by [VFMM Asia Pte] or did you stay employed through Mobilis (Youtap)?" Dr Johnston responded the same day saying "I don't ever remember getting an employment letter. I have my Epass. In principle I am employed by VFMM

Asia Pte – I pay taxes in Singapore. I guess Nadia used to deal with all this in accounts.” It seems the auditors signed off on the accounts.

[19] Then, in 2018, another firm of auditors again asked for a copy of an employment agreement between YMMA and Dr Johnston. At that point, an employment agreement was drafted for Dr Johnston and was signed by him and by Mr Jones. Dr Johnston says that the audit was the trigger for the preparation of the employment agreement; it was prepared as a “box-ticking” exercise. Neither Dr Johnston nor Mr Jones recall signing the document. On the basis of the evidence I heard, I am satisfied that the document was drafted because the issue was raised by the auditors.

[20] The employment agreement was prepared by YMMA’s chief operating officer based on a precedent provided by Youtap Ltd but with some amendments. Dr Johnston provided information to YMMA’s chief operating officer for the employment agreement. The agreement is dated 1 November 2015 but was signed in or about October 2018. It opens that it was between Dr Johnston and YMMA. It refers to the Employment Relations Act at one point, being a reference to the New Zealand act. The salary recorded for Dr Johnston is expressed in New Zealand dollars and does not appear to align with what he was actually paid. It is unclear why the figure that is in the employment agreement was included.² Both signature lines are incorrect. Dr Johnston’s name is misspelt; more significantly, Mr Jones is recorded as signing for Youtap Ltd. The employment agreement was sent to the auditors in October 2018.

[21] There is no doubt there was some sloppiness in the drafting of the employment agreement, which reflects its “box-ticking” purpose. It was clearly prepared for the purposes of the audit. I accept that it was intended to be a documentary record of the employment arrangements that had been in place for several years, with its primary purpose to record that Dr Johnston was employed by YMMA. This purpose was clear from the preamble, notwithstanding the errors in the agreement, including in the signature line for Mr Jones.

² There was a suggestion that, at some point, it may have been the correct conversion of the Singaporean salary, but that is not at all clear.

[22] Dr Johnston's employment was terminated by letter dated 8 February 2022. He was given one month's notice in accordance with the YMMA employment agreement. The termination was based on YMMA's understanding of Singaporean employment law.

[23] On 14 February 2022, Dr Johnston applied to the Ministry of Manpower for a personalised employment pass, which is not tied to an employer the way an E-pass is, but would enable him to remain in Singapore for a period of time, provided his income remained above a certain amount. In that application, Dr Johnston declared that he currently held an E-pass and was employed by YMMA. He received a personalised employment pass recording that YMMA was his employer.

[24] Following his dismissal, Dr Johnston engaged Singaporean lawyers, who corresponded with YMMA's Singaporean lawyers, and requested information from YMMA pursuant to the Employment Act 1968 of Singapore.

[25] On 9 March 2022, a day after his employment terminated, Dr Johnston registered a claim against YMMA as his employer in the Tripartite Alliance for Dispute Management in Singapore, being an employment disputes tribunal administered by the Singaporean Ministry of Manpower. The claim was for an alleged non-payment or shortfall in the payment of salary. In submitting that claim, Dr Johnston declared that the information he was supplying was true and correct to the best of his knowledge and belief.

[26] Then, in May 2022, Dr Johnston's New Zealand counsel, wrote to both YMMA and Youtap Ltd asserting Dr Johnston was employed by and dismissed from Youtap Ltd, or in the alternative, if he was employed by YMMA, that Youtap Ltd was a controlling third party. Dr Johnston claimed he was unjustifiably dismissed, unjustifiably disadvantaged, and that he was also owed holiday pay and arrears of salary. He sought YMMA and Youtap Ltd's agreement to attend mediation.

[27] On 17 June 2022, Dr Johnston issued proceedings against Youtap Ltd in the Employment Relations Authority. As noted, in its preliminary determination, the Authority found that Dr Johnston was employed by Youtap Ltd, rather than YMMA.

[28] In the challenge to that preliminary determination, the Court has to determine whether Dr Johnston was employed by Youtap Ltd or YMMA. Neither party suggests that Dr Johnston was employed jointly by both entities.

[29] If the Court finds Dr Johnston was employed by YMMA, the question of whether Youtap Ltd was, nevertheless, a controlling third party may arise.³

Youtap Ltd says there was a novation

[30] Youtap Ltd contends that from 1 November 2015, when Dr Johnston commenced work for YMMA in Singapore, there was a change to the identity of his employer by novation.

[31] Youtap Ltd says if the Court is not convinced that there was a change of employer (from Youtap Ltd to YMMA) as part of the agreed arrangements in 2015, then, alternatively, the signing of the YMMA employment agreement in 2018 resulted in Dr Johnston ceasing to be employed by Youtap Ltd.

[32] Youtap Ltd also says that a controlling third party can only be joined where there is a case before the Authority involving an unresolved personal grievance claim between the employee and their employer. At this stage, there is no claim before the Authority between Dr Johnston and YMMA, and Youtap Ltd says that it is doubtful that the Authority would have any jurisdiction to hear a claim against YMMA as that relationship is likely governed by the law of Singapore.

Dr Johnston says the real nature of his relationship with Youtap Ltd was of employment

[33] Dr Johnston's case is that he remained employed by Youtap Ltd from 2007 until his employment terminated in March 2022. He says there was no change to his employer either in 2015, when Dr Johnston moved to Singapore, or in 2018 when he signed the YMMA employment agreement.

³ Employment Relations Act 2000, s 103B.

[34] He says that the real nature of the relationship between himself and Youtap Ltd was one of employment.⁴

[35] Dr Johnston referred to the principles outlined by the Labour Court in *New Zealand Seamen's IUOW v Gearbulk Shipping (New Zealand) Ltd* which, it was submitted, might inform the inquiry into the real nature of the relationship.⁵ In *Gearbulk* the Court was considering whether the actions of a controlling company in the same group of companies as the named employer could be attributed to the employer. In that context, the Court was looking at the tests for piercing or looking behind the corporate veil to identify whether, in reality, another entity's actions could be attributed to the named employer.

The parties agreed to a change of employer in 2015

[36] In a novation, an original party to a contract is replaced by a new party, with all the rights and obligations of the original party being transferred to the new party and the original party ceasing to be a party to the contract.⁶ The inquiry in determining whether there has been a novation is whether it has been agreed that a new contract is to be substituted for the old and the obligations of the party under the old agreement are to be discharged.⁷ Agreement to a novation may be inferred from conduct, and need not be express.⁸

[37] The issue, then, is whether in assessing the parties' conduct here, the proper inference is that a change of contracting parties from Youtap Ltd to YMMA was mutually intended.

⁴ Employment Relations Act, s 6.

⁵ *New Zealand Seamen's IUOW (Industrial Union of Workers) & Federated Cooks and Stewards IUOW (Industrial Union of Workers) v Gearbulk Shipping (New Zealand) Ltd* [1990] 1 NZILR 688 at 699.

⁶ *Pilgrim & Ors v Attorney-General & Ors* [2023] NZEmpC 227, [2023] ERNZ 1020 at [47]; and Stephen Todd and Matthew Barber *Laws of Contract in New Zealand* (7th ed, LexisNexis, 2022) at 685.

⁷ *ALH Group Property Holdings PTY Ltd v Chief Commissioner of State Revenue* [2012] HCA 6, (2012) 245 CLR 338 at [12].

⁸ *Pilgrim*, above n 6. at [50]; *Hela Farmer AB v Hela Farmer Australasia Ltd* CA 16503, 17 February 2005 at [63].

[38] What is apparent from the evidence, is that Dr Johnston was an active participant in the arrangements put in place for his employment after his move to Singapore in 2015. Indeed, it was Dr Johnston who was the primary driving force in setting up the contractual arrangement between him and YMMA. His email of 22 October 2015 was instrumental in determining the arrangements for his employment in Singapore. He said that being employed by the Singaporean entity was mandatory as part of his E-pass approval; he expressly said that he would need to make his KiwiSaver contributions as an individual rather than through the New Zealand entity (Youtap Ltd) as he would no longer be employed by Youtap Ltd; he also included that “partial” employment was likely to present him with an unwanted tax liability.

[39] The change in employer from Youtap Ltd, in New Zealand to YMMA, in Singapore was mutually beneficial to the parties. The Youtap Group wished to have a senior person resident and working from Singapore to be convenient to key customers and access the markets nearby. Youtap Ltd does not appear to have been particularly concerned about which entity employed Dr Johnston but both parties understood that Dr Johnston needed to be employed by a Singaporean-based employer to get the E-pass enabling him to work in Singapore. Importantly for Dr Johnston, being domiciled in Singapore and employed by a Singaporean company also gave him significant tax advantages.

[40] I accept the submission made by Mr Skelton KC for Youtap Ltd, that there was a novation in 2015 when Dr Johnston commenced employment in Singapore.

[41] That, however, is not the end of the Court’s analysis. It remains open to Dr Johnston to argue that, notwithstanding the change in the terms of the employment agreement, including the identity of the employer, the real nature of the relationship between Dr Johnston and Youtap Ltd continued to be one of employment.

Section 6 of the Act provides the framework for analysis

[42] The Act defines an “employee” as follows:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, **employee** —

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

(b) includes—

(i) a homemaker; or

(ii) a person intending to work; but

(c) excludes a volunteer who—

(i) does not expect to be rewarded for work to be performed as a volunteer; and

(ii) receives no reward for work performed as a volunteer.

(d) ...

(1A) ...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority—

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

(4) ...

(4A) ...

(5) The court may, on the application of a union, a Labour Inspector, or 1 or more other persons, by order declare whether the person or persons named in the application are—

(a) employees under this Act; or

(b) employees or workers within the meaning of any of the Acts specified in section 223(1).

(6) The court must not make an order under subsection (5) in relation to a person unless—

(a) the person—

(i) is the applicant; or

(ii) has consented in writing to another person applying for the order; and

(b) the other person who is alleged to be the employer of the person is a party to the application or has an opportunity to be heard on the application.

(7) ...

[43] The leading cases on s 6 have addressed whether a worker was an employee or an independent contractor. The identity of the principal was not in issue; the issue was employment status.

[44] In that context, the Supreme Court in *Bryson v Three Foot Six Ltd* considered the meaning of “all relevant matters” under s 6(3)(a). It said that “all relevant matters” includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship, and also includes any divergences from, or supplementation of, those terms and conditions which are apparent in the way in which the relationship has operated in practice.⁹ In *Prasad v LSG Sky Chefs New Zealand Ltd*, it was also highlighted that examining the reality of the working relationship is crucial to determining a worker’s status.¹⁰

⁹ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [32].

¹⁰ *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835 at [34].

[45] In *Rasier Operations BV v E Tū Inc*, the Court of Appeal considered *Bryson* in the context of a s 6 claim brought by ride share Uber drivers.¹¹ Again, the principal issue was whether those drivers were employees. In that context, the Court of Appeal adopted a two-stage inquiry:¹²

- (a) First, identify the substance of the parties' mutual rights and obligations as a matter of reality, by considering:¹³
 - (i) the written and oral terms of the contract between the parties, with a focus being on the parties' mutual obligations, interpreted objectively, rather than on any labels ascribed to the relationship;
 - (ii) how those terms have been implemented in practice;
 - (iii) the parties' common intention about the substance of the mutual rights and obligations, with any subjective intentions of either party not being relevant;¹⁴
 - (iv) any relevant industry practice.¹⁵
- (b) Second, determine whether the rights and obligations identified at the first stage amount to a contract of service, assessing that using the common law tests: the control test, the integration test, and the fundamental test.¹⁶

[46] None of the common law tests individually, however, will necessarily be conclusive. Respective weight will be placed upon them depending upon the overall factual matrix.¹⁷

¹¹ *Rasier Operations BV v E Tū Inc* [2024] NZCA 403, (2024) 20 NZELR 813.

¹² At [97].

¹³ At [98](a), [99] and [143] – [204].

¹⁴ At [106] – [114] and [209] – [216].

¹⁵ At [205] – [208].

¹⁶ At [98](b) and [220].

¹⁷ *Clarke v Northland Hunt Inc* [2006] 4 NZELR 23 (EmpC) at [22].

[47] In cases such as the present, where the Court is examining who the employer is, and employment status is not in issue, the approach needs to be somewhat different. What remains important is an overall impression of the underlying and real nature of the relationship between the parties.¹⁸ In assessing this, the Court must consider all relevant matters, including any matters that indicate the true intentions of the parties. All relevant matters include the broad range of factors described in *Bryson*, including features of control and integration.¹⁹

[48] In the situation here, the intention of the parties, including as indicated by the documentation between them, is a key factor. The other key factor is the way in which Dr Johnston's employment operated in practice, including the extent to which Youtap Ltd, rather than YMMA, controlled Dr Johnston's work and the extent to which he was integrated into Youtap Ltd's business, as opposed to into the business of YMMA.

The parties intended that Dr Johnston be employed by YMMA

[49] Intention is the one factor that is specifically identified in s 6, at s 6(3)(a). Its importance is also highlighted by the requirements in s 6(6) that, although a union or a Labour Inspector may make an application under s 6, they only may do so if the worker has consented in writing. Essentially, if the parties have intended to define their relationship in a particular way, and are satisfied for the relationship to be treated as they intended, then the Court has no role in reviewing that.

[50] Nevertheless, where a worker wishes to assert a different position than what was intended, it is open for them to do so. While it is an important factor that the Court must consider, intention is not determinative.²⁰ Frequently, in the cases that come before the Court, the conflict that arises is between the intention of the parties at the outset, including as set out in any written terms, and the way the relationship operated in practice. Often, a worker is happy with the characterisation of the relationship while it subsists, but when it is ended, they seek to challenge that

¹⁸ *Three Foot Six Ltd v Bryson* [2004] 2 ERNZ 526 (CA) per McGrath J dissenting, this approach being undisturbed on appeal to the Supreme Court.

¹⁹ *Head v Chief Executive of Inland Revenue Dept* [2021] NZEmpC 69, [2021] ERNZ 183 at [98](a).

²⁰ Employment Relations Act, s 6(3).

characterisation so they can access personal grievance procedures and remedies. That appears to be the case with Dr Johnston.

[51] As already noted, the evidence here was that in 2015, the parties mutually intended and agreed that Dr Johnston would become employed solely by YMMA in Singapore. Thereafter, Dr Johnston repeatedly sought to have that arrangement recognised by Singaporean authorities, including after his employment ended. Mr Jones was also operating on that basis when he terminated Dr Johnston's employment, believing Dr Johnston was covered by the 2018 YMMA agreement and Singaporean law.

[52] It is clear that there was a common and continuing intention that Dr Johnston would be employed by YMMA, and not employed by Youtap Ltd.

While YMMA and Youtap Ltd were related companies, the focus remains on the relationship between Youtap Ltd and Dr Johnston

[53] The Court in *Gearbulk* referred to the tests in *Smith, Stone & Knight v Birmingham Corporation* to determine whether a subsidiary is carrying on the business of the parent company and therefore the corporate veil between them should be pierced or looked behind.²¹ If a subsidiary is a sham, created as a façade to conceal the true facts, in order to evade a legal or fiduciary obligation, that may support the Court looking behind the corporate veil.

[54] Mr Langton, counsel for Dr Johnston, did not go so far as alleging that YMMA was a sham. He, nevertheless, says that YMMA was used as a vehicle or device for Youtap Ltd through which Dr Johnston could obtain an E-pass, and continue his work for Youtap Ltd in Singapore.

[55] I agree that there is some synergy between the issue of how the various companies operated between themselves and the issue of who, in reality, employed Dr Johnston. However, that is only to the extent that the inter-company arrangements impacted on how the relationship between Youtap Ltd and Dr Johnston operated. That

²¹ *Gearbulk*, above n 5, at 679 and 699 – 701; and *Smith, Stone & Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116.

synergy can be appropriately accounted for within the considerations of control and integration; to impose a *Gearbulk* analysis would be superfluous. The Court's focus remains on the real nature of the relationship between Dr Johnston and Youtap Ltd, as directed by s 6(2).

[56] The parties' intention is not inconsistent with the way the relationship operated in practice. Both parties agree that Dr Johnston had a large degree of autonomy in the way in which he operated YMMA. He worked primarily in the Asia Pacific region with others employed by YMMA out of the Singapore office of YMMA.

[57] Mr Langton pointed to issues with how the companies in the Youtap Group engaged with each other – noting that YMMA funded Dr Johnston's salary in part from inter-company transfers and that there was no inter-company accounting for the work Dr Johnston performed for the wider Youtap Group. Those matters did not, however, affect Dr Johnston's relationships with YMMA and Youtap Ltd. Although YMMA received funding from other companies in the Youtap Group, ultimately Dr Johnston's salary was paid by YMMA. It is not contested that companies across the Youtap Group shared some resources, including that Dr Johnston performed some services for other Youtap companies. However, that is not inconsistent with Dr Johnston being employed by YMMA, as part of the wider Youtap Group.

[58] Mr Jones did, of course, exert some control over Dr Johnston. Effectively, Mr Jones was the head of the Youtap Group; he was the chief executive of both Youtap Ltd and YMMA. In corresponding with Dr Johnston, Mr Jones's sign-off would include his position – chief executive – and then the generic name for the group used in the wider market – “youtap!”. His engagements with Dr Johnston were consistent with his role as chief executive of YMMA.

[59] Dr Johnston was undoubtedly integral to the business of YMMA. As canvassed, he was purposefully placed on the ground in Singapore. That was to use his seniority and experience to facilitate the purpose of YMMA; expanding the business of the Youtap Group into the Asia market. I accept that after the move Dr Johnston's duties primarily focussed on attracting potential clients in this market. In carrying that out, Dr Johnston remained closely connected with the wider business

of the Youtap Group, and maintained other generic duties, but the nature of his placement and work reflects that he was integral to the business of YMMA in particular. Expanding the business of a parent company, or a group of companies, is a legitimate and common purpose of a subsidiary company. That nexus between the companies does not mean that Dr Johnston's work was integral to Youtap Ltd as opposed to YMMA.

[60] On balance, therefore, I find that the intention of the parties was that Dr Johnston would be employed by YMMA from November 2015, that this intention remained the case throughout Dr Johnston's employment, and in the period immediately following it. Further, the way in which Dr Johnston interacted with YMMA and Youtap Ltd is consistent with him being employed by YMMA, being a subsidiary of Youtap Ltd and one of the companies in the Youtap Group.

[61] Accordingly, I find that Dr Johnston was not employed by Youtap Ltd in the period leading up to the termination of his employment.

The Court has no jurisdiction to consider a claim that Youtap Ltd was a controlling third party

[62] Although the issue of whether Youtap Ltd was a controlling third party was before the Authority, the Authority did not need to deal with that given that it found that Dr Johnston was employed by Youtap Ltd.

[63] The parties referred to the issue in their submissions, but it was not the focus for either party, who both recognised that there currently are no proceedings in the Authority between Dr Johnston and YMMA. The issue can be dealt with briefly at this stage.

[64] Section 103B of the Act allows either party to personal grievance proceedings to apply to the Authority or the Court to join a controlling third party to the proceedings. Under s 123A, a controlling third party joined in this way may be ordered to provide the employee with monetary remedies for the personal grievance to the extent the Authority or Court determines that the controlling third party's actions

caused or contributed to the situation that gave rise to the personal grievance, and it is just to do so.

[65] Section 103B only comes into play, however, where there is an unresolved personal grievance between the employee and their employer before the Authority or Court.²² As Dr Johnston has not filed any claim against YMMA in the Authority, there is no basis for either YMMA or Dr Johnston to apply to join Youtap Ltd as a controlling third party.

[66] It is, therefore, premature, and not within the Court's jurisdiction to consider whether Youtap Ltd is a controlling third party, and, if so, whether it should be ordered to pay any remedies under s 123A. At this point, it is fair to note that there are some significant hurdles that Dr Johnston would need to get over before he could have any such claim determined by the Authority or the Court.

In conclusion, Youtap Ltd's challenge succeeds

[67] In conclusion, Dr Johnston was not employed by Youtap Ltd at or immediately before the termination of his employment. He was employed by YMMA from November 2015.

[68] The Authority's preliminary determination is therefore set aside, and this judgment stands in its place.²³

Youtap Ltd is entitled to costs

[69] Youtap Ltd has been successful in its challenge and is entitled to costs. In the event the parties are unable to agree on costs, Youtap Ltd will have 28 days from the date of this judgment within which to file and serve any memorandum in support of its claim for costs. Dr Johnston is to respond by filing and serving a memorandum

²² *Riddler v Meridian Energy Ltd* [2023] NZEmpC 87, [2023] ERNZ 339 at [31] – [36].

²³ Employment Relations Act, s 183.

within a further 21 days. Any reply from Youtap Ltd then should be filed and served within a further seven days.

J C Holden

Judgment signed at 2.40 pm on 9 May 2025