IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 225
5375524

	BETWEEN	KEVIN ENOSA Applicant
	A N D	BLACK & WHITE FIRE SYSTEMS LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	James Pullar, Counsel for the Applicant Bede Laracy, Advocate for Respondent
Investigation meeting:	On the papers
Submissions Received	31 July 2012 from Applicant 13 August 2012 from Respondent
Date of Determination:	15 October 2012

PRELIMINARY DETERMINATION OF THE AUTHORITY

A. Black & White Fire Systems Limited must provide the Authority with its financial information leading up to the incorporation of the new company and as set out in detail in paragraphs 25 to 29 below and serve a copy of the information on the Applicant by 26 October 2012.

Employment relationship problem

[1] On 26 March 2012 the Applicant lodged a Statement of Problem with the Authority seeking an order that the Respondent, Black & White Fire Systems Limited (Black & White) comply with Authority determinations dated 21 May and 26 May 2011. Member Cheyne ordered the Respondent to pay the Applicant a total of $10,266.40, including costs, of which $3592.23 was paid into the Applicant's counsel's trust account on 11 July 2011.

[2] The Applicant seeks an order against the Respondent and against Mr Vaisevuraki, director of the Respondent, personally and/or against the new company Black & White Fire Systems (2011) Limited (Black & White 2011) for compliance with the Authority decisions by way of:

- payment of the outstanding amounts with a detailed breakdown of the Respondent's calculation;
- payment of interest on the outstanding money;
- an order for reimbursement of the filing fee; and
- legal costs associated with the application for compliance.

[3] Mr Laracy on behalf of Mr Vaisevuraki responded that the Respondent company has ceased to trade and therefore could not guarantee any payment or payment schedule. He also noted that Mr. Vaisevuraki could not personally guarantee payment and in any event Mr Vaisevuraki was not a party to the proceedings.

Background

[4] In e-mail correspondence dated 3 June 2011 to Mr Beck, Mr Enosa's then counsel, leading up to the payment of $3592.23 by the Respondent Mr Vaisevuraki wrote that the payment would be for:

> *…the sum of $2,000.00 + GST and $1,966.40 less PAYE & student loan deduction.*

[5] On 12 July 2011 Mr Vaisevuraki sent another e-mail to the effect that he did not consider that the Respondent needed to pay the $6000.00 ordered by the Authority for compensation.

[6] The Respondent tendered $3592.23 in full and final settlement. Mr Beck made it clear to Mr Vaisevuraki that the Applicant did not accept that amount in full and final settlement.

[7] On 11 August 2011 Mr Enosa applied through the Christchurch District Court to enforce the Authority's orders against Black & White. On 19 August 2011 the Court notified Mr Enosa that it had not been possible to execute a Distress Warrant

against the Respondent because the address was vacant and the bailiff had been told the *Debtor now lives in Wellington*. The bailiff was unable to proceed further.

[8] On 22 August 2011, the first working day after 19 August 2011 Mr Vaisevuraki took the first step to register a new company; Black & White Fire Systems (2011) Limited (Black & White 2011). On 24 August 2011 Black & White 2011 was incorporated.

[9] Mr Vaisevuraki is the sole director and of both Black & White companies. He was the principal of the business with whom Mr Enosa had a direct employment relationship. Mr Vaisevuraki was the person who unjustifiably dismissed Mr Enosa.

[10] Mr Vaisevuraki is one of two shareholders of both companies. He owns 80% of the shares in Black & White and 70% of the shares in Black & White 2011. The other shareholder in both companies is Natasha Vartiainen. Both companies share the same registered office. Ms Vartiainen and Mr Vaisevuraki have the same address.

Issues

[11] The issues I need to determine are:

a. Whether I should exercise my discretion to make a compliance order against Black & White;

b. Whether I should re-open the investigation to join Mr Vaisevuraki and Black & White 2011 and make compliance orders against them to ensure that Black & White complies with the Authority orders.

Determination

[12] Sections 137(1)(b) and 161(1)(n) of the Employment Relations Act 2000 (the Act) give the Authority power to order compliance with any determination of the Authority:

> *(1) This section applies where any person has not observed or complied with—*
> *…(b) any order, determination, direction, or requirement made or given under this Act by the Authority or a member or officer of the Authority.*
> *(2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party*

> *or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.*

[13] Mr Laracy does not now pursue Mr Vaisevuraki's position that Black & White need not pay Mr Enosa $6,000.00 compensation. Instead Mr Laracy submitted that Black & White ceased to trade in August 2011 having made a loss of $30,000.00. He submitted that Black & White also owed money to the IRD:

> *Following negotiation with IRD that include an arrangement regarding all outstanding debt to the IRD, they have now agreed to have the company struck off.*

[14] Mr Laracy submits that there is no practical benefit in issuing a compliance order against a company that has ceased to exist, or will shortly cease to exist – *Spencer v Hughes Dairy Farms Limited* (2008) 8 NZELC 99.

[15] I should only exercise my discretion to order compliance if carrying out my order would not breach other statutory provisions and where the law does not allow the order to be carried out - *McLennan v Internet Productions Ltd (in liquidation)* [1].

[16] Since Mr Laracy's submissions were received Mr Pullar objected to the Companies Office removing Black & White from the Companies Register. The Registrar of Companies, Mr Neville Harris, wrote to Mr Pullar on 10 September 2012 noting that he had *suspended action to remove the company from the register.* I do not consider the *Spencer* case to be directly applicable to this situation as in that case the company had ceased to exist.

[17] In addition the cases of *McLennan* and *Mills v Metro Floor Canterbury (2002) Limited (in liquidation)*[2] are not directly applicable as Black & White is not in liquidation.

[18] A compliance order has a number of purposes one of which is to stop a wrong-doer undertaking avoidance of Authority orders. As Judge Colgan, as he then was, pointed out in *McLennan* it is:

> *…an important element of the legislation that it is for wrong-doers to compensate for their wrong-doing.*[3]

[1] [2003] 1 ERNZ 282, at 292
[2] [2011] NZERA Christchurch 184

[19] Black & White is a separate corporate entity from Mr Vaisevuraki. Black & White has been ordered by the Authority to pay Mr Enosa money. It has not challenged the Authority's decision to the Employment Court. The date for lodging a challenge to the Court has long past. Therefore, Black & White still owes Mr Enosa the balance of the amounts ordered. Prima facie there is a case for making a compliance order against Black & White.

[20] Mr Pullar submitted that not only should Black & White be ordered to comply with the Authority order but so should Mr Vaisevuraki and his newer company, Black & White 2011, because Mr Vaisevuraki has acted to cause Black & White to thwart the Authority's order by using the sham or façade of a new company which is essentially carrying on trading in the same business as Black & White.

[21] The timing of the incorporation of the new company is perhaps so coincidental as to raise the suspicion of deliberate avoidance. However, Mr Laracy submitted that there were genuine business reasons for Mr Vaisevuraki establishing Black & White 2011.

[22] Clause 4 of Schedule 2 of the Act allows the Authority to reopen an investigation. The re-opened investigation need not be carried out by the same member of the Authority. Section 221 of the Act empowers the Authority to join parties. I am considering whether I should re-open the matter to join Mr Vaisevuraki and Black & White 2011. If I decide to do so I may apply the principles set out in the Employment Court case of *Square 1 Service Group v Butler*[4]. Judge Colgan suggested that the then Employment Tribunal had the ability to lift the corporate veil and look at whether the incorporation of a new company was a sham or façade created for the purpose of avoiding lawful or proper obligations[5].

[23] Before deciding whether to exercise my discretion to order compliance with the Authority's order I consider that I need to know more about Black & White's arrangement with the IRD and its financial position immediately prior to Black & White 2011's incorporation. I need to be able to assess the real reason for the incorporation of a new company. In addition it may be relevant that Mr Vaisevuraki is the controlling mind of both companies.

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[3] [2003] 1 ERNZ 282, at 291
[4] [1994] 1 ERNZ 667
[5] Ibid, at 679 & 680

[24] In *Mills v Metro Flooring Canterbury (2002) Ltd (in liquidation)* Member Cheyne undertook a similar enquiry into whether the matter should be re-opened in order to join a more recently incorporated company as a respondent party.

[25] Black & White, and Mr Vaisevuraki, need to produce evidence to support the position that the new company is not a sham or a device to avoid complying with the Authority's order.

[26] Black & White must provide evidence of its financial position both in relation to the IRD and more generally leading up to and during August 2011. Evidence provided should include correspondence with the IRD of any arrangements made.

[27] I also require evidence of payment to the IRD of the PAYE and student loan portion of Mr Enosa's holiday pay that was withheld. Initially that money had not been paid.

[28] I note that $674.17 is the balance of the $1966.40 gross that it was ordered to pay that remains unpaid if the IRD has not been paid that amount.

[29] I also need evidence about the business that each company carried or carries out, including whether Black & White 2011 purchased any assets of the old company. The financial information is likely to need to be accompanied by affidavit evidence from Mr Vaisevuraki.

[30] Once I have received the financial information I will be likely to need to hold a hearing in Christchurch to resolve whether to join Black & White 2011 and/or Mr Vaisevuraki and whether to make the compliance orders sought.

[31] The path is still clearly open to the parties to settle the matter between them in the interim.

[32] After provision of the financial information I will hold a directions conference to consider setting down an investigation meeting.

Costs

[33] Costs are reserved.

Christine Hickey
Member of the Employment Relations Authority