

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 197/09  
5159084

BETWEEN                      ALLAN DEWSNAP  
   Applicant  
  
AND                                KAPITI TECHNOLOGIES  
   LIMITED  
   Respondent

Member of Authority:      P R Stapp  
  
Representatives:            Graeme Ogilvie for Applicant  
   Graeme Gowland for Respondent  
  
Investigation Meeting:     27 November 2009 at Wellington  
  
Submissions received:     27 November 2009  
  
Determination:              14 December 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The employment relationship problem is about the role of Kapiti Technologies Limited in the employment relationship problem instead of Mr Dewsnap's employer, Zeal Distributors Limited (in liquidation).

**Issues**

[2]     The issue is whether or not Kapiti Technologies Limited should be treated as one and the same as Zeal Distributors Limited (in liquidation).

**The facts**

[3] An investigation meeting was held in the Employment Relations Authority on 3 July 2009 at Wellington that involved Mr Dewsnap and Zeal Distributors Limited (Zeal). The investigation meeting was adjourned for written submissions to be lodged and served. Also arrangements were left to be made to obtain a transcript of a tape kept by Mr Dewsnap of a meeting between the parties. Leave was given for any submissions to be made on the transcript of the tape. Issues were raised by the respondent over the transcript, and arrangements were put in place to reconvene the investigation meeting to enquire into the tape recording issue.

[4] In the meantime Zeal Distributors Limited went into voluntary liquidation on 15 September 2009. The Liquidator has not consented to allow the continuation of any legal proceedings against Zeal. The Authority is not able to proceed with Mr Dewsnap's employment relationship problem against Zeal. That is now accepted by Mr Dewsnap.

[5] Instead Mr Dewsnap is relying on an amended statement of problem dated 24 September 2009 and lodged in the Authority that included on notice Kapiti Technologies Limited. He wants that company treated as one and the same as Zeal to conclude his employment relationship problem.

[6] The directors of Kapiti Technologies Limited denied it has any involvement in the employment relationship problem. A statement in reply from Kapiti was lodged on 7 October 2009.

**Determination**

[7] I have no hesitation not to join Kapiti Technologies Limited to the employment relationship problem. In the first instance it was not Mr Dewsnap's employer at the time he raised his employment relationship problem. He has always asserted his employer was Zeal Distributors Limited.

[8] Next I have considered the submissions made by Mr Ogilvie, which are in essence that Kapiti Technologies Limited should be treated as if it was Mr Dewsnap's employer because:

- Kapiti Technologies Limited is the same business as Zeal Distributors Limited. It involves the same directors. There was a sale and purchase agreement dated 30 April between Zeal Distributors Limited and Kapiti Technologies Limited.
- The Authority has been deliberately misled on the position of the company.
- The actions of the directors.
- Delays by the directors in the Authority's investigation.

[9] I will deal with each of these.

[10] First, I am satisfied that the companies are in the same business, and there is nothing to preclude this from happening. In this case it has happened because Zeal was not trading and went into voluntary liquidation. There are plausible reasons for that decision relating to the finances of Zeal and the circumstances surrounding a distribution agreement. The decision to liquidate Zeal related to the financial situation of the company and that it was not trading, and not to defeat any claim involving Mr Dewsnap.

[11] The existence of the same directors in both companies is not a decisive factor. I am satisfied that the decision by the principal of the distribution arrangement was by that person, acting independently from either of the directors of Zeal and Kapiti involved in the distribution arrangement.

[12] The financial arrangements involved an independent financial advisor whom I have no reason not to believe. There were specified assets and liabilities that did not include all Zeal's assets and liabilities in the sale and purchase agreement with Kapiti Technologies Limited. Also Mr A O Procter, financial advisor, was able to explain the treatment of goodwill. Given the nature of the distribution agreement there was a likely overlap and the role of the companies and any clients would not be a decisive factor either.

[13] Secondly I am not satisfied that the directors, Kelvin Nixon and Aaron Gibson, set out to deliberately mislead the Authority about the companies. Mr Gibson clarified at the Authority's 27 November 2009 investigation meeting his evidence that he gave on 3 July when he said that Zeal still operated. This is a complex situation but what has always been clear is that Zeal before it went into liquidation was not trading and was insolvent. Mr Gibson was still a director of Zeal at the time of the Authority's 3 July investigation meeting and the employment relationship problem had been lodged against Zeal Distribution Limited. That explains the focus on Zeal at the time. However, Messrs Gibson and Nixon have not adequately explained why the existence of Kapiti Distributors Limited was not mentioned prior to 3 July 2009. Kapiti Technologies Limited was incorporated on 17 April 2009: well before the Authority's investigation meeting. Mr Gibson did not refer to it, but I accept he says he made a mistake that could have related to Zeal still being registered and that it was not in liquidation at the time of the Authority's investigation meeting on 3 July 2009. I am satisfied that Kapiti Distributors Limited was operating after Zeal ceased trading and was sold. Nothing has been produced to support that there was some deliberate attempt to keep that company secret when the statement of problem clearly focussed on Mr Dewsnap's employer being Zeal.

[14] Thirdly I am satisfied that the directors were aware of their responsibilities as directors and that they made a genuine decision to voluntarily put Zeal into liquidation because it was not trading and was insolvent. As such Mr Dewsnap has not been able to satisfy me to the requisite level that there is something amiss to create a sham or that there are good reasons that are significant enough to lift the corporate veil of Zeal and treat Kapiti Technologies Limited as if it was his employer at the time. This is because of the financial state of Zeal and the cessation of the distribution agreement.

[15] The last matter is that Mr Dewsnap believes that the delays are the responsibility of Zeal's directors to avoid his claims. It has not been established that any delays have been deliberately caused to avoid the employment relationship problem. There was a process being followed in the investigation that did rest on the transcript of the meeting being provided and the respondent was within its rights wanting to test matters arising from the transcript of the tape. Provision was made for written submissions and further submissions to follow in regard to the matters arising from the transcript of the parties' meeting. The decision to put Zeal into voluntary

liquidation coincides with it being insolvent and not trading. Any claims before the Authority would not preclude that from happening.

[16] In conclusion the matters raised to join Kapiti Technologies Limited are not sufficient, given the high degree of evidence required to lift the corporate veil, and in this case to treat Kapiti Technologies Limited as if it was Zeal.

### **Orders of the Authority**

[17] Mr Dewsnap's employment relationship problem in the Authority cannot proceed. The Authority's investigation is therefore closed.

[18] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority