

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 54  
5443177

BETWEEN RACHEL SUSAN BOTHWELL  
Applicant

AND MANAWATU DANCE  
ACADEMY LIMITED  
First Respondent

AND JACQUELINE CAROL  
PHILLIPS and MICHELLE ANN  
SMITH  
Second Respondents

Member of Authority: P R Stapp

Representatives: Jeremy McGuire, Counsel for the Applicant  
Nikki Flint, Counsel for the First Respondent  
Barbara Buckett, Counsel for the Second Respondents

Investigation Meeting: On the papers as to a preliminary matter

Submissions received: By 23 April 2014 (From the Second Respondent and  
Applicant)

Determination: 28 May 2014

---

**DETERMINATION OF THE AUTHORITY**

---

**Application to strike-out the second respondents**

[1] The second respondents, Jacqueline Carol Phillips and Michelle Ann Smith, have applied to be struck-out as parties to the proceedings. The grounds they rely upon are that there is no question for them to answer, that they are not the applicant's employer and there is no justification for lifting the corporate veil which is limited to exceptional and specific circumstances.

[2] Also, it has been submitted that the Employment Relations Authority does not have jurisdiction to investigate any liability (which is denied), on the part of the second respondents.

[3] In reply, the applicant's representative relies on two grounds for attempting to hold the respondents accountable in the applicant's claim for a personal grievance dated 13 December 2013. The first relates to s.25 of the Companies Act 1993 as to the identity of the company on the basis that the directors have to take responsibility for their actions. The second issue relates to the lifting of the corporate veil. This may involve an attempt for enforcement of a compensation award against the directors where the company is no longer trading.

[4] The applicant requests that the application to strike-out the second respondents be dismissed.

### **The facts**

[5] The statement of problem from Rachel Susan Bothwell against the Manawatu Dance Academy Limited and Jacqueline Carol Phillips and Michelle Ann Smith was filed in the Employment Relations Authority on 13 December 2013. The statement of problem claims that the respondents unjustifiably dismissed the applicant from her employment on 3 December 2013.

[6] The applicant's employer was more likely than not the Manawatu Dance Academy Limited. The name of the Manawatu Dance Academy Limited was included in an employment agreement given to Ms Bothwell with her offer of employment. It was clearly identified as "the employer". The employment agreement was signed off by Jacqueline Phillips and Ms Bothwell. The fact that the company name was included and that Ms Bothwell signed the agreement leads to the conclusion that she knew the name of her employer and that it was a company and not the directors personally. Indeed her statement of problem does not claim her employer was the directors personally.

[7] The statement of problem outlines how the applicant wants the problem or matter resolved with the reimbursement of future lost earnings, appropriate compensation and the payment of legal fees and expenses. These can only be a claim against her employer in the first instance.

[8] On 3 February 2014, a statement in reply was filed for the first respondent. The first respondent acknowledges that it was the employer, but denies the applicant's claims.

[9] By letter dated 29 January 2014, the second respondents requested that there be a direction made to sever their names from the claim and that the applicant justify their inclusion as parties to the claim prior to any statement in reply being filed on the second respondents' behalf. When attempts were made to organise mediation and a telephone conference with the Authority, Ms Buckett was engaged by the two respondents and she has subsequently applied and made submissions for both Ms Phillips and Ms Smith to be struck-out first, because there was no cause of action prescribed to any action by them in the matter. It is acknowledged they are directors of the company, but have no personal relationship with the applicant. To avoid any further costs, it is suggested that these respondents be struck-out and costs be awarded in respect of the application for strike-out.

[10] Mr McGuire disagreed with Ms Buckett's approach to the matter.

### **Determination**

[11] It is clear from the documents that have been filed with the statement of problem that the Manawatu Dance Academy Limited is most likely to be the employer. This is supported by the name of the company being referred to in the employment agreement, which Ms Bothwell signed, and the agreement directly referred to the company as "the employer". Also the statement of problem does not claim that the directors were Ms Bothwell's employer personally. Ms Phillips and Ms Smith are directors of the same company but in the personal grievance claim that has been filed in the Authority, there is no matter and/or any cause of action citing the directors to be included personally (as opposed to being involved as witnesses). This includes any particularised claim relating to their personal responsibility for meeting any liability.

[12] It seems that there may be problems with the Manawatu Dance Academy Limited and there is an indication that it is no longer trading. First, there has to be a hearing in regard to the personal grievance matter to establish liability, and that can only be brought against the employer at the time, which appears to be the Manawatu

Dance Academy Limited. Enforcement matters arise from that only if the applicant has a decision in her favour.

[13] Any matter of enforcement can involve new proceedings before the Authority. As such, it is in the enforcement proceedings that any issues about the company's ability to pay would be heard and any claims that Ms Phillips and Ms Smith have to make arrangements for the Manawatu Dance Academy Limited to pay any moneys awarded (*Northern Clerical IUOW v Lawrence Publishing Co of NZ Limited* (1990) ERNZ Sel Case 667 (LC)), and/or to consider lifting the corporate veil.

[14] Also, it is at that point that any issue arising in regard to the raising of the corporate veil would need to be made on application. Currently in the proceedings before the Authority, there is no application for the corporate veil to be lifted and nor can there be if the employer was the Manawatu Dance Academy Limited and until enforcement action arises. It seems to me that Mr McGuire has his proceedings out of alignment as to how best to approach this matter.

[15] There is an alternative for consideration. That is that both the directors be left in the claim, and other than any evidence relating to the personal grievance any claims that may eventuate in regard to their personal liability, be put on hold. However I accept that the second respondents' request to be struck out does not contemplate this course of action. There is no consent for me to act. Clearly for this to occur, information about the current financial status of the first respondent would be required. I am not in favour of this alternative course of action. My reasons are that no detailed financial information has been provided, that to consider that issue first does not deal with the real employment relationship problem between Ms Bothwell and her employer in regard to the personal grievance claim. Once any findings have been made on the personal grievance claim, any matter of enforcement that arises would need a fresh application. It seems to me that without the second respondents in the first proceeding there is nothing to prevent them being cited in a fresh claim for enforcement and their personal responsibilities (if any) heard then.

### **Order of the Authority**

[16] I direct that Ms Phillips and Ms Smith be struck-out of the current claim after 14 days from the date of this determination, unless Mr McGuire, on behalf of the applicant, refines and clarifies with more detail the claim in regard to both second

respondents and pleads any causes of action involving them in the claim for personal grievance. Otherwise, after 14 days, this matter can only proceed against the Manawatu Dance Academy Limited in regard to the claim for personal grievance.

**Costs**

[17] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority