IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 77A/09
5152705

	BETWEEN	EASTERN BAY INDEPENDENT WORKERS UNION INC, IMMO BEIJERLING & ORS Applicants
	AND	ABB LTD Respondent

Member of Authority:	James Wilson
Representatives:	Lou Yukich for the applicants Gillian Service for the respondent
Investigation Meeting:	Determined on the papers
Submissions received:	19 May 2009 from the applicants 7 August 2009 from the respondent
Determination:	27 August 2009

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Background

[1] In 2005 Carter Holt Harvey Ltd ("CHH") entered into a contract with ABB Ltd to undertake maintenance work at the CHH Tasman pulp mill in Kawerau. (the “commercial contract"). Although this commercial contract was not due to expire until late 2009, in March 2009 CHH advised ABB that the contract was to be terminated with one month's notice and that a new contract had been awarded to TSNZ Ltd.

[2] Following an unsuccessful application to the Authority for an interim injunction to stop this change of contractor, the applicants filed an amended statement of problem on 25 March 2009. This statement of problem alleged that, among other things:

> *The employer ABB Ltd (had not complied with) s.4 of the Employment Relations Act 2000 in not consulting and not providing relevant information prior to making a decision to terminate the employment of the union's members and (had not complied) with clause 27 of the collective employment agreement in not notifying and not consulting the union prior to the issue of termination notice to the union's members and are not paying redundancy compensation…*

And:

> *The second third and fourth applicants (have) a personal grievance for unjustified dismissal in that the employer failed to advise the union in accordance with its duty under clause 27 of the collective agreement and under section 4 of the Employment Relations Act prior to the issue of notice of termination of employment.*

And:

> *The employer failed to pay redundancy compensation to Immo Beijerling, John Young and James Berryman in accordance with its duty under clause 27 of the collective agreement… and failed to give one month's notice to John Young and James Berryman.*

[3] In reply ABB said that it has complied with the redundancy and termination provisions of the collective agreement between it and the Union and has acted in good faith at all times since the decision by CHH to terminate the commercial contract. As part of its response ABB said:

> *The decision by CHH to terminate the commercial contract was not a decision of which ABB had any notice and was a matter that was simply out of its hands. ABB could not, on receiving notice, and certainly cannot now, consult with its employees or unions about a decision by it to exit the CHH commercial contract. After it received notice from CHH, ABB has acted in accordance with clause 27 (of the collective employment agreement).*

Preliminary issue; the identity of the employer

[4] During the course of the Authority's investigation of these issues Mr Yukich suggested that a fundamental issue to be addressed was the identity of the employer. He suggests that ABB may not in fact be the employer of the workers concerned. He points to the establishment, in terms of the commercial contract, of a joint "alliance board" and suggests that this Board is evidence of a "joint venture" arrangement between CHH and ABB and it is this joint venture that was the employer. This is, in his submission, important because he says the members of this Board, including senior management of ABB, must have known that the commercial contract was to be terminated well before this information was formerly conveyed to the management at ABB on 5 February 2009 and the joint-venture, as the employer, should have consulted with the Union and its members in terms of the Collective Agreement.

[5] When it became clear that the Union felt that the question of who was the employer of the Union's members was so fundamental, I agreed to adjourn the substantive investigation and determine this preliminary issue, i.e. who was the employer of the Unions members. On 19 May 2009 Mr Yukich filed a submission addressing this issue and on 7 August 2009 Ms Service filed a submission in response.

The respective submissions

[6] In his submission Mr Yukich cites the Employment Court decision in *Muolla v Rotaru* [1995] 2 ERNZ 414, pp 419-420 where the Court said:

> *It is of course true that the expression "employer" is defined in s. 2 of the Employment Contracts Act 1991 as meaning "a person employing any employee or employees;" and while this seems naturally to tend a conclusion that an employer therefore should be a separate legal personality, it is well settled that that is not necessarily so. For example, a partnership can be an employer and so can a joint-venture made up of companies which separately may be employers in their own right or not. It has been held that a joint-venture, although not a legal entity, is a person and an employer within the definitions of a predecessor of the Employment Contracts Act 1991, the*

Industrial Conciliation and Arbitration Act 1954: New Zealand Federated Labourers etc IUOW v Tyndall [1964]) NZLR 408.

[7] Mr Yukich continues:

Also referred to in establishing the employer in a "chain of command" was NZ Seamen's etc IUOW v Shipping Corp of New Zealand Limited [1989] 1 NZILR 189 where the employer was held to be the respondent shipping company, notwithstanding the interpolation of a management company between the company and the seamen. Whether this may be the case in any other situation will depend on the wording of a particular agreement, interpreted in the light of the surrounding circumstances.

For completeness it is necessary to quote from the S*hipping Corporation* case where Court said:

There is control. There is the business of the owner. There is an integration factor. There is, albeit indirectly, a payment of wages by the owner. In my view, Denholm (the management company) is no more than a manager acting on behalf of and for the general purposes of the business of the owner. Its inter-position does not in my view destroy the employment relationship between the crew and the owner. Denholm has not become the employer.

[8] On behalf of ABB Ms Service has drawn my attention to the employment Court decision *Orakei Group (2007) Ltd (formerly PROP Auckland Ltd) v Dougherty* [2008] ERNZ 345 at para [12].

[12] The onus is on the employee, on the balance of probabilities, to prove the identity of the employer at the outset of the employment. The Court must make an objective assessment of the evidence about the identity of the employer.

Ms Service argues that, in this case, the identification of the employer is clear. She points out that there is a collective agreement between the Union and ABB Ltd, which both ABB and the Union have signed, that specifically names ABB Ltd as the employer party. She points out that while the Courts have accepted that an "employee" can be a partnership or a joint-venture (*Muolla v Rotaru* quoted above) the Court in *Orakei Group (2007) Ltd* also said:

> … *what is required is more than two unrelated employers. There must be a sufficient degree of relationship between the legal entities. In judging that relationship the court will look for the element of common control.*

[9] Ms Service submits that ABB was at all relevant times the employer of the Union's members and that this is not a case where another entity was in reality the employer or their were joint employers. She argues that the is no element of common control or joint responsibility for the employees and ABB was solely responsible for recruiting staff to perform maintenance work at the Tasman mill and all aspects of the recruitment process. She says that ABB set the employees hours a week and rosters, instructed employees what work they had to perform, supervised that work, managed performance and disciplinary issues and paid the employees they wages and salaries. It was ABB who negotiated the employees terms and conditions of employment with the Union. She says that the relationship between ABB and CHH was one of principal and independent contractor and not a joint-venture or partnership arrangement. She points out that this is reflected in the express terms of the commercial contract. She points to the evidence of ABB's National Service Manager Mr John Stewart (who was also a member of the alliance board, purported by the Union to be a joint-venture arrangement). As part of his evidence Mr Stewart has provided me with an extract from the commercial contract which expressly states, under the heading <u>personnel</u>:

> *The ABB Personnel employed by ABB to perform the service are employed solely by ABB and no ABB personnel are employees separately or jointly of Carter Holt Harvey (or any of its related companies) and are ABB personnel and under ABB's sole control and direction. ABB is entitled to employ as many employees as it considers appropriate to perform the services. ABB shall have full and effective control over the hiring, management and dismissal of the ABB personnel who are engaged in providing the services.*

Discussion

[10] I have reached the very clear conclusion that ABB Ltd was the employer of the Union's members at the Tasman mill. Mr Yukich's proposition that his members were in fact employees of a "joint-venture" is entirely contingent on the existence of a joint-venture which was capable of being the employer. There is no evidence that such an joint-venture existed. As Ms Service has submitted *CHH and ABB are separate and distinct legal entities with different commercial interests and objectives. There are no common shareholdings or directorships. The relationship between ABB and CHH was one of principal and independent contractor.*

[11] In the *Shipping Corporation* case the contract between the New Zealand Shipping Corporation and its management contractor specified that employees:

> *…shall comply with the reasonable and legitimate orders of the Owners and to that end while so serving each such person shall be deemed to be the servant of the Owners.*

This level of control exercised by the Shipping Corporation, the Court found, indicated an employment relationship, In the present case neither CHH or the Alliance Board had any control over the employees and in fact were expressly excluded from doing so. Neither CHH nor the Alliance Board were the employer of the Union's members.

Determination

[12] In answer to the preliminary matter raised by the Union, **ABB Ltd were the employer of the Unions members undertaking maintenance at the CHH Tasman mill.**

Next steps

[13] The Authority support office will contact the parties in the near future to arrange a conference call to arrange a timetable for the recommencement of the Authority's investigation of the substantive issues in this case.

James Wilson
Member of the Employment Relations Authority