IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 220
5411802

	BETWEEN	TONY CALLAGHAN and MELISSA GREIG Applicants
	A N D	NORTERRA RURAL RESOURCES LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	Megan Salt for Applicant Kim Strudwick for Respondent
Investigation Meeting:	27 May 2013 at Auckland
Date of Determination:	31 May 2013

DETERMINATION OF THE AUTHORITY

A. Norterra Rural Resources Limited employed Tony Callaghan and Melissa Greig so the Authority has jurisdiction to investigate the applicants' employment relationship problem.

Employment relationship problem

[1] Tony Callaghan and his fiancée Ms Melissa Greig (the applicants) claim they were employed by Norterra Rural Resources Limited (the NZ company) as joint managers of the Savaii Lagoon Resort (the Resort) in Fagamalo Savaii, Samoa. They started work on 14 February 2011 and their employment ended on 29 January 2013. Mr Callaghan and Ms Greig have filed a number of claims with the Authority relating to their employment.

[2] The NZ company claims the Authority does not have jurisdiction to investigate the applicants' claims because it says it never employed them. It claims the applicants were employed by a Samoan registered company which is based in and

operates in Samoa called *"Norterra Rural Resources (Samoa) Limited"* (the Samoan company) which traded as *"Savaii Lagoon Resort"*.

[3] The Authority only has jurisdiction to investigate employment relationship problems involving parties who are or were in an employment relationship. If the applicants were employed by the NZ company the Authority can investigate their claims but if they were employed by the Samoan company the Authority cannot investigate their claims.

[4] This determination is confined to the jurisdiction issue which has been dealt with as a preliminary matter.

Issue

[5] The issue to be determined is which legal entity employed the applicants?

Factual findings

Connection between the two companies

[6] The NZ company claims the only connection between it and the Samoan company is that the NZ company owns the Resort buildings which it leases to the Samoan company which runs the Resort.

[7] I do not accept that. Mr Bruce McCallum and his wife Mrs Margaret McCallum (the McCallums) are involved with a number of different legal entities which include the NZ company and the Samoan company. They are experienced business people who have done business in Samoan since they build the Resort in 2005.

[8] Mr McCallum is the sole director of the NZ Company and he and his wife are shareholders both personally and through Silver Fox Developments Limited (which the McCallums are directors of and which the NZ Company is the sole shareholder of). The McCallums are also both directors and shareholders of the Samoan company.

[9] I consider the NZ company is closely connected with the Samoan company. The NZ company uses its own funds and bank accounts to purchase items for the Resort. This includes linen, furniture and advertising for the Resort. It also paid the applicants' salaries.

[10] The NZ company says any payments from its bank accounts are expenses paid on behalf of the Samoan company, they are not expenses of the NZ company. The NZ company says when it is preparing its year-end financial statements it adjusts the income received and expenses paid in New Zealand because it gets the Samoan company to reimburse it for any costs associated with the Resort. The applicants were never advised of this arrangement.

Initial communications

[11] When Mr Callaghan sent off his CV he received a response a few days later from Mrs McCallum which referred to the salary being paid in New Zealand dollars. The McCallums are based in New Zealand. There was no mention of the salary being paid in Samoan Tala.

[12] I find there was nothing in the initial communications that put the applicants on notice they were to be employed by a Samoan entity and would be subject to Samoan and not New Zealand employment laws.

Draft Employment Agreement

[13] On 13 November 2010 Mrs McCallum emailed the applicants a "*draft Contract of Employment for discussion*" (the draft employment agreement). This identifies the employer as follows:

> *"Company Employer*
> *Norterra Rural Resources Ltd*
> *Savaii Lagoon Resort, Fagamalo*
> *Savaii, Samoa"*

[14] Throughout the document there are multiple references to *"the company"* which include *"the company employs" "the company will pay" "the company will provide"* The only legal entity identified in the draft employment agreement is the NZ company. No mention is made of the existence of a Samoan company or that the Resort was operated by a Samoan company. There is nothing to show the applicants would be employed by a Samoan company.

[15] I reject Mr McCallum's claim that the company named as the employer was the Samoan company. The only company named in the draft employment agreement is the NZ company. There is no reference to the Samoan company at all. Mr

McCallum says the reference to the Resort shows that it was the Samaon company who was the named employer. I do not accept that.

[16] The only legal entity which has been linked to the Resort is the NZ company. Legal entities have their own legal names to enable them to be distinguished from one another. A reference to the legal name of the NZ company cannot be read as if it was a reference to a Samoan company of a different name.

Query from applicants about what laws would apply to them

[17] After receiving the draft employment agreement Mr Callaghan raised a number of queries with Mrs McCallum. These included:

> 1. *Will Melissa and I be governed under New Zealand employment law even though we are living in Samoa?*
>
> 2. *Are the Samoan staff governed under Samoan employment law?*

[18] Mrs McCallum's email response on 15 November 2010 to the first question was "*to my knowledge, it depends on where you are being paid as to what laws you are governed under, so I am not sure. This is something we need to look into."* Her response to the second question was "*yes, all Samoan staff are paid in Samoa […]".*

[19] Mr Callaghan's evidence is that when confirmation was given by the McCallums that they would be paid in NZ dollars into NZ bank accounts by the NZ company the applicants believed they were employed by a NZ company under New Zealand employment laws. I conclude that was a reasonable view. Mr McCallum admits nothing more was put in writing following his wife's email response to the applicants' query. He says the issue was not directly discussed again.

[20] I consider the applicants' query was a perfect opportunity for the McCallum's to make it clear to the applicants they were to be employed by a Samoan company (not a NZ company) so would be subject to Samoan law if that is what the McCallums wanted to occur. They did not do so.

Samoan staff

[21] Mr McCallum says the applicants should have known they were employed by the Samoan company because they knew the Samoan company employed the Samoan staff who worked at the Resort under Samoan law. I do not accept that. The

applicants were in a different position as managers than other Samoan employees. Mr McCallum's email of 15 November implies there is a difference between the applicants and other Samoan staff.

[22] I consider the applicants were entitled to rely on Ms McCallum's response to their express query about which laws applied. The McCallums are experienced business people who have operated in Samoan since 2005. The applicants are not.

Letter to ANZ Bank

[23] On 25 January 2011 Mrs McCallum wrote to the ANZ Bank confirming that "*Norterra Rural Resources Limited, 5 Glance Street, Warkworth, New Zealand, is employing Tony Callaghan and Melissa Greig of Wellington, as managers of the company's resort, Savaii Lagoon Resort, in Savaii, Samoa, commencing 12 February 2011".*

[24] There is no mention in the letter of the Samoan company. The NZ company expressly identifies itself as the applicants' employer. The letter is on NZ company letterhead and has the NZ company contact details. This shows the NZ company deliberately held itself out to others as being the applicants' employer. This strongly indicates the NZ company employed the applicants.

Final signed Employment Agreement

[25] The parties all signed the employment agreement (which they called a "*Contract of Employment")* on 14 February 2011. It names the NZ company as the employer. The only company referred to is the NZ company. There is no mention of the existence of the Samoan company or that it is the Samoan company employing the applicants.

[26] I do not accept Mr McCallum's evidence that the reference to *"the company"* was to the Samoan company because the legal name of the NZ company was used not the legal name of the Samoan company.

Salary payments

[27] The NZ company uses its money to pay the applicants' salaries in New Zealand dollars into the applicants' New Zealand bank accounts which I consider suggests it employed them. The fact the NZ company recovers these salary expenses

from the Samoan company at year-end does not establish the applicants were employed by the Samoan company because that is just a financial issue between two legal entities who are owned and operated by the same individuals.

[28] Mr McCallum says the applicants were only paid by the NZ company to make it easier for them to repay their New Zealand mortgage so they could avoid overseas exchange and transaction fees. I note that is not documented in any of the exchanges between the parties.

[29] It is up to the McCallums to structure their companies' affairs in such a manner that it is clear to employees of each legal entity who is employed by what entity. If a company other than the employer is paying the applicants' salaries then the McCallums should have made that clear to the applicants. They did not do so in this case.

PAYE

[30] The NZ company deducts PAYE from the salaries paid to the applicants which it then remits to the New Zealand Inland Revenue Department (IRD). The NZ company is recorded by the IRD as the "*employer or payer."* The NZ company is only required to deduct PAYE from its own employees. This strongly indicates the NZ company was the employer.

[31] If the Samoan company employed the applicants then Samoan tax should have been deducted from the applicants' salaries and it should have been remitted to the Samoan Inland Revenue Department. That did not occur.

ACC

[32] The NZ company advised the applicants in an email dated 9 April 2011 that it pays ACC to the IRD for them because they are included in the NZ company's employee details it sends to IRD.

[33] This is a strong indicator the NZ company employed the applicants because it is not required to pay ACC contributions for individuals it does not employ. ACC is not payable by a foreign entity that does not operate in New Zealand and which does not employ any staff in New Zealand.

[34] Mr McCallum says the NZ company pays ACC for the applicants because the McCallums wanted to ensure the applicants would be covered by ACC if they had an accident in Samoa. This shows the NZ company deliberately involved itself in employment matters relating to the applicants which I find suggests it employed them.

Expenses in Samoa

[35] The NZ company says the applicants were provided with accommodation, meals and power provided by the Samoan company and that any expenses claimed by the applicants were reimbursed by the Samoan company. I consider this is a neutral factor in terms of indicating which entity employed the applicants.

Samoan National Provident Fund

[36] The applicants say it is a legal requirement in Samoa for all Samoan workers to apply for a Samoan National Provident Fund employee number and to pay into that NPF. The applicants were never advised to do so. Instead Mrs McCallum entered into email communications with the applicants about Kiwisaver. That suggests the applicants were not employed by the Samoan company.

Query from Ms Greig

[37] On 9 April 2012 Ms Greig emailed Mrs McCallum to ask for some wage slips and whether ACC was being deducted. Mrs McCallum responded by email explaining the PAYE and ACC situation and offered to provide a formal letter about these issues from the NZ company – not from the Samoan company.

[38] Mrs McCalluam expressly identifies the NZ company as the employer saying:

> "*Norterra does not contribute to Kiwisaver. We elected not to be part of that. Your salary would be less if we did. […]*
>
> *You do not need to pay ACC yourselves. You are not self employed. The employer contribution covers you and <u>you are being employed by a NZ company.</u> […]"* (my emphasis)

[39] I consider this makes it clear the applicants were employed by the NZ company. Mrs McCallum did not refer to the Samoan company at all. She did not explain to the applicants that they were employed by the Samoan company, quite the contrary – she says they are employed by the NZ company.

[40] Mrs McCallum did not refer to the requirement for Samoan employees to have National Provident Fund contribution deducted from their pay as superannuation which is what I would have expected her to say when engaging with the applicants if they had been employees of the Samoan company.

[41] Mrs McCallum did not say that Kiwisaver did not apply to the applicants because they were not employees of a New Zealand company. Quite the opposite. She engaged in discussion about Kiwisaver and suggested that if the NZ company contributed to Kiwisaver that would have reduced the applicants' salaries. Such advice is consistent with the NZ company employing the applicants and inconsistent with the Samoan company being the employer.

Employment Sponsorship Form

[42] The NZ company relies on the Employment Sponsorship Form submitted to the Government of Samoa for Ms Greig dated 5 May 2011 to show the Samoan company employed the applicants.

[43] Ms Greig is a New Zealander so she had to be *"sponsored"* to work in Samoa. Mr McCallum says the sponsorship form shows Ms Greig must have been employed by the Samoan company.

[44] I do not accept that. Under the heading "*Details of Employer*" the business named is *"Norterra Rural Resources Limited t/a Savaii Lagoon Resort"*. That is the NZ company's legal name. The additional reference to the fact the NZ company may be trading as the Resort does not change the NZ company into the Samoan legal entity. The Samoan company's legal name is *"Norterra Rural Resources (Samoa) Limited"* so that is the name that should have been recorded on the sponsorship form if the Samoan company was the employer.

[45] Mr McCallum says the fact the sponsorship form asks for the Samoan passport number of the principal of the employer shows Ms Greig could only be employed by a Samoan company. I do not accept that. The passport numbers entered were those of the McCallums who are both New Zealanders so they put their New Zealand passport numbers in that section. No Samoan passport number was recorded on the sponsorship form.

[46] Mr McCallum says they recorded their passport numbers as directors of the Samoan company. I do not accept that because I consider that when the McCallums identified themselves as directors it was in relation to the legal entity named as the employer on the sponsorship form - *"Norterra Rural Resources Limited t/a Savaii Lagoon Resort"* which is the NZ company's name.

[47] Mr McCallum says Ms Greig signed that she would be bound by Samoan law. That is not correct. The declaration on the sponsorship form was the employer's declaration not the employee's declaration. It was the named employer (i.e. the NZ Company) that signed the declaration that as the employer it would comply with the provisions of the Labour and Employment Regulations 1973 and abide by the laws of Samoa in connection with the employment of Ms Greig.

[48] Mr McCallum admits he was not exactly sure what the laws referred to in the sponsorship form were but thought they related to minimum wages and holidays. He accepts he did not bring these laws to the attention of Ms Greig or to Mr Callaghan. He also accepts the applicants were never expressly told they were employed under Samoan employment laws.

[49] There is no direct evidence before the Authority that a New Zealand based company which is closely associated with a Samoan entity is unable to sponsor an employee to work in Samoa. I note that the sponsorship form was dated almost two months after Ms Greig had already started started work at the Resort which suggests it was not a prerequisite to her working in Samoa. Ms Greig's offer of employment was not conditional upon her obtaining sponsorship.

Communications with Samoan immigration

[50] On 5 May 2011 the McCallums wrote in their capacity as Managing Directors of *"Norterra Rural Resources Ltd t/a Savaii Lagoon Resort"* (i.e. the NZ company) to the Ministry of Labour in Samoa which records that the position of Resort Managers was offered to the applicants.

[51] I do not accept Mr McCallum's evidence that the reference to *"t/a Savaii Lagoon Resort"* means the letter was from the Samoan company. The letter is on the NZ company letterhead. The entity named is the legal name of the NZ company. No mention is made of a Samoan company nor is there any reference to the fact that it

was the Samoan company which employed the applicants. I consider this strongly supports a finding the NZ company employed the applicants.

[52] The information put before the Samoan government relates to *"employment permits for […] foreign workers to work in Samoa.*" It identifies the NZ company as the *"employer/local sponsor"* of Ms Greig. There is no mention of the Samoan company on the information passed to the Samoan government by its immigration division. This supports a view that the NZ company employed the applicants.

Annual leave claim

[53] On 5 November 2012 the applicants emailed Mrs McCallum with their understanding of their annual leave and public holiday entitlements. The applicants say *"We are contracted to work for Norterra Rural Resources under New Zealand employment law"*. The email then refers to New Zealand employment law entitlements to four weeks annual holiday per annum and 11 public holidays per annum and says:

> *"As an employer we think it would be a good idea for you to keep these sorts of employee details [referring to the leave records] as standard practice. We believe it may even be a legal requirement under New Zealand employment law for all employers to do so? It would certainly make things a lot easier to sort out should any queries arise."*

[54] Mr McCallum responds to the applicants email saying they would have the discussion about leave entitlements and the like when the parties meet in Samoa in two weeks time. There was then a number of email exchanges between the applicants and the McCallums in which the applicants press for their issues to be resolved immediately while the McCallums insist any issues would have to wait until they saw the applicants in Samoa.

[55] I consider it significant the McCallums did not take immediate issue over the applicants' view that they were subject to New Zealand employment law and entitled to New Zealand annual holiday and public holiday entitlements. I would have expected the McCallums to have immediately addressed that point if they believed the applicants were employed by a Samoan company and working under Samoan law. Their failure to do so supports the view that the NZ company employed the applicants.

Extension of sponsorship

[56] On 25 May 2012 the McCallums applied for an extension of Ms Greig's sponsorship. Their letter to Samoa immigration was on the Resort letterhead, but it did not identify the legal entity that employed Ms Greig. I note the Resort is a trading name so is not a legal entity.

[57] No mention is made of either the NZ company or the Samoan company. The letter just confirms Ms Greig and Mr Callaghan had been employed as managers of the Resort. The McCallums sign off as *owners/directors* but do not identify what legal entity/entities they are representing. I consider this is neutral in determining the employer.

MCIL Written Contract of Service

[58] Mr McCallum relies on a "W*ritten Contract of Service"* (the contract) prepared by the Ministry of Commerce Industry and Labour (MCIL). The contract was prepared by MCIL when it reviewed Ms Greig's sponsorship in May because it was unhappy with her NZ employment agreement. MCIL required Ms Greig to sign a Samoan contract of service which it prepared and sent to her to sign and then get her employer to sign.

[59] Mr McCallum says he signed the document on behalf of the Samoan company but there is no record of him having done so. Mr McCallum says he returned the original to MCIL, but they do not have a copy of it on their files. Mr McCallum says that he did not made a copy of the signed contract of service before returning the original to MCIL.

[60] The written contract of service does not identify a legal entity. It does not refer to the Samoan company. The name and address of the employer is recorded as "*Savaii Lagoon Resort at Fagamalo"* which is not a legal entity. The contract identifies the parties as "*Savaii Lagoon Resort"* as the employer and Ms Greig as the foreign worker. This document was signed by a representative from MCIL and Ms Greig on 23 May 2011.

[61] Mr McCallum relies on the following statement in the contract:

> *"A foreign worker is entitled to paid public holidays, annual leave, sick leave, overtime for extra work in accordance with the provisions*

> *of the Public Holidays Act 2000 and the Labour and Employment Act 1972".*

[62] This is not conclusive because Ms Greig as a manager did not fall within the definition of "*worker*" in the relevant legislation.

[63] Mr McCallum says Ms Greig agreed to be bound by the Samoan law because the contract says:

> *"All terms and conditions of employment shall be in accordance with the provision of any written law in operation at the time of the signing of the contract."*

[64] This suggests that as at 23 May 2011 Ms Greig intended to be bound by Samoan law, but it is not conclusive of the identity of the employer issue because I am not satisfied the contract was signed by the employing entity.

MCIL Half Yearly Survey

[65] Mr McCallum relies on a half yearly survey which was conducted by MCIL in November 2012 as showing that the applicants knew they were employed by the Samoan company. Mr Callaghan includes himself and Ms Greig in the numbers of workers he reports as being at the Resort.

[66] The name of the business on the survey is recorded as "*Savaii Lagoon Resort".* There is no reference to the Samoan company in the survey document. I accept Mr Callaghan's evidence that this was just a government survey which he understood was to identify the number of workers in each business. It has nothing to do with the legal identity of the employer.

MCIL investigation

[67] Mr McCallum claims MCIL accepts the applicants were employed by a Samoan company because it investigated a grievance from them. He says the applicants' claim to MCIL shows they knew they were subject to Samoan law.

[68] The applicants contacted the NZ Labour Group Contact Centre run by the Ministry of Business Innovation and Employment (MBIE) and were advised to contact the Samoan equivalent of the Department of Labour (MCIL) because they were in Samoa, which they did. Their first port of call was the New Zealand agency.

[69] The letter from MCIL concludes it did not have jurisdiction to deal with matters relating to someone in a managerial position, so it unable to deal with the applicants' issues because they had been contracted "*as managers for the Savaii Lagoon Resort."* Nowhere in the MCIL letter is there any reference to the Samoan company.

[70] MCIL did not address the dispute about who employed the applicants so it does not explain whether it formed a view on whether they were subject to New Zealand employment laws or not. I consider this is a neutral factor.

Samoan company issues

[71] The applicants say they could not have been employed by the Samoan company because it was inoperative at the material time They say the Samoan company was legally unable to operate or do business in Samoa during the period that the applicants were employed.

[72] On 24 August 2009 MCIL advised the Samoan company by letter that it had to re-register under the amended Companies Act 2006 (which came into force on 1 July 2008) by 30 June 2010 and that it had to cease trading or be dissolved or struck off the Companies Register if it did not do so.

[73] A further letter was sent by MCIL to the Samoan company on 24 August 2009 repeating the same information. Another letter was sent by MCIL to the Samoan company on 27 March 2012 which referred to the previous letters and emphasised (in bold font) that "*should Norterra Rural Resources (Samoa) Limited fail to re-register by 30 June 2010, **the company must cease trading or be dissolved or struck off the Companies Register.**"*

[74] The letter identifies the Samoan company had not re-registered under the Companies Amendment Act 2006 and that in accordance with s.338(c) of the 2006 Act it "***must not*** *carry on business until it is re-registered."*

[75] The McCallums say that they never received the MCIL letters. They became aware of the issue as a result of these proceedings and the Samoan company was re-registered on 10 April 2013.

[76] The evidence establish the Samoan company should not have been carrying on business in Samoa at the material time which suggests the applicants were employed by the NZ company.

20 November 2012 meeting

[77] I have not had regard to the transcript of the meeting between the applicants and the McCallums held on 20 November 2012 in Samoa because the accuracy of it was disputed by the respondents and the original recording has not been reviewed.

[78] The applicants say it was during the meeting in November that the McCallums told them for the first time that they were employed under Samoan employment law by a Samoan registered company and that because the Samoan company employed them they were not covered by New Zealand employment law. I accept that evidence.

Outcome

[79] I find the applicants have discharged the onus of establishing on the balance of probabilities that they were employed by the NZ company. I am satisfied the parties to this matter were in an employment relationship so the Authority has jurisdiction to investigate the applicants' employment relationship problem.

[80] The parties are directed to mediation on the applicants' substantive claims.

Costs

[81] Each party was self represented so no issue arises as to costs. The issue of $71.56 filing fee will be resolved at the conclusion of the substantive proceedings.

[82] The parties are directed to attend mediation on the applicants' substantive claims.

Rachel Larmer
Member of the Employment Relations Authority