

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 124/09
5158508

BETWEEN

BRUCE MCNABB
Applicant

AND

PERTRONIC INDUSTRIES
LIMITED
First Respondent

AND

PERTRONIC TRADING
(SHANGHAI) COMPANY
LIMITED
Second Respondent

Member of Authority: P R Stapp

Representatives: Steph Dyhrberg for Applicant
Michael Quigg for Respondents

Investigation meeting On the papers

Submissions received by: 22 June 2009

Determination: 28 August 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The statement of problem claimed that Mr McNabb was unjustifiably dismissed and that he was not genuinely made redundant.

[2] Pertronic Industries Limited denied that it was Mr McNabb's employer, but claimed he was employed as the general manager of Pertronic Trading (Shanghai) Company Limited. It is claimed Mr McNabb is thereby subject to the laws of the

People's Republic of China, and the Employment Relations Authority has no jurisdiction over the employment relationship.

The defence

[3] Mr McNabb was employed by Pertronic Industries Limited for the period March 1990 until 31 July 2007. However, that arrangement ceased by agreement and on 1 August 2007 Mr McNabb entered into a written fixed term contract with Pertronic Trading (Shanghai) Co Limited that was later registered in China. The employment contract was registered in the People's Republic of China despite there being some delays and difficulties in establishing the company and the payroll system, which included the tax arrangement and the method of payment. Mr McNabb was paid in Chinese currency except for 25% of his earnings, which were paid in New Zealand dollars and deposited in his Hong Kong account.

[4] Repatriation costs were met by Pertronic Trading (Shanghai) Co Limited. Any other costs were paid by Pertronic Industries Limited, which was subsequently reimbursed by Pertronic Trading (Shanghai) Company Limited.

The applicant's claim

[5] Mr McNabb accepted that he must establish the identity of his employer. He claimed that he was employed by both companies at the relevant time. The factors he relied on are:

- Cases cited by the respondents are not relevant as they deal with lifting the corporate veil. Mr McNabb has never claimed that Mr Percy, a director of both respondents was his employer.
- An employee sent to work for an overseas subsidiary can remain employed by a New Zealand employer at the same time. There is no bar to a finding of New Zealand jurisdiction applying.
- The applicant's appointment documentation was issued on behalf of the first respondent. The arrangement was referred to as an overseas posting. The documentation refers to an expected duration of 3 years. Mr McNabb claims that the documentation was consistent with a secondment, although a Chinese entity was later formed and a contract signed by the applicant and Mr Percy. The China office is a wholly

owned subsidiary of the first respondent, and operated under the direction of the first respondent, particularly Mr Percy. The applicant was replaced by another employee of the first respondent. Mr McNabb claimed that the administration matters were dealt with by the first respondent.

- There were discussions and offers of employment back in New Zealand supporting the existence of an ongoing employment relationship with the first respondent.
- Documentation is consistent with ongoing employment between Mr McNabb and the first respondent. This included an email from Mr Percy dated 11 June announcing the applicant's departure and that there was no full time position available in New Zealand, but other subsequent emails supported a continuing employment relationship between the first respondent and the applicant. The two respondents were inextricably linked and that Mr Percy is using the Chinese entity to avoid justifying the dismissal.
- There is no evidence that Mr McNabb's employment with the first respondent ceased on 31 July 2007.
- Mr McNabb did not request that his pay be split. Mr McNabb claims that Mr Percy made that suggestion to recognise work that was to be carried out in other countries. The applicant claims he agreed because he had undertaken work in other parts of Asia. Mr Percy provided the documentation setting up the arrangement.
- The tax status should not be determinative.
- On jurisdiction the applicant accepts that the Authority will have to decide if it has jurisdiction. The employment agreement signed by Mr McNabb and the second respondent does not refer to jurisdiction. There was no mention of any dispute resolution procedures that would apply, distinguishing the matter from other cases cited. Jurisdiction in New Zealand should be implied because of the costs, the convoluted nature of the Chinese processes, and lack of any certainty that Mr McNabb could access a cause of action in China and the respondents have declined to attend mediation. Because of these factors he would be denied access to justice.

- Mr McNabb submitted a document that was a newsletter issued by the first respondent in September 2006 that referred to Mr McNabb's "3 year secondment".

The respondents' replies

[6] I will deal with the last bullet point first. The respondents requested the Authority to read the document produced by Mr McNabb in context as a news publication, and as a newsletter it would not realistically advise readers of the full details of any employment arrangements. The use of the word secondment was the wrong word because there was no company Mr McNabb could be seconded to because in September 2006 Pertronic Industries Limited was the only company that existed.

[7] On other matters the respondents say that Mr McNabb referred to his application to the New Zealand IRD for non resident tax status and requested Pertronic Industries Limited not to deduct any further PAYE from his salary. The last PAYE was deducted on 21 November 2006.

[8] There are different dates relied upon by the applicant for his commencement and that the employment agreement attached to the statement of problem is an incorrect, unsigned document, whereas the one produced by the second respondent has a different start date, finish date and a different annual salary.

[9] The first tax deducted by the second respondent occurred in December 2007 and it took between July 2007 and November 2007 for Mr McNabb to arrange his Chinese tax registration. He was paid by the second respondent in Chinese currency from 1 December 2007 until his employment ended on 31 July 2008.

Determination

[10] Mr McNabb signed an employment contract with Pertronic Trading (Shanghai) Company Limited. The contract commenced from 1 August 2007. He was employed in the full time position of general manager. There were provisions for the termination of the contract, the renewal of the contract, leave, sick leave, annual

salary, personal income tax, and allowances. There was no mention of any continuing arrangements with the first respondent continuing. Mr McNabb applied for non-residential tax status for his remuneration and requested that PAYE not be deducted from his salary payments. Arrangements were made for the payment of Mr McNabb's salary that applied to his work for the second respondent (19 November 2007 and 13 December 2007: SOP).

[11] A letter dated 11 June 2008 that outlined options regarding Mr McNabb's continued employment in China was written under the letterhead of the first respondent. Mr McNabb was offered a consultancy role back in New Zealand with the first respondent.

[12] It is my decision that the documentation and submissions support the second respondent being Mr McNabb's employer for the following reasons:

- Mr McNabb signed off an employment agreement with the second respondent. There was no express secondment and I accept that the newsletter would not represent all the information about any employment arrangements and that careful weight has to be given to the document produced because it is a newsletter.
- While Mr Percy is a common director of the two companies, they are separate entities.
- The payment of any split salary involving the first respondent is not inconsistent with an administrative arrangement to make such payments, but the correspondence referring to the split payment arrangement also refers to the second respondent. The fact that the first respondent was referred to in the letterhead would not be determinative considering the arrangements put in place for employment in China, the existence of an employment agreement and other correspondence clearly under the second respondent's letterhead.
- Tax arrangements were made and PAYE ceased being deducted for non resident tax that support separate arrangements being put in place.
- Mr McNabb produced a copy of a different agreement to the one he actually signed. I accept, however, an explanation might be that he did not have the original, and therefore I am not in any position to conclude that he has been misleading.

- New tax arrangements in China were put in place. The second respondent company was registered in that country and separate payroll arrangements were entered into.
- Mr Percy distinguished the Chinese entity from that of the first respondent sufficiently for it to be a separate employer.

[13] I cannot imply jurisdiction to save costs and ensure that justice is done under New Zealand rules, as requested by the applicant, and to avoid the rules that apply in other countries.

[14] This is not a situation where Mr McNabb had a 'home employer' at the same time he moved to work under arrangements for a new employer off shore. The terms of the arrangement did not sufficiently and clearly express and or imply a secondment. Indeed the correspondence leaves me to conclude that the offer of a consultancy arrangement, upon repatriation, was very different to a secondment and repatriation involving a continuing relationship with the first respondent when that had ended. I am supported also by the contract with the second respondent being open to renewal.

[15] Significantly Mr McNabb moved to work in China. That was his place of work. This is entirely different to an employee working for a foreign company in New Zealand and distinguishes the law that I was requested to apply by the applicant's representative and grant jurisdiction. To imply jurisdiction over terms relating to employment in China, despite a common named director and another entity with a company registered in that country, would, I suggest be going too far.

[16] Unfortunately for Mr McNabb this is one of those situations where, upon entering into changed employment arrangements, he had the responsibility of ensuring that he obtained appropriate advice and was informed at the time. His failure to get advice, and include dispute resolution procedures in an agreement operating in a foreign country, cannot be levelled at his previous employer, the first respondent, for the reasons set out above.

[17] Thus, it is my conclusion that Mr McNabb's employer was the second respondent. The Authority does not have jurisdiction to intervene in the relationship

between Mr McNabb and the second respondent, does not have jurisdiction to imply jurisdiction, and does not have jurisdiction to investigate the employment relationship problem when the first respondent was not Mr McNabb's employer when his employment with the second respondent ceased.

[18] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority