

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 50
5438838

BETWEEN LORETTA RYDER
Applicant

AND WHITIREIA INDEPENDENT
STUDENTS ASSOCIATION
First Respondent

AND WHITIREIA COMMUNITY
POLYTECH
Second Respondent

Member of Authority: G J Wood

Representatives: N Flint for Applicant

J Sumner for Second Respondent

Submissions received by: 23 March 2015

Determination: 6 May 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In my substantive decision ([2013] NZERA Wellington 34) I determined that the first respondent, Whitireia Independent Students' Association (WISA), owed Ms Ryder the sum of \$53,013.70 in unpaid wages. Ms Ryder's claim arose from the time when she was de facto president of WISA between 7 May 2009 and 4 August 2010. As I noted in para [21] of my substantive determination Ms Ryder's claim arose after she had voluntarily gone without remuneration for an indeterminate period and it was discovered that in excess of \$1million had been taken from WISA's accounts. WISA's Vice President, a close associate of Ms Ryder, later admitted to defrauding

the Association and was sentenced to jail as a result. A forensic audit conducted by an accounting firm showed that WISA's financial and executive processes were poor and Ms Ryder was one of three signatories who signed a number of cheques where the process was completed improperly. Tens of thousands of dollars of WISA funds remain unaccounted for beyond that admitted to by the Vice President. Ms Ryder was never charged with any offences. She remains entitled to be paid the monies owing set out above.

[2] Since the Authority's determination in March 2013 Ms Ryder has made a number of attempts to be paid by WISA and/or the second respondent, Whitireia Community Polytechnic (Whitireia/the Polytech), who had held and distributed funds on WISA's behalf.

[3] In her original application Ms Ryder sought a compliance order requiring WISA and/or Whitireia to pay her the \$53,013.70, which has remained unpaid. However in her final submissions (perhaps given that WISA remains effectively moribund) the orders sought were essentially directed against Whitireia. She therefore seeks orders that compliance be made directly by Whitireia because it was and is financially responsible for WISA and its debts and it should therefore comply with the determination. Alternatively, because the Polytechnic had allegedly assumed responsibility for the proper management of WISA, it should make available sufficient funds to enable WISA to comply with the determination. Again in the alternative, it claims that Whitireia owes WISA monies and that it should make those monies available to WISA to enable it to comply with the determination. Effectively the second and third options require WISA to make the actual payment, but it must first receive funds to do so from Whitireia.

[4] Whitireia denies any responsibility for the debts owed by WISA. Consistent with its effectively moribund state, WISA was not represented during the Authority's investigation.

Factual discussion

[5] As noted in the substantive determination WISA was in financial difficulties at least from 2009 onwards due to fraud and mis-management. There were two important results from this. First, Ms Ryder, as its de facto president, agreed to work without immediate payment i.e. to forego her salary for the foreseeable future.

Second, after August 2010 the Polytech chose not to remit any more students association funds it had collected on WISA's behalf.

[6] WISA's Chief Financial Officer, Mr Mark Raisin, put in place a process whereby it would remit those funds only by way of payment to third parties approved by two signatories to WISA's accounts. A proper invoice was also required.

[7] I accept Mr Raisin's evidence that as a result of these approved payments, all the funds held by the Polytechnic on behalf of WISA have now been dissipated. While for some time WISA's bank accounts were frozen at some point WISA got access to its own bank account, not controlled by Whitireia. However the evidence before the Authority showed that this bank account had, by the date of the investigation meeting, also virtually been extinguished of funds.

[8] In 2012 WISA became a voluntary students association due to new legislation. It was still operating at the time of the substantive investigation in November 2012. However I also note that in 2012 Whitireia took over the student support functions previously provided by WISA on its behalf and in its own name.

[9] By 2015, while still a registered incorporated society, WISA appeared to have no members and no executive. It was in effect moribund if not defunct.

[10] An accountant and business advisor, Mr Alan Strawbridge, who gave evidence on behalf of Ms Ryder, properly questioned the accounts and financial position of WISA and raised a number of valid concerns about where money and other assets of WISA had gone. The question in this case is whether or not Whitireia are in any way responsible for such issues and if so, what are the implications for Ms Ryder's claim.

[11] It is claimed that \$83,000 would have been available to meet WISA's claim had the Polytechnic withheld all the funds it held since the students association became voluntary and in fact arguably ceased to operate lawfully in accordance with its rules. I accept Mr Raisin's evidence Whitireia had no knowledge that WISA was in breach of its rules in 2012/2013 over membership numbers and/or an invalid executive. It was entirely plausible, as he stated, that some members could have paid fees to WISA directly, the Polytechnic having no obligation to collect them. Thus it cannot be concluded that, when the executive was operating, it was doing so in breach of WISA's constitution. While there was a wider claim that monies owed to Ms Ryder should have been given priority that only results from looking back in

hindsight. The fact is that Ms Ryder was not given priority for payment and in fact her claim was never a debt owed by WISA, rather a contingent liability, until the date of the Authority's determination of 26 March 2013. Even if there was a debt it did not mean that the Polytechnic is now required to meet Ms Ryder's claims out of its accounts. There were plenty of other deserving claimants on WISA's funds at the time. Unfortunately for Ms Ryder the timing of issues meant that her claim was not met and cannot now be met by Whitireia from funds held on behalf of WISA as they have been exhausted.

[12] Evidence given that sought to show that Whitireia's actions went beyond sensible constraints on release of funds to third parties on behalf of WISA are that Whitireia retained for itself the power to refuse requested payments, Whitireia advised WISA that Ms Ryder's claims should be made a contingent liability rather than be paid, requested additional information by way of budgets from WISA and took over many of its previous functions.

[13] On the other hand, Whitireia only ever released WISA funds it held upon receipt of an invoice and two signatories from authorised executive members. There was no evidence it ever made any payments outside that regime, which would have implied some form of control by Whitireia. I accept that any over payment by Whitireia on behalf of WISA, once the monies held for it had been exhausted, was simply an error. Whitireia's actions in ensuring student support functions were still provided in the uncertainty caused by students associations all becoming voluntary cannot be equated with it carrying out those functions as or on behalf of WISA.

[14] Mr Strawbridge rightly noted a book debt to WISA of \$19,610, which he believed was most likely owed by Whitireia. However I accept Mr Raisin's evidence that this was an unverified debt, that it is unlikely that there is such a debt and that even if there were it is not owed by Whitireia. If it is a matter of unpaid student fees those are owed directly to WISA by the students, not by Whitireia.

[15] Mr Strawbridge properly questioned why a basketball court funded by WISA was later destroyed by Whitireia yet no compensation was paid to WISA. Mr Raisin's evidence, which I accept, was that WISA had accepted that there were no debts owing to it by the Polytechnic and therefore the loss of basketball equipment and asphalt paid for by WISA was not an 'asset' that it sought compensation over the loss of. It is

also questionable what value such assets would have, given depreciation and the fact that Whitireia controlled the land the court was built on.

[16] Mr Strawbridge also properly questioned why WISA was never compensated by Whitireia when it took over the use of a building for which WISA had paid for the fitout. I accept Mr Raisin's evidence that the depreciated assets were minimal and of little value and that WISA never sought any compensation for their use.

[17] Ms Ryder has been unable to obtain the funds owing to her from WISA or Whitireia despite many attempts and has therefore applied for compliance orders to ensure that WISA and/or Whitireia do so.

The law

[18] Section 229CA of the Education Act 1989 deals with the duties and powers of tertiary institutions (in the guise of their Councils) over student association funds after membership of students associations had been made voluntary. The relevant parts are sub-sections 4 to 8:

4. *The council of an institution must, if asked by a students association of the institution, collect the membership fees of that association, but only if the association provides the council with –*
 - (a) *A copy of its current constitution; and*
 - (b) *An independently audited set of financial accounts of the association for the last financial year.*
5. *The council must pay all membership fees collected on behalf of the students association to the association in a timely manner.*
6. *Despite sub-sections (4) and (5), the council may decline a request to collect membership fees on behalf of a students association, or may withhold all or any part of any membership fees collected, if the council believes that –*
 - (a) *The terms of the constitution of the association are being breached; or*
 - (b) *The accounts disclose financial irregularities.*
7. *The council may retain any membership fees that have been withheld under sub-section (6) until the council is satisfied that all breaches of the association's constitution, and all financial irregularities, have been appropriately addressed by the association.*

8. *The council may charge a students association for the actual and reasonable costs incurred by the council in collecting membership fees on behalf of the association.*

[19] Generally, the Authority's jurisdiction applies only to the parties to an employment relationship problem. In *Northern Clerical IUOW v. Lawrence Publishing Co of NZ Limited and John Tony Holdings Limited v. ANOR* [1990] 1 NZILR 717, however, the Employment Court dealt with the issue about whether compliance orders need be limited only to an actual employer. At page 721 the Court held:

I think it is sound law to say in general that the Court will not require a managing director or a holding company to pay compensation which is clearly the liability of a separate employing entity. It is also good law in my view to say that the Court cannot compel some other person who has no powers in the matter to bring about payment by a separate employing entity of the money for which it is liable ...

After considering carefully the submission of both parties in respect of the corporate veil, I think the matter falls to be decided without the necessity to go into that area of law. On this approach, it is not a matter of looking behind a veil for a true personality hidden in the shadows. It is rather a matter of seeing who is responsible to carry out the act which Lawrence Publishing Limited has been ordered to perform and has not so far performed... 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 that the liability was met by the person upon whom the liability fell.

[20] The effect of the order against all three parties in that case was to bind all of them to ensure that the employer made the payment ordered. Whether this was to be from the employer's own resources or not was not a matter for the Court but for the three respondents. The order also had the effect of prohibiting any action by any of the three respondents that would have had the result of preventing the employer from making the payment.

[21] In *McLennan v. Internet Productions Limited (in liquidation)* [2003] 1 ERNZ 282 the Court noted that the Court had the power to direct one person to meet the debts of another person, but that the power to order compliance was discretionary.

[22] At para.[42] it was held:

It is an important element of the legislation that it is for wrong-doers to compensate for their wrong-doing. The orders were directed to the

wrong-doers. An order requiring a third party to pay the sums might see the recipient paid but not by the wrong-doer. The objective of an order for compliance under subs (1) is compliance by the wrong-doer. An order for compliance under subs (2) must be of that kind also. An order that a third party simply pay the compensation from its own resources is not an order of the sort able to be made under subs (1).

[23] At para.[43] it was held:

So while Lawrence Publishing type orders were intended by Parliament to be covered by s 55(2), I do not interpret the subsection to extend to orders of the sort claimed against Mr Taylor in this case. Put another way, orders under s 55 must be with the objective of requiring a liable party to comply. In the particular circumstances of this case now, it is common ground that the affairs of the only surviving liable party were conducted by a liquidator whose obligations were defined in statute and who was, in any event, not a party to these proceedings.

Determination

[24] Ms Ryder submitted that s.229CA of the Education Act allows Whitireia to take control of WISA's finances and circumstances of financial irregularity or breach WISA rules. It was also submitted that Whitireia had failed in its duty (both self-appointed and legislated) to ensure the proper running of spending of WISA. This submission overstates the provisions of the Act, which relate to membership of associations of tertiary students and provide for voluntary student membership and membership fee payments. Nothing in that section relates to Whitireia taking over the running of WISA as a students association and therefore becoming liable in its place for its debts. The Act simply gives powers to a Polytech to withhold membership fees that it has already collected, but does not give powers to it to run a students association.

[25] In any event I am satisfied that Whitireia never took over the effective running of WISA. Whitireia believed that WISA had a valid executive at the time of Ms Ryder's original claim and it took the prudent steps to ensure that any payments made from monies it held on behalf of WISA were validly invoiced and authorised for payment by the relevant signatories of WISA. Given the financial irregularities and mismanagement that plagued WISA such a financially prudent arrangement should not be misconstrued as control of a separate and independent organisation. I therefore conclude that Whitireia was never responsible for and/or in control of the financial

management and regulation of WISA. It is therefore not responsible on its own account to pay the debts owed to Ms Ryder by WISA.

[26] In addition, Whitireia was not required to refuse to release any of the \$83,000 in funds requested to be paid by the executive and supported by an invoice, just because it and WISA were aware of a claim by Ms Ryder. Even if that were the case it goes beyond the Authority's jurisdiction to order it to now pay its own funds to meet what was at the time only a contingent liability to a separate and independent organisation. The Authority only has jurisdiction to require a non-party to advance sufficient funds to a liable party to enable it to pay a debt the result of an employment relationship problem.

[27] As to the alternative (*Lawrence Publishing*) claim, it should not be required to make funds available to WISA to enable it to comply with the determination, given that Whitireia never assumed responsibility for the proper financial management of WISA. In any event, given WISA's status there is no point in making such an order because there is no mechanism for ensuring Ms Ryder is paid the monies she is owed from WISA funds once they received such funds from Whitireia.

[28] As to the final claim, in the circumstances of the financial difficulties that WISA was in and the fraud and financial mis-management surrounding those financial problems (during which Ms Ryder was the de facto president for some period), I conclude that there is insufficient evidence to conclude that WISA is owed any monies by Whitireia. In any event, for reasons given above, I have concluded that the Authority has no jurisdiction to order Whitireia to pay any debts it may owe to WISA.

[29] I therefore dismiss Ms Ryder's claims against the second respondent Whitireia Community Polytechnic. I note that while the claims against Whitireia Independent Students Association were not pursued directly it is always open to Ms Ryder to enforce the monies owed to her through the District Court.

Costs

[30] Costs are reserved.

G J Wood
Member of the Employment Relations Authority