

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**[2011] NZEmpC 157  
CRC 18/09**

IN THE MATTER OF      a challenge to a determination of the  
Employment Relations Authority

BETWEEN                HERITAGE EXPEDITIONS LIMITED  
Plaintiff

AND                      GRAEME JOHN FRASER  
Defendant

Hearing:                1 November 2010  
(Heard at Christchurch)

Appearances: Linda Ryder, counsel for plaintiff  
Defendant in person

Judgment:             30 November 2011

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**JUDGMENT OF JUDGE A A COUCH**

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[1] Mr Fraser was employed to manage a business called Wild Earth Travel. He took up that position on 4 July 2005. On 23 June 2006, Mr Fraser was dismissed on grounds of redundancy. The issue decided in this judgment is the identity of Mr Fraser's employer at the time he was dismissed.

[2] This matter has a long and difficult history. It has been the subject of two determinations of the Employment Relations Authority<sup>1</sup> and two previous decisions of the Court<sup>2</sup>. To put this decision into context, it is necessary to understand the history of the dispute. While that has been traversed in previous decisions, I summarise it here for convenience.

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<sup>1</sup> CA 159/08 dated 23 October 2008 and CA 93/09 dated 3 July 2009

<sup>2</sup> CC 11/09 dated 26 August 2009 and [2010] NZEmpC 35

[3] Following his dismissal, Mr Fraser pursued a personal grievance alleging that his dismissal was unjustifiable. That grievance was eventually lodged with the Authority where, in a statement of problem he prepared himself, Mr Fraser cited his employer as Rodney Russ.

[4] Mr Russ was the overall manager of a business involved in the travel industry. One part of the business specialised in travel to the Antarctic, the sub-Antarctic, the Pacific and the Russian far east. Wild Earth Travel was another part of the business which focussed on tourists visiting New Zealand.

[5] In a statement in reply prepared by Mr Russ, he asserted that Mr Fraser had been employed by Heritage Travel Group Limited at the time the dismissal occurred. During the Authority's investigation, that assertion was not challenged and the matter was determined on that basis. The Authority found that Mr Fraser had been unjustifiably dismissed and awarded him remedies totalling nearly \$14,000. Heritage Travel Group Limited was recorded as the respondent and it was that company which was ordered to make payment to Mr Fraser. That determination was not challenged.

[6] Mr Fraser took steps to enforce the Authority's orders through the District Court. This process was unfruitful. It emerged that Heritage Travel Group Limited had ceased trading and was in the process of being removed from the register of companies.

[7] On 28 April 2009, solicitors representing Mr Fraser wrote a detailed letter to the Authority. It was asserted that Mr Fraser had been employed by Heritage Expeditions Limited rather than Heritage Travel Group Limited. The Authority was asked to substitute Heritage Expeditions Limited as the respondent in the proceeding.

[8] In response to that informal request, the Authority reopened its investigation and scheduled a further investigation meeting. Notice of that meeting and a minute issued by the Authority were sent to Heritage Travel Group Limited but the letter

was returned with a letter advising that Heritage Travel Group Limited had “ceased operations on 31 May 2008”.

[9] No notice of the reopened investigation was ever given to Heritage Expeditions Limited notwithstanding that the purpose of the further meeting was to determine whether that company ought to be liable to Mr Fraser.

[10] Heritage Expeditions Limited was not represented at the second investigation meeting held on 4 June 2009. In its absence, the Authority heard further evidence from Mr Fraser who produced a written employment agreement between himself and “Heritage Expeditions New Zealand Limited” which he said was the only employment agreement he had during his employment.

[11] Following that meeting, the Authority gave a second determination in which it found as a fact that Mr Fraser had only ever been employed by Heritage Expeditions Limited and substituted that company as respondent in the proceedings. The effect was to make Heritage Expeditions Limited liable to comply with the orders for payment to Mr Fraser made in the Authority’s first determination. The Authority also ordered Heritage Expeditions Limited to fully reimburse Mr Fraser for the \$2,097.50 legal costs he had incurred.

[12] The Authority’s supplementary determination came to the attention of Mr Russ while he was in eastern Russia and had only very limited access to communications. He made an application to extend the time for filing a challenge to that determination. The application was opposed but, for the reasons given in my judgment of 26 August 2009, I granted the extension of time sought. As a result, Heritage Expeditions Limited challenged the Authority’s second determination and sought a hearing de novo.

[13] Shortly after that, Ms Ryder was engaged as counsel for Heritage Expeditions Limited and filed an amended statement of claim. The first ground relied on was that the Authority had no jurisdiction to reopen its investigation of its own volition and that its supplementary determination was therefore a nullity. That was dealt with as a preliminary issue. In my judgment of 31 March 2010, I found that the Authority

did have power to reopen its investigation in the manner it did and that its second determination was therefore not invalid on that ground. I then observed:

[32] Although I have found as a matter of jurisdiction that the Authority had the power to reopen its investigation in this case, that is not to say that the power was exercised appropriately. That is a separate matter which, had the plaintiff sought judicial review or mounted a non de novo challenge on the point, would have to be decided in light of all the relevant evidence. As the plaintiff has challenged the whole of the Authority's determination and sought a hearing de novo, however, there is no need to embark on that inquiry.

[14] A further hearing on 1 November 2010 was then scheduled to consider the substantive issue, being the identity of Mr Fraser's employer at the time he was dismissed. On 30 April 2010, I gave directions for the disclosure of documents and for the exchange of briefs of evidence. Through Ms Ryder, Heritage Expeditions Limited largely complied with those directions. Mr Fraser did not. On 2 October 2010, he wrote to the Registrar of the Court saying that he would not be participating in the hearing, essentially because the strain on him of the prolonged proceedings had become too much for him to bear. Following clarification of a number of legal issues which Mr Fraser had clearly misunderstood, he changed his mind and advised all concerned that he would attend the hearing. He did not, however, make disclosure of documents or provide any briefs of evidence. Despite being told that Mr Fraser would be attending the hearing, Heritage Expeditions Limited did not serve a copy of Mr Russ's brief of evidence on him.

[15] At the hearing, these omissions initially caused some difficulties. Both Mr Fraser and Ms Ryder were unable to prepare cross examination. Following discussion, these issues were resolved by agreement. Mr Fraser was provided with a copy of Mr Russ' brief and I adjourned to allow him time to read it before Mr Russ gave his evidence. Following Mr Fraser giving his evidence in chief, the Court took an extended lunch adjournment of one and half hours. As Mr Fraser's evidence in chief took less than 10 minutes, that gave Ms Ryder ample time to take instructions on it and to prepare her cross examination.

## **Issue**

[16] The broad issue is the identity of Mr Fraser's employer at the time of his dismissal in June 2006. Mr Russ and the plaintiff contended that it was Heritage Travel Group Limited as the Authority had originally determined. Mr Fraser contended that it was Heritage Expeditions Limited as the Authority had subsequently determined.

[17] In the course of the hearing, the issue was narrowed and refined. It was common ground that, when Mr Fraser began employment in July 2005, his employer was Heritage Expeditions Limited. The case for the plaintiff therefore was that Mr Fraser had either explicitly agreed to such a change or had implicitly agreed to the change by conduct. The specific issue I must decide, therefore, is whether that was satisfactorily established on the evidence.

## **Companies**

[18] Mr Russ is a director and/or shareholder of several companies. For the purposes of this case, we are only concerned with two of them. Heritage Expeditions Limited was incorporated in 1985. Mr Russ is the sole director of that company. Heritage Travel Group Limited was incorporated on 21 October 2005.

[19] What is immediately apparent is that the only company in existence when Mr Fraser was employed was Heritage Expeditions Limited. Heritage Travel Group Limited was incorporated during the period of his employment.

## **Evidence**

[20] It was common ground that Mr Fraser was originally employed by Heritage Expeditions Limited. Mr Russ accepted that was so and that Mr Fraser continued to be employed by that company for several months. Mr Fraser's role was to manage Wild Earth Travel which was involved in wholesaling and retailing travel products of other organisations.

[21] A written employment agreement was produced which cited the parties as Mr Fraser and “Heritage Expeditions New Zealand Limited”. It was common ground that there was no company of that name and that this was intended to be a reference to Heritage Expeditions Limited. Mr Russ explained that the error may have come about because he also had a company in Australia called Heritage Expeditions Limited and that the terms Heritage New Zealand and Heritage Australia were used to distinguish between them.

[22] Mr Fraser said that he had signed this employment agreement but the copy produced was not signed by either party.

[23] On 5 September 2005, a meeting was held to discuss the future marketing of the business, then being operated entirely through Heritage Expeditions Limited. The meeting was led by a marketing consultant, Marijke Schiphorst of SMS Ltd, a specialist travel marketing company. Mr Russ and several members of the staff of Heritage Expeditions Limited attended the meeting, including Mr Fraser. One of the proposals which came out of the meeting was that the operations of Wild Earth Travel should be separated from the rest of the operations of Heritage Expeditions Limited.

[24] As the sole director of Heritage Expeditions Limited, Mr Russ adopted that proposal and a new company, Heritage Travel Group Limited, was incorporated on 21 October 2005. The new company had two directors, Mr Russ and David Shackleton, who was a shareholder in Heritage Expeditions Limited and the accountant for the business. The same day it was incorporated, Mr Russ signed a memorandum on behalf of the directors of Heritage Travel Group Limited addressed to the directors of Heritage Expeditions Limited (himself) which read:

Heritage Travel Group Ltd agrees to take over all the listed employment contracts previously entered into between the listed employees and Heritage Expeditions Ltd

Names:

Paul Fitzpatrick, Graeme Fraser and Nathan Russ

[25] Mr Russ said that he regarded this memorandum as effectively transferring the employment of Mr Fraser to Heritage Travel Group Limited and that he was an

employee of that company thereafter. He agreed, however, that this memorandum was never shown to Mr Fraser and that no new employment agreements were prepared.

[26] In his evidence in chief, Mr Russ then said “It was agreed that Mr Fraser would be employed on the same terms and conditions as he had with Heritage Expeditions Limited and that his employment would be deemed to be continuous.” As he did not expand on that statement, I asked him what events it was based on. In reply, Mr Russ referred to the marketing meeting on 5 September 2005 and said “He was part of that meeting which agreed that we would form Heritage Travel Group Ltd and that the contracts would be moved over.”

[27] In his evidence in chief, Mr Fraser said of the meeting on 5 September 2005:

... there was no discussion of my contract, my transfer of employment during the meetings. The meetings were more because Marijke Schiphorst was a marketing person. They were marketing related meetings about the best way of promoting the new division. They didn't cover employment matters especially in such an open forum.

[28] Mr Fraser reinforced this evidence in answer to questions in cross examination and from the Court. Specifically, he said: “I was never consulted about the transfer of my contract to Heritage Travel Group, I did not sign anything to that effect either.”

[29] On 3 November 2005, Mr Russ held a staff meeting. One of the items on the agenda was “Formation of Heritage Travel Group Ltd – what does it mean to the day to day operation.”

[30] Mr Russ produced numerous documents which he said showed that Heritage Travel Group Limited was Mr Fraser's employer from 21 October 2005. These included bank statements for Heritage Travel Group Limited showing salary payments to Mr Fraser by direct credit. Mr Russ agreed, however, that those statements would never have been shown to Mr Fraser and that he was not provided with pay advice slips.

[31] Mr Russ produced Inland Revenue forms showing that Heritage Travel Group Limited had paid PAYE tax on Mr Fraser's behalf but a related letter from Inland Revenue recorded that such payments were only made by that company from January 2006 onwards. Prior to that, all payments had been made by Heritage Expeditions Limited.

[32] Mr Russ produced what he said was a copy of an extract from the wage book of Heritage Travel Group showing payments to Mr Fraser but it had no reference to that company on it and only covered the period between April and June 2006. It did not have any signatures by Mr Fraser evidencing receipt of wages and Mr Russ agreed that Mr Fraser would never have seen it.

[33] Mr Russ said that Mr Fraser had been issued with a credit card in the name of Heritage Travel Group Limited and produced statements for the months of January and February 2006. Mr Fraser agreed that he had such a card but said that he used it very little and that he had not seen the statements. When shown them, he said that several of the debts shown were incurred by other people including Mr Russ.

[34] Mr Russ produced a performance appraisal of another employee conducted in November 2005 on a form headed "Heritage Travel Group Ltd". Although no document was produced relating to Mr Fraser, he accepted that a similar form was used for his performance appraisal at about the same time.

[35] Mr Russ gave evidence that Heritage Expeditions Limited and Wild Earth Travel had separate telephone numbers which he said meant that calls for each part of the business could readily be distinguished. When asked about this, Mr Fraser said that the business as a whole had two telephone lines and that callers were asked to press 1 or 2 to indicate which part of the business they were calling.

[36] Shortly before his dismissal, Mr Fraser sought mediation assistance from the Department of Labour. Mr Russ provided a letter from the Department referring to this mediation and addressed to "Heritage Travel Group".

[37] Mr Fraser lodged his personal grievance with the Authority in February 2007 by hand writing on a printed form of the statement of problem. He described the respondent as follows:

Full name of respondent:	Rodney Russ
Address of respondent:	Director, Heritage Expeditions Travel Group 53 B Montreal Street, Christchurch

[38] At the Authority's investigation meeting, Mr Russ insisted that Mr Fraser's employer had been Heritage Travel Group Limited. Mr Fraser did not challenge this.

[39] When he obtained orders for payment to him by Heritage Travel Group Limited, Mr Fraser attempted to enforce them against that company.

[40] When Heritage Expeditions Limited sought an extension of time to pursue the current challenge in the Court, Mr Fraser swore an affidavit in opposition. In it, Mr Fraser said that, when he filed proceedings in the Authority, he honestly believed he had been employed by Heritage Travel Group Limited.

[41] During the term of Mr Fraser's employment and subsequently, Mr Russ and others involved in the business have used many different names for the business as a whole and for parts of it. Several documents signed by Mr Russ were produced on letterhead which was:

**Heritage Expeditions**  
A Division of Heritage Travel Group Ltd

[42] The email address on this stationery was [info@heritage-expeditions.co.nz](mailto:info@heritage-expeditions.co.nz) and the website referred to was [www.heritage-expeditions.com](http://www.heritage-expeditions.com).

[43] In this correspondence, including the lengthy and detailed statement in reply filed in the Authority, Mr Russ referred throughout to aspects of the business as "Heritage Expeditions" or "Heritage Travel Group" without use of the word "limited" and in the same manner as Wild Earth Travel" which, prior to 2008, did not correspond to the name of a company. In that correspondence, Mr Russ also referred to the "Heritage Group" and there was letterhead in that name. Mr Russ confirmed such names were commonly used in the business during Mr Fraser's time there

without reference to whether they were companies or not. Mr Russ said “I think that’s the nature of the business.”

[44] Mr Fraser said that, in the course of his employment, he paid little or no attention to corporate personality. While he was aware of the formation of Heritage Travel Group Limited, he thought that Wild Earth Travel remained part of Heritage Expeditions which became part of Heritage Group Travel. He said:

... all I understood was that Heritage Travel Group was an umbrella term used to describe the combination of slightly unequal divisions of Heritage Expeditions and Wild Earth Travel. At the same time Wild Earth Travel remained a division of Heritage Expeditions.

[45] Mr Fraser said that the first time he really turned his mind to the difference between the various corporate entities was when he could not enforce the orders made against Heritage Travel Group Limited. It was then he took legal advice and realised that his employer throughout had been Heritage Expeditions Limited.

## **Discussion**

[46] Ms Ryder based her submissions on the proposition that the identity of Mr Fraser’s employer should be established by considering what an independent but knowledgeable observer would say. In support of this proposition, she cited the following passage from *Mehta v Elliott (Labour Inspector)*.<sup>3</sup>

[22] The question of who was the employer must be determined as at the outset of the employment. If that changed during the course of the employment, there must be evidence of mutual agreement to that change. Because Messrs Sheikh and Mehta give different accounts of who they believed employed Mr Sheikh, it is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties. Put another way, who would an independent but knowledgeable observer have said was Mr Sheikh's employer when he commenced employment?

[47] I agree with this dictum but it does not support the proposition Ms Ryder relied on. When Judge Colgan spoke of an independent but knowledgeable observer, he said that was an appropriate viewpoint for deciding the identity of the employer at the commencement of employment if that was disputed. As he also said in this

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<sup>3</sup> [2003] 1 ERNZ 451

passage, however, “If that changed during the course of the employment, there must be evidence of mutual agreement to that change.” That reflects the legal principle that a contract of service is personal to the parties and cannot be assigned without the agreement of both parties.

[48] In this case, there is no dispute about the identity of Mr Fraser’s employer at the outset. It was Heritage Expeditions Limited. That company asserts that, during the course of the employment, the identity of Mr Fraser’s employer changed to Heritage Travel Group Limited. I can only reach that conclusion if I am satisfied on the evidence that both Heritage Travel Group Limited and Mr Fraser agreed to that change. It is clear that Heritage Travel Group Limited accepted such a change. What is far from clear, is whether Mr Fraser did so.

[49] Citing *Colosimo v Parker*<sup>4</sup> Ms Ryder also submitted that the onus rests on the employee to prove the identity of the employer. While that statement was made by Judge Perkins in that case<sup>5</sup>, it was made in the context of a dispute about who the employer was at the commencement of the employment relationship. Mr Parker alleged that Mr Colosimo was his employer. Mr Colosimo denied that. Judge Perkins’ observation that the onus was on Mr Parker to establish the identity of his employer was therefore a simple application of the general principle that the party who asserts a fact bears the onus of proving it. In this case, there is no dispute that Heritage Expeditions Limited was originally Mr Fraser’s employer. As it is Heritage Expeditions Limited which asserts that Mr Fraser became an employee of Heritage Travel Group Limited before he was dismissed, the onus of establishing that such a change took place rests on that company.

[50] It was clear from Mr Russ’ evidence that he believed it was possible for the identity of Mr Fraser’s employer to be changed simply by agreement between Heritage Expeditions Limited and Heritage Travel Group Limited. As a matter of law, he was mistaken. Mr Fraser’s consent was required for any such change to be effective.

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<sup>4</sup> (2007) 8 NZELC 98,622

<sup>5</sup> At [28]

[51] Ms Ryder's primary submission was that Mr Fraser explicitly agreed to the identity of his employer changing from Heritage Expeditions Limited to Heritage Travel Group Limited. She relied on the evidence of Mr Russ. In his evidence in chief, he said:

As Mr Fraser had attended the meeting on 5 September 2005, he was fully aware (and was in fact part of the process) of the decision to transfer his employment over to the new company entity.

[52] Later in his evidence in chief, Mr Russ went on to say:

It was agreed that Mr Fraser would be employed on the same terms and conditions as he had with Heritage Expeditions Limited and that his employment would be deemed to be continuous.

[53] When asked what he meant by this latter statement and, in particular, by whom this was "agreed", Mr Russ said that these things were agreed by everyone present at the marketing meeting on 5 September 2005. When asked whether Mr Fraser explicitly agreed to that, Mr Russ replied:

He was part of the meeting which agreed that we would form Heritage Travel Group Limited and that the contracts would be moved over.

[54] When this evidence was put to Mr Fraser for comment, he agreed that he had been present at the meeting on 5 September 2005 but said there had been no discussion of changes in employment or any other management issues. Mr Fraser said that the meeting had been focussed on marketing the products being handled by Wild Earth Travel and was led by Ms Schiphorst as a specialist travel marketing consultant. According to Mr Fraser, "the Heritage Travel Group structure didn't form part of that meeting." When asked to comment specifically on Mr Russ' evidence that it had been agreed at that meeting that his employment would be transferred to Heritage Travel Group Limited, Mr Fraser replied:

That's what I mean is not correct because the new entity to promote those tours was Wild Earth Travel which was already established. The only reason for the Heritage Travel Group name seemed to be to give gravitas to the company as a whole.

[55] While it is likely the recollection of both men on this issue was imperfect after more than four years, I find Mr Fraser's account distinctly more credible than

that of Mr Russ. It is clear from the contemporary documents that the meeting on 5 September 2005 was focussed on marketing. It was described by Ms Schiphorst as a “marketing planning meeting”. The agenda she prepared for the meeting was concerned solely with marketing. In his evidence, Mr Russ referred to it as a “marketing workshop”. While the formation of a new company may well have been suggested as an option or even seen as the best option, it is inherently unlikely that detailed management issues such as terms and conditions of employment would have been discussed at such a meeting. The company had yet to be formed, it was unknown when the company might be incorporated and there was no evidence that even the name had been decided at the time of the meeting on 5 September 2005.

[56] Mr Russ’ evidence on this issue was entirely inconsistent with the evidence dated 21 May 2008 he gave to the Authority in its original investigation. He said then that the decision to form Wild Earth Travel was made at a meeting involving Ms Schiphorst held on 7 March 2005 and that the decision to form Heritage Travel Group Limited was made by the directors and shareholders of Heritage Expeditions Limited before Mr Fraser was employed on 4 July 2005. In that evidence, Mr Russ made no mention of the meeting on 5 September 2005 nor did he suggest that the identity of Mr Fraser’s employer changed at any time.

[57] It is also significant that the amended statement of claim dated 23 November 2009 made no mention of the meeting on 5 September 2005, alleging instead that Mr Fraser consented to the transfer of his employment at the meeting on 3 November 2005. This statement was drafted by Ms Ryder, presumably on the instructions of Mr Russ.

[58] Even if I were to place more weight on Mr Russ’ evidence about this issue, that would not satisfy me that Mr Fraser explicitly consented to the identity of his employer changing from Heritage Expeditions Limited to Heritage Travel Group Limited. Being present at a meeting at which a decision is made does not amount to personal consent to the decision. Any decision which was made at the meeting could only have been in the broadest terms. The new company had yet to be formed or the process of incorporation even started. No one knew when it might be formed. It

was also common ground that discussion of trading entities within the business was usually conducted without reference to corporate identity.

[59] Although it was alleged in the amended statement of claim that Mr Fraser explicitly agreed to the transfer of his employment at the meeting on 3 November 2005, Mr Russ did not give evidence in chief to that effect. As far as he went was to produce an agenda for the meeting which contained the item “Formation of Heritage Travel Group Limited – what does it mean to day to day operation.” In answer to a question in re-examination, Mr Russ said:

I don't have minutes of that meeting but I clearly remember talking about the three that were going to be immediately shifted over and how we would shift them over and they would be employed by the new company, because we were keen to shift people out of Heritage Expeditions we weren't that shift based.

[60] While this is evidence of Mr Fraser being told about how Mr Russ viewed the situation, it does not support the proposition that Mr Fraser agreed to anything. That is consistent with Mr Russ' view that Mr Fraser's consent to a change of employer was not required and that the change had already taken place on 21 October 2005. In answer to a question from the Court, Mr Russ agreed that the nature of the meeting on 3 November 2005 was an explanation of decisions which had already been made as far he was concerned.

[61] On the balance of probabilities, I am not satisfied that Mr Fraser explicitly consented to the transfer of his employment from Heritage Expeditions Limited to Heritage Travel Group Limited.

[62] Ms Ryder's alternative submission was that Mr Fraser was aware that Heritage Travel Group Limited had taken over his employment and, by his conduct, he consented to that.

[63] Much of the evidence relied on in support of this submission comprised business records. This included Inland Revenue documents, bank statements, Companies Office records and credit card statements. What those documents established is that Heritage Travel Group Limited was a separate company which operated in a manner consistent with Mr Fraser being its employee. Nothing in the

documents themselves suggested that Mr Fraser had consented to Heritage Travel Group Limited becoming his employer and there was no evidence that Mr Fraser saw any of those documents at the time.

[64] There were only two documents referring to Heritage Travel Group Limited which it was established Mr Fraser was aware of. The first was the form used to conduct a performance appraisal in November 2005 which had the name Heritage Travel Group Limited at the top of the first page. Immediately under that, however, the first sentence of the document is “This formal performance appraisal is completed annually with each staff member at Heritage Travel Limited”. On the evidence, there was no such company as “Heritage Travel Limited.”

[65] The other document was the credit card. Although the card itself was not produced, it is a proper inference from the two statements produced that it was in the name of Heritage Travel Group Limited and Mr Fraser.

[66] The next evidence Ms Ryder sought to rely on was the change to the telephone system but this did not assist the plaintiff’s case. Mr Fraser was able to give much more detailed evidence about the system than Mr Russ was. Mr Fraser said that, while there were two lines, both gave callers the option of speaking to Heritage Expeditions or Wild Earth Travel. There was no mention of Heritage Travel Group.

[67] The other evidence relied on by the plaintiff was of statements made by Mr Fraser after his dismissal and of the terminology he used in documenting his claim. Ms Ryder drew my particular attention to four aspects of that evidence.

[68] She referred firstly to the request for mediation Mr Fraser made shortly before his dismissal. She suggested that Mr Fraser cited his employer then as Heritage Travel Group Limited. That does not seem to be supported by the evidence. The request itself was not produced. Rather, what was produced was a letter from the Mediation Service of the Department of Labour to Mr Russ at “The Heritage Travel Group Heritage Travel Group”. Mr Russ’ response was on behalf of

“Heritage Expeditions” on letterhead which had the name “Heritage Expeditions” prominently displayed at the top.

[69] Second, Ms Ryder suggested that Mr Fraser pursued his personal grievance claim against Heritage Travel Group Limited. Again, this was not supported by the evidence. Mr Fraser’s personal grievance was raised in a letter from his solicitors dated 25 August 2006 addressed to “Heritage Expeditions New Zealand Limited”. This no doubt reflected what was recorded in his employment agreement. The initial statement of problem recorded the respondent as Mr Russ and gave his address as “Director, Heritage Travel Group”.

[70] Ms Ryder’s third point was that Mr Fraser “accepted the judgment against Heritage Travel Group Limited and took steps to enforce the judgment against Heritage Travel Group Limited.” The real point here is that Mr Fraser did not take issue with Mr Russ’ statement to the Authority in the course of its initial investigation that Heritage Travel Group Limited was the proper respondent. Once orders had been made against that company, Mr Fraser could not enforce them against any other entity.

[71] The fourth evidential factor relied upon by Ms Ryder was what Mr Fraser said in his affidavit dated 28 July 2009, sworn in opposition to the application for extension of time. In particular, Ms Ryder placed emphasis on the following statement made by Mr Fraser:

10. I later discovered that I had always been employed by Heritage Expeditions Limited. At the time of filing the initial proceedings, I honestly believed that I had been employed by Heritage Travel Group Limited. I therefore filed my proceedings against that company.

[72] The obvious difficulty with this statement is that Mr Fraser did not file his proceedings against Heritage Travel Group Limited. As noted earlier, the respondent named in the original statement of problem was Mr Russ personally. In paragraph [5] of the Authority’s supplementary determination, it said:

[5] In a statement in reply, Mr Russ submitted a cover page which adjusted the identity of the respondent. It reads:

Fraser

v  
Heritage Travel Group Limited, Rodney Russ  
(Not Heritage Expeditions as claimed by Fraser in his statement of  
evidence dated 6th May)

[73] This indicates that, after initially naming Mr Russ as the respondent, Mr Fraser had directed his claim against Heritage Expeditions. It was Mr Russ who sought to have Heritage Travel Group Limited substituted as the respondent and, in the absence of any objection from Mr Fraser, the Authority did so.

[74] It should be remembered also that Mr Fraser's personal grievance was raised in a letter addressed to "Heritage Expeditions New Zealand Limited".

[75] What this reflects is that Mr Fraser was largely unconcerned about the particular identity of his former employer at that stage. He had no reason to believe that it would make any difference to the outcome whether his claim was against one company or another or against Mr Russ personally. As far as he was concerned, his dealings were with Mr Russ personally and so he commenced proceedings against him personally. Mr Russ' attitude during the Authority's original investigation appears to have been similar. Throughout his extensive written evidence and submissions, he referred to Heritage Expeditions, Heritage Travel Group and Wild Earth Travel in the same manner and as part of a single business entity. He gave no evidence about the specific identity of Mr Fraser's employer.

[76] As Ms Ryder correctly went on to submit, it was only when Heritage Travel Group Limited proved to be worthless that Mr Fraser realised that the identity of his employer was important.

[77] While Mr Fraser's affidavit was a sworn statement for which he must be responsible, it is clear he was wrong in the passage set out above. To the extent he had an honest belief that he had been employed by Heritage Travel Group Limited, that must have come later, after Mr Russ confidently asserted to the Authority that it was so. In the meantime, Mr Fraser seems to have variously believed that he was employed by "Heritage Expeditions New Zealand Limited", Mr Russ personally and "Heritage Expeditions". In such circumstances, the statement in Mr Fraser's

affidavit assists me little in deciding who his employer actually was at the time of his dismissal.

[78] Having regard to all the evidence, I find that the plaintiff has not established on the balance of probabilities that Mr Fraser knew about a change in the identity of his employer and consented to it. As a matter of fact and law, it follows that Heritage Expeditions Limited remained Mr Fraser's employer throughout the period of his employment and was his employer at the time of his dismissal.

[79] A major factor in the outcome of this case is the indiscriminate use of names in the business operated by Mr Russ. The names of companies, occasionally with the word "limited" but generally not, and trading names unrelated to companies have been used interchangeably and inconsistently. Terms like "group" and "division" have also been used in ways which are confusing. Mr Russ attempted to downplay this in his evidence but it was abundantly clear from the contemporary documents that he played a major part in creating and perpetuating the contradictions and confusion which existed.

### **Other aspects of the Authority's determination**

[80] In its supplementary determination, the Authority referred to Mr Russ having identified Heritage Travel Group Limited as Mr Fraser's final employer and said:

[6] There was at the time, no challenge to this formal statement identifying the employer's identity. It was when Mr Fraser sought to enforce the Authority's orders against Heritage Travel Group Limited through the District Court at Christchurch, that a Court Collections Officer was told by Mr Russ that Heritage Travel Group Limited had been wound up.

[7] The company's details downloaded on 20 May 2009 established at that date the company was still registered. The document states:

*The Registrar of Companies is satisfied that this company has ceased to carry on business and has instigated actions to remove the company from the Register.*

[8] The Companies Office confirmed with Mr Fraser's solicitor an application to wind up this company was received in early February 2009. As is clear from this, Mr Russ lied to the Court Collections Officer who was unable to enforce the distress warrant.

[81] The conclusion that Mr Russ lied to an officer of the court greatly offended him. His concern was heightened when that conclusion was the subject of a sizeable article in the Christchurch “Press” newspaper.

[82] It is unclear from the determination what the source of the evidence relied on for this conclusion was. I was provided with a copies of three written reports from the Collections Unit of the Christchurch District Court regarding execution of the distress warrant obtained by Mr Fraser against Heritage Travel Group Limited. The first, dated 23 December 2008, records: “Rodney Russ, Director states that the Company ceased trading in May 2008 and has no bank accounts or assets.” If this was the information relied on by the Authority, it clearly made a mistake when it said Mr Russ lied.

[83] It is most unfortunate that the Authority should have made such a mistake and that it leapt to a conclusion which was seriously damaging to Mr Russ’ reputation without giving him the opportunity to be heard. That ought not to have happened.

[84] In its supplementary determination, the Authority ordered Heritage Travel Group Limited to fully indemnify Mr Fraser for the costs he had incurred in relation to the reopened investigation. In doing so, the Authority referred to “his former employers’ cynical disregard for his rights” and concluded:

[17] Given the behaviour of Mr Russ and Mr Shackleton in attempting to evade their responsibilities to Mr Fraser, I have no hesitation in awarding the applicant the full amount of \$2,097.50 in costs.”

[85] This rhetoric was unfair to Mr Russ and Mr Shackleton and the attitude reflected in it ought not to have been taken into account in fixing costs. Heritage Expeditions Limited was unrepresented in the reopened investigation because of the Authority’s failure to notify it of the meeting. As a result, neither Mr Russ nor Mr Shackleton had an opportunity to be heard. That was an obvious breach of natural justice, the consequences of which ought not to be visited on the company. The award of costs cannot stand.

[86] As I have sustained the conclusion reached by the Authority as to the identity of Mr Fraser’s employer, it can properly be said that he was successful in the

reopened investigation and ought to receive an award of costs in that regard. Applying the usual principles for fixing costs in the Authority, Heritage Expeditions Limited is ordered to pay Mr Fraser \$650 in that regard.

## **Conclusion**

[87] Heritage Expeditions Limited was Mr Fraser's employer at the time of his dismissal. The challenge is unsuccessful in that regard.

[88] Heritage Expeditions Limited is substituted as the respondent in the substantive proceedings determined by the Authority.<sup>6</sup>

[89] Heritage Expeditions Limited is ordered to pay Mr Fraser costs of \$650 in relation to the Authority's reopened investigation.

[90] By operation of s 183(2) of the Employment Relations Act 2000, the determination of the Authority is set aside and this decision stands in its place.

## **Comment**

[91] This judgment is being delivered long after the hearing. That delay, and the resulting inconvenience to the parties, is regrettable. The principal reason for that delay is the Christchurch earthquakes, which have impacted heavily on the Court's resources and my availability to devote the time required not only to complete this judgment but also to complete judgments in other matters heard before this case.

## **Costs**

[92] As Mr Fraser appeared in person, he is not entitled to an award of costs in respect of his own time and effort. To the extent that he incurred costs for advice and representation in other aspects of the proceeding before the Court, however, he may claim a contribution towards them. He may also seek reimbursement of any disbursements he has incurred. I note, however, that in the one aspect of the matter

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<sup>6</sup> CA 159/08 dated 23 October 2008

in which Mr Fraser was represented by counsel, the initial application for an extension of time, he was not successful in opposing the application.

[93] If Mr Fraser wishes to seek an order for costs, he should file and serve a memorandum setting out the relevant details within 20 working days after the date of this judgment. In that event, the plaintiff will have a further 20 working days to respond.

A A Couch  
Judge

Signed at 1.00pm on 30 November 2011