

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 61  
5429047

BETWEEN                      CAROLYN FITZPATRICK  
Applicant

A N D                              ELDERCARE SERVICES  
LIMITED  
First Respondent

A N D                              ROSS GORDON LOWRY  
Second Respondent

Member of Authority:      K J Anderson

Representatives:            S Austin, Advocate for Applicant  
S Clews, Counsel for Respondents

Investigation Meeting:      On consideration of the papers

Date of Determination:      21 February 2014

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] Pursuant to s.137(1)(b) of the Employment Relations Act 2000 (the Act) the applicant, Ms Carolyn Fitzpatrick, seeks compliance orders from the Authority pertaining to two earlier determinations issued by the Authority;<sup>1</sup> whereby various monies were awarded to her. The parties have agreed that the Authority should determine matters “on the papers” and respective evidence and submissions have been lodged by the parties accordingly.

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<sup>1</sup> Member E. Robinson

**The two determinations**

[2] The first determination ([2013] NZERA Auckland 65), issued 25 February 2013, was the outcome of an investigation conducted by the Authority whereby it was determined that Ms Fitzpatrick was unjustifiably disadvantaged in her employment with Eldercare Services Limited (the First Respondent) (Eldercare). It was also found that Ms Fitzpatrick was unjustifiably dismissed. Remedies totalling \$41,229.67 were awarded.

[3] The second determination ([2013] NZERA Auckland 112), pertains to the costs awarded to Ms Fitzpatrick against Eldercare in the sum of \$8,369.96.

[4] While Ms Fitzpatrick has had the above matters determined in her favour by the Authority, Eldercare has not paid her the monetary entitlements due under the respective orders made by the Authority.

[5] Ms Fitzpatrick also asks the Authority to impose upon the respondent(s) “...such penalty for a breach of the Act as the Authority considers appropriate”. But just what that precisely means is not explained.

**The failure of Eldercare to make the payments due to Ms Fitzpatrick**

[6] Via a letter dated 11 June 2013, Ms Fitzpatrick’s advocate (Mr Austin) sought payment of the sum of \$49,599.63; being the total monies awarded by the Authority under the two determinations referred to above. There is no evidence of any response to Mr Austin’s letter. However, the *Statement in Reply* received by the Authority on 26 August 2013, informs that Eldercare Services Limited is insolvent, the company has no assets, and the only liability arising is the monies owed to Ms Fitzpatrick.

[7] But of more relevance is the recent evidence before the Authority from the New Zealand Companies Office. This informs that Eldercare Services Limited changed its name to SACF Partnership Limited (SACF) on 26 August 2013; and the latter company was subsequently removed from the Companies Office Register on 21 November 2013.

[8] It goes without saying that the practical and legal effect of the removal of SACF from the register is that the company ceases to exist as a legal entity. It logically follows that the proceedings against Eldercare Services Limited are nullified

accordingly. Therefore, unfortunately for Ms Fitzpatrick, she is now unable to obtain any assistance from the Authority in regard to the remedies previously awarded to her against the First Respondent, Eldercare Services Limited.

### **The proceedings against Mr Ross Lowry**

[9] Mr Ross Lowry has been cited by Ms Fitzpatrick as the Second Respondent to these proceedings. The submissions for Ms Fitzpatrick refer to the duty of Mr Lowry, as the sole director and shareholder of Eldercare (subsequently SACF Partnership Limited – Struck Off), to ensure that Eldercare, and then SACF (pursuant to s.23(4) of the Companies Act 1993), complied with the orders of the Authority as set out in the two determinations.

[10] It appears to be acknowledged within the submissions for the respondents that there was an obligation on Mr Lowry to take such steps as were within his power to ensure that the entitlements due to Ms Fitzpatrick were met.

[11] However, Mr Lowry attests in his affidavit that Eldercare has never owned any assets and has never had much in the way of cash reserves. Rather, Eldercare's business was to provide staff to another company: Golden Pond Private Hospital Limited; which operates the business of the Golden Pond Home and Hospital at Whakatane.

[12] Mr Lowry attests that Eldercare ceased trading prior to the end of the 2013 financial year (31 March 2013) and at that time it had assets of \$96. Mr Lowry says that Eldercare ceased to trade because it was insolvent and it had no means of changing its financial position; in particular, it could not borrow money because it had no assets to offer as security. Mr Lowry attests that when the personal grievance was advanced by Ms Fitzpatrick, he attempted to ensure that she (and her advocate) was made fully aware of Eldercare's financial situation. Mr Lowry says that Mr Austin: "... made it clear he did not believe me and he thought that what I was saying was simply a strategy that was being adopted".

[13] Mr Lowry's evidence is that Eldercare did not have the financial means to fund the litigation. The Authority notes that there was no attendance for Eldercare at the investigation meeting on 22 January 2013, and there were no submissions made pertaining to the matter of costs.

[14] Finally, Mr Lowry attests that:

I took all of the steps within my power while I was a director to ensure that the liability under the judgment [determinations] was met by Eldercare. Because Eldercare has no assets I have offered to procure the transfer of all of the shares in Eldercare to the applicant – that offer has been rejected,<sup>2</sup> I do not believe that there is more that I can do. I have throughout acted in the utmost good faith by ensuring that the applicant and her advocate were fully aware of the financial status of Eldercare.

### **Determination**

[15] It is accepted by the Authority that significant monies became due to Ms Fitzpatrick as a result of the two earlier determinations issued. But unfortunately for Ms Fitzpatrick, she has no recourse against Eldercare for the reasons referred to earlier. This is because Eldercare Services Limited, and subsequently, SACF Partnership Limited, are no longer in existence as companies. It logically follows that any proceedings against them becomes a legal nullity.

[16] And while Ms Fitzpatrick has attempted to sheet home a liability to Mr Lowry, there is no tangible evidence to suggest any reason why any liability should be assigned to him as an individual.

[17] The submissions for Ms Fitzpatrick cast cynical assertions in regard to alleged financial machinations pertaining to the various company structures that existed, but there is no probative evidence available that supports these assertions. Neither is there any evidence that assists the Authority in regard to providing any satisfaction to Ms Fitzpatrick pertaining to the entitlements due to her. While Ms Fitzpatrick has obtained two earlier determinations from the Authority in her favour, and the Authority can raise a quizzical eye in regard to the various business structures adopted by Mr Lowry, the unfortunate reality for Ms Fitzpatrick is that there is nothing more the Authority can do to assist her.

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<sup>2</sup> It is established that the shares were worthless.

**Costs**

[18] Given the circumstances, costs shall lie where they fall.

**K J Anderson**  
**Member of the Employment Relations Authority**