

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 207
5498197**

BETWEEN

KATHERINE BENNETT
First Applicant

SAMSURI ZAINOL
Second Applicant

FRANK VAN GEEMS
Third Respondent

AND

SEAN MICHAELS
First Respondent

CORPORATE GROUP
INTERNATIONAL LIMITED
Second Respondent

CORPORATE CLEANING
SERVICES LIMITED
Third Respondent

CORPORATE PROTECTION
AND SECURITY
INTERNATIONAL LIMITED
Fourth Respondent

Member of Authority: Eleanor Robinson

Representatives: Greg Bennett, Advocate for Applicant
Sean Michaels Representative for Respondent

Investigation Meeting: 17 July 2015 at Auckland

Submissions received: 17 July 2015 from Applicant
None from Respondent

Determination: 17 July 2015

ORAL DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicants, Ms Katherine Bennett, Mr Samsuri Zainol and Mr Frank van Geems claim that Mr Sean Michaels, Director of the First, Second and Third Respondents, Corporate Cleaning Services Limited, Corporate Protection and Security International Limited (CPSIL) and Corporate Group International Limited (CGIL), is the true employer of the Applicants and apply to have the Authority lift the corporate veil to show that Mr Michaels is the true employer.

[2] The Applicants claim that they have been unjustifiably constructively dismissed by the Respondents.

[3] The First and Second Applicants, Ms Bennett and Mr Zainol claim that they are owed wages by the Fourth Respondent, Corporate Protection and Security International Limited (CPSIL).

[4] The Third Applicant, Mr van Geems, claims that he is owed wages by the Second Respondent, Corporate Group International Limited (CGIL).

[5] The First, Second and Third Applicants also claim a penalty against the Respondents for a breach of good faith obligations.

[6] The First, Second and Third Applicants also claim a penalty against Mr Michaels and/or the Second and fourth Respondents for misleading and deceiving them pursuant to the Fair Trading Act 1986.

Issues

[7] The issues for determination are whether:

- a. The Authority should pierce the company veil in respect of the Second, Third, and Fourth Respondents.
- b. The Applicants were unjustifiably constructively dismissed
- c. The Applicants are owed wages and if so, how much and by who or whom?
- d. Should a penalty be awarded against Mr Michaels or another Respondent for a breach of good faith?

- e. Should a penalty be awarded against Mr Michaels or another Respondent for misleading and deceiving the Applicants pursuant to the Fair Trading Act 1986?

Background Facts

[8] CPSIL is a company which supplies security and protection services. Mr Michaels is a director of CPSIL, and also the sole director of CGIL.

Ms Katherine Bennett

[9] Ms Bennett said that she had first met Mr Michaels on or about 2007, and had dealings with him in a professional capacity over the intervening years. During March 2014 she had a number of meetings with Mr Michaels which resulted in an offer of employment.

[10] Ms Bennett said she commenced employment with CPSIL as Marketing Manager on 14 April 2014, and was provided with an individual employment agreement with CPSIL. The terms of the employment agreement were that she was employed as a Marketing Manager on 14 March 2014 and that her salary was \$60,000.00 to be paid fortnightly.

[11] Ms Bennett said that she was given a cheque in respect of payment for her first two weeks of employment which was raised against CPSIL's ASB account by Mr Michaels. However Mr Michaels had asked her not to bank the cheque until Monday 5 May 2014 to ensure the required funds to cover it had cleared through the ASB bank account.

[12] Ms Bennett said she had presented the ASB cheque as instructed on Monday 5 May 2014, but it had been subsequently informed by ASB bank that the cheque had been dishonoured.

[13] Ms Bennett said she had been given a further cheque by Mr Michaels but this cheque was also dishonoured.

[14] During April 2014 Ms Bennett said she understood from discussions at CPSIL management meetings that investment in the business was assured. Mr Michaels told her on 20 May 2014 that investor funds had cleared in the CPSIL ANZ account and that she would receive her outstanding wages payment, however no cleared funds into her bank account eventuated.

[15] Ms Bennett said she had raised her concerns about non-payment with Mr Michaels, but that there was no resolution.

[16] As a result of the complete non-payment of wages since she commenced employment, Ms Bennett said she terminated her employment with CPSIL on 28 May 2014.

Mr Samsuri Zainol

[17] Mr Zainol said that he had first met Mr Michaels on or about early February 2014 and was offered a position with CPSIL as Operation/Training Manager.,

[18] Mr Zainol said he commenced employment with CPSIL 21 March 2014, and was provided with an individual employment agreement with CPSIL. The terms of the employment agreement were that he was employed as Operation/Training Manager and that his salary was \$50,000.00 to be paid monthly.

[19] Mr Zainol's individual employment agreement stated at clause 7.1 that he would be paid a salary of \$50,000.00 to be paid monthly into a nominated bank account, however he had asked, and Mr Michaels had agreed, to payment on a fortnightly basis.

[20] Mr Zainol said that after delaying payment of his salary to him on an ongoing basis, Mr Michaels said that he was still awaiting payment from a client.

[21] Mr Zainol said that during the course of his employment Mr Michaels provided cash payments to him, one of \$100.00 and one of \$1,708.61.

[22] Mr Zainol said that during this period he had been using his savings, and was worried about his future prospects, but he felt reliant on Mr Michaels to assist him with employment required to assist with his immigration application.

[23] Mr Zainol said he had repeatedly asked Mr Michaels for payment of his salary, but no salary payment had been received by him other than the two ad hoc cash payments.

[24] As a result of the non-payment of wages since he commenced employment, Mr Zainol said he terminated his employment with CPSIL on 27 June 2014.

Mr Frank van Geems

[25] Mr van Geems said he applied for an advertised position and was interviewed by Mr Michaels during March 2014. He had subsequently been offered and accepted the position of Director with CGIL with effect from 22 April 2014 at an annual salary of \$80,000.00.

[26] On his first day of employment Mr van Geems said he had been given access to CGIL's bank and company accounts by Mr Michaels, asked to be a signatory on the accounts and assured that investment monies would shortly clear the CGIL account balances.

[27] Mr van Geems said he personally purchased some furniture for the CGIL offices for which he had not been reimbursed.

[28] On 23 April 2014 a potential investor in CGIL, Mr Steven Musikier, arrived in New Zealand. However he had withdrawn his intention to invest in CPIL.

[29] As he was privy to the company accounts and was unaware of any investment funds being received, and as he had not been paid, Mr van Geems said he had terminated his employment with CPIL on 20 May 2014.

Determination

Should the Authority pierce the company veil in respect of the Second, Third, and Fourth Respondents?

[30] The Authority and the Employment Court have rarely pierced the corporate veil, and in instances where it has occurred this has usually been in the context of associated or subsidiary companies, however it is accepted that it may do so in equity and good conscience to deliver justice between the parties.

[31] It is submitted for the Applicants that the Second, Third and Fourth Respondents are not making any profit and are 'shell' companies.

[32] The fact that a company is not profitable is not *per se* a reason for piercing the corporate veil.

[33] In this case the Second, Third and Fourth Respondents are registered as limited liability companies with the New Zealand Companies Office, and as substantiated by the Applicants' evidence, trade, having clients and offer and perform services for the clients.

[34] I therefore do not find that this is an appropriate case for piercing the corporate veil.

Were the Applicants unjustifiably constructively dismissed?

[35] There is no evidence before me that the Applicants raised a personal grievance of unjustifiable constructive dismissal against CPSIL or CGIL respectively.

Are the Applicants owed wages and if so, how much and by whom?

[36] In accordance with s 157 (1) of the Employment Relations Act 2000 (the Act) I address the substantive merits of the case by addressing the wages claims of the Applicants.

[37] The Wages Protection Act 1983 governs the payment of wages between an employer and an employee. In accordance with s 4: *an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.*

[38] I accept the Applicants' evidence regarding the actual dates they were employed as the employers have not provided time and wage records.

[39] I find that the Applicants are owed monies in respect of non-payment of wages and are entitled to payment of wages for the hours which they have worked by CPSIL and CGIL respectively.

Has there been a breach of a term of the employment agreements of the Applicants by the non-payment of wages by CPSIL and CGIL and if so, should the penalty be awarded against Mr Michaels personally for aiding and abetting the breaches?

[40] I find that CSIL and CGIL breached an agreed term of the Applicants respective employment agreements by the non-payment of wages.

[41] Pursuant to s 134(1) of the Act, a person who breaches an agreed term of an employment agreement to which the Act applies, is liable to a penalty of up to \$10,000.00 for an individual or up to \$20,000.00 for a company.

[42] I am considering whether a penalty should be awarded against Mr Michaels personally on the basis that he was the "mind" of CPSIL and CGIL, and as such he aided, abetted or incited the breach of the employment agreements by CPSIL and CGIL

[43] This claim was only raised at the Investigation Meeting and as it is a serious claim in nature akin to a fine, I invite submissions from the parties, following which I shall determine the issue of penalties.

Should a penalty be awarded against CPSIL and CPGL misleading and deceiving the Applicants pursuant to the Fair Trading Act 1986 and if so, should the penalty be awarded against Mr Michaels personally for aiding and abetting the breaches?

[44] The duty of good faith contained in s 4 of the Act requires that parties deal with each other in good faith , and in particular that the parties should not mislead or deceive each other¹.

[45] I find that the Applicants were misled by CPSIL and CGIL into believing that they would be remunerated in accordance with their employment agreements, by the non-payment of monies and by assurances that payment would be made, but which payments were subsequently not made.

[46] I am considering whether a penalty should be awarded against Mr Michaels personally on the basis that he was the “mind” of CPSIL and CGIL, and as such he aided, abetted or incited the breach of the Settlement by CPSIL and CGIL

[47] This claim was only raised at the Investigation Meeting and I therefore invite submissions from the parties, following which I shall determine the issue of penalties.

Remedies

[48] CPSIL is ordered to pay Ms Bennett the sum of \$7,268.90 gross in respect of unpaid wages for the period 14 April to 28 May 2014 (calculated as \$60,000.00 p.a. x 6.3 weeks).

[49] CPSIL is ordered to pay Mr Zainol the sum of \$11,652.90 gross in respect of unpaid wages for the period 21 March to 27 June 2014 (calculated as \$50,000.00 p.a. x 14 weeks - \$1,808.61 paid in cash).

[50] CGIL is ordered to pay Mr van Geems the sum of \$6,666.00 gross in respect of unpaid wages for the period 22 April to 20 May 2014.

Interest

[51] The Applicants have applied for interest on the outstanding wages.

[52] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum².

¹ S 4 (1)(b)(i) of the Act

² Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

[53] I consider that it is appropriate that CPSIL and CGIL respectively are ordered to pay interest on the outstanding sums owed to the Applicants.

[54] CPSIL is ordered to pay interest of 5% on the outstanding sums due to Ms Bennett and Mr Zainol and CGIL is ordered to pay interest of 5% on the outstanding sums due to Mr van Geems.

[55] The Applicants are to be reimbursed the filing fee of \$71.56.

Costs

[56] Costs are reserved until the matter is concluded

Eleanor Robinson
Member of the Employment Relations Authority