

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 313  
5403170

BETWEEN                      ALAN JOHNSTON  
Applicant

A N D                              JACQUES CALVO  
Respondent

Member of Authority:      K J Anderson

Representatives:            G Bennett, Advocate for Applicant  
P Tremewan, Counsel for Respondent

Investigation:                On consideration of the papers

Date of Determination:     24 July 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1]     Via a *Statement of Problem* received by the Authority on 23 November 2012, the applicant, Mr Alan Johnston, alleges that he was unjustifiably disadvantaged in his employment by the respondent failing to consult with him when terminating his employment due to redundancy. Mr Johnston also says that he was not paid for “slot payments” but he has provided no details at all regarding how much money is owed, why he believes there is an entitlement; or when the alleged payments were due. However, notwithstanding the lack of particulars regarding his claims, there is a preliminary issue that Mr Johnston is asking the Authority to determine: Was there an employment relationship between Mr Johnston and Mr Calvo?

[2]     A *Statement in Reply* was received by the Authority on 19 December 2012. This informs that Mr Johnston was not employed by Mr Calvo. Rather, Mr Johnston was employed by Cellular Specialists Limited and the company has been placed into liquidation. The Authority is informed that Mr Johnston previously filed a statement

of problem against Cellular Specialists Limited (file no 5393695). It appears that because this company is in liquidation, Mr Johnston is attempting to pursue Mr Calvo, as the sole director of the company.

[3] The Authority convened a conference call with the parties on 23 January 2013. It was explained to Mr Bennett that that there are some considerable difficulties facing Mr Johnston in that he would have to persuade the Authority that Mr Calvo should be a potentially liable respondent party and given that there is little evidence to suggest that a “piercing of the corporate veil” argument would be successful, Mr Johnston may wish to consider his position before committing to further costs, as well as exposing himself to a potential costs claim against him by the respondent. On the strength of the overall discussion, the outcome of the conference call was that Mr Bennett agreed to have further discussions with his client to ascertain if proceedings would continue or be withdrawn.

[4] On 10 February 2013, the Authority was notified that Mr Johnston wished to proceed to an investigation meeting and have his claims determined by the Authority. On the same date, Mr Tremewan, for the respondent, noted Mr Johnston’s decision with “a degree of surprise” and he asked that it be noted by the Authority that upon a further conference call being convened to schedule an investigation meeting, his client would be requiring surety for costs in the sum of \$7,500. But, most probably, the Authority does not have a statutory power to make such an order.

[5] The outcome of a conference call on 11 April 2013 is that Mr Bennett was to file and serve an amended statement of problem by 27 June 2013, along with legal submissions going to the preliminary issue: that is, the identity of the employer and the associated “corporate veil” argument(s). This was recorded via an email from the Authority to both parties. The Support Officer sent a “reminder” email to Mr Bennett on 17 June 2013. His response was that the submissions “should be ready” by next Friday (28 June 2013) but Mr Bennett made a further and extraordinary, statement, informing that: *“Given that this matter was not overly urgent or that submissions were being relied upon I have put them on the back burner to other matters”*. As nothing was received from Mr Bennett, the Support Officer sent Mr Bennett another reminder email on 28 June 2013. This was responded to by Mr Bennett’s office on 1 July 2013 informing that the amended statement of problem would be emailed “...

*later today or at the latest, tomorrow morning*". But true to form, nothing further has been received by the Authority from Mr Bennett.

[6] On 8 July 2013, Mr Tremewan wrote to the Authority drawing attention to the failure by the applicant to comply with the timetable that had been agreed to in regard to filing the relevant papers. In summary, Mr Tremewan urged the Authority to strike out Mr Johnston's application pursuant to clause 12A of the Second Schedule of the Employment Relations Act 2000.

### **Determination**

[7] Given that it is unlikely that the applicant's claims would be successful and the absolute, bordering on contemptuous, failure of advocate for Mr Johnston to prosecute the case, I accept the argument for the respondent that the application of Mr Johnston should be dismissed on the grounds that it is frivolous and vexatious. Not only has the respondent been put to expense regarding a matter that was not likely to have much chance of success, there has been an abuse of the processes of the Authority. This is despite the fact that counsel for the applicant has been given considerable latitude by the Authority and its officers.

[8] Pursuant to clause 12A of the Second Schedule of the Employment Relations Act 2000, the application of Mr Alan Johnston (file no: 5403170) is dismissed.

[9] Costs are reserved. The respondent has 28 days from the date of this determination to file and serve submissions. The applicant has a further 14 days to respond. Given the circumstances that have prevailed to date, there shall be no extension of time granted to the applicant.

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