

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

<b>BETWEEN</b>	Robert Ivan Daunton
<b>AND</b>	Pacific Pine Chemicals Limited
<b>REPRESENTATIVES</b>	Applicant in Person Simon Porter, Counsel for Respondent
<b>MEMBER OF AUTHORITY</b>	Leon Robinson
<b>INVESTIGATION MEETING</b>	10 November 2006
<b>SUBMISSIONS RECEIVED</b>	10 November 2006 13 November 2006
<b>DATE OF DETERMINATION</b>	28 November 2006

**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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The Authority determines:-

- A. The applicant was employed and dismissed by the respondent Pacific Pine Chemicals Limited, a New Zealand limited liability company; &
  - B. The law of New Zealand applies in the resolution of this employment relationship problem; &
  - C. The parties are directed to attend mediation on or before 28 February 2007.
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## The problem

[1] The applicant Mr Robert Ivan Daunton ("Mr Daunton") applies to the Authority for an investigation into his dismissal. He asks that the Authority investigate and resolve the problem in his favour by orders for reimbursement and compensation.

[2] However, there are preliminary issues which arise. The parties have not attended mediation because a limited liability company Pacific Pine Chemicals (Fiji) Limited by its solicitors, say that it is the correct employer. That Fijian registered company further says that the proper law governing the employment was the law of Fiji.

[3] This Determination deals with preliminary issues:-

(i) Who was the employer?; &

(ii) Which law applies?.

## The facts

[4] The respondent company Pacific Pine Chemicals Limited is based in Kawerau and was incorporated in New Zealand in December 2003. It was engaged in developing the business of resin supply and manufacturing. It employed a small local labour force to assist in the development of the "tapping" process and manufacturing facility. "Tapping" is where a machete is used to put a cut in a tree. The resin then leaks out and a gutter guides the resin into a receptacle. That process is distinct from the manufacturing process, which involves the filtering, washing and distillation of the raw tapped resin. Two products are produced from the petrochemical process, gum rosin and gum turpentine.

[5] In February 2005, Pacific Pine Chemicals Limited made a decision to locate its supply (i.e. tapping) operations to Fiji. One of its directors Mr Ramon Dudley Mountfort ("Mr Mountfort") was introduced to Mr Daunton by Mr Daunton's sister, who attends Mr Mountfort's church and was a shareholder in the respondent.

[6] Both Mr Daunton and Mr Mountfort give evidence that Mr Daunton was offered and accepted a position as General Manager of Pacific Pine Chemicals (Fiji) Limited, a company which was to be formed and registered in Fiji. Mr Daunton says he and Mr Mountfort agreed that he (Mr Daunton) would work from the respondent's office in Kawerau for seven weeks to learn its business and then in early June he would move to Fiji to set up the operation there on behalf of Pacific Pine Chemicals Limited. Once the Fiji company had been set up and he had secured a work visa, Mr Daunton was then to be employed by the Fijian company Pacific Pine Chemicals (Fiji) Limited.

[7] Mr Mountfort says Mr Daunton was to train in New Zealand for a short time to allow him to become familiar with tapping and inducted into the respondent's processes and operations. During this time, by necessity, he would be employed by the respondent Pacific Pine Chemicals Limited. Critically, Mr Mountfort says *"however, as soon as he went to Fiji he would then be employed by the Fijian company."*

[8] The negotiations of the detail of arrangements were substantially conducted by email and a draft individual employment agreement was eventually provided to Mr Daunton. Mr Daunton raised queries and Mr Mountfort responded by an email of 18 March 2005. That email materially stated: -

1. *Initially you are employed by PPC NZ and as such NZ law applies even if you are working overseas.*
2. *Once you move to Fiji you will be promoted to the Fijian company and work for it. This will require a change of contract, at the moment the company Fiji Pine Chemicals is not legally formed.*
3. *So your contract is for the interim period that you are in NZ.*
4. *You will be required to help draft the Fijian contracts for your self and for fiji employees - remembering we are not an established company in fiji.*
5. *Clause 9.2 - you report to me, so I am your manager.*
6. *Yes - change it. Note with the move to Fiji your holidays etc will be transferred.*
- ...
9. *Yes in Fiji you will be the "man" or what the public perceive as the company or spokesperson. We will address these issues for your fiji contract. But for NZ this does not concern you and the employer is PPC.*
- ...
17. *Salary is \$60k NZ, \$75K when in Fiji and \$90k once I go or after three months whichever is soonest.*

[9] Mr Daunton agreed to all the points raised in this email and ultimately, a written individual employment agreement was signed by both parties. Mr Mountfort for the respondent signed on 24 March 2005 and Mr Daunton on 30 March 2005. That agreement is produced to the Authority. It materially provides as follows ("the IEA"):-

*This Individual Employment Agreement is made on 24th March 2004*

*Between: Pacific Pine Chemical Limited  
(the employer)*

*And: Robert Ivan Daunton  
(the employee)*

1. *Terms of Agreement*
  - 1.1 *This agreement will come into effect on 4th April 2005 and will remain in force until renegotiated or terminated. This agreement replaces any other agreement or understanding.*
3. *Places of Work*
  - 3.1 *The employee agrees to work at any other site that the employer may deem to be applicable to complete the work.*

47. *Employment Relations Act 2000*

47.1 *The parties must comply with the provisions of the Employment Relations Act 2000.*

*Schedule 1*

*Employment Agreement Schedule - Job Description*

*Position      General Manager*

*Tasks/Duties:*

*Prepare for appointment to Fiji as General Manager with task of establishing a viable pine tapping operation there. Including negotiating supply agreements, employing and training staff, developing management systems and meeting supply targets.*

*Schedule 2*

*Wages:      \$60,000 plus a bonus calculated as 1% of Net Profit after Tax to be paid annually in December for the previous financial year's accounts after one full year of service. The details for this bonus scheme are still be worked through though the bonus will be divided amongst qualifying employees and paid as a share equivalent to the salary of each employee. This bonus scheme excludes senior management.*

*To go to F\$75,000 when relocated and to F\$90,000 once in full responsibility as General Manager in Fiji.*

*A laptop computer and cell phone to be provided and appropriate vehicle once in Fiji.*

[10] Mr Daunton commenced employment on 4 April 2005 at Kawerau. He managed the respondent's Kawerau plant and familiarised himself with its operation. During this time, the respondent was awaiting the Fijian Native Land Trust Board's consent to access Fiji Pine Schemes.

[11] In late May, Mr Mountfort directed Mr Daunton to go to Fiji. Mr Daunton was instructed to obtain the necessary permissions from the Fijian investment bureau, obtain tax numbers and generally establish the Fijian operation. Mr Daunton and his family spent a couple of days in Australia before arriving in Fiji on 29 May 2005.

[12] Mr Daunton set about making arrangements for his employment with the Fijian company. He was in constant contact with a Fijian lawyer and particularly wrote to the lawyer in relation to his employment by email of 4 June 2005 in these terms: -

*Gidday Ulamilla*

*Please find attached a reviewed copy of the contract between Pacific Pine Chemicals and me. Ray and I have been through it and made changes to suit my role in Fiji but there are lots of references to NZ law so you will need to modify these clauses to comply with Fiji law. I have highlighted all (?) references in red.*

*In addition to this can you modify the following clauses:*

Clause 13: *Public Holidays: to suit Fiji*  
Clause 14: *Sick Leave; Ray would like this to be the minimum entitlement under Fiji law*  
Clause 15: *Bereavement Leave; again the minimum entitlement*  
Clause 16: *Jury Service: drop this if it is not required by Fiji law*  
Sched 3: *Dispute Resolution*

*As you said earlier there is a lot of unnecessary stuff in these contract (sic) so feel free to delete or add what you see fit.*

*Thanks  
Regards  
Rob*

[13] The Fijian company Pacific Pine Chemicals (Fiji) Limited was established in Fiji on 8 June 2005.

[14] Mr Daunton ceased being paid by the respondent as from 4 August 2006. From that time he was paid by the Fijian company Pacific Pine Chemicals (Fiji) Limited at the agreed increased salary.

[15] On 9 August 2005 Mr Daunton emailed the lawyer again about the employment agreement as follows: -

*Giddy Ulamilla  
I know you are busy but could you please review my earlier e-mail and get back to me. I need to have this contract sorted out as I'm out of pocket by a considerable amount without it.  
Thanx  
Rob*

[16] The lawyer did not provide a final employment agreement and no agreement was concluded between Mr Daunton and the Fijian company Pacific Pine Chemicals (Fiji) Limited.

[17] Mr Daunton was dismissed on 22 September 2005.

[18] By letter dated 12 October 2005, Mr Mountfort wrote to Mr Daunton and referred to "*clause 39.5 of your contract*". Clause 39.5 of the IEA is as follows: -

*39.5 Serious misconduct by an employee may give rise to summary dismissal (without prejudice to any of the employer's other remedies in law) and no notice period will be given to the employee by the employer.*

[19] By letter dated 29 November 2005, Mr Daunton's solicitors raised a personal grievance with Pacific Pine Chemicals Limited in relation to Mr Daunton's dismissal.

[20] The parties have not attended mediation.

## The issues

[21] Who dismissed Mr Daunton in Fiji and which law applies?

[22] The IEA expressly states that the *Employment Relations Act 2000* applies. That makes clear the law which applied while the IEA remained in force.

[23] I understand the respondent to say that as soon as Mr Daunton went to Fiji, he would be employed by the Fijian company. I do not agree that this was so.

[24] Firstly, the Fijian company was not formed when Mr Daunton arrived there and logically, he could not have been employed by something which did not then exist. As well, the IEA expressly contemplated its terms being operative in multiple locations. The IEA states: -

*3.1 The employee agrees to work at any other site that the employer may deem to be applicable to complete the work.*

That wording is capable of including work performed in Fiji.

[25] Nor do I consider Mr Daunton became employed under a pre-incorporation contract by Mr Mountfort as agent for a company to be formed, whether written or oral or a combination of both. There was no ratification of such a contract by the company when it was formed.

[26] If as Mr Mountfort maintains the time in New Zealand was for training and induction and limited temporally for that purpose, I note the terms of the IEA are not limited as to duration or in any other way. It is expressed to "*remain in force until renegotiated or terminated*". The employment is expressed as an indefinite one and there is nothing fixed-term about it. In any case, there are strict requirements for fixed-term employments not satisfied in this instance. I note that lawyers prepared the IEA and no fixed-term arrangement is recorded.

[27] These matters are corroborative of Mr Daunton's position and lead me to conclude that when Mr Daunton arrived in Fiji on 29 May 2005, he had been instructed to go and work there by the New Zealand respondent. His time in Fiji was on the instruction of the New Zealand respondent and Mr Daunton continued to remain employed by the New Zealand respondent.

[28] For completeness, I find there was nothing that terminated the IEA by virtue simply of the fact of Mr Daunton's arrival in Fiji. I would consider something far more overt by way of termination is required to have extinguished the IEA. Similarly too, the mere fact of the

registration and establishment of the Fiji company did not extinguish the IEA either. Again something more overt was required.

[29] That something overt seems to me could only have been the voluntary and mutual entering into a new employment contract, intended to be the re-negotiated employment by the Fiji company. As Mr Mountfort's email of 18 March 2005 attests, a change of contract was required for the employment with the Fiji company. Had the parties signed a new employment agreement that would have been sufficient to bring about the end of the IEA. But no such agreement in substitution was negotiated and therefore, I conclude that Mr Daunton remained employed under the terms of the IEA and by the New Zealand respondent Pacific Pine Chemicals Limited.

[30] On this analysis, Mr Daunton was dismissed by the New Zealand respondent Pacific Pine Chemicals Limited. The terms of the IEA applied and as expressly stated therein, the *Employment Relations Act 2000* was to be complied with. It appears this was the position Mr Mountfort understood too, for when he wrote terminating Mr Daunton's employment, he did so expressly relying on clause 39.5 of the IEA.

## The determination

[31] I answer the preliminary issues as follows: -

- (i) Mr Daunton was employed and dismissed by the respondent Pacific Pine Chemicals Limited a New Zealand limited liability company; &
- (ii) The law of New Zealand applies in the resolution of this employment relationship problem.

[32] Accordingly, the Authority is empowered to continue to investigate this employment relationship problem. For the sake of clarity, the investigation shall continue as one between Mr Daunton and the New Zealand limited liability company Pacific Pine Chemicals Limited, and not Mr Mountford personally.

[33] The parties are directed to attend mediation before 28 February 2007. Mr Daunton is to advise the Authority of the outcome of that mediation.

## Costs

[34] I do not expect to be asked to address costs. If Mr Daunton has any claim for costs of professional representation in pursuing these preliminary issues, he should indicate that to the Authority support officer within 7 days so that I may consider any further steps as necessary.

Leon Robinson  
**Member of Employment Relations Authority**