

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 267
5442667

BETWEEN ANNA ALE
 Applicant

A N D KIDS AT HOME LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Alex Hope, Counsel for Applicant
 Erin Burke, Counsel for Respondent

Submissions Received: Filed respectively by Counsel for the Applicant and for
 the Respondent on 4 August 2016

Investigation Meeting: On the papers

Date of Determination: 09 August 2016

**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY
ON A PRELIMINARY ISSUE (No 2)**

Employment Relationship Problem

**Application to join a party pursuant to s.221 of the Employment Relations Act
2000 and application to strike-out proceedings**

[1] The Authority has received an application from the applicant, Ms Anna Ale,
that:

- (a) Ms Paula Marie Lovegrove be joined as a second respondent to the
 proceedings; and
- (b) The proposed second respondent, Ms Lovegrove, pay the costs of the
 application.

Ms Ale's affidavit

[2] In support of her application to join Ms Lovegrove as a second respondent, Ms Ale has filed an affidavit sworn on 24 June 2016, in which she claims, among other things, that she was unjustifiably dismissed and unjustifiably disadvantaged by Kids at Home Limited (Kids at Home) and these claims are currently before the Authority. Ms Ale says Ms Lovegrove was the sole director and shareholder of Kids at Home at the time of her claims.

[3] Ms Ale says during 2014/2015, Kids at Home sold its business. In February 2016, while her claims against Kids at Home had yet to be resolved by the Authority, Ms Ale says Kids at Home was removed from the Companies Office register by Ms Lovegrove.

[4] Following removal of Kids at Home from the Companies Office register, the Employment Court issued a decision on costs in favour of Ms Ale¹.

[5] Ms Ale wishes to enforce the Employment Court's costs judgment against Kids at Home. Because Kids at Home is no longer on the Companies Officer register, Ms Ale seeks to join the sole director and shareholder of Kids at Home, Ms Paula Lovegrove as a second respondent against whom the costs judgment may be exercised.

Application to join Ms Lovegrove as a party - s.221 of the Employment Relations Act 2000 (the Act).

[6] Mr Hope contends that it is in the interests of justice for Ms Lovegrove to be joined to the proceeding before the Authority so that it can continue its investigation into her claims against Kids at Home. Mr Hope relies on s.221 of the Act.

Opposition to application to join Ms Lovegrove as a second respondent

[7] Ms Burke, Counsel for the proposed second respondent, Ms Lovegrove, opposes the application on the grounds there is no legal basis to do so. Further, Ms Burke seeks to have the entire matter struck out on the grounds that following the removal of Kids at Home from the Companies Office register, there is no longer a respondent.

¹ [2016] NZEmpC 26. The costs decision followed a largely successful challenge to the Employment Court by Ms Ale to a preliminary determination of the Authority : [2015] NZEmpC 209, [2015] NZERA Auckland 103

[8] Ms Burke for Ms Lovegrove contends that Ms Lovegrove was the former director and shareholder of Kids at Home and that Ms Ale's proceedings were at all times against Kids at Home. Kids at Home ceased trading in late 2014/ early 2015 and was removed from the Companies Office register in February 2016. Ms Lovegrove has filed an affidavit in the Authority dated 2 August 2016, confirming these facts and giving evidence that Kids at Home was removed from the Companies Office register without her knowledge.

[9] The former accountant for Kids at Home, Mr Allan Spice has filed an affidavit dated 4 August 2016, in the Authority setting out the circumstances which led to the removal of Kids at Home from the Companies Office register.

[10] Kids at Home had ceased trading and no annual return was filed. In these circumstances, Kids at Home was automatically removed from the Companies Office register.

[11] Ms Burke says there is no cause of action against Ms Lovegrove, the director and shareholder of Kids at Home. Ms Lovegrove did not employ Ms Ale, Kids at Home did and as such there is no legal or factual ground to join Ms Lovegrove to the proceeding between Ms Ale and Kids at Home.

[12] Reliance is placed on *Saloman v A Saloman & Co*² by Counsel for Ms Lovegrove, as authority for the proposition that joining sole directors/shareholders who had not directly employed an employee would breach the fundamental doctrine of separate legal identity.

[13] Further, it is argued that the application to join Ms Lovegrove should be dismissed along with the proceeding against Kids at Home, an entity which no longer exists.

Determination

[14] Mr Hope for Ms Ale, submits that this is a case in which the Authority should join Ms Lovegrove under s.221 of the Act. Mr Hope contends that Ms Lovegrove "...has been the owner/director and day to day operator of Kids at Home from the time it employed the Applicant to the time it dismissed the Applicant to the time it defended the Applicant's claims in the Employment Relations Authority and in the

² [1896] UKHL 1

Employment Court” and that the removal of Kids at Home from the Companies Office register was at Ms Lovegrove’s instruction.

[15] Kids at Home has been removed from the register. However, this appears to have been a function of the Companies Office not Ms Lovegrove and was as a result of Kids at Home ceasing to trade and not filing an annual return. This is not a situation in which Kids at Home has been placed into liquidation, voluntarily or otherwise. Kids at Home ceased business in February 2015 and was removed from the register a year later.

[16] Kids at Home was the true employer of Ms Ale, not Ms Lovegrove who was the director and shareholder of Kids at Home at the relevant time.

[17] Mr Hope further argues that the courts of general jurisdiction have power to award costs against individuals, including company directors in some circumstances. Mr Hope has referred the Authority to some decisions including one from the Privy Council, *Dymocks Franchise Systems (NSW) Pty Ltd v Todd & Ors*³ in which costs were awarded against a person who was a non party. The other decision relied upon by Mr Hope was *New Zealand Medical Laboratory Workers Union Inc v Capital Coast Health Ltd*⁴.

[18] The facts in those cases differ to the facts before the Authority. No application has been made to award costs against Ms Lovegrove as a non party. In *Capital Coast*⁵, the Court considered its jurisdiction to join a party thus making that party amenable for a costs award. In that case, the Court was considering its jurisdiction to join legal counsel (or a representative) for the purposes of awarding costs against her. The case did not concern the joinder of a director in circumstances such as in the current case.

[19] Ms Ale seeks to join Ms Lovegrove as a party because a respondent is required in order for the Authority’s investigation to continue. It is my view that there are no grounds for the Authority to join Ms Lovegrove as a second respondent. Ms Lovegrove did not employ Ms Ale and I am not satisfied that there are grounds to join Ms Lovegrove under s.221 of the Act as contended by Mr Hope.

[20] The application to join Ms Lovegrove as a second respondent is dismissed.

³ [2004] UKPC39

⁴ [1998] 2 ERNZ 107

⁵ Supra pp111-11

Restoring a company to the Companies Office register

[21] It is possible for a company such as Kids at Home which has been removed from the Companies Office register to be restored to the register upon application to the Registrar of Companies or upon an application to the High Court pursuant to provisions contained in the Companies Act 1993.

[22] This is an option that may be available to Ms Ale should she wish to take it.

[23] In the event that Ms Ale chooses to apply to have Kids at Home restored to the Companies Office register, and in the event it is restored then the Authority's investigation may be able to continue.

[24] If she wishes to continue with her claim against Kids at Home, Ms Ale can take steps to restore Kids at Home to the Companies Office register. Consideration should be given to the prospect of successfully recovering a monetary award against Kids at Home in the event Ms Ale is successful. This is for the reasons above, that the business was sold and ceased trading in early 2015. However, this is for consideration at a later date.

[25] In all the circumstances, I am not prepared to strike out the current proceedings between Ms Ale and Kids at Home. However, Ms Lovegrove is not to be joined as a party to those proceedings.

Costs

[26] The parties are encouraged to agree costs. In the event they are unable to, Ms Lovegrove has 14 days from the date of this determination in which to file a memorandum as to costs and Ms Ale has 14 days from receipt to file a memorandum in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority