

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON OFFICE	
<i>Under the Employment Relations Act 2000</i>	
	Determination Number: WA 49/07
	File number: 5041925
BETWEEN	Malcolm Hunt (Applicant)
AND	Williams Contracting Limited (Respondent)
Member of Authority:	P R Stapp
Representatives:	Billy Kleinsmith for the Applicant
	No appearance for the Respondent
Investigation Meeting:	Wanganui, 29 March 2007
Determination:	30 March 2007
DETERMINATION OF THE AUTHORITY	

Employment Relationship Problem

[1] This is an application for a compliance order to enforce a Record of Settlement signed off by a mediator from the Department of Labour. The respondent has been identified as a trading name. There is a limited liability company in existence with the same name and it has nothing to do with the applicant's employment relationship problem.

The issues

[2] There are a number of issues and they are:

- Is the Respondent correctly cited in the proceedings?
- Can a Compliance Order be made on a trading name only?
- Is the Record of settlement enforceable?
- Should anyone be joined to the proceedings for the Record of Settlement to be enforced?

The background

[3] Mr Hunt says he started work as a site manager on 13 March 2006 with his employer Scott Williams and Justin Mikkelsen of Williams Contracting/Williams Contracting Ltd. He says he was requested to attend a meeting in regard to his performance on 6 April 2006. He says the meeting took place on 12 April. In a letter dated 6 April Mr Hunt was terminated from his employment with effect from the 12th and he was paid until 19 April 2006. Mr Hunt raised a personal grievance. Mr Hunt signed off a settlement of an employment relationship problem on 22 August 2006. It was a full and final settlement of all matters between the parties arising out of the employment relationship between the “applicant” and the “respondent”. The “applicant” was Mr Hunt and the “respondent” was Williams Contracting Ltd (“the respondent Williams”). Mr Justin Mikkelsen also signed off the settlement, but without any written expression under his signature as to whom he was signing for and on behalf of.

[4] A mediator from the Department of Labour was requested to sign the terms. That was done. I am satisfied that the Record of Settlement was completed under s149 of the Employment Relations Act.

[5] Mr Hunt says that the respondent Williams has not complied with the terms of settlement. He says that the respondent Williams is liable because it still operates in Wanganui. The Applicant says this is supported by the use of the respondent Williams name on letter head in correspondence dated 6 April and 1 May 2006 and the River City Press dated 18 January 2007 and Williams Contracting being used in the River City Press dated 31 January 2007.

The respondent Williams

[6] There was no appearance at the Authority’s investigation meeting by anyone associated with the respondent Williams. I was satisfied that attempts were made to serve the notice of investigation meeting and statement of problem on the respondent through Messrs Scott Williams and Justin Mikkelsen personally because they seemed to have some involvement with the respondent Williams from the documents produced by the applicant.

[7] A company search showed that there was only a South Island company with the same name incorporated as Williams Contracting Limited.

[8] Mr Hunt acknowledged that the company in the South Island, “Williams Contracting Limited” (registered Williams), exists but has nothing to do with his employment relationship problem. That registered company has entirely different directors and has nothing to do with the matter. There has been no contact with that company or its directors because the applicant has made it quite clear it is the respondent Williams, and not the registered Williams, that is involved.

[9] Mr Scott Williams has been identified as having something to do with the respondent Williams because of his contact details on the correspondence. He was served with the notice of investigation meeting and statement of problem at 4 Stewart Street Wanganui, an address given to the Authority by the applicant and used by the respondent Williams. Scott Williams happens to be a director of another company called “Williams Contracting (Wanganui) Ltd” and uses the same address. “Williams Contracting (Wanganui) Ltd” has not been served either because it is not a cited Respondent. It was incorporated on 15 September 2006. This was sometime after Mr Hunt’s employment with the respondent Williams.

[10] Mr Justin Mikkelsen was also served with the notice of investigation meeting and statement of problem because he was the signatory on the Record of Settlement. Mr Mikkelsen has referred to the existence of another company, namely Solid Form Holdings Limited (Solid Form) trading as “Williams Contracting”. He referred to himself as the Business Manger Solid Form Holdings Ltd t/a Williams Contracting, and used “*WCL Williams Contracting Ltd*” letterhead in corresponding with the Applicant on 6 April and 1 May 2006. He is a director of Solid Form. The notice of investigation meeting and statement of problem were not served on Solid Form because it is not a party either and Mr Hunt says he did not know about that company until it was raised by Mr Mikkelsen.

[11] The personal service on Messrs Scott Williams and Justin Mikkelsen was taken to get assistance to find out who was behind the respondent Williams and to get them to voluntarily participate in the investigation. Mr Hunt decided to proceed against the respondent Williams without joining Messrs Scott Williams and Justin Mikkelsen on notice. Another option would have been for me to summons them both, which I considered, but this action was not taken by me because, if they had anything to do with the matter they could reasonably have been expected to turn up voluntarily.

[12] Responses and replies were received from Messrs Mikkelsen and Scott (Scotty) Williams over the telephone at the Authority's office in Wellington before the Authority's investigation meeting.

[13] Mr Scott Williams left a message and says that he was an employee of Solid Form Holdings trading as "Williams Contracting", without any reference to "Limited". The message was that he says he has nothing to do with the matter as there is no such thing as Williams Contracting Ltd in Wanganui. His name and a contact detail appear on the "*WCL Williams Contracting Ltd*" letterhead. He was not mentioned in the Record of Settlement.

[14] Mr Mikkelsen contacted the Authority's office over the telephone too. He has said that Solid Form Holdings Ltd trading as Williams Contracting, of which he is a director, is going into liquidation and referred the Authority to the company's accountant. No contact was made with the accountant because it was not necessary in my opinion.

Determination

[15] The respondent Williams must be a trading name because it was operating in Wanganui, it had nothing to do with the registered Williams, and it was not incorporated as a limited liability company. On its own and on the face of its name the respondent Williams is not a legal entity for the enforcement in law of Mr Hunt's Record of Settlement. Why Messrs Scott Williams and Justin Mikkelsen have been using a trading name and passing it off as a limited liability company has not been explained by either of them. Mr Hunt acknowledged that the registered Williams Contracting Ltd had nothing to do with these proceedings. Therefore, the Record of Settlement in its name cannot be enforced.

[16] The use of the respondent Williams trading name is certainly misleading and deceptive without some explanation. This has caused difficulties in identifying who Mr Hunt's employer was. The employer had a responsibility to provide an intended employment agreement, which amongst other things should have made it clear who the employer was. No employment agreement, wage records or wage slips have been produced.

[17] Mr Scott Williams cannot be joined because he is not personally a named party on the Record of Settlement and he is not a signatory. The settlement does not record any agreement as to who the employer was. There is no certainty that Mr Williams was trading in the business since he did not

sign the Record of Settlement and left a message that there is no such thing as Williams Contracting Ltd in Wanganui and that he was an employee of Solid Form Holdings Ltd.

[18] Although Mr Mikkelsen has signed the Record of Settlement there is no written indication of his authority as to who he is signing for and on behalf of with his signature. In the absence of that I am not able to join Mr Mikkelsen personally either, despite him being linked with the respondent Williams. There is not enough evidence to suggest he was actually trading as the respondent Williams because he is associated with Solid Form. Mr Hunt added at the Authority's investigation meeting that Mr Mikkelsen also employed him but there had been no prior notice of this information before the Authority's investigation meeting for Mr Mikkelsen to respond to. Therefore it would not have been safe to join him to the proceedings without notice.

[19] As an aside the mediator appears to have accepted in good faith that the respondent Williams Contracting Limited was a bona fide registered company as a party in Mr Hunt's employment relationship problem. However, Mr Hunt has the primary responsibility to establish the correct legal entity to refer to as the employer and respondent in proceedings. He has not been able to do that because the respondent Williams is only a trading name. It is not a legal entity for the enforcement of the Record of Settlement. I cannot accept that just because Mr Hunt says the respondent Williams operated in Wanganui that this can be relied upon for enforcement. To enforce any settlement the employer has to be properly identified in a legal form (a person by name, partnership, registered company, trust etc) because a trading name is simply not sufficient. Mr Hunt has not been assisted by whoever his employer was, if as he says, he was not provided with an employment agreement and pay slips, and the Record of Settlement was signed by Mr Mikkelsen that included the name of a company that had nothing to do with Mr Hunt's employment relationship problem.

Conclusion

[20] The respondent is not correctly cited. The respondent Williams is a trading name that requires a legal entity for enforcement. It is probable that at least Messrs Scott Williams and Justin Mikkelsen personally had some involvement in the business and Mr Hunt's employment but there has not been enough evidence to join them to be personally liable in these proceedings. One or other or both of them or another entity may ultimately be found to be liable. Mr Hunt's employer in law therefore needs to be identified. The Record of Settlement produced cannot be enforced in its present form.

[21] Mr Hunt's options include starting again, once he has identified who his employer in law was.

Costs

[22] Costs are to lie where they fall because the respondent has not been correctly cited.

[23] I have requested the support officer send a copy of this determination to the "registered Williams Contracting Ltd" as a matter of courtesy and information of what has happened. Also a copy will be sent to the Registrar of Companies.

P R Stapp
Member of the Authority