

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 134  
5558449

BETWEEN

PETER BROADHURST  
Applicant

AND

PREMIER BUSINESS FORMS  
NZ LIMITED  
Respondent

Member of Authority: Andrew Dallas

Representatives: May Moncur, Advocate for the Applicant  
Michael Quigg, Counsel for Respondent

Investigation Meeting: On the papers

Determination: 3 May 2016

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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- A. Premier Business Forms NZ Limited is joined as Respondent to proceedings 5558449 under s 221(a) of the Employment Relations Act 2000 (the Act).**
- B. WP (PBP) Limited (formerly Premier Business Print Limited) (in liquidation) is struck out as Respondent to proceedings 5558449 under s 221(a) of the Act.**
- C. Costs are reserved.**

## **Employment Relationship Problem**

[1] Peter Broadhurst was employed as a Flexo Printer by a printing company carrying on business at premises located at 1 Arwen Place, East Tamaki, Auckland. He believed he was employed by Premier Business Print Limited (Premier Business).

[2] His initial employment was governed by a series of fixed term individual employment agreements. Premier Business was identified as the employer on these agreements. He was subsequently engaged on a permanent basis. Mr Broadhurst was dismissed on 13 February 2015.

[3] Mr Broadhurst challenged his dismissal and subsequently lodged a statement of problem in the Authority.

[4] On 18 June 2015 the then legal representative for Premier Business wrote to the Authority and advised that he "... acts for Premier Business Print Limited". The letter enclosed a statement in reply prepared in the name of Premier Business, which was also dated 18 June 2015.

[5] The reply attached Mr Broadhurst's individual employment agreement dated 30 November 2014, which identified Mr Broadhurst's employer as Premier Business. Corriene Karam and Ross Muirhead signed this agreement on behalf of Premier Business. Ms Karam and Mr Muirhead had previously signed Mr Broadhurst's fixed term individual employment agreement dated 16 June 2014. In both individual agreements, Ms Karam identified herself as "CFO, Director" and Mr Muirhead identified himself as "General Manager".

[6] On 11 September 2015, Premier Business' legal representative advised the Authority that he no longer acted for the company.

[7] A case management conference (CMC) was convened with the parties on 21 October 2015. A Member's Minute issued after the CMC by the Member then dealing with the matter identified Dennis Wong as having represented Premier Business.

[8] A review of the New South Wales Law Society website discloses that Mr Wong is a Corporate Legal Practitioner with TMA Australia Pty Limited and that his business address is 4-6 Straits Ave, Granville, NSW 2142, Australia.

[9] According to records held by the New Zealand Companies Office, Premier Business' ultimate holding company is the TMA Group of Companies Limited (TMA). TMA's registered office is 6 Straits Ave, Granville, NSW 2142, Australia. A review of the Australian Securities & Investment Commission's website (ASIC) discloses that TMA and TMA Australia Pty Limited have the same directors: Ms Karam, Anthony Karam and Tony Saad. TMA (and TMA Australia Pty Limited) and Premier Business have two directors in common: Ms Karam and Mr Karam.

[10] Premier Business did not comply with any of the directions of the Authority contained in the Minute issued on 21 October 2015. Attempts by the Authority to communicate with Mr Wong proved fruitless. Neither Mr Wong nor anyone else appeared on behalf of Premier Business at the Authority's investigation meeting on 4 December 2015.

[11] I gave an Oral Indication of likely conclusions pursuant to s 174(B) of the Employment Relations Act 2000 (the Act) at the end of that investigation meeting.

[12] Prior to issuing my determination, I learnt a liquidation process for Premier Business had begun. A review of the New Zealand Companies Register disclosed that Premier Business' name was changed to "WP (PBP) Limited" at 15.49hrs on 3 December 2015 and it was placed in liquidation at 11.31hrs on 22 December 2015.

[13] As a result of the liquidation, I formed the view that s 248(1)(c) of the Companies Act 1993 applied:

248 Effect of commencement of liquidation

(1) With effect from the commencement of the liquidation of a company,—

...

(c) unless the liquidator agrees or the court orders otherwise, a person must not—

- (i) commence or *continue legal proceedings against the company* or in relation to its property; or
- (ii) exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company ... (Emphasis added).

[14] The effect of s 248(1)(c) of the Companies Act was that Mr Broadhurst's proceedings could not continue against WP (PBP) Limited (formerly Premier Business Print Limited) (in liquidation) — being “the company” without the consent of the liquidator or the High Court. Consequently, on 19 January 2016, I wrote to the liquidator, Brendan Gibson of KordaMentha requesting his consent to continue proceedings so I could issue my determination. However, subsequent events overtook the need for this consent to be granted.

### **Authority's re-opened investigation**

[15] After issuing my letter of 19 January 2016 to Mr Gibson, I reviewed a number of documents held on the New Zealand Companies Office website in respect of WP (PBP) Limited/Premier Business and a related corporate entity, Premier Business Forms NZ Limited (Premier Forms). I also reviewed the Liquidators' First Report for WP (PBP) Limited dated 23 December 2015.

[16] A review of Premier Forms' Financial Statements for the year ended 30 June 2014 (and also for the year ended 30 June 2013) disclosed the following statement:

#### 17. Consolidated financial statements

The company owns 100% of the shares in Premier Business Print Limited [WP (PBP) Limited], an inactive company.

[17] A review of the Liquidators' First Report disclosed the following statement:

The company [WP (PBP) Limited] was incorporated in October 1997 and was acquired by the current shareholders in 2010. Since that time the Company has been dormant.

[18] In light of these references to WP (PBP) Limited/Premier Business having been an inactive and dormant company since 2010, I wrote to Mr Gibson advising that I was re-opening my investigation under clause 4, Schedule 2 of the Employment Relations Act 2000 (the Act) to inquire as to whether another company was Mr Broadhurst's employer at the time of employing him in 2014.

[19] Under powers provided in s 160(1)(a) of the Act, I asked Mr Gibson to provide me with answers to the following questions:

- (i) Had Premier Business employed any persons for the five years leading up to the commencement of its liquidation on 22 December 2015?
- (ii) If so, in what capacity and for how long?; and
- (iii) Had Premier Business in carrying on its activities provided labour to, or in any other way sourced labour for, Premier Forms?

[20] On 18 February 2016, the liquidator provided the following answers from the directors of WP (PBP) Limited/Premier Business:

- (i) The company has not traded in the five years leading up to liquidation; and
- (ii) Several employment agreements were signed in this company's name in error.

[21] It was somewhat surprising that Ms Karam, a director of WP (PBP) Limited/Premier Business, and also Chief Financial Officer of TMA, would sign several employment agreements in the company's name in error.<sup>1</sup>

[22] As part of my re-opened investigation, I also requested that Mr Broadhurst make inquiries with the Inland Revenue Department as to which corporate entity was remitting his PAYE deductions. He provided an Income Tax statement, which identified "Premier Business Forms NZ Limited" as this corporate entity.

[23] In response to the above information, and having regard to the true nature of the employment relationship under s 6 of the Act, I formed the view that it was more likely than not that Premier Forms had been Mr Broadhurst's employer.

[24] On 18 March 2016, I issued a Member's Minute to Mr Broadhurst's representative and Mr Wong outlining my intention to join Premier Forms as a party to the proceedings. The Minute was also served on the registered office of Premier Forms.

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<sup>1</sup>A review of the TMA website discloses that Ms Karam is Chief Financial Officer for TMA. See: [www.tmagroup.com.au/TMABoardofDirectors.html](http://www.tmagroup.com.au/TMABoardofDirectors.html).

[25] The effect of s 248(1)(c)(i) of the Companies Act is that proceedings cannot continue against WP (PBP) Limited/Premier Business. However, against this, the High Court has suggested that s 248(1)(c)(i) does not expressly preclude the court from entering judgement: *Pacific Holdings Limited v Hudson New Zealand Limited and Ors* HC Auckland CIV 2005-404-531, 8 September 2005 at [73]. This has approach been followed by the Authority: *Park v K & C Howick Ltd T/A Howick Kim's Club (in liquidation)* ERA Auckland, AA247/07, 14 August 2007 at [6]. The Employment Court has previously reserved an argument about the effect of s 248(1)(c)(i) on its proceedings.<sup>2</sup>

[26] In any event, it was not necessary to determine that particular issue. The Authority re-opened its investigation to inquire into whether another company, not in liquidation and to which s 248 of the Companies Act did not apply, was Mr Broadhurst's employer.

[27] Following that investigation, on the information now before the Authority, there was a strong likelihood that Premier Business Forms NZ Limited (Premier Forms) had been Mr Broadhurst's employer at all material times.

[28] The Authority proposed to join Premier Forms as respondent to these proceedings. Premier Forms, via Memorandum of Counsel dated 1 April 2016, opposed that course, relying on s 248(1)(c)(i) of the Companies Act. Premier Forms submitted no other reason why it should not be joined.

[29] Proceedings are not continuing against WP (PBP) Limited/Premier Business. If joined, proceedings would continue against Premier Forms. If Premier Forms was not joined, Mr Broadhurst would need to lodge a new statement of problem if he wishes to proceed with his employment relationship problem. In other words, he would have to start all over again.

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<sup>2</sup>*Newick v Working in Limited (in liquidation)* [2013] NZEmpC 132 at [4]

## Issue

[30] The issue for determination by the Authority has become whether s 248(1)(c)(i) of the Companies Act prevents the Authority from re-opening an investigation?

## Role of the Authority

[31] The Court in *Goel v The Director-General for Primary Industries* recently analysed what it described as “the Authority’s unique statutory role and powers”:<sup>3</sup>

[53] First, there are the general statutory provisions affecting how the Authority determines cases. Its statutory mandate is set out in s 157 of the Act. It is “an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities” (subs (1)).

[54] Under s 157(2) the Authority must, in carrying out its role, comply with the principles of natural justice, aim to promote good faith behaviour, and support successful employment relationships.

[55] Under s 157(3) the Authority “must act as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with” the Act, regulations made under it, or a relevant employment agreement.

[56] Importantly, s 160 (“Powers of Authority”) permits the Authority to “call for evidence and information from the parties or from any other person” (s 160(1(a))). Under s 160(3):

The Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described.

[32] Clause 1 of Schedule 2 of the Act is also relevant and this provides:

Construction of employment agreements and statutory provisions

(1) The Authority may, in performing its role, deal with any question related to the employment relationship, including—

...

(b) any question connected with the construction of this Act or of any other Act, being a question that arises in the course of any investigation by the Authority.

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<sup>3</sup>[2015] NZEmpC 54.

[33] In the course of Mr Broadhurst's employment relationship problem, a question connected with the construction of s 248 of the Companies Act arose. I am permitted to deal with that question.

[34] Finally, s 221 of the Act grants the Authority broad procedural powers. This provision relevantly provides:

221 Joinder, waiver, and extension of time

In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—

(a) direct parties to be joined or struck out ...

### **Section 248(1)(c)(i) of the Companies Act 1993**

[35] Section 248(1)(c)(i) of the Companies Act is a protective provision. In essence, it is designed to protect the remaining assets of an ailing company from continuing or collateral legal attack by unsecured creditors seeking to receive a distribution of residual company funds outside the priority given to various classes of creditors under that Act.

[36] Section 248(1)(c)(i) of the Companies Act prevents legal proceedings continuing against the company in liquidation. Therefore, s 248(c)(i) prevents Mr Broadhurst continuing his employment relationship problem against WP (PBP) Limited/Premier Business

[37] However, WP (PBP) Limited/Premier Business was not, on the information now before the Authority, Mr Broadhurst's employer. The re-opening of the Authority's investigation did not disturb WP (PBP) Limited/Premier Business or otherwise affect the rights of its secured creditors. In any event, given the company did not trade in the five years leading up to its liquidation and the directors passed a resolution of solvency on 21 December 2015, this would appear to be a solvent liquidation.

[38] To suggest s 248(1)(c)(i) of the Companies Act further operates to limit the investigatory functions of the Authority in relation to a company not affected by liquidation and then have that company seek to shield itself using this provision is an exercise in strained statutory interpretation and is entirely artificial.

[39] The answer to the issue for determination is, “no”, s 248(1)(c)(i) of the Companies Act does not prevent the Authority from re-opening an investigation in the current circumstances.

### **Substantial merits without regard to technicalities**

[40] It is appropriate in all the circumstances, having regard to the substantial merits of Mr Broadhurst’s case, without regard to technicalities, to join Premier Business Forms NZ Limited as Respondent to his employment relationship problem.

[41] If Mr Broadhurst were required to begin anew, there would still, but for settlement, be a substantive investigation conducted by the Authority into the merits of his employment relationship problem. It would be unfair and inequitable to put Mr Broadhurst to the time and expense of doing so, as a result of an artificial technical argument advanced by his likely former employer, which has sat apart from the matter to date.

[42] Mr Broadhurst is entitled to have his employment relationship problem investigated and resolved without further delay.

### **Orders**

[43] For the reasons given above, I make the following orders:

- A. Premier Business Forms NZ Limited is joined as Respondent to proceedings 5558449 under s 221(a) of the Employment Relations Act 2000 (the Act).
- B. WP (PBP) Limited (formerly Premier Business Print Limited) (in liquidation) is struck out as Respondent to proceedings 5558449 under s 221(a) of the Act.

**Costs**

[44] Costs are reserved pending the finalisation of the substantive employment relationship problem.

Andrew Dallas  
Member of the Employment Relations Authority