

[5] On 30 July 2007, Mr Innes filed an amended statement of problem identifying Mr Miyazawa as respondent.

[6] A directions conference before me was convened on 30 July at which I directed that I would deal with the preliminary issue of whether or not Mr Innes was employed by Mr Miyazawa.

[7] On 2 August 2007, the respondent in these proceedings (Mr Miyazawa) filed a statement in reply seeking to have Mr Innes' amended statement of problem struck out, and costs.

[8] It follows that the investigation meeting on 28 August 2007 proceeded as a strike-out application by Mr Miyazawa against Mr Innes' claim that Mr Miyazawa employed Mr Innes.

[9] At the investigation meeting, the Authority had the benefit of submissions from both counsel supported by affidavit evidence from the two principal protagonists. Those affidavits each had attached to them relevant documentation.

[10] While it is appropriate to remind ourselves of the customary caution in matters of this kind where evidence has not been heard and tested in the usual way, it is nonetheless possible to draw some conclusions.

The Submissions

[11] Certainly, the positions of the respective parties, as expressed in their submissions, are clear enough. For Mr Miyazawa, it is submitted that Mr Innes knew or ought to have known throughout his employment that he was employed by Pacific Access Limited, the entity that he filed his original statement of problem against. Mr Miyazawa drew my attention to the fact that it was not until the second amended statement of problem filed on 30 July 2007 that there was any definitive claim that he was Mr Innes' employer.

[12] Further, Mr Miyazawa draws my attention to the absence of any rebuttal in Mr Innes' own affidavit of the documents that he himself prepared or had prepared naming Pacific Access Limited as his employer. Mr Miyazawa makes the point here that, during the employment relationship, Mr Innes was, it seems, very clear that Pacific Access Limited was his employer and it was not until well after the

relationship had come to an end, albeit in difficult circumstances, that Mr Innes made the allegation that Mr Miyazawa was his employer.

[13] The implication which Mr Miyazawa invites me to draw is that, because Pacific Access Limited is now in liquidation, Mr Innes is proceeding against Mr Miyazawa personally because Mr Miyazawa is still solvent and is able to meet obligations of an employment relationship.

[14] Mr Innes, for his part, says through his counsel that, while he accepts that he was employed by Pacific Access Limited during the early part of the relationship, there was a point at which that ceased and that point was reached, according to Mr Innes, on 8 January 2007 when, according to Mr Innes, a document which he prepared effectively became an agreement between himself (and one other employee) on the one hand, and Mr Miyazawa personally on the other. It is said that Mr Miyazawa crystallised that new employment obligation by making three wages payments to Mr Innes.

[15] Mr Miyazawa acknowledges that those payments were made, but denies their significance. He says, in effect, that he simply felt sorry for Mr Innes and the predicament that Mr Innes was in as a consequence of the company's financial turmoil. Mr Miyazawa points to a letter written on his behalf by his counsel to Mr Innes dated 19 January 2007 which sets out the financial difficulties Pacific Access Limited was experiencing and makes clear the possible consequences of that to Mr Innes.

[16] Further, Mr Miyazawa denies Mr Innes' characterisation of the 8 January 2007 document as an *agreement*. He describes it as an offer, not an agreement.

[17] Mr Innes also encourages me to *lift the corporate veil*. He contends that the effect of s.25 of the Companies Act 1993 requires Mr Miyazawa to carefully identify when his business activity is through the medium of a limited liability company and when it is not. Mr Innes contends that Mr Miyazawa has not fulfilled that fundamental corporate undertaking, and therefore is personally bound.

[18] In particular, Mr Innes relies on an employment agreement which he prepared and which expresses the employer to be *Queens Motor Company*, an entity which, rather unhelpfully, is alleged to be the trading name of both Mr Miyazawa in his personal capacity and Pacific Access Limited. This employment agreement was

signed by Mr Innes on 1 December 2005 but was never executed by or on behalf of any employer party.

[19] Mr Innes seeks to rely on s.25(2) of the Companies Act 1993, which creates joint liability as between a misdescribed company and a person issuing a document purportedly in the company's name, as a basis for sheeting home liability to Mr Miyazawa. The difficulty with this argument is that, Mr Innes drafted the employment agreement and he does not refer to the employer as Mr Miyazawa. Even if that argument is not persuasive, the fact is that no employer party has signed the agreement so it cannot be evidence for the identity of the employer.

[20] One might equally apply the logic of the *contra proferentum* rule as evidence for the view that the employment agreement, drafted as it was by Mr Innes, ought to be construed against him in the event of any dispute between the parties.

[21] However, I prefer to simply let matters rest on the basis that I do not accept the employment agreement is in any way helpful in identifying the identity of the employer.

[22] Next, the submission from Mr Innes contends that once Mr Miyazawa made personal payments from his own account, in lieu of wages which would normally have been paid from Pacific Access Limited's account, Mr Miyazawa effectively took over the obligations of the employer. Mr Innes says the loss he is pursuing is occasioned by the employer failing to pay him properly or indeed at all, **in the period since Mr Miyazawa allegedly took on this personal responsibility**. It follows, according to Mr Innes, that since Mr Miyazawa took over personal responsibility for paying wages, his failure to continue doing so entitles Mr Innes to look to him for making good on the deficit.

[23] Mr Innes has a further submission which he makes in the alternative. He argues that, in the event that the Authority decides that Pacific Access Limited is the employer, then the behaviour of Pacific Access Limited in ceasing to trade and then going into liquidation is an appropriate basis for the Authority to *lift the corporate veil*.

[24] I have given consideration to this submission but decided in all the circumstances that it is not appropriate for the Authority to make any observations about it beyond saying that its scope falls outside of the basis for the hearing which I

presided over on 28 August 2007. It would be completely improper of me to express any view about this issue without hearing evidence from both parties these parties being Mr Innes and Pacific Access Limited.

[25] The purpose of the investigation meeting over which I presided on 28 August 2007 was to determine whether Mr Innes was employed by Mr Miyazawa. The question whether the Authority should *lift the corporate veil* in relation to Pacific Access Limited is a quite different question and is not one which can properly be addressed in this determination.

[26] There are a number of reasons for this conclusion. The first is that the purpose of this hearing, as I have just reiterated, is to determine whether Mr Miyazawa employed Mr Innes or not. The question whether the Authority should *lift the corporate veil* relates not to Mr Miyazawa as employer but to Pacific Access Limited as employer and is predicated on the footing that the Authority has already made a determination that Mr Miyazawa is not Mr Innes' employer. As that decision (whether Mr Innes is employed by Mr Miyazawa or not) is the very purpose of the present investigation meeting and this determination, it is literally putting the cart before the horse to contemplate what might happen were Pacific Access Limited to be Mr Innes' employer.

[27] Furthermore, Mr Goldstein, who appeared for Mr Miyazawa, made it absolutely plain that he acted for Mr Miyazawa in his personal capacity and did not have instructions from Pacific Access Limited. In those circumstances, it would be completely improper of the Authority to contemplate reaching a conclusion on a matter where consideration had not even been given to an affected party being represented and heard by the Authority.

[28] It also follows that the Authority has not heard in any shape or form from Pacific Access Limited on its view of the argument about lifting the corporate veil and unless and until that happens, it seems to me inappropriate to take the matter any further.

[29] I also note for the sake of completeness that it does not seem to me that this is the sort of matter that could properly be dealt with by the Authority without the benefit of actual evidence being heard in the usual way and that of course was not in

contemplation in the present proceedings nor indeed, for the reasons that I have traversed above, possible in all the circumstances.

Issues

[30] It follows that the only issue for determination remains the question whether Mr Miyazawa employed Mr Innes and given that Mr Miyazawa has applied to the Authority to strike out the proceedings insofar as they plead a cause of action against him personally, it is appropriate to consider the matter as a strike-out application.

[31] The issues then are:

- (a) Is this a case where the Authority's discretion to strike out ought to be exercised; and
- (b) Can a definite conclusion be reached without the Authority having to conduct a further investigation?

Is this a suitable case for the exercise of the Authority's discretion?

[32] The legal principles involved in strike-out applications are those stated in the Labour Court decision *New Zealand (with exceptions) Shipwrights etc Union v. New Zealand Amalgamated Engineering etc IUOW* [1989] 3 NZILR 284.

[33] In that decision, the Court said:

The purpose of a striking out application is to save the Court the time and the parties the expense of an inquiry into a case which, from the start, is obviously doomed to failure. It is in the public interest that the Court should not be involved in an exercise in futility and that defendants should not, without good reason, be brought before the Court.

[34] Looking at the matter in the round, I am satisfied on the balance of probabilities that Mr Innes has no tenable case for his contention that Mr Miyazawa is his employer. I accept the submission of Mr Miyazawa that Mr Innes appears to have decided that Mr Miyazawa was his employer some time after the relationship ended and after he had already filed one set of proceedings against Pacific Access Limited as his employer. It is difficult to avoid the conclusion that the reason that Mr Innes filed his amended statement of problem which, as a matter of fact, was the first occasion

that he definitively alleged that Mr Miyazawa was his employer, was after he learned that Pacific Access Limited was likely to be put into liquidation.

[35] I also accept Mr Miyazawa's submission that it is a fatal flaw to Mr Innes' application that he fails absolutely to deal with all of the documentation which describes another entity (not Mr Miyazawa) as his employer. Mr Innes was not a junior employee with limited experience. Based on the salary he commanded and his title of business manager and the tasks which he plainly undertook for the employer, he was a senior employee who one would reasonably expect to understand who his employer was.

[36] Nowhere in his affidavit does Mr Innes explain why he is associated with a succession of documents generated by his own hand or on his instructions which describe his employer as somebody other than Mr Miyazawa.

[37] Those documents, which as I say are generated by Mr Innes himself or on his behalf, coupled with a succession of other documents which were generated by the employer itself but which Mr Innes could be expected by reason of personal involvement to be aware of, all lead to a very clear picture that Mr Innes was employed by a legal person other than Mr Miyazawa.

[38] The evidence of this seems to me so clear and compelling that the Authority is able to reach a *definite and certain conclusion*.

[39] Indeed, I have to say that I am not persuaded that there is any evidence at all that Mr Miyazawa could have been the employer of Mr Innes. The only evidence before the Authority of that possibility is Mr Innes' bald assertion in his affidavit and his claim that a document prepared on 8 January 2007 was an agreement between himself and Mr Miyazawa, the effect of which was that Mr Miyazawa was to take over the employer's obligations.

[40] Nothing can be taken from Mr Innes' bald claim that he thought Mr Miyazawa was his employer. Based on the factual position, if he thought that, given his extensive involvement with the business of the employer, he was completely mistaken. His categorisation of the 8 January 2007 document as an agreement is also mistaken. It is nothing of the sort. Counsel for Mr Miyazawa described it as an offer, not an agreement and while I accept that meaning is preferable, my own view is that the document in question is best described as a response to a proposal. Either way, it

seems to me the plain interpretation of the words in the 8 January 2007 document are that it is not an agreement between Mr Innes and Mr Miyazawa.

[41] That leaves the payments clearly made by Mr Miyazawa to Mr Innes to deal with. Mr Miyazawa says that those payments were made by him to assist Mr Innes once the company's financial problems became evident. Mr Miyazawa denies that the payments had any more significance than that and I accept that evidence as truthful. There is simply no evidence to support Mr Innes' assertion that Mr Miyazawa's kindness in making those payments is evidence of some wider obligation.

[42] I am satisfied that there are no disputed questions of fact which the Authority must decide in order to reach a conclusion in this matter and I am equally satisfied that the justice of the case does not require the matter to proceed. In essence, the claim brought by Mr Innes that Mr Miyazawa was his employer is in my judgment absolutely futile and it is not fair or reasonable for Mr Miyazawa to be put to the trouble of defending that claim.

Can a definite conclusion be reached without further investigation by the Authority?

[43] This is not a matter where the Authority needs to hear evidence to reach a conclusion. Essentially, the parties have provided all of the relevant evidence which is documentary in nature. That evidence has all been considered by the Authority in reaching the decision that it has that the matter is not tenable and that the justice of the case does not require that it proceed.

[44] While the Authority's investigative powers may perhaps encourage reflection on the appropriateness of a strike-out application before the Authority and a different dynamic that may exist in an investigative forum, I am not persuaded that those unique powers of the Authority change the fundamental justice of the position that a strike-out application which is clear on its face can be appropriately dealt with by the Authority without the need for further investigation, if the facts suggest that conclusion.

Determination

[45] I have reached the conclusion that the application to strike out ought to be granted for the reasons that I have advanced above.

[46] While I have reflected on the unique nature of the Authority's investigative powers I am not persuaded that on this occasion the justice of the case requires the matter to proceed to a full investigation meeting to enable evidence to be given and taken in the usual way.

[47] I think in all the circumstances that it would not be just to put Mr Miyazawa to the trouble of defending an application which, in my judgment, has so little merit.

[48] Costs are reserved.

James Crichton
Member of the Employment Relations Authority