

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 61  
5448996

BETWEEN                      MOHAMMED IRFAN ALI  
Applicant

A N D                              ABHISEK QUALITY FOODS  
LIMITED  
Respondent

Member of Authority:        David Appleton

Representatives:              Robert M Thompson, Advocate for the Applicant  
Paul McBride, Counsel for Mr Rajagopal and  
Mr Ramesh Anand

Investigation Meeting:        Determined on the papers

Submissions Received:        30 April 2015 and 11 May 2015 from Mr Thompson  
7 May 2015 from Mr McBride

Date of Determination:        11 May 2015

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**DETERMINATION OF THE AUTHORITY**

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- A. I decline to join Mr Rajagopal and Mr Ramesh Anand as respondents.**
- B. I decline to issue a determination on the substantive issues without an investigation meeting.**
- C. Costs are reserved.**

**Employment relationship problem**

[1] Mr Ali seeks to have joined to the proceedings the two directors and shareholders of the respondent company. This is resisted by the two individuals. The respondent company has made no representations.

**Brief account of the events leading to the application**

[2] On 8 April 2015 Mr McBride, who was at that point acting for the respondent company, wrote to the Authority and to Mr Thompson advising that the respondent company had ceased trading with effect from 31 March 2015. Mr McBride sought leave to withdraw as counsel and solicitors for the respondent in the proceedings. That leave was granted.

[3] On 9 April 2015 Mr Thompson indicated that his client wished to continue with his claim against the respondent *and any other party where liability may be imposed under the relevant New Zealand laws*. The Authority retained the dates of the investigation meeting which it had set down.

[4] On 30 April 2015 the Authority received a letter from Mr Thompson seeking leave to join a director and shareholder of the company (Mr Ramesh Anand Rajagopal) as a *co-respondent*.

[5] Mr Thompson also sought leave from the Authority to join the other director and shareholder of the company (Mr Elilarasi Ramesh Anand) as a *co-respondent*.

[6] Mr Thompson also requested that, should the Authority decline leave to allow Mr Ali to amend his statement of problem to join Mr Rajagopal and Mr Ramesh Anand as respondents, then the Authority *make an immediate determination for a full award and full costs in Mr Ali's favour, in accordance with his statement of problem, based on the papers already presented*.

[7] Mr Thompson also requested that, *in making its determination in favour of Mr Ali, the Authority also orders Mr Rajagopal and Mr Ramesh Anand to take the necessary action to personally see to it (ie guarantee) that Abhisek promptly pays Mr Ali's claims as awarded by the Authority*.

[8] On 7 May 2015 the Authority received a letter from Mr McBride advising that he had been instructed by Mr Rajagopal and Mr Ramesh Anand to oppose the applications made by Mr Thompson.

**Mr Thompson's submissions**

[9] The principal stated ground for Mr Thompson's application to join Mr Rajagopal as a respondent is that the respondent company was *nothing more than the*

*alter ego of Mr Rajagopal, thus being no more than an instrument for his personal advantage and he should therefore be jointly and separately liable.* Mr Thompson states that there are a number of facts which support the application. These are as follows:

- (a) Mr Rajagopal registered a new company on 5 March 2015 for the purposes of continuing the Bombay Palace Restaurant business in the same location as previously;
- (b) Mr Rajagopal signed a new lease for the same premises, trade name, etc;
- (c) Mr Rajagopal applied for a temporary liquor licence using the respondent company's liquor licence as the base licence;
- (d) Mr Rajagopal and his wife are the sole directors and shareholders of the respondent company and thus are the direct beneficiaries of the profits and other benefits of the business;
- (e) Mr Rajagopal arranged with Immigration New Zealand for the business to hire overseas chefs;
- (f) Mr Rajagopal communicated directly with the applicant regarding his employment arrangements and countersigned the employment agreement;
- (g) The applicant's wages were paid by Ramesh Bombay Palace Wanaka, and not the respondent company;
- (h) Mr Rajagopal reimbursed the applicant \$210 for kitchen utensils;
- (i) Mr Rajagopal was the *self-proclaimed manager* to whom the applicant complained;
- (j) In his letter of 18 December 2013 Mr Rajagopal confirmed that he owed outstanding wages and holiday pay to the applicant;
- (k) Prior to the filing of the statement of problem correspondence was with Mr Rajagopal;

- (l) Mr Rajagopal is noted as the respondent's owner in the statement of reply;
- (m) Mr Rajagopal deposed in his affidavit to the Authority that he works full time in the restaurant alongside Mr Ramesh Anand;
- (n) Mr Rajagopal personally complained to the Police about an alleged theft by the applicant.

[10] Mr Thompson gives no detailed reasons why Mr Ramesh Anand should be joined as a respondent.

### **Discussion**

[11] Section 221 of the Employment Relations Act 2000 (the Act) gives the Authority the power to join a party to proceedings, as follows:

#### ***221 Joinder, waiver, and extension of time***

*In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—*

- (a) direct parties to be joined or struck out; and*
- (b) amend or waive any error or defect in the proceedings; and*
- (c) subject to section 114(4), extend the time within which anything is to or may be done; and*
- (d) generally give such directions as are necessary or expedient in the circumstances.*

### **The issues**

[12] I believe that the following are the key issues to be determined in deciding whether Messrs Rajagopal and Ramesh Anand should be joined as respondents to these proceedings:

- a. Was Abhisek Quality Foods Limited Mr Ali's employer?
- b. If not, who or what was?
- c. If so, is there any valid reason to join Messrs Rajagopal and Ramesh Anand as respondents?

**Was Abhisek Quality Foods Limited Mr Ali's employer?**

[13] The Companies Office register shows that Abhisek Quality Foods Limited has two directors (Messrs Rajagopal and Ramesh Anand) and two shareholders (the same individuals).

[14] When the statement of problem was first lodged with the Authority, there was included with it an individual employment agreement which stated that it was between *Abhisek Quality Food Limited trading as Bombay Palace Indian Restaurant*, and *Ali Mohammed Irfan*. This document appears to have been derived from an employment agreement supplied by the Restaurant Association of New Zealand and contained the sorts of terms and conditions one would expect. It was signed by Mr Ali as employee and appears to have been signed by Mr Rajagopal. Following Mr Rajagopal's signature is stated the words *for the Employer*.

[15] The text of the employment agreement refers to *you* and *we*. However, there is nothing to suggest that it recorded an employment relationship between Mr Ali and Mr Rajagopal personally.

[16] Furthermore, the Authority has also seen a letter from Immigration New Zealand addressed to *Mr Ramesh Rajagopal of Abhisek Quality Foods Limited* which provided that company with approval in principle to recruit two tandoori/curry chefs. The name of the company is stated on the letter and it is absolutely clear that it is the company and not Mr Rajagopal himself which has been given that approval in principle to employ the tandoori/curry chefs. It is understood by the Authority that Mr Ali was one of the tandoori/curry chefs employed on the strength of this approval from Immigration New Zealand.

[17] I am satisfied that Abhisek Quality Foods Limited was the employer of Mr Ali at all material times.

**Is there any valid reason to join Messrs Rajagopal and Ramesh Anand as respondents?**

[18] It would appear that Mr Ali has never previously argued that he was employed directly by Mr Rajagopal or Mr Ramesh Anand, either in conjunction with Abhisek Quality Foods Limited, or instead of that entity. It would appear that this application

for leave to join those two individuals arises because the respondent company has apparently ceased trading.

[19] The Act makes clear that the Authority has jurisdiction to resolve<sup>1</sup> and make determinations about<sup>2</sup> *employment relationship problems*. An employment relationship problem includes a personal grievance, a dispute and any other problem relating to or arising out of an *employment relationship*. An employment relationship is defined as any of the employment relationships specified in s.4(2) of the Act.

[20] Section 4(2) of the Acts sets out eight employment relationships in an exhaustive list. The first relationship in that list is of *an employer and an employee employed by the employer*. No other relationship listed in s.4(2) is relevant to the current situation.

[21] As I have already found, it is clear on the evidence before the Authority that Abhisek Quality Foods Limited was the employer of Mr Ali and not Mr Rajagopal or Mr Ramesh Anand. Therefore, without more, Mr Rajagopal or Mr Ramesh Anand cannot be joined as parties as they were not Mr Ali's employer. So, is there any other valid reason to join them?

[22] Being a New Zealand registered company, Abhisek Quality Foods Limited is a distinct legal entity in its own right separate from its shareholders and continues in existence until it is removed from the New Zealand Companies Office Register.<sup>3</sup> Therefore, there have to be good reasons to pierce the corporate veil, in order to justify joining Mr Rajagopal or Mr Ramesh Anand as respondents.

[23] Mr Thompson has cited the Employment Court case of *New Zealand Seafarers' Union v Silver Fern Shipping Ltd (No 2)* [1998] 3 ERNZ 786 to support his contention that it is appropriate to pierce the corporate veil. His Honour Judge Colgan (as he was then) set out at page 808 three relevant principles to be applied to a careful factual analysis, as follows:

*(1) It is unnecessary to show that the corporate structure was established for the purpose of the pretence alleged or for the purpose of any pretence arrangement. Rather, the question is whether the use of the corporate structure in place is pretence. An otherwise usual corporate structure may nevertheless be used by the*

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<sup>1</sup> Section 157 of the Act.

<sup>2</sup> Section 161 of the Act.

<sup>3</sup> See section 15 of the Companies Act 1993.

*constituents of it to create or perpetuate a pretence: Square 1 Service Group Ltd v Butler [1994] 1 ERNZ 667.*

*(2) The Courts take a cautious approach to interfering with the long established law of corporate separateness: NZ Seamens IUOW v Gearbulk Shipping (NZ) Ltd [1990] 1 NZILR 688 following Securitibank Ltd (No 2) Re [1978] 2 NZLR 136 (CA).*

*(3) In the specialist employment jurisdiction considerations of equity and good conscience in the determination of cases (s 104(3) Employment Contracts Act 1991) and of the special relationships of trust, confidence, and fair dealing between employers and employees have caused this Court and its predecessor, in a principled way and rarely, to lift the corporate mask or pierce the corporate veil to ensure that justice is done as between parties in an employment relationship: Gearbulk (above); Square 1 Service Group 20 (above); Red Eagle Corp v Walker, unreported, Colgan J, 11 September 1995, AEC86A195.*

[24] After a careful factual analysis, His Honour Judge Colgan found at page 813 in the *Silver Fern Shipping* case that:

*On balance I find the preponderance of the evidence in favour of the plaintiffs' claim that the defendants are, so far as employment of seafarers is concerned, one entity, the employer.*

[25] However, I am not convinced that there is any strong evidence to persuade me that Mr Ali was employed by a single entity, comprising Abhisek Quality Foods Limited, Mr Rajagopal and Mr Ramesh Anand. The fact that such a concept sounds so odd is testimony to the fact that the *Silver Fern Shipping* case was decided on a very different set of facts than those that prevail in the current case and that, at its heart, Mr Ali's contentions that Mr Rajagopal or Mr Ramesh Anand should be joined ignore the fundamental basis on which the Authority investigates matters; namely, to resolve and make determinations about employment relationship problems.

[26] I adopt with approval the submissions of Mr McBride in which he addresses Mr Thompson's arguments; namely, I agree that:

- (a) Mode of payment of wages is not determinative of the identity of the employer;
- (b) The proposition that the two individuals as shareholders derived a profit from the business does not advance matters, as that is the aim of all shareholders;
- (c) There is no limitation as to who may make a criminal complaint;

- (d) The company's trading name is irrelevant;
- (e) Where the same premises are used, the prior existence of a liquor licence is material to the grant of a new licence to a different owner;
- (f) It is not surprising that, as a director and shareholder of the respondent company, Mr Rajagopal was involved in the operation of the business; and
- (g) The fact that the respondent company and the new company share a shareholder does not link them in a Companies Act sense.

[27] It is noted that the respondent company has only two directors and two shareholders and it is a completely normal commercial practice in such circumstances for the owner or owners of a small company to have the day to day running of the affairs of the company.

[28] I note Mr Thompson's submissions that directors have duties of good faith under the Companies Act 1993. However, I do not agree that those duties warrant Mr Rajagopal and Mr Ramesh Anand being joined to these proceedings in circumstances where it is clear that Mr Ali was employed by Abhisek Quality Foods Limited and by no other person.

### **Determination**

[29] I conclude that there are no grounds made out by Mr Ali for allowing the Authority to join either Mr Rajagopal or Mr Ramesh Anand as respondents in this matter, and I decline that application.

### **The application for summary judgment**

[30] Mr Thompson asked that, if the Authority declined to grant leave to have Messrs Rajagopal and Ramesh Anand joined as respondents, that the Authority make an immediate determination for a full award and full costs in Mr Ali's favour.

[31] The Authority must conduct its proceeding in accordance with the Act which requires, at s.157, that the Authority must, in carrying out its role, comply with the principles of natural justice.

[32] An investigation meeting has been set down to investigate this matter on 3 and 4 June 2015. It would be a serious breach of the rules of natural justice for the Authority to determine this matter without giving the respondent company the opportunity to be present at that investigation meeting and to defend itself.

[33] I therefore decline to make an immediate determination of the matters.

[34] Finally, having declined to join Messrs Rajagopal and Ramesh Anand as respondents in this matter, the Authority does not have the jurisdiction to order these individuals to *guarantee* that the respondent company pays any awards granted by the Authority.

### **Costs**

[35] I reserve costs. Mr McBride may serve and lodge a memorandum of counsel in respect of costs incurred in defending Mr Thompson's application for joinder within 14 days of the date of this determination. Mr Thompson may serve and lodge a memorandum in reply within a further 14 days.

David Appleton  
Member of the Employment Relations Authority