

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 28
5587313

BETWEEN

MARK JOHNSTONE
Applicant

A N D

LIBOR LASEK
First Respondent

SEBASTIAN STAPLETON
Second Respondent

TRADE ASSIST LIMITED
Third Respondent

Member of Authority: David Appleton

Representatives: Applicant in person
First and Second Respondents in person
Sebastian Stapleton for Third Respondent

Investigation Meeting: 3 March 2016 at Christchurch

Submissions Received: 3 March 2016 for the Applicant
3 March for the first, second and third Respondents

Date of Determination: 11 March 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

- A. Although Mr Johnstone was unjustifiably dismissed, and is owed arrears of pay totalling \$8,803.98, he was never employed by any of the three respondents.**
- B. His employer was a company which went into liquidation the day after his dismissal. The Authority accordingly has no jurisdiction to make any orders against it.**
- C. There are no orders as to costs.**

Employment relationship problem

[1] Mr Johnstone claims that he was unjustifiably dismissed on 19 August 2015 and that he is owed arrears of pay, notice pay, redundancy pay and holiday pay. He claims a total of \$11,035.09.

[2] Each of the respondents denies that they have ever employed Mr Johnstone.

Brief account of the events leading to the dismissal

[3] Mr Johnstone was employed under the terms of an individual employment agreement as an apprentice carpenter. The parties to the employment agreement were Mr Johnstone and a company called Libor Limited, which is part of a group of companies called the Libor Group. Libor Limited went into liquidation with effect from 20 August 2015.

[4] Mr Johnstone claims that Libor Limited (in liquidation) failed to honour the terms of Schedule 3 of his individual employment agreement, which set out the terms of the apprenticeship, in that it failed to pay his course fees owed to the Building & Construction Industry Training Organisation (BCITO). He says that, as a result of this failure, he was unable to progress his apprenticeship and also missed out on a \$2,000 tools grant to apprentices being offered by BCITO at the time when he should have been signed up.

[5] Mr Johnstone says that, on Wednesday 19 August 2015, he was dismissed from his employment with Libor Limited (in liquidation), being told that it was his final day. He said that, in the week leading up to his dismissal, the employees were advised that Libor Limited (in liquidation) had gone into liquidation or receivership but that the company had been taken over by another company, and that all of their jobs were safe. He said that they were told that the employees would be required to sign new employment contracts with the new company in the following few days.

[6] The Authority saw a copy of a letter on the headed notepaper of Trade Assist Limited dated 12 August 2015. This was signed by Mr Stapleton and was written in the following terms:

Dear Valued Staff Member,

Trade Assist Limited is pleased to announce that we have entered into a conditional agreement to purchase the business of Libor Group

(Libor Limited, Libor Living Limited and L Group Limited) with the expected takeover date being from Wednesday 19th August 2015.

- **About Trade Assist.** Trade Assist Limited is owned by Value Plus Holdings Limited and Canterbury Ventures Limited. The Shareholders have had a successful history in Canterbury within the construction, farming, transport and finance sectors.
- **Management structure.** Sebastian Stapleton will be Managing Director of Trade Assist Limited. The company has offered continued employment to Libor Lasek as a Business Development Manager.
- **Employee Entitlements.** An important aspect of the agreement to purchase Libor Group has been the protection of and transfer of employee entitlements.
 - Most employees will receive new employment agreements on the same terms and conditions as they currently have with Libor Group.
 - All holiday pay and sick leave will be transferred to Trade Assist Limited.
- **Immigration.** Trade Assist Limited is currently working with NZ Immigration to reach agreement for the transfer all Immigration Visa's for current staff to Trade Assist Limited. Some paperwork will need to be completed by each employee along with their completed employment contract.
- **Pay week.** Trade Assist Limited's pay week will run from Monday to Sunday, with payment being made Weekly each Wednesday by direct credit.
- **Customer Contracts.** Trade Assist has met with most customers who have indicated a willingness to continue to work with Trade Assist Limited.

Trade Assist are committed to to [sic] build strong relationships with our staff and customers, and continue being a constructive part of the Canterbury Rebuild.

Please don't hesitate to contact me if you have any questions.

Kind regards,
 Trade Assist Limited
 Sebastian Stapleton
 Managing Director

[7] Mr Johnstone says that his dismissal was communicated to him by Julie Boothby, who worked for another company in the Libor Group, and that she said that she was not really in a position to be able to fully explain the reason behind his dismissal, but that it could be to do with his *previous interactions on the commercial side of things*.

[8] Mr Johnstone believes that those *previous interactions* may have referred to an alleged safety incident involving standing on a trestle table and a verbal altercation

with a representative of CERA regarding where he was standing on a site. He said that these interactions had been dealt with at the time, having been more than two months previously, and that there was no formal disciplinary procedure followed in respect of them.

[9] Mr Johnstone says that, when he contacted Libor Limited (in liquidation) on 28 August to inquire about his final pay and outstanding holiday pay, he was told that he would not be receiving any money and was referred to the liquidators.

The issues

[10] The issues to determine are as follows¹:

- a. Whether Mr Johnstone was unjustifiably dismissed;
- b. Whether Mr Johnstone is owed arrears of pay, and if so, the amount;
- c. Whether any of the three respondents are liable to Mr Johnstone.

Was Mr Johnstone unjustifiably dismissed?

[11] It was uncontested that Mr Johnstone was not consulted with in any way prior to his dismissal. Accordingly, it must be the case that he was unjustifiably dismissed.

Is Mr Johnstone owed arrears of pay, and if so, in what amount?

[12] I am satisfied that Mr Johnstone was not paid in respect of three days worked, four weeks' notice pay and holiday pay. I find that Mr Johnstone is owed the following sums;

- a. \$735 gross, in terms of his three days worked,
- b. \$4,508 gross in terms of notice pay, and
- c. \$3,560.98 gross in terms of holiday pay.

¹ The Authority is unable to investigate the breach of contract claim in relation to the apprenticeship agreement as that claim is clearly against Libor Limited (in liquidation) and the Authority has no jurisdiction to consider such a claim. See paragraph 17.

Are any of the three respondents liable to Mr Johnstone?

[13] Mr Johnstone did not have any significant legal arguments as to why he believed that one or more of the three respondents were liable to him, although he said that it was a matter of integrity.

Legal principles

[14] Part 6A of the Employment Relations Act 2000 (the Act) deals with the continuity of employment of an employee if his or her work is affected by restructuring. Part 6A is divided into a number of subparts, Subparts 1 and 2 relating to specified categories of employee. These are the categories of employees listed at Schedule 1A of the Act, often colloquially known as *vulnerable employees*.

[15] Schedule 1A relates to employees who provide cleaning, food catering services, caretaking or laundry services to various sectors of industry. Quite clearly, Mr Johnstone does not fall within those categories of employee and so is not protected by the terms of subparts 1 and 2 of Part 6A of the Act.

[16] Mr Johnstone is therefore covered by subpart 3 of Part 6A of the Act, entitled *Other Employees*. The protection provided by subpart 3 is significantly less than that provided to the so called *vulnerable employees*. Essentially, the protection for *other employees* extends to the requirement for collective agreements and individual employment agreements to contain employee protection provisions. I note that Mr Johnstone's employment agreement contained, at clause 16, an employee protection clause which appears to comply with the Act. It is not known whether Libor Limited (in liquidation) complied with its obligation under the employee protection provision, although the Authority has no jurisdiction to investigate that issue in any event.

[17] Section 248 of the Companies Act 1993 provides that no proceedings can be commenced against a company in liquidation unless either the liquidator agrees or the High Court orders otherwise. Mr Johnstone has not obtained the agreement of the liquidators or the High Court to proceed against Libor Limited (in liquidation) which is, presumably, the reason he is seeking to recover his losses from one or more of the three respondents.

[18] Mr Johnstone will only have a claim against the respondents if any of them were his employer prior to or at the time of his dismissal². An *employer* is defined in s.5 of the Act as *a person employing any employee or employees; and includes a person engaging or employing a home worker.*

The first and second respondents

[19] I am satisfied that there is no case against the first and second respondents, as neither of them has ever employed Mr Johnstone in a personal capacity. Mr Johnstone was employed pursuant to an individual employment agreement by Libor Limited (in liquidation) up to the day he was dismissed. No evidence was given that that company was substituted by either Mr Lasek or Mr Stapleton prior to the dismissal of Mr Johnstone, which was effected prior to it going into liquidation.

[20] Furthermore, no evidence was presented to suggest that the company was a *sham or a mere simulacrum*³ or that there were any other compelling and exceptional reasons to pierce the corporate veil, and find that Mr Lasek was personally liable for Mr Johnstone's employment.

The third respondent

[21] Unlike in the countries of the European Union, where there is comprehensive legislative protection for employees in a position similar to that in which Mr Johnstone found himself⁴, New Zealand law does not provide comprehensive protection to employees working in businesses that are transferred between owners, save for those vulnerable employees referred to above. This was confirmed by Her Honour Judge Inglis in the Employment Court case of *Lend Lease Infrastructure Services (NZ) v. Recreational Services*⁵ in which, at para.[81], Her Honour stated as follows:

The effect of Part 6A is to require an employer to engage employees, over which the new employer has no control or choice – effectively strangers. It is, in this sense, an exception to the usual principles regarding the freedom to contract in employment. The position adopted in New Zealand can be contrasted to the legislative framework in the United Kingdom, where all employees – rather than discrete categories of employees – are eligible to transfer. It is clear

² See s. 4(2) of the Act which sets out the employment relationships governed by the Act.

³ See *Lee v Lee's Air Farming Ltd* [1961] NZLR 325 (PC).

⁴ The Transfers of Undertakings Directive 2001/23/EC

⁵ [2012] ERNZ 145

that Part 6A was intended to provide protection for limited categories of employees providing a particular type of service.

[22] Therefore, given that Mr Johnstone is prohibited in law from suing Libor Limited (in liquidation), his former employer, and there is no legal basis for him to pursue Mr Lasek and Mr Stapleton personally, Mr Johnstone's only hope is against Trade Assist Limited.

[23] However, given that New Zealand does not have the same legislative protection as the EU, and given that Mr Johnstone is not a protected employee as defined in Schedule 1A of the Act, his only hope actually boils down to being able to show that there was an agreement between Trade Assist Limited and the seller of the assets of Libor Limited (in liquidation) to transfer his employment under the terms of the sale and purchase agreement.

[24] If that were the case, Mr Johnstone would have an argument pursuant to the Contracts (Privity) Act 1982, in which a promise contained in a contract which confers a benefit on a person who is not a party to the contract obliges the promisor, enforceable at the suit of the beneficiary, to perform that promise.

[25] Whilst it would not be appropriate to enforce such a promise by requiring Trade Assist Limited to employ Mr Johnstone, as it would be against public policy to force two parties into an employment relationship where they had not been in such a relationship beforehand, it would be open to the Authority to vary the terms of any such promise and to award compensation to Mr Johnstone under s.7 of the Contracts (Privity) Act.⁶

[26] Mr Stapleton produced at the investigation meeting a copy of the sale and purchase agreement between Libor Limited, Libor Living Limited (part of the Libor group of companies) and Trade Assist Limited. This showed that agreement was entered into on 20 August 2015, one day after Mr Johnstone was dismissed. This agreement contained a clause headed *Employees*. It read as follows:

10.1 Offer of Employment The Purchaser may, with effect from Completion, offer employment to any of the Employees of the Vendor and any independent contractors, on terms and conditions no less favourable than those presently applicable to such Employees or

⁶Section 162 of the Act confers on the Authority the jurisdiction to make any order that the High Court or a District Court may make under, inter alia, the Contracts (Privity) Act 1982.

contractors, and the Vendor shall use its best endeavours to persuade all such Employees to accept the offer.

*10.2 **Payment of accrued benefits** The Purchaser shall assume liability:*

10.2.1 to a maximum of \$[redacted] for all of the Vendor's Employees accrued entitlements (the "Accrued Entitlements") including holiday pay, and long service leave owing to such Employees up to the Completion Date (excluding the Director (Liber Lasek) of the Vendor entities and their immediate family) transferring to the employment of the Purchaser; and

10.2.2 to a maximum of \$[redacted] for the staff wages unpaid by the Vendors to the Vendors' Employees for the period 19 August 2015 to 19 August 2015 ("Unpaid Wages"), which amount shall be paid by the Purchaser to the relevant Employees who transfer to the employment of the Purchaser on Completion (or, if later, on the date those Employees agree to become an employee of the Purchaser).

*10.3 **Non-Transferring Employees** The Vendor shall remain solely responsible for all redundancy, severance or other amounts payable to Employees of the Business who do not transfer their employment to the employment of the Purchaser ("Remaining Employees"). The Purchaser shall pay to the Vendors an amount equal to the Accrued Entitlements and Unpaid Wages of the Remaining Employees one month after the Completion Date.*

[27] Mr Stapleton says that the monies referred to in clause 10.3 were paid to the liquidators. He also said that Mr Johnstone was not the only employee of Libor Limited (in liquidation) who was not employed, as several divisions were not carried over to Trade Assist Limited.

[28] The extract above shows that the third respondent was not obliged to take on all of the employees of Libor Limited (in liquidation). It clearly contemplated that some employees would not be transferred over to Trade Assist Limited. It therefore did not create any benefit for a class of third parties in which Mr Johnstone can be said to fall as Trade Assist Limited was not legally obliged to take on any specific employees. Therefore, Mr Johnstone is not able to rely upon the Contracts (Privity) Act to assist him.

Conclusion

[29] It is regrettable that Mr Johnstone clearly has a claim for unpaid wages, notice pay and holiday pay which he is unlikely to receive any substantial portion of, if any, from the proceeds of the liquidation.

[30] Mr Johnstone, however, is not legally entitled to seek payment of those sums from either Mr Lasek, or Mr Stapleton personally. Mr Lasek was not Mr Johnstone's employer personally and there are no exceptional circumstances which apply that would justify the Authority lifting the corporate veil. Mr Stapleton was simply the director acting on behalf of Trade Assist Limited who decided not to offer a contract of employment to Mr Johnstone, along with a number of other former employees of Libor Limited (in liquidation).

[31] Similarly, Trade Assist Limited did not become the owner of the assets of the company until 20 August 2015, the day after Mr Johnstone was dismissed. That company had no obligation whatsoever to offer Mr Johnstone an employment agreement any more than any other company in New Zealand had that obligation.

[32] This is most unfortunate for Mr Johnstone, but the Authority has no jurisdiction to award him any remedies.

Costs

[33] Although Mr Johnstone was unsuccessful, none of the three respondents were legally represented and so no question of a contribution towards legal costs arises. I therefore made no order as to costs.

David Appleton
Member of the Employment Relations Authority