IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 99/09
5131232

	BETWEEN	RICHARD GRANT BIRKINSHAW Applicant
	AND	TIM TEPAKI, TEPAKI GROUP COOK ISLANDS, TEPAKI ONE HOLDINGS, TEPAKI FOUR HOLDINGS, TEPAKI FIVE HOLDINGS, TE PAKI SIX HOLDINGS, TEPAKI SEVEN HOLDINGS, THORNDON TERRACES LIMITED and CHILDCARE HOLDINGS LIMITED Respondents

Member of Authority:	G J Wood
Representatives:	Grant Birkinshaw on his own behalf No attendance by or for respondents
Investigation Meeting:	16 June 2009
Determination:	24 July 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter has had an extremely troubled history. Mr Birkinshaw was given leave pursuant to clause 4A of the Second Schedule of the Act to pursue this claim overseas on the grounds that one of the respondents, who is said to be the principal of the other respondents, was now domiciled permanently in the Cook Islands.

[2] Subsequently Mr Birkinshaw's direct employer, of which he had also been a shareholder, Tepaki Group Limited, was placed into liquidation. For understandable reasons Mr Birkinshaw did not seek leave of the High Court or the liquidator to continue to pursue the claim against Tepaki Group Limited, which has been withdrawn. The matter has remained on foot, however, against the other respondents. There has been only limited contact with one respondent, also the principal of the others, Mr Tim Tepaki.

[3] Mr Tepaki and all of the other respondents have failed to provide a proper statement in reply and have only provided a minimum of information in advance of the investigation meeting, despite Mr Tepaki's attendance on several conference calls, where the result was often further delay, as set out in directions and other correspondence.

[4] Neither Mr Tepaki nor any of the other respondents attended or were represented at the investigation meeting. No contact could be made with him at the time of the investigation meeting, although he subsequently emailed the support staff to indicate that his passport had expired because his secretary had not renewed it, and therefore he was unable to attend the investigation meeting. While I had already concluded the investigation meeting by the time this information was received, I note that Mr Tepaki gave no prior warning to Mr Birkinshaw or the Authority that he could not attend because of this alleged passport difficulty.

[5] A subsequent more detailed explanation gives me no cause to doubt my conclusion that no good cause had been shown for any of the respondent parties to fail to attend or be represented. I had already determined to act as fully in the matter before me as if those parties had duly attended or be represented.

[6] Put simply, Mr Tepaki's conduct was not such as could be seen as facilitating the Authority's investigation.

Findings

[7] Mr Birkinshaw was employed by Tepaki Group Limited in February 2007 as its Director of International Development, at a salary of $1,000 per week. He was also made a 10% shareholder in the company. Mr Birkinshaw understood that Tepaki Group Limited was the holding company for a number of business projects, mainly in the construction and development industry, but also in other businesses such as child

care. As a qualified planning consultant and Director of International Development, Mr Birkinshaw carried out a number of task such as preparing business plans and other project management and construction development activities until May 2008. Unfortunately Mr Birkinshaw was not paid from mid October 2007. Mr Tepaki's force of personality was such that he somehow cajoled and inveigled Mr Birkinshaw into working without getting his wages due, until early May 2008. No doubt the lure of eventual profits through his 10% shareholding was one factor that persuaded Mr Birkinshaw to carry on working for Tepaki Group Limited against his better judgment.

[8] Of the respondents only Thorndon Terraces Limited and Child Care Holdings Limited remain registered in New Zealand. No detailed information was given to me by Mr Birkinshaw about the other respondents. Even if they are registered companies, they are not registered in New Zealand. I believe them to be Cook Island based entities, and on the basis of the information provided by Mr Birkinshaw relate to property and/or tourism developments in Rarotonga and Aitutaki. It is unknown whether Mr Tepaki owns all the shares in those other entities, but I accept that he is in effective control of all of them.

[9] There is no jurisdiction to make any findings against these other respondents accordingly because, as cited, they are not legal entities and thus not subject to the Authority's jurisdiction.

[10] I accept Mr Birkinshaw's evidence that he was told that Tepaki Group Limited was the umbrella of all of the Tepaki companies and that Mr Tim Tepaki, its Managing Director, led all of the Tepaki Group operations through his strength of personality. I also accept that all of the Tepaki Group entities operated as one in that funds were regularly transferred from New Zealand to the Cook Islands and from the Cook Islands to New Zealand, and that funds flowed from company to company.

[11] Mr Birkinshaw, in response to a question from me, stated that he would not call the arrangement a sham, but that there were a number of inter-related operating vehicles set up and used for convenience. Thus if one went broke others were protected. When asked if the arrangements were a façade to conceal the true nature of his employment, Mr Birkinshaw replied that he could not actually say that there was any façade to disguise the nature of his employment.

[12] I accept that Mr Birkinshaw was not paid by Tepaki Group Limited when he had a contract that required him to be paid $1,000 per week. He is therefore owed $46,250 accordingly.

[13] I do not accept his claim of $16,000 for four months severance, as there was no entitlement to redundancy compensation or severance under his employment agreement.

The Law

[14] Mr Birkinshaw was to be paid for the monies he is owed by Tepaki Group Limited. In general no personal liability under a contract may be imposed on a company officer or agent of a company, unless it can be established that there was a contract which unequivocally involved that person accepting the personal liability, apart from any liability which might exist on the corporation with which he or she was associated (*Mahon v. Crockett* (1999) 8 NZCLC 262, 043 (CA)). What Mr Birkinshaw is trying to do is in effect to lift the corporate veil so as to allow the Authority to do justice to the parties by finding that Mr Tepaki or one of the other remaining respondents was the true effective employer of Mr Birkinshaw.

[15] In *Red Eagle Corporation Ltd v. Walker* (unreported) Colgan J, AEC 86A/95, 11 September 1995 it was held at pg.7:

> *Cases in which the ordinary courts have lifted the corporate veil include especially those where there have been holding and subsidiary companies. In the introduction to Capture 6 of* Gower's Modern Company Law (4th Edition) (1979) it is said:
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> However, it must be said at once that they reveal no consistent principle beyond a refusal by the legislature and the judiciary to apply the logic of the principle laid down in Salomon's case where it is too flagrantly opposed to justice, convenience or the interests of the Revenue. In the cases where the veil is lifted, the law either goes behind the corporate personality to the individual members, or ignores the separate personality of each company in favour of the economic entity constituted by a group of associated companies. The latter situation is often merely an example of the former, the individual members being corporate rather than human beings, but even when that is so the two situations are worth distinguishing since there seems to be a greater readiness to lift the veil in the latter.
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> *As this Court's predecessor noted in the Gearbulk Shipping case:*
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> Although it might generally be said that there has been a degree of reluctance on the part of Courts to lift the veil, they have shown less reluctance to do so when the inference that they are asked to draw is

> that a subsidiary company has acted as agent for its holding company. An example is Firestone Tyre and Rubber Co. v. Llewellin [1957] 1 WLR 464, in which it was held that although an English subsidiary was a separate legal entity which was selling its own goods, nevertheless the sales were means whereby an American parent company carried on its European business so that it was trading in the United Kingdom through the agency of the subsidiary. In each case it is a question of fact whether the subsidiary is carrying on the business of the parent company or its own.
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> In Smith, Stone & Knight Ltd v. Birmingham Corporation [1939] 4 All ER 116 Atkinson, J attempted to extract principles or guidelines. Acknowledging that it was indeed a question of fact in each case he propounded six tests:
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> (1) Were the profits treated as those of the parent company?
>
> (2) Were the persons conducting the business appointed by the parent company?
>
> (3) Was the parent company the head and brain of the trading venture?
>
> (4) Did the parent company govern the adventure and decide what should be done and what capital should be embarked on it?
>
> (5) Were the profits made by its skill and direction?
>
> (6) Was the parent company in effectual and constant control?

[16] In *NZ Seafarers' Union Inc v. Silver Fern Shipping Ltd (No 2)* 3 ERNZ 786 at 808 the principles drawn from New Zealand case law were described 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 constituents of it to create or perpetuate a pretence:* Square 1 Service Group Ltd v. Butler [1994] 1 ERNZ 667 (AEC34/94).
>
> *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* Re Securitibank Ltd (N0. 2) [1978] 2 NZLR 136.
>
> *3.* *In the specialist employment jurisdiction considerations of equity and good conscience in the determination of cases … 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

(above); Red Eagle Corporation v. Walker, *unreported, 11 September 1995, AEC86A/95.*

[17] The Judge also noted that the case for lifting the corporate veil can be made either because of a façade or because two or more nominally independent legal entities are a single economic unit. It was also noted, at 810, that

> *…general unfairness or inequity suffered by a third party will not be sufficient to warrant the Court ignoring the separate legal personality of a company.*

[18] Were it not for the fact that Tepaki Group Limited is in liquidation it may also have been possible for the Authority to consider ordering one or more of the respondents, such as Mr Tepaki, to take action to ensure that Tepaki Group Limited met its obligations to Mr Birkinshaw, provided the Authority was satisfied that those parties were in a position to influence Tepaki Group Limited to comply with orders made against them. That is not, however, available where the employer is in liquidation (*McLellan v. Internet Productions Ltd* (in liquidation) [2003] 1 ERNZ 282).

Determination

[19] For the reasons given above it is not possible for the Authority to order Mr Tepaki (who has clearly treated Mr Birkinshaw very badly), as someone who was not Mr Birkinshaw's employer, to ensure that payment owed by Tepaki Group Limited is made to Mr Birkinshaw, because Tepaki Group Limited is in liquidation.

[20] Unfortunately, the evidence is not sufficient to establish that Mr Tepaki, or any other entities cited as respondents, are the alter ego of the principal company, Tepaki Group Limited. This case is unlike the common situation where the parent company is found to be the effective employer, even though a subsidiary had been the apparent employer of the worker. Tepaki Group Limited, which has been put into liquidation after Inland Revenue action, was itself, as Mr Birkinshaw gave evidence, the holding company.

[21] Mr Tepaki has clearly created a wide ranging group of companies, which were set up for convenience, as Mr Birkinshaw stated, so that if one went broke the others were protected. That is an accepted corporate strategy and consistent with the basis of limited liability company systems in New Zealand. However morally repugnant the

implications may be in circumstances such as this, it can not be said to be a pretence or artificial in all the circumstances.

[22] Mr Birkinshaw even had a small but significant shareholding in the company which went into liquidation, albeit that he had resigned as a director well before then. He held no such shareholding in the other companies, as far as he is aware. Different shareholdings between the entities cited as respondents is another reason not to lift the corporate veil. Overall, there is insufficient evidence to conclude that the two remaining respondent companies in the group should be held responsible in law for the debts of the holding company. The same applies to Mr Tepaki personally.

[23] Unfortunately, therefore, I am obliged to conclude, as in *McLennan*, that Mr Birkinshaw is in the position of many unsecured creditors of failed companies, some of whom are owed money as ex employees, but others of whose debts are no less meritorious. That position is that he has no remedies available to him in the Authority and I dismiss his application accordingly.

Costs

[24] Costs are reserved.

G J Wood
Member of the Employment Relations Authority