

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 78
5461767

BETWEEN	NIGEL RAYMOND ANDERSON Applicant
A N D	TRADEWORKERS (2012) LIMITED (Struck off) First Respondent
A N D	AUTOGLAS STIEGER AUCKLAND LIMITED Proposed Second Respondent
A N D	AUTOGLAS STIEGER LIMITED Proposed Third Respondent
A N D	STIEGER INVESTMENTS LIMITED Proposed Fourth Respondent

Member of Authority: Helen Doyle

Representatives: Rhonda Harris, Counsel for the Applicant
Franz Stieger, Advocate for the Proposed Respondents

Investigation Meeting: On the papers

Submissions Received: 20 May 2015 from the Applicant
21 May 2015 from liquidator appointed for the first respondent
21 May 2015 on behalf of the proposed second, third and fourth respondents
2 June 2015 further information about similar determination received on behalf of proposed respondents.

Date of Determination: 11 June 2015

DETERMINATION OF THE AUTHORITY

A The application for joinder of the three proposed respondents is declined. Costs are reserved on the application.

B The proceeding against the first respondent is at an end as it has been struck off the company register.

Employment relationship problem

[1] Pursuant to s.221 of the Employment Relations Act 2000 (the Act) the applicant seeks to join the three proposed respondent companies to these proceedings. That is opposed.

[2] By agreement the matter is to be determined on the papers.

Background to application

[3] On 21 May 2014 the applicant lodged a personal grievance with the Authority against the first respondent, which was placed in liquidation in November 2014. The liquidation was completed and the first respondent struck off the Companies Register in April 2015. The applicant said that his employment relationship problem was that he had been unjustifiably dismissed on 7 March 2014 without proper notice and in reliance on an invalid trial period and was disadvantaged. The applicant said that the trial period relied on by the first respondent is invalid.

[4] The applicant signed an individual employment agreement with the first respondent on 26 September 2013. At the conclusion of a 90 day trial period a variation to the individual employment agreement was entered into between the applicant and the first respondent and signed by the applicant on 23 December 2013. It contained reference to three months trial ending on 20 March 2014.

[5] On 7 March 2014 a letter was sent by the sole director of the first respondent, Franz Stieger, to the applicant. Amongst other matters it confirmed advice given to the applicant that day of his dismissal under the trial period. It noted that the applicant's last day of work with a one week notice period would be 14 March 2014 but he was not required to work notice out. At the head of the letter was *Tradeworkers 2012 Limited*.

[6] On 8 April 2014 Ms Harris wrote to the first respondent raising a personal grievance. Mr Stieger responded on behalf of the first respondent.

[7] On 7 July 2014 Mr Stieger lodged a statement in reply on behalf of the first respondent.

[8] On 18 July 2014 the Authority held a telephone conference with Ms Harris and Mr Stieger. The parties agreed to attend mediation but the Authority, in the event the matter did not settle, set it down for an investigation meeting on 29 October 2014 in Dunedin and timetabled for an exchange of statements of evidence.

[9] The Authority was advised on 16 September by Ms Harris that mediation did not proceed and the investigation meeting date would be required.

[10] On that same day Mr Stieger's wife Alvina Stieger advised the Authority and Ms Harris by email dated 16 September 2014 that the first respondent is no longer trading and has no money or assets. This advice followed an email from an Authority officer on 16 September 2014 reminding the parties about the timetable for lodging statements of evidence as the investigation meeting was proceeding.

[11] The Authority officer confirmed to both parties by further email on 16 September notwithstanding Ms Stieger's advice that the investigation meeting would still be proceeding.

[12] On 7 October 2014, Ms Harris advised that an amended statement of problem including the joinder of the proposed respondents would be lodged. The Authority indicated amongst other matters in that event the investigation meeting would have to be adjourned. By email dated 8 October 2014 Ms Harris acknowledged that. The investigation meeting was adjourned.

[13] On 30 October 2014, the applicant lodged an amended statement of problem seeking joinder of the proposed respondent companies. The first respondent did not reply to the amended statement of problem.

[14] On 11 November the Authority issued a minute to Ms Harris and Mr Stieger. The minute advised Ms Harris and Mr Stieger that a telephone conference was to be organised for 26 November 2014 at 9.30am to discuss the proposed joinder of the second, third and fourth respondents. The minute advised that Ms Harris and Mr Stieger should be prepared to make submissions about the proposed joinder during the telephone conference and that the matter will then be set down for an investigation meeting.

[15] On 26 November 2012 at the start of the telephone conference with the Authority Mr Stieger advised that the first respondent was in liquidation. He stated his belief that the proposed respondents did not have anything to do with the matter and that the applicant was an employee of the first respondent only. Ms Harris said that she wanted to make contact with the liquidator to obtain financial records showing who paid the wages of the applicant. Mr Stieger agreed to advise the liquidator he consented to Ms Harris being provided with this information.

[16] I set out in a notice of direction dated 26 November 2014 the basis Ms Harris proposed joining the three respondents. She referred to the first respondent as an agent and the arrangement of the companies as a sham and the corporate structure was used to perpetrate a fraud and avoid the good faith provisions of the Employment Relations Act 2000. I recorded in the notice that Ms Harris was to advise as soon as possible whether the liquidator consented to the claim progressing against the first respondent. I noted that the Authority would determine the issue of joinder giving both parties a further opportunity to provide any submissions, in regard to whether leave should be granted, by close of business 28 November 2014.

[17] Ms Harris sought an extension of that date as she had not received financial statements from the liquidator and there was then some discussion between the parties. Matters were not progressed and in the New Year an Authority officer requested an update from Ms Harris. On 3 March 2015 the Authority was advised that the applicant wished to pursue the matter and on 23 April 2015 the Authority held a further telephone conference and further submissions were received together with a letter from the appointed liquidator of the first respondent, Victoria Toon.

Joinder

[18] Section 221 of the Act provides:

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.*

[19] The Authority therefore may direct parties to be joined at any stage of the proceedings if it would more effectually dispose of any matter before it according to the substantial merits and equities of the case.

[20] I record that there has been a determination of the Authority declining joinder which involved the first respondent and the same three proposed respondents¹.

Submissions of the applicant

[21] Ms Harris refers to observations of Judge Colgan as the Chief Judge was then in *Square 1 Service Group Ltd v Butler*² in which he observed:

Not infrequently, a claimant will be uncertain as to which of more than one party to proceed against. The accepted and prudent course in such circumstances is to issue proceedings nominating the persons potentially and arguably liable. It would usually thereafter be one of the substantive issues at trial which of such defendants may be liable. In the case of two companies in these proceedings it is easily understandable why, after having nominated the company that initially admitted through its advocate that it was the appropriate defendant, Mr Butler sought to include the cleaning company when the corporation's solicitors so advised Mr Butler's.

[22] Ms Harris submits that this is an appropriate case for lifting the corporate veil on the first respondent, at least to the extent of joinder so that the substantive issue of the true identity of the employer can be argued and determined.

[23] She submits that the first respondent was either an agent of all or one of the proposed respondent companies and or it was incorporated as a sham to avoid its obligations under the Employment Relations Act 2000.

[24] Ms Harris relies on the following facts:

- a. On 16 September 2014 the first respondent had no money and assets.
- b. On 13 November 2014 the first respondent was placed into liquidation by shareholder resolution.

¹ [2015] NZERA Christchurch 5

² [1994] 1 ERNZ 667 page 671

- c. In February 2015 there was an attempt to remove the first respondent from the companies register.
- d. Mr Stieger is the sole director of all of the companies and is in effect in control of all of the companies.
- e. Stieger Investments Limited is the sole common shareholder, with the directors of that company being Mr Stieger, his wife and one other person.
- f. The applicant never received any communication via the first respondent. All communication regarding his contracts was from the proposed third respondent including his dismissal letter and the variation to this agreement.
- g. The applicant's business card read in bold "Sales Representative, Autoglas Stieger Limited".
- h. The Dunedin branch which was the applicant's primary place of business was operated by Autoglas Stieger Limited with signage and advertising confirming this.
- i. All sales were invoiced to Autoglas Stieger Limited.

Submissions of the liquidator

[25] Ms Toon submits that the applicant was employed by the first respondent and attached a copy of the IR348. Ms Toon submits that the other companies cannot be joined as the first respondent was struck off the register on 9 April 2015 after the completion of the liquidation on 18 February 2015.

Submissions of the proposed respondents

[26] Mr Stieger submits that the applicant read and signed his employment agreement with the first respondent before he commenced employment and that his business card stated that he was a contractor.

[27] He submits that the applicant never raised any queries during his employment about his employment with the first respondent until after his employment was

terminated and that he was paid his weekly wages, holiday entitlements and final pay by the first respondent. Further the pay slips were from the first respondent.

Would joinder of the second, third and fourth proposed respondents more effectually dispose of the matter according to the substantial merits and equities of the case?

[28] There is a complicating factor in this matter in that the first respondent, although initially placed in liquidation, has after completion of the liquidation been struck off the company register and therefore no longer exists. No proceedings can be maintained against it for that reason. It is possible for the Authority under s.221 of the Act to consider joinder of parties in substitution of the first respondent if that would more effectually dispose of the matter according to its substantial merits and equities. Arguably matters have progressed beyond that stage since the company has been struck off because there is no proceeding to join the proposed respondents to. That may well be a fundamental difficulty to the application for joinder.

[29] I did not receive submissions from Ms Harris on that point and if I am wrong in respect of the above I will go on to consider the submission made in respect of joinder.

[30] The substantial merits and equities of this case concern alleged personal grievances of unjustified dismissal and unjustified action causing disadvantage. A personal grievance is a claim against an employee's employer or former employer. There cannot be a personal grievance against a company who is not the employer.

[31] Mr Anderson did not raise his personal grievance against the second, third or fourth proposed respondents or initially issue proceedings against other than the first respondent. It was not until after this matter had been set down by the Authority that the application for joinder of the three proposed respondents was made. The applicant had been advised at that point the first respondent had no money or assets and had ceased trading. There was no suggestion in this proceeding at an early stage before the matter was set down for investigation that there was uncertainty about which company was his employer. There may be issues about the time limits for raising a personal grievance.

[32] Ms Harris submits that there is an issue about the true identity of the employer and grounds would be made out even at this interlocutory stage to support a lifting of

the corporate veil. I accept that there have been cases in the employment area in which the corporate veil has been lifted. I do note in this case as the first respondent has been struck off the register it would not be participating in the proceedings.

[33] A piercing of the corporate veil is a means by which the separate personality of the first respondent would be disregarded and this has been recognised to be appropriate where the structure has been used to perpetrate a fraud or where the arrangement is simply a sham or a façade. As was stated in *Butler* the approach of the Courts in interfering with the long established law of corporate separateness was cautious.

[34] The written employment agreement and a variation to that agreement name the first respondent as employer.

[35] Mr Stieger is the sole director of all the companies.

[36] Ms Harris submits that communications regarding Mr Anderson's contracts were from Autoglas Stieger Limited which is the company referred to on his business card. Further that the Dunedin branch where the applicant primarily worked was operated by the third proposed respondent. Further, Ms Harris submits that sales were invoiced to that company. I note that the heading of the dismissal letter was that of the first respondent.

[37] The employment agreement provides that the applicant as an employee of the first respondent was to have his services contracted out to other companies and in particular in the variation the proposed third respondent in Dunedin. He signed a memorandum of understanding to this effect on 26 September 2013 with the first respondent. This was to be done with prior discussion and agreement between the applicant and the first respondent. That could in all likelihood explain his business card. There was no attempt to conceal that the applicant would or could be contracted to work for one of the proposed respondents. It did not lead Mr Anderson to conclude when he raised his personal grievance that the true identity of his employer was other than the first respondent.

[38] There is an argument by Ms Harris that the first respondent or Mr Stieger in employing the applicant was acting as an agent for the other three proposed respondents but that is not clear. It seems likely that the first respondent employed staff whose services were or could be contracted by agreement to other companies.

By itself that company structure would not deprive the first respondent of corporate separateness.

[39] There is an argument that the first respondent sought to evade the obligations under the Act to the applicant. The first respondent took steps to defend the proceedings against it. A shareholders resolution to place a company into liquidation or removal from the register is not a clear indication to deprive the first respondent of any advantage of separate personality on the ground that it is not the true employer.

[40] Ms Harris at this interlocutory stage suggests that there was something fraudulent or some impropriety about the relationships between the first respondent and the second, third and fourth proposed respondents as it affected the applicant.

[41] There is nothing, even at this interlocutory stage, to support the operation of the first respondent as a sham or facade or that it was fraudulent.

[42] Ms Harris submits that if joined the applicant would seek disclosure of financial statements and IRD records of wages from the companies to unravel the true identity of the applicant's employer and the interwoven nature of their businesses. Even if this was to occur payment of wages by itself is not determinative of the identity of an employer.

[43] I do not agree with the submission of Ms Harris that there is sufficient material to show that in order to more effectually dispose of the proceedings according to the substantial merits and equities the Authority needs to join the three proposed respondents for resolution of the true identity of the employer.

[44] I agree that the situation is most unfortunate for the applicant because the proceeding against the first respondent cannot continue and are therefore at an end. There is however nothing further the Authority can do to assist him.

Determination

[45] The application for joinder is declined.

Costs

[46] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority