

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 351  
3125974

BETWEEN	PAUL JOHN WILLIAM KAIHAU Applicant
AND	CONLINXX LIMITED First Respondent
	DONNA SUDFELDT Second Respondent

Member of Authority:	Marija Urlich
Representatives:	Mr Kaihau, in person Charlotte Parkhill and Mathew Barnett, counsel for the Respondent
Investigation Meeting:	On the papers
Determination:	6 August 2021

---

**PRELIMINARY DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] In his statement of problem Mr Kaihau seeks findings that his dismissal on 24 June 2020 was unjustifiable and seeks remedies of reinstatement and lost earnings.<sup>1</sup> In the statement of problem Conlinxx Limited and Ms Sudfeldt are named as respondents. This determination deals with a preliminary issue – whether Conlinxx should be treated as the sole respondent or, to put it another way should Ms Sudfeldt be removed as a respondent.

---

<sup>1</sup> The statement of problem identifies defamation as part of the employment relationship problem. At a case management conference held with the parties on 17 June 2021 and as recorded in the subsequent minute of the same date the Authority does not have jurisdiction to deal with a claim for defamation and that part of the claim cannot be considered.

[2] On 17 June 2021 the Authority held a case management conference with the parties to timetable directions for the investigation of Mr Kaihau's application. The preliminary issue of whether Conlinxx should be the sole respondent was identified and discussed and a timetable was set for the filing of information including that Mr Kaihau was to file written reasons why Ms Sudfeldt was named as a respondent party, Conlinxx would provide a reply and the Authority would then determine the preliminary issue. These directions, the reasons why there is a preliminary issue to be decided as well as a timetable for the substantive matter and a date for an investigation meeting of the substantive matter were recorded in a minute dated 17 June 2021.<sup>2</sup>

[3] Mr Kaihau has not filed any information regarding the preliminary issue in accordance with the 17 June minute or a subsequent minute dated 19 July setting out the issue again and resetting the timetable. Conlinxx has not filed further information.

[4] I am satisfied the parties have had a fair opportunity to put before the Authority any information they believe is relevant to the preliminary issue and it is appropriate to move to determine the preliminary issue on the information before the Authority which includes the statement of problem, the statement in reply and the employment agreement.

### **Should Ms Sudfeldt be removed as a respondent party?**

[5] Under s 221 of the Employment Relations Act 2000 (the Act) the Authority may, to more effectively dispose of any matter according to its substantial merits and equities, amongst other matters direct a party to be joined or struck out.

[6] The onus of proving the identity of the employer rests on the employee where the employee puts that fact in issue.<sup>3</sup> The standard of proof is on the balance of probabilities and the question of who the employer was must be determined at the outset of the employment. The Authority should objectively assess the employment

---

<sup>2</sup> For the avoidance of doubt the timetabling directions for the substantive matter as set out in the minute 17 June 2021 remain in place.

<sup>3</sup> This appears to be the issue. For example Mr Kaihau does not seek a penalty against Ms Sudfeldt: Employment Relations Act, s 134.

relationship at its outset and ask who an independent but knowledgeable observer would have said was the employer.<sup>4</sup>

[7] Mr Kaihau entered an individual employment agreement with Conlinxx on 2 July 2018. I am satisfied it is clear on the face of that document Conlinxx is the employer. Other documents before the Authority show Conlinxx continued as Mr Kaihau's employer throughout the period at issue – the drug and alcohol policy and the disciplinary investigation documents December 2019 and June 2020.

[8] The disciplinary investigation documents show Ms Sudfeldt was at all times acting in her capacity as Conlinxx's transport manager. It is understood Conlinxx accepts it is vicariously liable for the actions of Ms Sudfeldt acting in that capacity including in her interactions with Mr Kaihau in the relevant period.

### **Outcome**

[9] Pursuant to s 221 of the Employment Relations Act Conlinxx Limited is the sole respondent and Ms Sudfeldt is removed as a respondent party.

### **Costs**

[10] Costs are reserved.

Marija Urlich  
Member of the Employment Relations Authority

---

<sup>4</sup> *Colosimo v Parker* (2007) 8NZELC 98,622 and *Wilson v Bruce Wilson Painting & Decorating Limited* [2014] NZEmpC 83 at [13], (20014) 11NZELR 712.