IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 380/07
5096343

	BETWEEN	JOSEPHINE MARY HALL Applicant
	AND	FINLAY AND ASSOCIATES LIMITED T/A BOBBY'S Respondent

Member of Authority:	Leon Robinson
Representatives:	Applicant In Person Andrea Twaddle for Respondent
Submissions lodged:	7 November 2007 19 November 2007 22 November 2007
Investigation Meeting:	Consideration on Papers
Determination:	3 December 2007

DETERMINATION OF THE AUTHORITY

The problem

[1] The Authority has previously issued a determination concerning these parties on 3 October 2007 ("the Determination"). The Determination made formal orders to settle the employment relationship problem.

[2] The respondent has lodged an application dated 7 November 2007 seeking to have the determined investigation re-opened and further, by application dated 7 November 2007 asks that the Authority's orders be stayed.

[3] This determination disposes of both applications.

The facts

[4] The applicant lodged her application for investigation in the Authority on 20 August 2007.

[5] The application was served on the respondent at its massage bar and strip club operation at 161 Ruapehu Street, Taupo the following day on 21 August 2007. The respondent Finlay and Associates Limited's (Finlay) registered address and address for service is at its accountants McPherson and Coombe, Marshall Street, Paeroa.

[6] The respondent's statement in reply was due to be lodged in the Authority by 4 September 2007. On 7 September 2007 a support officer of the Authority telephoned and left a message for Finlay's director Mr Dennis Shane Finlay (Mr Finlay) to contact the Authority. A similar message was left for Mr Finlay on the morning of 10 September 2007.

[7] In the afternoon of 10 September 2007, Mr Finlay advised the support officer the application had been received by Finlay and that Finlay was intending to lodge its statement of reply. He further advised he was waiting for a DVD to be returned from the Police together with a Police report. This advice was recorded by the support officer.

[8] By Memorandum of 18 September 2007 I directed the matter be set down for an investigation meeting to be held at Taupo on 2 October 2007. I made that direction as a consequence of the Finlay's failure to lodge its statement in reply within the prescribed 14 days. The Memorandum also contained these additional directions:-

> *(ii) the Notice of Investigation Meeting and a copy of this Memorandum shall be served on Finlay & Associates Limited at its registered address not less than seven days before the date of the scheduled Investigation Meeting;*
>
> *[4] Finlay and Associates Limited should not misinterpret this Minute as the grant of leave (permission) to it to respond to the application. It may attend the Investigation Meeting to seek the Authority's leave to defend the application.*

[9] The Notice of Investigation Meeting and Memorandum were served on Finlay at its registered office on 20 September 2007.

[10] The respondent did not attend the Investigation Meeting held at Taupo on 2 October 2007 to seek the Authority's leave to defend the matter.

[11] The Authority issued its Determination on 3 October 2007.

The application to reopen investigation

[12] The respondent by its solicitor applies to reopen the investigation to which the Determination relates. It states these grounds in support of its application:-

> *4.1 There has been a miscarriage of justice.*
>
> *4.2 The Respondent has not been provided a full opportunity to present its case at the Investigation Meeting.*
>
> *a. The Authority determination records at paragraph [2] and [3] of the determination that:*
>
> *i. The Respondent did not lodge a statement in reply, but indicated its intention to take steps to lodge a statement in reply/defend the proceedings.*
>
> *ii. The Respondent did not attend the Investigation Meeting and when the Authority Member contacted the Respondent to ascertain its intentions, it denied all knowledge of the Investigation Meeting scheduled.*
>
> *b. The Respondent did not receive Notice of the Investigation Meeting until after the Investigation Meeting was held.*
>
> *i. The Notice of Investigation Meeting was served on the registered office and address for service of the Respondent. That address is the address of the Respondent's accountant.*
>
> *ii. The Respondent's accountant forwarded those documents to the **personal address of the Respondent** in Taupo. The Respondent's accountant was not aware that **the Respondent no longer resided at that address**.*
>
> *iii. The Respondent did not receive any telephone notification that the documents served by the Authority had been received or sent to the outdated Taupo address.*

> *iv.* ***The Respondent had moved from Taupo to Paeroa*** *during the three weeks at which time the Authority issued its Notice of the Investigation Meeting and the Investigation Meeting being held.* ***He did not receive mail*** *sent to the Taupo business premises, or* ***his previous personal residence*** *until after the Investigation Meeting was held.*
>
> *c. The Respondent has material evidence relevant to findings of fact and of law made by the Employment Relations Authority in its determination of this matter. it should be provided an opportunity to be heard.*
>
> *4.3 Judgment was obtained in the absence of the Respondent from the Investigation Meeting. It is the Respondent's submission that:*
>
> *a. The Respondent has a substantial ground of defence. The Respondent maintains the dismissal of the Applicant was substantively and procedurally justified.*
>
> *b. The Respondent's non-appearance at the Investigation Meeting is reasonably explained.*
>
> *c. The Applicant will not suffer irreparable injury if the judgment(sic) is set aside.*
>
> The emphasis is mine.

[13] The Authority is not a Court so I do not think it appropriate that I attempt to apply the tests extracted from court judgments to dispose of this application. I think it enough that I commit to act as I think fit in equity and good conscience.

[14] I deal first with the second ground argued that the Respondent has not been provided a full opportunity to present its case at the Investigation Meeting. The central argument here is that *the Respondent did not receive Notice of the Investigation Meeting until after the Investigation Meeting was held*

[15] I immediately note the emphasised elements in the contended grounds confuse the respondent limited liability company Finlay & Associates Limited and its director Mr Shane Finlay ("Mr Finlay"). Both "persons" are referred to indiscriminately as "the respondent". That is obviously wrong for they are separate legal entities. Mr Finlay is not the respondent - the limited liability company of which he is director is.

[16] The Authority is entitled to rely on the notified registered address and address for service of the respondent as recorded by the Registrar of Companies in the Companies Office register. The Authority is not required to look behind that register for that is to defeat the very purpose of the register. The Authority relied on the recorded information as it had been provided to the registrar by the respondent. Service was effected according to the notified various addresses of the respondent company.

[17] The respondent, whether Finlay & Associates or the incorrectly cited Mr Finlay personally, now argues that the notice of investigation meeting and memorandum was not sent on to Mr Finlay because he had moved from Taupo to Paeroa on or about 31 August 2007 and he did not inform the accountants of his new residential address. The present application alleges that:-

> *The **Respondent's** accountant forwarded those documents to the personal address of the **Respondent** in Taupo. The Respondent's accountant was not aware that the **Respondent** no longer resided at that address*

The emphasis is mine.

[18] Mr Finlay gives sworn evidence that his close friend had an urgent issue with his farming business because employees left without notice during calving season. Mr Finlay says he agreed to help his friend at short notice and on or about 31 August 2007 he and his partner Delwyn Anderton moved from Taupo to Paeroa to help Mr Finlay's friend. Mr Finlay says they vacated their Taupo residence at 37 Marshall Street entirely. He says that although the residence was occupied in his and his partner's absence, he was the only person with access to the mailbox which was locked at all times. He explains that due to the hurried nature of his move to Paeroa he was unable to manage to arrange to have his mail redirected from Taupo to Paeroa.

[19] Mr Finlay is not the respondent. His address was not the "personal" address of the respondent. The Authority was not required to see that Mr Finlay was personally served because Mr Finlay is not a party to the investigation. Service on Mr Finlay is not the Authority's concern. So if the purpose of confusing Mr Finlay personally as

the respondent is to found a claim that the respondent was not properly served then such ground is simply wrong. I distinguish service on Mr Finlay from knowledge by the respondent of the investigation. That is a different issue and I will return to this matter later.

[20] But Finlay was not entitled to defend the matter in any event. When Mr Finlay spoke with the support officer on 10 September 2007 he acknowledged service of the application and confirmed an intention to defend it. By that time however, the respondent was already out of time. It could only defend the application with the Authority's leave in accordance with Regulation 8 of the *Employment Relations Authority Regulations 2000* as follows:-

> *(3) If a party fails to lodge a statement in reply within the time specified in subclause (1), that party is entitled to reply or respond to the application only with the leave of the Authority.*
> *(4) Leave may be granted on such terms and conditions as the Authority thinks fit.*

[21] While Mr Finlay acknowledged service of the application and contemporaneously confirmed an intention to defend, he failed to comply with the express notice in the statement of problem that the respondent's reply was to be lodged in the Authority within 14 days. So too did the respondent fail to comply with the advice in the Authority's covering letter dated 20 August 2007 which materially advised:-

> *You are required by Regulation 8 of the Employment Relations Authority Regulations 2000 to file with the Authority two copies of a Statement in Reply within 14 days after the date of receipt of this letter. The Statement in Reply is enclosed for your completion and return.*

[22] Mr Finlay now by an affidavit sworn by him on 20 November 2007 confirms his explanation for why the respondent did not comply with the Authority's regulations in terms of lodging its statement in reply. He says this:-

> *I was waiting for the dvd to be returned from the Police, as well as the Police Report, to know whether criminal charges would be pursued against Josie in relation to this incident. I did not realise the Employment Relations Authority did*

> *not require this information before it proceeded with its Investigation. If I had, I would have filed in the timeframe advised.*

Whether or not this is so, Finlay was out of time and Regulation 8 is uncompromising - Finlay could defend the matter only with the Authority's leave.

[23] So as at 10 September 2007 the respondent was not entitled to defend the application as of right and the application was undefended. That being so, as a courtesy to the respondent in my Memorandum of 18 September 2007 I invited it, if it wished to do so, to seek leave to defend the matter by attending at the scheduled investigation meeting to make such an application.

[24] The Authority by regulation 21 is required to give at least 7 clear days' notice of an investigation meeting. In conventional litigation that is an extradordinarily short period in which to prepare for an adjudicative type hearing. But in the scheme of the Employment Relations Act 2000 and its emphasis on speedy, informal and practical justice 7 days notice is not extraordinary at all. So when the Authority set this matter down for investigation meeting, it did so in accordance with the legislation.

[25] Finlay failed to seek leave. It says by the present application, that it could neither turn up to defend the matter nor seek leave to defend out of time because the Notice of Investigation Meeting and Memorandum were not received by it. At any time Finlay could have made an application for leave to defend the matter out of time. Whether at the scheduled investigation meeting or otherwise, it did not do so.

[26] As I have said earlier, I do not accept that because the relevant documents were not served on Mr Finlay personally that the respondent did not have notice of the investigation meeting or the invitation to it to attend to seek leave to defend out of time. The fact remains that documentation was served on the respondent in the manner specified by the respondent itself, that is, at its registered office and the nominated address for service at its accountants. Service at its accountants was sufficient and I find, effective and entirely in accord with the Authority's regulations.

[27] I do not consider that Finlay's failure to keep itself properly advised of its own communications should have consequences for Ms Hall now. That Finlay did not maintain contact with its own registered address is not Ms Hall's failing. As I understand Mr Finlay's evidence, his personal mailbox remained locked and unchecked from 31 August 2007 when he left for Paeroa for at least three weeks although the precise date is unclear because Mr Finlay does not give evidence of when he did actually check his mail. If he does not mean this then the implication otherwise is that he did periodically check his mail and it would not assist him now to assert that. In my view it was a rather reckless way to conduct company business. Ms Hall and this Authority did all that could reasonably be expected to notify Finlay. The company's own internal failings ought not now operate to deprive Ms Hall of the determination in her favour. This is no basis to reopen the investigation.

[28] So I conclude by weighing the equities of the matter. I infer that Mr Finlay preferred to pursue matters against Ms Hall through the Police rather than comply with the notified and acknowledged requirement to lodge a statement in reply. That was Finlay's prerogative through him. The consequence of prioritising matters that way was that Finlay was not then entitled as of right to defend Ms Hall's claim in this institution. It having no entitlement to defend the matter as of right, the invitation that it could seek leave at the investigation meeting was properly served and it is no answer that Mr Finlay was remiss in making appropriate arrangements for the receipt of company correspondence as the reason why it as it says it did not attend to defend the matter. But it did not lose the right to defend because Mr Finlay was not served with a notice of investigation meeting - it never had that once its 14 days to reply had passed. My summary of matters this way leads me to conclude that equity and good conscience favours Ms Hall. Nor am I persuaded in any other respect that there is a sound basis to reopen this investigation. **I decline to reopen this investigation.**

The application for stay

[29] As a consequence of my determination not to reopen this investigation, I also determine there is no basis to therefore stay the formal orders made in the Determination. **Accordingly, the application for stay is refused.**

Costs

[30] As Ms Hall is not represented by professional advocate, there will be no orders for costs.

Leon Robinson

Member of Employment Relations Authority