

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 76
3036791

BETWEEN	SEBASTIAN JENKINS Applicant
AND	BF7 TRADING LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Greg Bennett for Applicant No Appearance for Respondent
Investigation Meeting:	13 February 2019
Oral Determination:	13 February 2019
Record of Oral Determination:	13 February 2019

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. The application to lift or pierce the corporate veil is declined.**

- B. Mr Jenkins was unjustifiably dismissed and BF7 Trading Limited is ordered to pay to Mr Jenkins the sum of \$5,000 under section 123(1)(c)(i) of the Act within 14 days of the date of this determination.**

- C. Costs are reserved.**

Employment relationship problem

[1] BF7 Trading Limited is an online recruitment agency trading under the name Filled Roles. It specialises in labour hire within the building and construction industry. The company is run by two brothers, Mr Roy Bishop and Mr Spencer Bishop. Mr Spencer Bishop is the sole director and a major shareholder of the company. Mr Roy Bishop was a director until 1 March 2017 and a shareholder until 26 October 2017. Mr Jenkins worked for BF7 Trading Limited as a Carpenter from 21 January to 6 April 2018.

[2] Mr Jenkins lodged a statement of problem with the Authority on 21 August 2018 claiming he was unjustifiably constructively dismissed. The Authority experienced difficulties in serving the statement of problem on BF7 and so on the direction of the Authority Mr Jenkins personally served the statement of problem on BF7 on 25 October 2018.

[3] No statement in reply was received from BF7 and on 4 December in order to move this matter forward, I proposed to the parties that the matter be progressed to an investigation meeting and made directions accordingly.

[4] The Notice of Direction and Notice of Investigation Meeting were served on BF7 at 7.17am on 14 December 2018. To date no statement in reply has been received and BF7 has not engaged in the Authority's process.

[5] No representative from BF7 attended the investigation meeting. Mr Roy Bishop from BF7 contacted the Authority on the morning of the investigation meeting and advised he would not be attending. Mr Bishop was advised of the Authority's satisfaction with the service of the notice of investigation meeting and all other documents and was reminded that the Act allows the Authority to continue in BF7's absence.

[6] As provided in clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) I have proceeded to act fully in the matter as if BF7 had engaged in the process or was represented.

Issues

[7] In order to resolve Mr Jenkin's employment relationship problems I must determine the following issues:

- a) Should the Authority lift or pierce the corporate veil?
- b) Was the resignation actually a dismissal?
- c) Was Mr Jenkin's resignation reasonably foreseeable?
- d) What if any remedies should be awarded?

[8] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Lifting or piercing the corporate veil

[9] Mr Jenkins has applied to lift or pierce the corporate veil so that the sole director of BF7, Mr Spencer Bishop becomes personally liable for the obligations of BF7.

[10] Lifting or piercing the corporate veil was considered by the Employment Court in *Bennett and Others v Michaels and Others*.¹ In order to lift or pierce the corporate veil a company has to have been set up with the intention of evading legal responsibility of the person.² Where such a finding is not made the veil cannot be lifted.³

[11] In *Bennett*, after examining the applicable authorities in detail, the Court did lift the corporate veil to find that Mr Michaels should be personally liable but did so having found that Mr Michaels deliberately created and used the corporate entities in order to hide behind them and divert any income received from the running of the

¹ [2016] NZEmpC 137.

² Ibid at [24].

³ Ibid at [28].

businesses to himself personally while avoiding liability. The evidence before the Court included evidence that Mr Michaels:

- a) manipulated creditors who supplied furniture and business equipment to the business;
- b) made false representations as to obtaining backing and financial advances from investors;
- c) persistently issued cheques which he must have known had no possibility of being met by the banks; and
- d) manipulated entries between banks to obtain funds into his personal account.

[12] In support of this application I was referred to seven previous determinations of the Authority which include orders against BF7 for unjustified dismissal claims, wage arrears, compliance orders and penalties. One of those determinations includes orders made by myself for arrears of wages payable to Mr Jenkins.⁴ At the investigation meeting Mr Jenkins told me those orders remain outstanding, although he acknowledged he has not taken any steps to enforce my determination.

[13] In a later determination the Authority ordered a copy of its determination to be provided to the Labour Inspectorate for consideration as to whether further inquiry of BF7's compliance with employment standards is warranted.⁵ I am not aware of what, if any steps have been taken by the Labour Inspectorate.

[14] While the determinations issued by the Authority in previous cases indicates a pattern of behaviour by BF7 to ignore its legal obligations there is no evidence of the type of conduct relied on by the Court in *Bennett* by Mr Bishop. Further, Mr Bishop has not been joined to these proceedings and no application for joinder has been made.

[15] I am not satisfied the legal test for lifting the corporate veil has been made out and the application is declined.

⁴ *Jenkins v BF7 Trading Limited* [2018] NZERA Auckland 251.

⁵ *Do v BF7 Trading Limited* [2018] NZERA Auckland 294.

Was the resignation actually a dismissal?

[16] Mr Jenkins resigned from his job on 22 March 2018 and claims that his resignation was in law a constructive dismissal.

[17] A constructive dismissal is an apparent resignation which is, in reality, an employee's response to an act or omission of the employer of such significance that it amounts to a repudiation of the contract of the employment and entitles an employee to accept that repudiation by resigning the employment.

[18] Included in the instances of employer conduct that may amount to constructive dismissal is a sufficiently fundamental breach of duty by the employer.⁶ The nature of a claim for constructive dismissal is dependent on the events that preceded the employee leaving their employment; the focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach or breaches of the employer's duty or other actions by the employer.⁷

[19] In deciding whether an employer's conduct amounted to a constructive dismissal it is essential to examine the facts of the case to see whether the conduct of the employer can fairly and clearly be said to have crossed the line between inconsiderate conduct causing some unhappiness from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.⁸

[20] Mr Jenkins told me he resigned because despite making promises that he would receive a pay rise in February this was not forthcoming until 19 March and only after he had constantly followed this up with the Bishops. Further BF7 failed to fulfil a promise that he would become a permanent employee after three months employment.

[21] Mr Jenkins told me the Bishops were uncommunicative throughout the employment relationship. He provided evidence of the unsuccessful communications he made with both of the Bishop's.

⁶ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168; [1994] 2 NZLR 415 (CA).

⁷ *Commissioner of Police v Hawkins* [2009] NZCA 209.

⁸ *Wellington etc Clerical Workers Union IUOW v Greenwich*

[22] Adding to these concerns was the fact that Mr Jenkins had PAYE deducted from his wage payments during his employment but these were not submitted to the Inland Revenue as required.

[23] All of these factors point to breaches of good faith on the part of BF7. The statutory obligations of good faith include the duty to be active and constructive in maintaining a productive employment relationship including being responsive and communicative.

[24] I am satisfied the conduct of BF7 was repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

Was a resignation reasonably foreseeable?

[25] To be successful in a claim for constructive dismissal Mr Jenkins must establish that any breach or breaches of duty by the employer are of such character as to make Mr Jenkins resignation reasonably foreseeable.⁹ I am satisfied he has established that BF7's conduct in breaching the statutory duties of good faith made it reasonably foreseeable that he would not want to continue in the employment relationship.

Remedies

[26] Mr Jenkins has established he has a personal grievance and is entitled to a consideration of remedies.

[27] Mr Jenkins claims lost wages for 13 weeks. He told me at the investigation meeting that he commenced employment in a new job the day after he left BF7. In that case he has not lost any remuneration as a result of his personal grievance.

[28] Mr Jenkins has claimed compensation of \$15,000 for humiliation, loss of dignity, and injury to feelings. Mr Jenkins told me that he rang the Bishop brothers constantly seeking payment of his wages but to no avail. When he finally did make contact with Mr Spencer Bishop he was told to f#@!k off.

[29] Mr Jenkins is from the UK. His grandmother, who is still resident in the UK had a fall and he intended to visit with her and care for her. He was unable to do so

⁹ *Weston v Advkit Para Legal Services Limited* [2010] NZEmpC 140.

because he was relying on a tax refund which never eventuated due to his PAYE not being submitted to the Inland Revenue.

[30] Mr Jenkins' evidence is at the lower end of the spectrum of similar cases. In all the circumstances an appropriate award is \$5,000.

[31] I have considered whether Mr Jenkins can be said to have contributed to the situation leading to his dismissal and find that he did not.

[32] BF7 Trading Limited is ordered to pay to Mr Jenkins the sum of \$5,000 under section 123(1)(c)(i) of the Act within 14 days of the date of this determination.

Costs

[33] Costs are reserved. Mr Jenkins has 14 days in which to make submissions on costs. His submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[34] The Authority will deal with the costs issue on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards. The investigation meeting took about two hours including the issue of this oral determination.

Vicki Campbell
Member of the Employment Relations Authority