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Pelabon v Zumo Retail Nelson Limited (Wellington) [2018] NZERA 2044; [2018] NZERA Wellington 44 (18 May 2018)

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Pelabon v Zumo Retail Nelson Limited (Wellington) [2018] NZERA 2044 (18 May 2018); [2018] NZERA Wellington 44

Last Updated: 4 July 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 44
3021272

BETWEEN FLORIAN PELABON Applicant

AND ZUMO RETAIL NELSON LIMITED

First Respondent

AND ALLEN CHAMBERS LIMITED Second Respondent

AND GEORGE ALLEN CHAMBERS Third Respondent

Member of Authority: Michele Ryan

Representatives: Bede Laracy, Advocate for Applicant

George Allen Chambers on behalf of all Respondents

Investigation Meeting

Submissions

22 February 2018

On the day of the investigation meeting from Applicant
Nothing from Respondents

Determination: 18 May 2018

DETERMINATION OF THE AUTHORITY REGARDING AN APPLICATION FOR COMPLIANCE

Employment relationship problem

[1] In a determination issued on 6 October 2017 the first respondent, Zumo Retail Nelson Limited, (“ZRNL”) was ordered to pay Mr Florian Pelabon \$10,824.07 in wages, holiday pay, and compensation.¹ In a subsequent determination dated 2 February 2018 the Authority ordered ZRNL contribute \$2,250 towards costs

associated with Mr Pelabon’s substantive claim.²

¹ *Pelabon v Zumo Retail Nelson Ltd* [2017] NZERA Wellington 101

² *Pelabon v Zumo Retail Nelson Ltd* [2018] NZERA Wellington 10

[2] ZRNL has not made any of the ordered payments. Nor has it advanced a challenge to the Court concerning either determination.

[3] Mr Pelabon now seeks to enforce the orders set out in each determination by obtaining a compliance order against the first, second and third respondents. He requests interest and a contribution to the cost of this application also.

[4] The first respondent, ZRNL, was Mr Pelabon’s employer and is the entity in which the orders of each determination concerned.

[5] The Companies Office Register records the second respondent, Allen Chambers Ltd, (ACL) as the ultimate holding company of ZRNL, with Mr Chambers owning 100% of the shareholding of ACL.³

[6] Mr Chambers is personally cited as the third respondent on the basis that he is the director (sole) of both the first and second respondents.

[7] Mr Pelabon asks the Authority to lift the corporate veil and make an order that ZRNL and ACL comply with the Authority’s orders.⁴ He further requests ACL and Mr Chambers are ordered to ensure ZRNL complies with the orders made.

[8] In response to Mr Pelabon’s application Mr Chambers says ZRNL is “*essentially wound up*”. As regards the liability of the second and third respondents he says “*ACL is a separate corporate entity from ZRNL*”; “*no fraudulent conveyance has occurred with respect to ZRNL’s assets*”; “*it is unnecessary to defend the concept of a limited liability company*”.

[9] At issue is whether there are grounds to issue a compliance order against one or any of the cited respondents.

The Authority's investigation

[10] The general rule is that it is for the applicant to decide whom he or she will sue. Any person named as a respondent may oppose being joined to proceedings by applying for strike out if he or she considers there is no arguable case to answer.⁵

None of the cited respondents sought to remove themselves from Mr Pelabon's

application.

3. An ultimate holding company (UHC) is a company which controls another registered company through shareholding or other means.

⁴ Paragraph [2]–[3] of Mr Pelabon's application

⁵ *Auckland Regional Services Trust v Lark* [\[1994\] NZCA 251](#); [\[1994\] 2 ERNZ 135](#)

[11] During a case management conference held on 19 December 2017 with the parties, I noted ZRNL appeared to remain on the company's register and had not been wound up. Mr Chambers was directed to provide by 23 January 2018 a sworn affidavit setting out ZRNL's position, and certified copies of ZRNL's bank statements and additional information regarding ZRNL's financial status, if it was seeking to establish impecuniosity as cause for the failure to pay the amounts awarded by the Authority.

[12] Mr Chambers did not attend the investigation meeting. The Authority delayed the scheduled starting time while support staff sought to make contact with him. The call was not answered or returned. I am satisfied Mr Chambers was aware of the matter and the potential consequences of the respondents' failure to attend.⁶ The meeting proceeded pursuant to cl. 12, Schedule 2 of the Employment Relations Act (the Act).

Are there grounds to issue a compliance order and if so to whom?

[13] Section 137(1)(b) provides the Authority with a discretionary power to order compliance against any person who has not complied with a determination given under the Act by the Authority.

[14] In an email dated 24 January 2018 Mr Chambers said that ZRNL had owed a

\$346,523.64 to ACL, noting ZRNL had assets (excluding depreciation) of

\$491,813.67. He says ACL seized ZRNL's property on 1 November 2017 following default of its payments to it. He stated ACL [had] guaranteed ongoing supplier relations, and two entities covering operations had been set up.⁷ No further reference is made to ZRNL's remaining assets. The email was accompanied by a screen shot of

¹¹ 'General Ledger' bank account numbers.

[15] Neither document complied with the requirements of the Authority's direction. If ZRNL had concerns about preserving material it considered confidential material it was open to it to apply for a non-publication order.

[16] In any event, the content of the information provided is so slight, no reliable conclusions can be made from it. It is unclear what the screen shot document was

6. The Notice of Investigation Meeting dated 22 December 2017 included advice that should the respondents fail to attend the Authority may proceed and issue a determination.

7 Neither entity was cited as a respondent in these proceedings.

intended to convey other than a ZRNL account has been closed. I note the document appears to record the existence of additional ZRNL accounts.

[17] ZRNL did not furnish any of the usual financial indicia; profit and loss and cash flow records, balance sheets, or bank account statements, which would allow an objective body, such as the Authority, to be able to properly assess ZRNL's financial position.

[18] Mr Chambers' email of 24 January 2018 advised the Authority that ZRNL (and ACL) would allow an audit by a mutually agreed qualified accountant to be undertaken, albeit on the proviso that activity would be funded by the applicant or the Crown. ZRNL's approach to the provision of information has been unwise. The onus lies on it to demonstrate it is impecunious if that is the ground on which it seeks to avoid an order for compliance.

[19] There does not appear to be any reason as to why a compliance order should not be made against ZRNL where it remains listed on the Companies Office Register and has not been wound up. Nor does the information provided by ZRNL's director demonstrate ZRNL is without funds. ZRNL remains liable for the orders made pursuant to the substantive determination.

[20] This finding leads to me to conclude it is unnecessary to look behind the corporate veil to resolve the matter. The judgement of the Labour Court in *Northern Clerical Workers Union v Lawrence Publishers Co of New Zealand Ltd*⁸ provides precedent as regards the obligations of the second and third respondents. In that case the applicant, following an award of remedies associated with a personal grievance, sought payment through compliance orders against the employing company, its holding company, and the managing director who also held a majority shareholding in the parent company. The Labour Court concluded the dispute could be decided

without disrupting the corporate veil. It said the focus should be on "*who is responsible to carry out the act [the employer] had been ordered to perform*" but had not done so. It referred to a number of similar cases and said:

In each of those cases third persons were bound by compliance orders, not to make payment of a respondent's debt from their own pockets, but to take the steps which were in their power to ensure the liability was met by the person upon whom the liability fell⁹.

⁸ [\[1990\] 1 NZILR 717](#)

⁹ *Ibid* n8 at 722

[21] The Court found that the director and the holding company in that matter had complete control over the employer company. It held it was well within the power of each of them to put the employer in a position where it could pay the monies owed. To this end the Court concluded it had jurisdiction to make orders to have all three respondents ensure the employer made the payment, including that the holding company advance whatever funds necessary to the parent company "*whether from its own resources or not will be a matter ... for the three respondents.*"

[22] I am satisfied ACL and Mr Chambers exercise at least the same degree of control over ZRNL (if not more given the corporate structure of ZRNL and ACL as reflected in the Companies Office Register) to that of the holding company and the

[23] It is appropriate to order all three respondents in this matter to ensure ZRNL makes the payments ordered. As observed in *Lawrence Publishing*, that orders once made have the effect of prohibiting any action by any of the three respondents which would have the result of preventing ZRNL from making the payment.

Orders

[24] Pursuant to s 137 of the Act, within 4 days of this determination:

(i) Zumo Retail Nelson Limited must comply with the orders contained in the determinations dated 6 October 2017 and 2 February 2018 and pay Mr Pelabon the sum of \$13,074.07 within 14 days of this determination.

(ii) George Allen Chambers is ordered to make the payment referred to at

(i), as agent of Zumo Retail Nelson Limited;

(iii) Allen Chambers Limited is ordered to advance to Zumo Retail Nelson Limited whatever funds may be necessary (if any) in order to enable Mr George Allen Chambers and Zumo Retail Nelson Limited to comply with orders (i) and (ii) above.

[25] Beginning from the date on which each determination was issued, Mr Pelabon is entitled to interest on the orders. Zumo Retail Nelson Limited is ordered to pay Mr

10 Ibid n8

Pelabon \$249.67, the total sum of interest accrued to the date of this determination.¹¹

George Allen Chambers and Allen Chambers Limited are both ordered to take whatever action necessary to ensure the interest payment is made. Interest on all orders will continue to accrue until the date of payment.

Costs

[26] Costs associated with this application are awarded at \$500 plus filing fee of

\$71.56.

Michele Ryan

Member of the Employment Relations Authority

¹¹ Mr Pelabon's application was lodged with the Authority before the [Interest on Money Claims Act 2016](#) came into effect on 1

January 2018. Interest awarded in this determination is made pursuant to cl 11 of the Second Schedule of the Act at the rate prescribed under s 87(3) the [Judicature Act 1908](#), which is currently 5% per annum.

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