

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 129/10
5286669 and 5286670

BETWEEN	ERNEST WILLIAMS TRAVERS First Applicant
AND	KELVIN TRAVERS Second Applicant
AND	INTERIORS BY SENSATION LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicants in person Brian Gauld for Respondent
Investigation Meeting:	19 March 2010
Determination:	19 March 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ernest Travers and Kelvin Travers are father and son. Both worked as managers in the Sensation Yachts business although the essential issue in this matter is exactly which legal entity was their employer at the time of their employment ending in August 2009.

[2] By statements of problem lodged in the Authority in November 2009 each man sought orders for payment of outstanding wages. The amounts were not quantified but they say the wages are owed to them by Interiors by Sensation Limited (IBSL), a company which has traded under the name "*Italian Interiors*".

[3] IBSL did not lodge a statement of reply in the required form but by letter of 3 December 2009, Ivan Erceg – who was a director of IBSL at that time – denied any employment relationship ever existed between the company and either man. He says that all relevant times their employer was Sensation Yachts Limited (SYL) – a company that went into liquidation on 31 July 2009 and into receivership on 7 August 2009.

[4] IBSL is partly owned by SYL (in liquidation and in receivership). The other part owner of IBSL's shares is Millie Erceg. She is now its sole director and is the mother of Mr Erceg. Mr Erceg was previously a director of both IBSL and SYL. He is no longer a director of either company and was adjudged bankrupt on 2 February 2010. IBSL remained registered as at the date of this determination.

[5] There is no dispute that both Ernest Travers and Kelvin Travers are owed wages. The issue for determination by the Authority is whether they were employed by IBSL or SYL in order to identify which legal entity remains liable to pay those wages.

Steps to investigation

[6] As the existence of an employment relationship and the true identity of the employer were a "*matter*" for determination, the Authority was required under s159 of the Employment Relations Act to direct the parties to mediation unless it considered specified exceptions applied. Those exceptions did not appear to apply and on 16 December 2009 the matter was directed to mediation within 56 days. On 19 January 2010 Mr Erceg sought a 'stay' of the direction to mediation until he returned to New Zealand at an unspecified date in the future. Asked to clarify this he replied only that he planned to return at the earliest opportunity. The application was declined.

[7] Once the period set for mediation by direction had expired, the Authority set the matter down for an investigation meeting and a notice was issued to the parties. As with all correspondence on this file, the notice was sent to IBSL's registered office address, the home address of Mrs Erceg and by email to Mr Erceg.

[8] Two further separate applications for postponement of the investigation meeting have since been declined. Both were from representatives appointed by IBSL's director Mrs Erceg – Brian Gauld and Alastair Gauld. Brian Gauld is a former partner of the accounting firm that acted for Mr Erceg and his companies. Alastair Gauld is a principal of that accounting firm whose offices are the registered office of IBSL and were the registered offices of SYL before it went into liquidation and receivership. Both Mr Gaulds were due to be out of New Zealand on the date set for the investigation meeting – a fact known to IBSL before they were identified to the Authority as representatives. Arrangements were subsequently made for Brian Gauld to attend the investigation meeting by way of telephone conference. He did so from a location in the state of Washington in the United States which he was visiting on business.

[9] In an investigation meeting lasting around one hour the Authority heard affirmed oral evidence from Kelvin Travers, Ernest Travers and Brian Gauld who each also had the opportunity to comment on the evidence of other witnesses and the documents available to the Authority.

The evidence

[10] The relevant period of employment of Ernest Travers and Kelvin Travers began in April 2008. It ended in August 2009 when they found the business premises locked so they could no longer gain access to their workplace.

[11] The two men accept they were initially employed by SYL. This was for a period of three months with a written agreement. It was then extended by verbal and mutual agreement.

[12] They say that around July 2008 Mr Erceg instructed them to make arrangements for employees to be employed by IBSL rather than SYL. Both men say they were involved in preparing new employment agreements and making arrangements for staff to transfer to employment by IBSL rather than SYL. Kelvin Travers says he discussed the rationale for this change with Mr Erceg who had a plan that IBSL employees could be contracted back to work for SYL.

[13] Both men were adamant Mr Erceg also had asked them to transfer their employment to IBSL and they had agreed to do so. They say this occurred around July 2008 and was “*all done by phone*” as Mr Erceg was out of the country at the time. They say he promised to sign written employment agreements for them on his return.

[14] The two men also rely on IRD documentation to support their contention that they were employees of IBSL from July 2008. Both produced their IRD summary of earnings for the tax year from 1 April 2008 to 31 March 2009. Both documents list their “*employer or payer*” as SYL to from 1 April to 30 June 2008 and then “*Italian Interiors*” from 1 July 2008 to 31 March 2009.

[15] Brian Gauld confirmed Italian Interiors was a trading name previously used by IBSL. However he says the company has not traded for several years and has no assets. He said he had no idea why Sensation Yachts pay clerk would have changed the payer details on returns to IRD from SYL to Italian Interiors. Mr Gauld believed this was an error that his former accounting firm was taking steps to have corrected.

[16] On behalf of IBSL Mr Gauld also pointed to two documents as evidence that SYL remained the employer of both Ernest Travers and Kelvin Travers during the contested period.

[17] One is the pay slips both received. A pay slip for Ernest Travers dated 4 February 2009 had “*Sensation Yachts Limited*” printed across the top and Kelvin Travers acknowledged he received similar pay slips in that period.

[18] The second is an affidavit sworn by Kelvin Travers on 11 September 2009 which was filed in the High Court as part of a summary judgement application by an SYL creditor. His affidavit averred that “*from April 2008 to 26 August 2009, I was employed by Sensation Yachts Limited’s (sic).*”

[19] Ernest Travers and Kelvin Travers say they had both asked while still employed to have their pay slips changed to show IBSL but were told by Sensation Yacht’s pay clerk that, as the group of companies had not paid its payroll system provider, the requested change could not be made.

[20] Kelvin Travers says the reference to his employer in his affidavit of 11 September 2009 was a genuine mistake. He explained that it had been prepared hurriedly after an interview with a lawyer acting for a creditor of SYL and he was called back to sign it a few hours later.

Determination

[21] Having heard from these witnesses, considered their oral evidence and the documents available to the Authority, including correspondence from Mr Erceg, I find that Ernest Travers and Kelvin Travers were employed by IBSL from 1 July 2008 until the end of their employment in August 2009.

[22] In reaching this finding I prefer the evidence of Kelvin Travers and Ernest Travers about the content of their discussions with Mr Erceg over arrangements for the transfer of their employment from SYL to IBSL. Such a transfer can be agreed verbally. Fairly and properly Mr Gauld acknowledged in his evidence that he could not comment on those conversations, had not discussed them with Mr Erceg, and, consequently, could not say they did not happen.

[23] I also accept Kelvin Travers' explanation of the error in his affidavit of 11 September 2009. While it is a serious matter to have sworn an affidavit with such a mistake, that is a matter for him to deal with rather than this Authority.

[24] I accept that the IRD documents – recording returns made by the business' administrators at the time – are most likely to reflect the actual situation. In doing so I also take into account Kelvin Travers' evidence that Mr Erceg – while often absent on business overseas in this period – tightly controlled all decisions on expenditure and changes such as the transfer of employees to IBSL.

[25] I record my comment to the witnesses during the investigation meeting that the Authority's determination to identify the correct legal entity of the employer cannot take account of whether or not funds are available to meet the wages owed to Kelvin Travers and Ernest Travers. That is a matter for the parties and as there is no dispute that wages are due and owing, no further orders are required at this stage.

Leave is reserved for Kelvin Travers and Ernest Travers to seek orders under s131 of the Employment Relations Act 2000 if that is necessary.

Costs

[26] No costs were sought. Kelvin Travers and Ernest Travers represented themselves in this matter and I do not understand them to have incurred any legal expenses in doing so. However they are entitled, as the successful parties, to be reimbursed by IBSL for their fees for lodging this matter in the Authority. Accordingly IBSL is to reimburse each man \$70.

Robin Arthur
Member of the Employment Relations Authority