



New Zealand Employment Relations Authority Decisions

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Youssef v iP3 Systems Pty Ltd (Auckland) [2016] NZERA 715 (12 January 2016)

Last Updated: 17 December 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND		
		[2016] NZERA Auckland 14 5574934
	BETWEEN	AHMED YOUSSEF Applicant
	A N D	iP3 SYSTEMS PTY LIMITED First Respondent
	A N D	iP3 SYSTEMS NZ LIMITED Second Respondent
Member of Authority:	James Crichton	
Representatives:	Claire Mansell, Counsel for Applicant Oliver Carton, Counsel for Respondent	
Investigation Meeting:	On the papers	
Submissions Received:	14 October and 27 October 2015 from Applicant 14 October and 27 October 2015 from Respondent	
Date of Determination:	12 January 2016	
FIRST DETERMINATION OF THE AUTHORITY		

Employment relationship problem

[1] The applicant (Mr Youssef) alleges that he was unjustifiably constructively dismissed by one or other of the respondents, alleges that he is owed annual leave, long service leave and in addition, is owed a significant six figure advance which he says he made to the first respondent.

[2] Mr Youssef maintains that he was the Chief Executive Officer of either the first or the second respondent.

[3] The statement in reply filed by the respondents says that the second respondent (iP3 NZ) is a subsidiary of the first respondent (iP3) and that Mr Youssef was always an employee of iP3.

[4] That statement in reply neatly raises two issues, namely whether Mr Youssef was employed by iP3 NZ or iP3 and/or whether the Employment Relations Authority has jurisdiction to deal with the matter. Plainly, if Mr Youssef was employed at all material times by iP3 (as the statement in reply contends), then without definitively deciding the matter at this point, the *forum conveniens* may well be the state of Victoria in Australia rather than this Authority administering the law for New Zealand.

The issues

[5] The Authority will need to determine which entity employed Mr Youssef and then consider whether the answer to that question points to where the jurisdiction should lie to deal with the matter.

Who was Mr Youssef's employer?

[6] I am satisfied on the material before me that Mr Youssef was employed by iP3 (the Australian entity). I reach this conclusion because the letter of offer document dated 25 May 2005 is generated out of the corporate office of iP3 in Australia and simply identifies the New Zealand entity as a satellite office.

[7] Moreover, I am advised that iP3 NZ was not incorporated until 4 April 2008, nearly three years after the employment agreement was effected.

[8] Further, I am advised that Mr Youssef was paid by iP3 including the superannuation entitlement that is commensurate with Australian employment, and that other taxation arrangements were consistent with Australian rather than New Zealand employment.

[9] What is more, I am advised that Mr Youssef was effectively in charge of the Australian operation notwithstanding the fact that he was resident in New Zealand and that he effectively represented iP3 both as a senior manager and as a director because neither of the other two directors were resident in Australasia.

[10] I also note for the sake of completeness that while the statement of problem filed by Mr Youssef proceeded on the footing that Mr Youssef was employed by one or other of the respondents, an application for leave to serve proceedings outside New Zealand was made contemporaneously and that identifies iP3 as Mr Youssef's employer. It is also apparent in the submissions filed for Mr Youssef that the thrust of that argument is not to deflect iP3's claim that Mr Youssef was its employee but rather to plead that the *forum conveniens* was New Zealand rather than Australia.

[11] For the foregoing reasons then, I have concluded that Mr Youssef was employed by iP3 and not by iP3 NZ.

What is the *forum conveniens*?

[12] While I am satisfied on the basis of the material before me that Mr Youssef was employed by the Australian registered entity, it does not necessarily follow that his employment dispute ought to be dealt with in Australia. It seems on the evidence that even Mr Youssef was in two minds on the subject; it is apparent from the documentation on the Authority's file that Mr Youssef originally sought the assistance of Fair Work Australia to pursue his various claims but then apparently decided that dealing with the matter in New Zealand would be more straightforward.

[13] iP3 says unequivocally that it protests the jurisdiction of this Authority to deal with the matter. This is because it claims that Mr Youssef is its employee (a view that I agree with), and it attributes some of the difficulty in engaging and resolving the employment dispute to Mr Youssef himself, saying for instance that Mr Youssef has withheld documents in his role as a former chief executive officer of iP3.

[14] Also relevant is the fact that the employment agreement executed between the parties on 25 May 2005 contains an express provision that is relevant and in the following terms:

14. GOVERNING LAW

Your terms and conditions of employment, as indicated in this letter, will be compliant with New Zealand employment laws.

[15] Mr Youssef provided his services from New Zealand and it appears was always based here. However, so far as the submissions before me allow me to discern it, the bulk of the wider entity's operations are not in New Zealand and it may not put

it too strongly to say that Mr Youssef was during the employment one of a limited number of staff on this side of the Tasman.

[16] I am, however, drawn to conclude that, looked at in a practical way, the argument for dealing with the matter on one side of the Tasman or the other is pretty finely balanced. For instance, if there is disputation between the parties about material that Mr Youssef has apparently retained, that may point one way but conversely, iP3's auditors and other financial accounting people would potentially have to travel to New Zealand to engage on the matter, which might point the other way.

[17] However, Mr Youssef says that his health has suffered as a consequence of the ending of the employment relationship and he doubts his ability (although the evidence for this submission is not apparent) to prosecute his claim in Australia. That submission is inconsistent with Mr Youssef's own referral to Fair Work Australia in the first instance which would suggest that he originally had a different view, in any event.

[18] Whatever else is true, it is clear there is a dispute between the parties about the employment relationship between Mr Youssef and iP3. There is also dispute about whether the parties have properly engaged with each other in respect to trying to resolve matters on their own terms. Each blames the other for failing to engage.

[19] While Mr Youssef was employed exclusively in New Zealand and with an employment agreement that provided for New Zealand law to apply, he was employed by an Australian entity which says it wants to resolve matters, says that Mr Youssef is not facilitating that, and protests this Authority's jurisdiction.

[20] Looking at the usual legal rules, it could be argued that the provision in the employment agreement is an express selection by the parties of the legal jurisdiction that is to apply, but against that election is the fact that Mr Youssef was apparently paid in accordance with Australian employment terms, was responsible for the totality of the Australian operation which appears to be primarily based in Australia and so the system of law that has the most real and the closest connection with the employment relationship may, I fancy, be either New Zealand or Australia: *Musashi Pty Ltd v. Moore* [2001] NZEmpC 178; [2002] 1 ERNZ 203 applied.

[21] Looked at in a practical way, it seems to me that both parties have evidenced a willingness to try to resolve matters by agreement, both parties have blamed the other for the failure to achieve agreement to date and my instinct is that before making a definitive determination on the *forum conveniens* argument, I need to give the parties an opportunity to try to resolve matters on their own terms and to file further submissions directed specifically at the *forum conveniens* argument, recognising that I have decided the first preliminary question, namely the identity of Mr Youssef's employer.

Determination

[22] Mr Youssef was employed at all relevant times by iP3 and not by iP3 NZ.

[23] The parties are to engage with each other on whatever basis they see fit with a view to either agreeing a way to resolve matters by agreement or settling matters in whole or in part and at the end of 28 days from the date of this determination, I shall want to talk to counsel again to identify how the matter is to be progressed.

Costs

[24] Costs are reserved.

James Crichton

Chief of the Employment Relations Authority