Determination Number: AA 21A/06
File Number: AEA 640/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Lance Muir (Applicant)
AND	Savour & Devour Limited (Respondent)
REPRESENTATIVES	Applicant in person Maria Dew, Counsel for Respondent
MEMBER OF AUTHORITY	Robin Arthur
CONISDERATION OF APPLICATION FOR REOPENING OF INVESTIGATION	Application (29 March 2006); Respondent's reply (18 April 2006); and telephone conference with parties (22 May 2006)
DATE OF DETERMINATION	23 May 2006

DETERMINATION OF THE AUTHORITY

[1] By determination AA 423/05 dated 21 October 2005 the Authority found that the respondent unjustifiably dismissed the applicant on 10 May 2005. It awarded lost wages for nine weeks, part-loss of wages for a further 12 weeks and compensation for hurt and humiliation of $5200.

[2] By determination AA 21/06 dated 2 February 2005 the respondent was ordered to pay to the applicant the sum of $3000 as a contribution to his costs.

[3] On 29 March 2006 the applicant sought to have these orders amended to require another company to pay these amounts. The company – House of Brogan Limited ("HBL") – has the same two shareholders and directors as the respondent company, that is Tara and Geoff Brogan.

[4] The applicant said information from the company's accountant suggested the respondent company had no assets or income to pay the awarded amounts. The applicant also alleged that Tara and Geoff Brogan had employed him "*under a corporate veil*" to avoid paying for matters such as the Authority's awards to him.

[5] I treated the applicant's request as an application to reopen the investigation and join another party. The respondent and HBL were served with copies of the applicant's request and given an opportunity to lodge a reply.

[6] The respondent filed a statement in reply on 18 April 2006 which was stated to be made "*with the knowledge and consent of House of Brogan Limited as a non-party*".

[7] The respondent insists it was the applicant's employer throughout his employment. It is identified as the employer on the applicant's employment agreement. It provided a number of documents which it said showed that the respondent operated the café in which the applicant had worked and that it was the applicant's sole employer.

[8] An application of this type would routinely be decided on the papers. However there were some points that I wanted to clarify and I organised a telephone conference on 22 May 2006. Mr Muir attended representing himself. Ms Dew attended for the respondent and had Mrs and Mr Brogan in attendance with her.

[9] The statement in reply included copies of documents showing that the lease for the café premises was in the respondent's name, as was the café liquor licence; and the respondent had an employer's account with ACC which was used in respect of café employees. The applicant accepted that there was no reason to doubt the veracity of those documents.

[10] The applicant had provided copies of IRD records which identified HBL as the "employer or payer" of wages. The respondent provided copies of a wage slip for the applicant showing the words "Prepared by House of Brogan Ltd" and an IRD letter dated 8 April 2004 showing the company as "House of Brogan Limited".

[11] Ms Dew told me her client's directors instructed her that, in setting up the respondent company, they had used an existing computer system and accounting package for HBL. This resulted in that name appearing on wage and IRD records. However that did not, in its submission, alter the true nature of the employment relationship as being between the applicant and the respondent.

[12] Importantly, it is clear that the applicant was aware of this state of affairs before his dismissal and throughout his personal grievance case. For that reason I accept the respondent's submission that there is no 'fresh evidence' or matters previously concealed from the applicant which might justify the reopening of the investigation and the joinder of HBL. Rather the evidence is that the applicant was employed by the respondent and the respondent alone is liable to meet the awards of the two determinations.

Determination

[13] **Accordingly, as advised in the telephone conference, I decline the application to reopen the investigation, for the reasons given in this determination.**

Enforcement issues

[14] However the matter does not end there. I am not bound to treat an application to the Authority simply as being of the type described by the parties. There is a discretion to concentrate on solving the employment relationship problem and an obligation to act in equity and good conscience. Here the real problem presently – and what gave rise to the unsuccessful application – is that the respondent has not paid the amounts ordered in the two determinations.

[15] The statement in reply said the respondent had limited resources to pay the award and costs but that the applicant had not taken any enforcement action against the respondent.

[16] The applicant says he took the determinations to the Auckland District Court to request their enforcement. However he also showed staff at the District Court a copy of a letter from the respondent's accountants, written to the respondent's solicitors and dated 22 November 2005. The

letter states that the respondent "*has no assets and consequently no funds to meet the employment award recently awarded against the company*". On the basis of this letter, and the IRD documents identifying HBL, the applicant told me that Court staff advised him that the determinations could not be enforced and to return to the Employment Relations Authority.

[17] Whether that account is accurate or not, decisions on steps to enforce the Authority's determinations through the District Court under s141 of the Employment Relations Act cannot be based solely on subjective statements of position on behalf of the liable party – in this case, its accountant in a letter to its solicitor. The applicant is entitled, if he wishes, to have steps taken by the District Court to enforce those determinations through its procedures and for those measures to identify whether there are assets and income able to meet the terms of the orders made in the Authority's determinations.

[18] I am aware from the statement in reply that the accountant's letter was written as a time when the respondent was trying to negotiate with the applicant to accept a smaller amount than awarded. I note too that the letter does not state the respondent cannot pay the amounts ordered. Rather it states that in order to do so, its directors would have to make a personal loan to the company.

[19] The applicant advised during the telephone conference that he understood the respondent's café – in which he had worked – was now for sale. He had earlier provided a copy of an advertisement from the website of a firm specialising in sales of hospitality industry property. This showed the café lease was for sale for $580,000 plus stock at valuation. Ms Dew was able to confirm that the business was for sale and had been advertised in the *New Zealand Herald*. The respondent's statement in reply says that the respondent entered the lease for the café premises in 2003. Unless the lease has subsequently assigned, the respondent clearly has an asset of significant value.

Compliance order

[20] I advised the parties that I considered the circumstances of this matter may warrant the issuing of an order for the respondent to comply with the terms of the Authority's determinations. Under s138 of the Employment Relations Act 2000 ("the Act"), the Authority may of its own motion exercise its power under s137 to order compliance with any determination of the Authority.

[21] If such an order is not complied with, the person affected by the failure may apply to the Employment Court under s138(6) for further measures to be taken under s140(6) including imprisonment, fines and sequestration of property.

[22] Ms Dew requested the opportunity to consult with the respondent about the implications of a compliance order being made so that she could give advice and take instructions – the only two shareholders and directors being in her office at the time of the teleconference. Having indicated that I considered a compliance order was likely to be appropriate, I granted a 24-hour period for her to consult with her client and make any submissions on the prospect of a compliance order being made. The 24-hour period has passed without any further communication from Ms Dew on behalf of her clients.

[23] The respondent was ordered seven months ago to pay lost wages and compensation to the applicant. Three months ago it was ordered to pay costs to the applicant. It has not complied with those orders. I consider these circumstances warrant a further order by the Authority for the respondent to comply by a set time with the earlier orders.

[24] **Under s137 of the Act, the respondent is ordered to comply within 21 days of the date of this determination with the terms of the orders made in determinations AA 423/05 and AA 21/06 of this Authority.**

Costs

[25] Ms Dew indicated at the end of the telephone conference that both the respondent and HBL would want to seek costs as Mr Muir's application to reopen the investigation and join HBL was unsuccessful. She suggested both companies had incurred costs in responding to the application.

[26] I identified some difficulties in such a costs application. Firstly, HBL had an opportunity to reply to the application but did not. Only the respondent provided a response, said to be made with the knowledge and consent of HBL. The reality is that both companies have the same two shareholders and directors, Mr and Mrs Brogan.

[27] Secondly, costs are discretionary and equitable principles apply, including whether such a costs application is made with 'clean hands'. Here the unsuccessful re-opening application was made only because the respondent had not paid the awards.

[28] Earlier the respondent, through the actions of its two directors and a private investigator it hired, was found to have unjustifiably dismissed the applicant after having put to him a number of allegations which the private investigator described as "bluff" and accepted were made without foundation. Determination AA 423/05 described the respondent's actions as "not simply inept" but "deliberate" and in breach of the duty of good faith.

[29] Now the respondent is in breach of the terms of two determinations of this Authority. That breach is now the subject of a compliance order.

[30] However, if, despite these circumstances, the respondent believes it is entitled to costs in respect of the unsuccessful reopening application, leave is reserved to apply for costs within the next 21 days. No application for costs will be considered outside that timeframe.

Robin Arthur
Member of Employment Relations Authority