

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 50
5440905

BETWEEN	PAUL MAHONY Applicant
A N D	INDUSTRY TRADE & TRAINING OPTIONS LIMITED Respondent
A N D	INDUSTRY TRAINING & CONSULTING LIMITED Intended second respondent

Member of Authority: M B Loftus

Representatives: Alan Taylor, Advocate for Applicant
Grace Ginnane for the Respondent(s)

Investigation Meeting: Via the papers and telephone conference on 14 March
2014

Date of Determination: 1 April 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 16 January 2013 I issued a determination in which I concluded Industry Trade and Training Options Limited (ITTOL) owed Mr Mahony some \$2,292.50 in unpaid wages and holiday pay.

[2] ITTOL was ordered to pay that amount, plus interest and costs. There was also an order it pay a penalty for its failure to comply with statutory requirements in respect to time and wage records, with the penalty payable to Mr Mahony and not the Crown.

[3] The above sums have not been paid and Mr Mahony seeks a compliance order.

Background

[4] ITTOL conducted training courses for, and provided a range of hydroponic products to, the agricultural sector. It was owned and directed by two individuals; Grace Ginnane and Heather Morine. The two *fell out* and Ms Morine resigned her directorship. Soon after Mr Mahony, a friend of Ms Morine, resigned. He was not paid money he was owed on leaving and that led to the original determination.

[5] Almost simultaneously Ms Ginnane ceased trading under the ITTOL brand and it was subsequently struck from the Companies Register. Mr Mahony then applied to have it reinstated so he could pursue his original claim.

[6] ITTOL was again struck from the register on 13 August 2013 and was no longer extant when the compliance application was filed on 26 November 2013.

[7] Having ceased to operate ITTOL Ms Ginnane registered a new company, Industry Training and Consulting Limited (Industry Training), and used it to continue providing training programmes. It is this company Mr Mahony seeks to add as a second respondent against which he can enforce the earlier orders.

Conduct of the Investigation

[8] When initially filed, and given a background of not having had any responses to prior approaches from either ITTOL or Ms Ginnane, Mr Mahony sought an *ex-parte* determination on the papers. I refused his application and a telephone conference, in which both Mr Taylor and Ms Ginnane participated, was held on 10 February 2014. We discussed various impediments the application faced and Mr Taylor undertook to get instructions from his client.

[9] On 10 March Mr Taylor advised that while Mr Mahony appreciated the issues he wanted closure, at least as far as the Authority's process is concerned. He sought a determination reiterating the points made during the telephone conference.

[10] I consider it appropriate I provide that. I will also do so without further recourse to Ms Ginnane as the parties are already aware of the outcome and it favours her interests.

Determination

[11] There can be no doubt ITTOL has failed to comply with the orders contained in the determination of 16 January 2013. Ms Ginnane accepts that is the case.

[12] Despite that, and for reasons already explained during the telephone conference, I conclude this application should be struck out.

[13] The reasons are as follows. The respondent, ITTOL, does not exist and did not do so when the application was filed. Proceedings cannot be taken against a non-existent entity.

[14] Nor is there a valid argument as to why Industry Training should be joined. It never employed Mr Mahony and there are no orders against it.

[15] Industry Training did not exist when the original cause of action arose. Nor can it be considered a phoenix company (s.386B of the Companies Act 1993) as it has not been placed in liquidation and there are significant differences between it and ITTOL.

[16] ITTOL was the child of both Ms Ginnane and Ms Morine and even though the latter resigned her directorship she remained a shareholder. Ms Ginnane is the only director and shareholder of Industry Training and there is then the fact their businesses differ. Industry Training's focus is on training while ITTOL's operation was wider and the fact the scope of the two businesses differed was accepted by Mr Mahony during the original investigation meeting.

Conclusion

[17] For the above reasons, and as already said, the compliance application is struck out on the grounds there is no respondent against which it can proceed.

[18] Costs shall lie where they fall.