

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Jienju Chew (Applicant)
AND Trinity Systems Ltd (Respondent)
REPRESENTATIVES Wiman Chew and Rose Chew, counsel for the applicant
Susan Rowe, counsel for the respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 13 December 2006
DATE OF DETERMINATION 22 January 2007

DETERMINATION OF THE AUTHORITY

The application

[1] The respondent, Trinity Systems Limited ("Trinity") applies for a determination that 12 paragraphs of the applicant's statement of problem be struck out. The application was made on the grounds that the paragraphs concern the applicant's former employer, Aslan Consulting Group Limited ("Aslan") and a director of Aslan, Hamish Howard, both of whom are not parties to the proceedings or they involve a request for the setting of terms and conditions of employment which fall outside the jurisdiction of the Authority.

[2] The applicant, Jienju Chew, opposes the application to strike-out the paragraphs in the statement of problem.

[3] Both applicant and respondent seek costs.

The history to the application

[4] Ms Rowe, on behalf of Trinity, wrote to the applicant's representative, Mr Wiman Chew, on 7 August 2006 enclosing Trinity's statement in reply and advising that the majority of the claim fell outside the jurisdiction of the Authority. There was a further discussion about these matters during a telephone conference with the Authority and Ms Rowe and Mr Wiman Chew on 16 October 2006. The applicant was not of the view that there was any jurisdictional or other issues requiring amendment of the statement of problem.

[5] Trinity, in accordance with the timetable set by the Authority, lodged an application to strike-out the 12 paragraphs in Mr Chew's statement of problem and a notice of opposition to the application was received on behalf of the applicant. The application was the subject of an investigation meeting on 13 December 2006. The investigation meeting proceeded by way of submissions.

[6] An affidavit was lodged in support of the application to strike-out from the General Manager of Trinity, Hamish Howard, who was authorised to make the affidavit on Trinity's behalf. An affidavit by Mr Chew was lodged in opposition of the application to strike-out.

Ms Rowe objected to the admissibility of Mr Chew's affidavit, primarily, but not solely, on the basis that it was not restricted to statements of fact.

[7] There are matters in Mr Chew's affidavit in the nature of opinion and views on the law. There was a similar criticism made of Mr Howard's affidavit by Mr Wiman Chew. I have not had significant regard to the affidavit evidence in this case aside from obtaining background information for the purposes of the timeline against which events can be considered, and some information to consider the applicant's submission that this is an appropriate case for piercing the corporate veil. In those circumstances, I do not propose to make a formal finding on the admissibility of the affidavit evidence.

Jurisdiction of the Authority

[8] The applicant says in his notice of opposition to the application to strike-out that there is no specific provision in the Employment Relations Act 2000 or its regulations for the respondent to bring an application to strike-out and even if there was, the application has not specifically shown that it is an abuse of process.

[9] Section 221 of the Employment Relations Act 2000 confers on the Authority the powers set out below:

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.*

[10] I am satisfied that the Authority has the jurisdiction to consider the type of application Trinity is making by virtue of its powers under s.221 of the Employment Relations Act 2000. I accept Ms Rowe's submission that there is more than one basis on which a strike-out application can succeed. Trinity's application is on the ground that the allegations in the 12 paragraphs are untenable and cannot succeed.

[11] I also accept Mr Wiman Chew's submissions that the Authority should not be concerned by undue technicalities but concentrate on resolving employment relationship problems. To be able to resolve this employment relationship problem I need to ensure that the allegations are made against the right parties. The Authority is unable to make a determination against a third party to the proceedings.

[12] I also need to be satisfied that the Authority has jurisdiction to deal with the employment relationship problem as set out. Addressing these matters now will enable the Authority to more effectively resolve the employment relationship problem that Mr Chew has lodged and prevent further expense and possibly multiple proceedings at a later time.

The background to the employment relationship

[13] Mr Chew is currently in an employment relationship with Trinity.

[14] He was employed as an IT Systems Engineer by Aslan from 25 June 2001 until 30 October 2005. He was party to an individual employment agreement with Aslan dated

21 February 2005. The assets and business of Aslan were sold to Trinity effective 31 October 2005 when Aslan ceased trading and all service contracts were then performed by Trinity. The purchase price was a 50% shareholding in Trinity issued to the shareholders of Aslan as nominees of the company.

[15] Mr Chew was offered employment with Trinity as a technician. He was given an individual employment agreement by Trinity on or about 25 October 2005. Bargaining took place about Mr Chew's terms and conditions of employment with Trinity after that date.

[16] The problems Mr Chew wishes the Authority to resolve concern Aslan's conduct at the time its assets and business were sold to Trinity and the bargaining that took place during and after the sale to Trinity. There is also an allegation of discrimination in terms of the salary paid to Mr Chew whilst he was employed by Aslan and then by Trinity.

***The paragraphs which are the subject of the application to strike-out
Paragraphs 1.2 to 1.5 inclusive***

[17] Paragraphs 1.2 to 1.5 of the statement of problem contain allegations that concern the period when Mr Chew was employed by Aslan. Paragraph 1.2 alleges that there was a breach by Trinity of s.4(1A)(c) of the Employment Relations Act 2000 at the time of the restructuring and sale to Trinity.

[18] Paragraphs 1.3 to 1.5 contain allegations of breaches of Mr Chew's individual employment agreement with Aslan and a breach of s.69M of the Employment Relations Act 2000.

[19] Trinity is not a party to the individual employment agreement which is the subject of these paragraphs. There is nothing to support that any liability under the individual employment agreement between Aslan and Mr Chew was transferred after the sale to Trinity. The duty of good faith in s.4(1A)(c) of the Act is a duty upon an employer proposing to make a decision that will, or is likely to, have an adverse effect on employees. The employer at the time of restructuring was not Trinity but Aslan.

[20] On the face of the material before the Authority, Aslan and Trinity are two separate legal entities. Aslan was originally incorporated on or about 10 May 2001 in the name Aslan Limited. There was a company name change in January 2002 to Aslan Consulting Group Limited. Trinity was incorporated on 28 May 2003 with a sole director, Tony Edwards. There is nothing to support any connection between Aslan and Trinity at the time the companies were incorporated. Both companies had different directors when they were incorporated.

[21] Mr Wiman Chew and Mrs Rose Chew, on behalf of Mr Chew, submit that the Authority should look behind the transaction of the sale of Aslan to Trinity by way of piercing the corporate veil and/or that as all of Aslan's assets have been transferred to Trinity it should bear responsibility for Aslan's actions and inactions.

[22] I heard extensive submissions about the legal principles with respect to lifting the corporate veil. Case law supports a cautious approach in interfering with the principles of corporate separateness – Court of Appeal in *Savill v. Chase Holdings (Wellington) Ltd* [1998] 4 NZCLC 64, 574 and Employment Court in *Square 1 Service Group v. Butler* [1994] 1 ERNZ 667. Where a company is incorporated to avoid legal responsibilities or obligations to employees and the subsequent transaction is a sham or fraud, then that may well be a basis for lifting the corporate veil. Trinity, though, was incorporated in 2003 well before the sale took place in 2005. There is nothing to suggest any link to Aslan at that time or that Trinity was created as a sham or façade to avoid legal responsibilities to employees or creditors.

[23] The submissions put forward on behalf of Mr Chew do not, in my view, support that this is an appropriate instance to lift the corporate veil. I do not conclude that Trinity is liable for

the actions/inactions of Aslan when it employed Mr Chew simply by virtue of its purchase of the assets of Aslan.

[24] There is one final argument put forward by the applicant as to whether relief could indeed be granted against Aslan. Mr Wiman Chew submits that the company should not be joined when no relief could be granted against it. Aslan remains an incorporated company and has the proceeds of the sale to Trinity, being a 50% shareholding in Trinity issued to the shareholders of Aslan and nominees of Aslan.

[25] I conclude in terms of paras.1.2-1.5 of the statement of problem that for the reasons above the allegations in these paragraphs cannot succeed against Trinity. The employment relationship problems in these paragraphs can only be considered in terms of the actions of Aslan if it is joined as a party to the proceedings.

[26] I shall give an opportunity for the applicant to lodge an amended statement of problem if he wishes Aslan to be joined as a party. I make directions in relation to this in para.65 (b) below.

Paragraphs 1.6, 1.8, 1.11 and 1.12

[27] The main basis for removal of these four paragraphs is that, in the respondent's view, they deal with the setting of terms and conditions of employment for Mr Chew which Trinity says falls outside the jurisdiction of the Authority.

[28] Ms Rowe initially submitted at the investigation meeting that the objections in relation to para 1.6 were to be the subject of argument at the substantive hearing and would not therefore form part of the argument in support of the application to strike-out. Ms Rowe then indicated after Mr Wiman Chew's submissions that I should proceed to determine this paragraph along with the others which are the subject of the strike-out application.

[29] Paragraph 1.6 alleges that Trinity has bargained unfairly in breach of s.68(1)(b)(i) and (ii) and s.68(2)(b) and (d) of the Employment Relations Act 2000.

[30] Paragraph 1.6 requires a determination about whether the bargaining for the individual employment agreement between Trinity and Mr Chew was unfair. The Authority has jurisdiction to consider matters alleged to arise under s.68 of the Employment Relations Act 2000 because a party to an individual employment agreement has bargained unfairly – s.161(1)(d) Employment Relations Act 2000.

[31] Paragraph 1.6 can remain in the statement of problem for investigation. This will include consideration as to whether Mr Howard was acting, as alleged, on Mr Chew's behalf at the negotiations, which Trinity denies.

[32] Paragraph 1.8 alleges that Mr Chew was disadvantaged when he was told to take a pay cut upon the restructuring of Aslan. Trinity claims that this paragraph is simply about the setting of terms and conditions between Trinity and Mr Chew, particularly salary, which falls outside the jurisdiction of the Authority. The allegation set out in para.1.8 is based on the bargaining for an individual employment agreement between Trinity and Mr Chew as set out in para.1.6. I am not satisfied that the allegation in the paragraph is so clearly untenable that it cannot possibly succeed. Paragraph 1.8 can remain in the statement of problem for investigation.

[33] Paragraph 1.11 of the statement of problem is a request for a determination whether Mr Chew's salary should be the same as his colleagues, namely \$40,000 as at 1 November 2005 had it not been for the respondent's breach of the provisions of the Act, the terms of the IEA and the alleged discrimination.

[34] I accept Ms Rowe's submission that the next para.1.12 is predicated on the Authority's determination of Mr Chew's proper salary and whether there should be further compensation

for loss of a benefit in terms of a biennial salary review as provided in Schedule 1 of the individual employment agreement.

[35] Section 161 of the Employment Relations Act 2000 provides that the Authority has exclusive jurisdiction to make determinations about employment relationship problems generally. Section 161(2) provides that except as provided in subsections (ca), (cb), (d), (da), and (f), the Authority does not have jurisdiction to make a determination about any matter related to:

- (a) bargaining; or
- (b) the fixing of new terms and conditions of employment.

[36] Section 101(d) provides that amongst other matters the object of Part 9 of the Employment Relations Act 2000 is to ensure that the role of the Authority or Court in resolving employment relationship problems is to determine the rights and obligations of the parties rather than fixing terms and conditions of employment.

[37] Section 161(2) was considered by the Employment Court in *Asure New Zealand v. NZPSA* [2005] 1 ERNZ 747. The Court stated, amongst other matters, in para.[22] of that judgment:

The plaintiff's interpretation of s161(2) has, in my view, been strengthened by the 2004 amendment to that section. By expressly referring to the exceptions in subs 1(ca), (cb) and (da) relating to facilitated bargaining and fixing of the terms of a collective agreement, Parliament has shown more clearly its previous intention that s161(2) was meant to preclude the Authority or the Court from setting or fixing terms and conditions of employment in the place of parties to employment relationship doing so themselves.

[38] In *Asure* the Employment Court concluded that the employment relationship problem did not infringe on s.161(2) because the Court was being asked about the interpretation, operation or application of current terms and conditions and not to determine or fix new terms and conditions, even if they were related in a broader sense.

[39] In this case, the Authority is not being asked to interpret a clause in the agreement but to make a determination whether Mr Chew's salary should be \$40,000.

[40] Mr Wiman Chew relies in his submission on two exceptions as to s.161(2). The first is s.161(1)(d) which is concerned with matters alleged to arise under s.68 because a party to an individual employment agreement has bargained unfairly and s.161(1)(f) about whether good faith obligations have been complied with. He refers to s.69 of the Act which contains remedies for unfair bargaining. That section provides:

69 Remedies for unfair bargaining

- (1) *If a party to an individual employment agreement is found to have bargained unfairly under section 68, the Authority may do 1 or more of the following things:*
 - (a) *make an order that the party pay to the other party such sum, by way of compensation, as the Authority thinks fit;*
 - (b) *make an order cancelling or varying the agreement;*
 - (c) *make such other order as it thinks fit in the circumstances.*
- (2) *The Authority must not make an order under subsection (1)(b) unless the requirements of section 164 have been met, and that section applies accordingly with all necessary modifications.*

[41] Section 164 provides that the Authority may only make an order cancelling or varying an individual employment agreement if it has identified the problem in relation to the agreement and has directed the parties to attempt in good faith to resolve that problem. The parties must

have attempted to resolve the problem by using mediation and despite the use of mediation the problem has not been resolved. The Authority must be satisfied that any remedy other than such an order would be inappropriate or inadequate.

[42] I accept that the Authority has jurisdiction to consider matters alleged to arise under s.68 because a party has bargained unfairly and, about whether the good faith obligations have been complied with in a particular case.

[43] The Authority is being asked in paras.1.11 and 1.12 to go further than simply considering matters relating to the bargaining. The Authority is being asked to determine whether Mr Chew's salary should be \$40,000 which Mr Chew says is the same salary his colleagues are receiving. The Authority is then being asked, upon determining Mr Chew's proper salary, to consider lost benefits at that salary level. The Authority does not have jurisdiction to determine an employment relationship problem that Mr Chew should receive a salary at a level different from that which he is currently receiving.

[44] The Authority does have jurisdiction to consider remedies if it finds that there has been unfair bargaining under s.68 although the requirements in s.164 must be met.

[45] I am of the view that para.1.11 could be reframed in terms of remedies the Authority may grant under s.69 of the Employment Relations Act 2000 if a party under an individual employment agreement is found to have bargained unfairly. The paragraph should be placed in the statement of problem under the ways that Mr Chew would like the problem resolved in the event that Trinity is found to have bargained unfairly under s.68.

[46] Paragraph 1.12 could be reframed in a similar way to make it clear that it is a remedy that is being asked for. The Authority may, in terms of a personal grievance, provide a remedy for loss of a benefit (s.123(c)(ii)). The concept of compensation under s.69(1)(a) is also undefined.

[47] I conclude therefore that paragraphs 1.6 and 1.8 may remain for investigation. The Authority does not have jurisdiction to determine as an employment relationship problem a new salary for Mr Chew. Paragraphs 1.11 and 1.12 are capable of being reframed in the manner set out above.

Paragraphs 1.9, 1.10 and 1.16

[48] The primary objection to these paragraphs is that they contain allegations against Mr Howard and/or Aslan who are not parties to this proceeding.

[49] In paragraph 1.9 the Authority is asked to determine whether Mr Howard was acting in a conflict of interest when he, as a director of Aslan, negotiated on behalf of Aslan's employees with Trinity when it was intended that he become a director of Trinity.

[50] This paragraph is unclear. Ms Rowe submits that the allegation is against Mr Howard personally. There is difficulty if it is intended to be an allegation against Mr Howard. Mr Howard is not a party to this proceeding and was not Mr Chew's employer at that time. It would be unusual for a director to be personally liable in these circumstances rather than the employer who was at that time Aslan.

[51] There should be some consideration given as to whether this allegation should be against Aslan. If the allegation is about Mr Howard's actions as a director of Aslan it is not an allegation that could succeed against Trinity.

[52] If in fact this is meant to be an allegation about the actions of Mr Howard as an intended director or general manager of Trinity it will require clarification and reframing. I will give an opportunity for that to take place. As it stands at present the allegations in this paragraph cannot succeed against Trinity and will require amendment if it is intended to be a problem for investigation against Trinity.

[53] Paragraph 1.10 alleges a personal grievance of racial discrimination. The way the paragraph is worded is slightly confusing and could suggest that the allegation of racial discrimination is made against Mr Howard. That is capable of clarification.

[54] There are two periods of time covered by the allegation. The first concerns the period when Mr Chew was employed by Aslan. It alleges discrimination in terms of his employment by that company *by paying me ... \$5,000 less than the receptionist ... in 2004*. That allegation for the period in 2004 cannot succeed against Trinity as Trinity did not employ Mr Chew at that time.

[55] The second part of the allegation concerns the period when Mr Chew was employed by Trinity. It alleges that Mr Chew was paid less than his colleagues having substantially similar qualifications, experience and skills and being employed in the same or substantially similar circumstances in November 2005 and the respondent, through Mr Hamish Howard, is guilty of discrimination thereby breaching s.104 of the Act.

[56] Mr Chew was employed by Trinity as at November 2005. The allegation against Trinity is that Mr Chew was discriminated against in his employment by reason of one or more of the prohibited grounds of discrimination in s.105 of the Employment Relations Act 2000. I do not remove that part of the allegation and it will form part of the investigation.

[57] One of the issues that has been raised by Trinity is whether the personal grievance of discrimination was raised within 90 days. That can be the subject of evidence and submission at the substantive investigation meeting.

[58] Paragraph 1.16 asks whether Mr Howard, as director of Aslan, should be personally penalised under s.134(2) of the Act for instigating, aiding and abetting the breach of the employment agreement and/or provisions of the Act and his practice of racial discrimination.

[59] Mr Howard is not a party to the proceeding and no penalty can therefore be awarded against him unless he is a party.

[60] I conclude that paragraph 1.9 as it stands at present cannot succeed against Trinity. I have given an opportunity though for clarification and reframing if it is in fact intended to be a problem against Trinity.

[61] The allegation in paragraph 1.10 of discrimination in 2004 cannot succeed against Trinity as Mr Chew was not employed by Trinity at that time but by Aslan. That part of the allegation will not be investigated by the Authority in terms of the actions of Trinity. The allegation of discrimination when Mr Chew was employed by Trinity remains for investigation.

[62] Mr Howard is not a party to the proceeding in terms of paragraph 1.16 and no penalty can therefore be awarded against him. Mr Howard can be joined as a party if the applicant wishes by way of the amended statement of problem which I shall direct be lodged below.

[63] Paragraph 1.13 was also the subject of the strikeout application on the basis that payment has been made. I simply ask the applicant to consider if payment has been made and whether there is still an employment relationship problem for the Authority to resolve in terms of that paragraph.

Conclusions

[64] For the reasons I have given in this determination

- (i) Paragraphs 1.2 to 1.5 cannot succeed against Trinity and will not form part of an Authority investigation in terms of the actions of Trinity.
- (ii) Paragraphs 1.6 and 1.8 and 1.13 remain for investigation in terms of the actions of Trinity.

(iii) Paragraph 1.9 cannot as it stands at present succeed against Trinity. If it was intended to be a claim against Trinity it will have to be reframed.

(iv) Paragraphs 1.11 and 1.12 will have to be reframed.

(v) Paragraph 1.10 contains an allegation of discrimination for a period when Trinity was not Mr Chew's employer. That allegation cannot succeed against Trinity and will not form part of the Authority's investigation of the claim into the actions of Trinity. The allegation of discrimination from the time Mr Chew was employed by Trinity remains for investigation into the actions of that company.

(vi) The request for a penalty against Mr Howard in paragraph 1.16 can only be considered if he is a party to the proceeding.

[65] I make the following directions in terms of these conclusions:

(a) Paragraphs 1.2, 1.3, 1.4, 1.5, 1.16 and the first allegation in paragraph 1.10 will not form part of the employment relationship problem to be investigated by the Authority with respect to the actions of Trinity.

(b) I direct that an amended statement of problem be lodged and served by Friday 16 March 2007. I have taken into account in fixing that date that Mr Chew's representatives would probably be unavailable for all of February 2007 although there is nothing to prevent an earlier lodging if that it possible.

(c) I direct that an amended statement in reply be lodged and served by the respondent within 14 days of service of the amended statement of problem.

(d) A support officer from the Authority will then arrange a telephone conference as soon as possible with a view to setting the matter down for investigation. If there are to be additional parties joined to the proceeding then some allowance in terms of time will have to be made.

(e) I reserve leave for either party to return to the Authority if necessary in terms of these directions.

Costs

[66] I reserve the issue of costs. As I indicated to the parties I will deal with costs following the substantive investigation meeting. I am prepared to timetable for memoranda to be lodged and served at this point, to sit on the Authority's file until that time, if that is how the parties wish the matter dealt with. That could be dealt with during the telephone conference to be scheduled under paragraph 65(d) above.

Helen Doyle
Member of Employment Relations Authority