

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 165/09
5140576

BETWEEN	PAUL HOLMES Applicant
AND	META NZ LIMITED Respondent
AND	GRAHAM HEENEN, DAVID MACKENZIE, JOHN NICOL, KENNETH SPARROW First Intended Respondents
AND	CCC TWO LIMITED Second Intended Respondents
AND	PAUL ANDERSON, ANTHONY MARRYATT Third Intended Respondents

Member of Authority: Philip Cheyne

Representatives: Faye Birch and Kevin Murray, Representatives for the Applicant
Peter Zwart, Representative for the Respondent
Kerry Smith, Counsel for the First Intended Respondents
Susan Hornsby-Geluk, Counsel for the Second and Third Intended Respondents

Phone Conference: 18 September 2009

Submissions Received: 23 September 2009 from the Applicant
17 September 2009 from the First Intended Respondent
17 September 2009 & 25 September 2009 from the
Second and Third Intended Respondents

Determination: 1 October 2009

DETERMINATION OF THE AUTHORITY

[1] Paul Holmes was employed by Meta NZ Limited (Meta) from about July until November 2008. There is a written employment agreement identifying Meta as the employer. Meta terminated the employment effective from 29 November 2008 citing a fundamental breakdown of trust and confidence between the parties.

[2] In August 2009 Mr Holmes lodged with the Authority a statement of problem in which there is a list of 6 matters that he wishes the Authority to resolve: three types of personal grievances, a breach of good faith by Meta, a breach of the Health and Safety in Employment Act 1992 by Meta and a breach of s.148 of the Employment Relations Act 2000 by Meta. The remedies sought are compensation and penalties. The statement of problem was served on Meta as usual but a statement in reply has not yet been lodged because of the application for joinder. Nonetheless, Mr Zwart confirmed that Meta will say that it employed and dismissed Mr Holmes. At least to that extent there is no dispute between Mr Holmes and Meta.

[3] On 25 August 2009 Mr Holmes lodged an application to join additional parties to the proceedings. Those parties were served with this application and they lodged memoranda in opposition. I convened a phone conference to investigate the opposed application during which I agreed to receive a further memorandum from Mr Holmes and a response from counsel for some of the additional parties. I have now received this material. This determination resolves the application to join additional parties to the original application.

[4] Meta opposes the joinder application.

The parties sought to be joined

[5] There are three different groups.

[6] First, there is a list of four individuals who were apparently directors of Meta on 21 July 2008 when Mr Holmes was employed. I will refer to them as the Meta directors. Secondly, I am asked to join a company called CCC Two Limited. Thirdly, I am asked to join two people who are apparently the directors of CCC Two limited. I will refer to them as the CCC Two directors.

[7] I will refer to the three groups collectively as the additional parties.

The basis for joinder – Meta directors

[8] The assets and business of Meta were purchased by CCC Two Limited on 6 August 2009.

[9] The application says that Mr Holmes raised his grievances with the Meta directors in October and November 2008 and that they changed the name of their company on more than one occasion. It appears that Meta had a different name in 2005 and changed its name again on 12 August 2009 to *MNZ Limited*. The application refers to s.23(4)(b) of the Companies Act 1993. That says *A change of name of a company— Does not affect rights or obligations of the company, or legal proceedings by or against the company, and legal proceedings that might have been continued or commenced against the company under its former name may be continued or commenced against it under its new name.* In other words, the company's name change makes no difference to its liability, if any. This provision provides no support for joining additional parties but it justifies identifying the original respondent by its new name.

[10] There is an extra argument in the further memorandum. It is said that the Meta directors had a duty to disclose to CCC Two Limited the existence of Mr Holmes' personal grievance as a potential liability of the company and that they owed duties to Mr Holmes pursuant to ss.9 and 12 of the Fair Trading Act 1986. I will come to that point shortly, but I should first consider the nature of Mr Holmes' claims.

[11] Personal grievances are claims under Part 9 of the Employment Relations Act 2000 which contains the relevant definitions, remedies and procedures. S.101(b) says that an object of Part 9 is *to facilitate the raising of personal grievances with employers* S.103(1) contains the following exhaustive definition: ***personal grievance*** means any grievance that an employee may have against the employee's employer or former employer S.103A makes it clear that justification (as part of any grievance claim) is assessed based on the ... *employer's actions, and how the employer acted* Under s.114 there is a time limit for an employee to raise any grievance with ... *his or her employer*, the ability for the employer to consent to an out of time grievance and power in defined circumstances for the Authority to grant leave for an out of time grievance ... *after giving the employer an opportunity to be heard* All the statutory remedies either explicitly or implicitly are orders against the employer. Nowhere does the Employment Relations Act 2000 permit personal grievance claims against a person who is or was not the employee's employer.

[12] What all this means is that personal grievance claims can only be made by an employee against their employer either during or after the particular employment. Sometimes there can be doubt or dispute about the employer's identity or reliance on the law of agency, but not here. The employer was Meta so the grievance proceedings can only be against that company.

[13] The mention of ss.9 and 12 of the Fair Trading Act 1986 makes no difference. The first of those provisions prohibits misleading and deceptive conduct in trade generally. There is no reason to think that the Meta directors breached this provision in their dealings with Mr Homes concerning his employment, its termination and his grievance. The second provision says *No person shall, in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to that employment.* The provision is directed at conduct when forming an employment relationship and when negotiating terms. It provides no support for joining the Meta directors to personal grievance proceedings against Meta by a former employee.

[14] There is a claim that Meta breached s.4 of the Employment Relations Act 2000. Only certain breaches of the statutory good faith obligations that exist between parties in an employment relationship are susceptible to a penalty claim. There is no attempt here to explain how Meta has done anything to bring it within s.4A let alone the Meta directors personally.

[15] While it is said that Meta breached the Health and Safety in Employment Act 1992 there are no remedies claimed as a result. If Meta breached those statutory duties as an employer that is no reason to join the Meta directors.

[16] Finally, Mr Holmes says that Meta breached s.148 of the Employment Relations Act 2000 and I am asked to impose a penalty. Under s133(1)(b) the Authority has jurisdiction to impose a penalty for a breach of the Act ... *for which a penalty in the Authority is provided in the particular provision.* S.148 does not provide for a penalty. No remedy is available against Meta so there is even less reason to trouble the Meta directors with the claim.

The basis for joinder – CCC Two Limited & the CCC Two directors

[17] As noted, this company brought the assets and business of Meta on 6 August 2009.

[18] In the original memorandum, it is said that *the assets and liabilities of Meta Holdings Limited were purchased by the Directors of CCC Two Ltd ...* and that Mr Holmes has a legal claim against these transferred assets so as to require the company and its directors to be cited as respondents. That is factually wrong. CCC Two Limited (not *the directors*) bought the assets and the business of Meta NZ Limited (not *Meta Holdings Limited*) pursuant to a sale and purchase agreement dated 3 August 2009. The agreement contains provisions relating to then current employees and some provisions about certain liabilities but not in relation to Mr Holmes or his personal grievance or other claims. However for current purposes I will assume that Mr Holmes' statement of problem correctly describes what happened in August 2009.

[19] On the assumption just indicated, Mr Holmes' claim is legally wrong. He does not have any claim against Meta's assets. His claims are against the company, not its assets. Whether or not Meta will be able to pay any judgment should Mr Holmes eventually succeed is legally immaterial at this point. I should say that there is nothing to indicate that the sale and purchase is a sham or an improper attempt to avoid potential liability to Mr Holmes.

[20] In Mr Holmes' further memorandum it is submitted that CCC Two Limited accepted liability for Mr Holmes' proceedings under the sale and purchase agreement and consented to being joined. I reject these submissions. As explained above, the sale and purchase agreement does not deal with Mr Holmes' circumstances. The second part of the submission relies on an email from a Christchurch City Council HR advisor to Ms Birch. The email does not say that CCC Two Limited consents to being joined; rather, it says that the company is prepared to address Mr Holmes' grievances *in mediation* or otherwise on a *without prejudice basis*.

[21] Confusingly, the further memorandum also says that the CCC Two directors should be removed from these proceedings. Regardless of this apparent withdrawal the application was hopeless for the reasons explained.

General

[22] I accept as conventional and correct the submissions by counsel for the Meta directors about Meta's legal personality being separate from its directors and that this application confuses these separate legal personalities. Counsel for CCC Two Limited and its directors made similar points.

[23] The submission by Mr Holmes' representative that the cases mentioned can be distinguished for the reasons advanced is nonsense. *Lee v Lee's Air Farming Ltd* [1961] NZLR 325 confirmed that a company has a separate legal personality even when its managing director, its shareholder and its employee are the same person. The principle applies with no less force in a much bigger company such as at present. *Trevor Ivory Ltd v Anderson* [1992] NZLR 517 confirmed that an officer or servant of a company might in the course of their work come under a personal duty to a third party resulting in personal liability where there has been an assumption of a duty of care. Nothing of the sort has been alleged against the Meta directors and, in any event, it would be a tortious claim beyond the Authority's jurisdiction. *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, mentioned in support of the submission that *...it is about the legitimate expectation created by the directors and the application of the audi alteram partem principals* has no application presently.

[24] Mr Holmes' representative refers me to *Northern Clerical IUOW v Lawrence Publishing Co of NZ and John Tony Holdings Ltd & Anor* [1990] 1 NZILR 717. That is a case where the Labour Court declined to lift the corporate veil but was prepared to make compliance orders requiring non-parties to the original judgment to take specified steps to ensure that the original party complied with the Court's judgment. The current situation is well short of the facts in that case and it provides no assistance as this point.

[25] I am also referred to *Auckland Regional Services Trust v Lark* [1994] 2 ERNZ 135 where the Court of Appeal held that the general test in joinder applications is whether the proposed party will be directly affected by any order which may be made in the proceedings with the plaintiff generally entitled to decide who to sue subject to the named person's right to take striking out proceedings. That reflects the present situation where the additional parties oppose joinder effectively seeking to be struck out. For the reasons explained above, none of the additional parties can be affected by any of the orders sought so they should not be joined.

Summary

[26] Subject to what follows, none of the additional parties will be joined to Mr Holmes' claims against Meta NZ Limited. Meta should now lodge a statement in reply within 14 days.

[27] The additional parties seek an order of costs against Mr Holmes. The Authority may only order costs against parties to proceedings so I will join the additional parties solely for the purpose of dealing with their costs in defending this application. Nothing more is required from counsel for CCC Two and its directors as she has already dealt with costs. Counsel for the Meta directors may lodge and serve a memorandum within 14 days. Mr Holmes' representative may then lodge and serve within a further 14 days a memorandum in response to the claims for costs.

Philip Cheyne
Member of the Employment Relations Authority