

[2] On 19 November 2009 Mr Mani advised the Authority that he was not Mr Kearney's employer (he said that he was, rather, the director of the limited liability company which had engaged Mr Kearney) but that he was prepared to file a brief statement in reply and to attend mediation as an authorized representative of Sales Dynamics Ltd. Mr Mani signed this e-mail as *Director, Sales Dynamics Ltd.*

[3] Despite his agreement to attend mediation Mr Mani proved to be somewhat elusive and, in late February 2010, Ms Flaszka, for Mr Kearney, e-mailed the Authority advising that they had been unable to secure a mediation as Mr Mani had advised at the last minute that he was not going to attend the scheduled mediation meeting. Ms Flaszka advised that the applicant was concerned that there was a serious risk that Mr Mani might dissipate any assets he may have, and requested an urgent meeting date.

[4] On 5 March 2010 Mr Mani advised, again by e-mail, that Sales Dynamics Ltd had been Mr Kearney's employer and that he, as a director of that company was available to take part in a case management conference.

[5] On 9 March 2010 the Authority held a case management conference with Mr Mani and Ms Flaszka for Mr Kearney. During that conference call it was agreed that the parties would attend mediation on 17 March, Mr Mani would file a statement in reply on or before that date and the Authority's file would be altered to record Sales Dynamics Ltd. (Sales Dynamics) as the first respondent and Mr Mani as the second respondent. .

[6] The parties did not settle at mediation and, at a further case management conference on 24 March 2010 it was agreed that an investigation meeting would be held on 20 May 2010 and a timetable for the exchange of witness statements and other documents was established. During the case management conference it was agreed that a number of issues needed to be investigated and determined by the Authority. These included:

- Whether Mr Kearney was an employee (or an independent contractor) and if so, who was his employer?
- If Mr Kearney was an employee what payment had he been entitled to receive and was he entitled to any further payment by way of wages or over time?

- Did the Authority have the jurisdiction to order Mr Mani to repay Mr Kearney the \$20,000 he had paid to purchase shares in Sales Dynamics? (Mr Mani does not dispute that the money was paid or that no shares were ever transferred to Mr Kearney).
- Was Mr Kearney dismissed and if so was that dismissal unjustified?
- If Mr Kearney was unjustifiably dismissed what remedies is he entitled to receive?

[7] At the Authorities investigation meeting on 20 May 2010 Mr Kearney asked that the Authority make a decision on this matter on an urgent basis as he was concerned that the respondents' liquidity was in question. Mr Mani assured the Authority that there was no immediate likelihood of Sales Dynamics Ltd. or any other of Mr Kearney's possible employers being placed in liquidation. He subsequently produced accounting documents to support this assurance. At the meeting I reminded Mr Mani that, as second respondent and as a director of the companies concerned there was some potential, should his assurance be based on misinformation, that he be held personally liable for any awards I might order those companies pay to Mr Kearney. However based on Mr Mani's assurances I did not give priority to determining this matter.

[8] Regrettably on 16 August 2010, and before I had completed my determination, Ms McTavish Butler advised me that Sales Dynamics Ltd. and Percent Group Ltd (another of Mr Mani's companies, the sole shareholder in Sales Dynamics Ltd and potentially an alternate employer of Mr Kearney), had been placed into liquidation by the Inland Revenue Department for non-payment of taxes. In her letter advising me of these liquidations Ms McTavish Butler requested that I issue a determination on this matter as soon as possible and that, in the light of Mr Mani's earlier assurances he be found personally liable for any sums awarded to Mr Kearney.

[9] On the 24 August 2010 I held a telephone conference with Ms McTavish Butler and Mr Donovan. During that conference call I directed that Mr Donovan file submissions on behalf of Mr Mani addressing his contention that Mr Mani should not be held personally liable for any awards made to Mr Kearney and that Ms McTavish Butler would then be given an opportunity to file submissions in response.

[10] On 26 August Ms McTavish Butler forwarded a copy of a letter from the liquidator for Sales Dynamics Ltd to Mr Kearney, dated 25 August 2010, in which the liquidator said:

I was not aware that you had outstanding litigation against the above Company.

In terms of section 248(1)(c) of the Companies Act 1993 I do not consent to your continuing this action against the company.

[11] I have now received submissions from both Mr Donovan, on behalf of Mr Mani and Ms McTavish Butler for Mr Kearney.

The issues

[12] Now that the first respondent, Sales Dynamics Ltd, has been put into liquidation, and the liquidator has declined to give his consent for Mr Kearney to pursue an action against that company, the principal issue for determination is whether or not Mr Mani should be held personally liable for any awards which would have been made to Mr Kearney against Sales Dynamics. Only if the answer to this question is “yes” is it necessary for me to determine whether or not Mr Kearney would have been entitled to any awards made had Sales Dynamics not been placed into liquidation.

Should Mr Mani be held personally liable?

[13] Mr Donovan’s submissions extensively canvass a range of issues and cite a number of relevant court cases to support his contention that Mr Mani should not be held personally liable for any of Mr Kearney’s claims. In the interests of brevity I will not reiterate those submissions in this determination. However Mr Donovan’s submissions cover the following main points:

- If Mr Kearney was an employee, Mr Mani was not his employer
- The doctrine of undisclosed principal does not apply (because Mr Mani had never held out that he was Mr Kearney’s employer and had fully disclosed to Mr Kearney that Sales Dynamics was the company to which he would be providing services.)

- Mr Kearney's claims have not been brought in accordance with section 234 of the Employment Relations Act (the Act) (relating to an action brought by a Labour Inspector).
- The part payments for shares were received by Mr Mani as agent for Percent Group Ltd and not in his personal capacity. (Bank statements produced for the Authority confirm that these monies were paid into a The Percent Group Ltd bank account).
- There are no grounds to lift the corporate veil because Sales Dynamics was not a 'front' or sham but traded in a bone fide fashion.
- Mr Mani did not give any verbal undertaking accepting personal liability for Sales Dynamic debts.

[14] Ms McTavish Butler on the other hand, also in extensive and detailed submissions, argues that Mr Mani should be held personally liable. Ms McTavish Butler touches on all the points raised by Mr Donovan and says particular:

- Mr Mani personally approached Mr Kearney in March 2009 and offered him a job which was conditional upon Mr Kearney purchasing shares in one of Mr Mani's companies. It was Mr Mani who carried out employment negotiations with Mr Kearney and held himself out to be Mr Kearney's employer. Mr Kearney had no knowledge of the matrix of companies owned and controlled by Mr Mani and believed that at least one of his employers was Mr Mani.
- There is no need for the Authority to lift the corporate veil as Mr Mani has always been the second respondent in these proceedings and Mr Mani can be held to be a joint employer and equally liable for the same debts as might have been awarded against Sales Dynamic Ltd.
- The doctrine of undisclosed principal can easily be applied in this case because Mr Mani failed to provide Mr Kearney with an employment agreement and, when one was provided, the employer named in that document was not one that Mr Kearney knew anything about. The matrix of companies that Mr Mani required Mr Kearney to work within was not disclosed to Mr Kearney at the commencement of his employment.

- While Mr Kearney's claims have not been brought at this stage in terms of section 234 of the Act Mr Kearney could assign his claim to a labour inspector thereby satisfying the requirements of section 234(1). In any event it is open to the Authority to find that Mr Mani was the employer or joint employer and therefore section 234 is irrelevant.
- In respect to the payment for shares Ms McTavish Butler points out that section 161(1)(r) of the Act allows the Authority to make determinations *arising from or related to* the employment relationship. It is her submission that the purchase of shares was part of the employment relationship between Mr Mani and Mr Kearney.
- Ms McTavish Butler points out that, on at least two occasions (at the case management conference on 24 March 2010 and at the beginning of the investigation meeting on 20 May 2010) Mr Mani gave verbal undertakings that Sales Dynamics was not in danger of being placed into receivership or liquidation. The second of these undertakings was supported, subsequently, by the production of financial documents which she says *did not allay Mr Kearney's concerns about the financial status of Sales Dynamics Ltd...* She points out that Mr Mani was warned by the Authority that the consequences of a breach of that undertaking could well result in personal liability being attributed to him. She argues that based on Mr Mani's submissions it is apparent that he considers that there should be no consequences to Mr Mani's misleading the Authority. If that is correct it makes a mockery of the Authority's jurisdiction and power.

Discussion

[15] It is with some regret that I have reached the conclusion that it is not possible to order that Mr Mani be personally liable for awards that would have been made to Mr Kearney. It is clear that Mr Mani, as he is entitled to do, has deliberately used the law applying to limited liability companies to shield himself from personal liability. It is also clear that the undertakings in respect to the financial position of Sales Dynamics were at very least optimistic and, in the light of subsequent events, possibly dishonest. I accepted those undertakings in good faith and therefore did not give any specific priority to the completion of my investigation and determination of Mr

Kearney's claims. It may be that an early determination may not have resulted in Mr Kearney being able to obtain any recovery or compensation from his erstwhile employer but the liquidation of that employer has denied him the opportunity.

[16] Despite my reservations expressed above and having reviewed all the evidence and taken account of the comprehensive submissions of both representatives I have reached conclusions which, assuming that Mr Kearney was entitled to awards by way of recovery or compensation, **Mr Mani cannot be held personally liable for payment of those awards.**

[17] **Firstly I have reached the very clear conclusion that Mr Kearney was an employee and his employer was Sales Dynamic Ltd.** I also find that, on the balance of probabilities, Mr Kearney was aware that Sales Dynamic was his employer. Mr Kearney felt confident enough about his relationship with Mr Mani to negotiate and enter into an agreement to purchase some \$30,000 worth of shares in Sales Dynamics Ltd from Percent Group Ltd. He knew that Mr Mani was the major share holder of The Percent Group Ltd and sole director of both companies. I have heard ample evidence to conclude that during the discussions which led to the establishment of their business relationships Mr Kearney was fully aware of the nature of Mr Mani's business and fully understood the nature of the relationship he was entering into. There is evidence, for example, that Mr Kearney himself drafted the shareholder agreement which specifically states that he agreed to purchase shares in Sales Dynamics Ltd from ThePercent Group Ltd and that, before the share purchase, Mr Mani owned or controlled either directly or through other companies, 100% of the shares of The Percent Group Ltd, which in turn owned 100% of the shares in Sales Dynamics Ltd. Once his employment commenced Mr Kearney received pay advice slips from Sales Dynamics Ltd.

[18] Regrettably Mr Kearney seems to have been seduced by the possibility of high returns which led him to accept Mr Mani's optimistic assessment of future prospects without taking the prudent step of seeking independent professional advice.

[19] It is true that I formally warned Mr Mani that, should his undertakings to the Authority prove to be based on misinformation, there was the potential that he be held personally liable. I have re-examined the documentation provided by Mr Mani in support of his second undertaking (20 May 2010). While it can be said that these documents do not provide a full picture of Sales Dynamics financial position, they do appear to support Mr Mani's contention at that time that Sales Dynamics was not in immediate danger of liquidation. Ms McTavish Butler suggests that the accounting documents provided to the Authority by Mr Mani in May *are clearly different to those recorded in the liquidators report*. I accept that the statements are "different". This does not however mean that the statements provided by Mr Mani in May are incorrect. The two sets of documents were created for completely different purposes. It may be, and I must stress that there is no direct evidence to the contrary, that Mr Mani honestly believed, both in March and in May that his companies were not in danger of being placed in either receivership or liquidation. Whether or not Mr Mani has fulfilled his obligations as a director is a matter for the liquidator and/or the Companies office and is not within the Authority's jurisdiction

Payment for shares

[20] The share purchase agreement is quite specific. Mr Kearney agrees to purchase shares in Sales Dynamic Ltd from the current 100% shareholder, The Percent Group Ltd. There is no mention in the agreement of an employment relationship except that:

Nothing in this agreement shall create a partnership or agency or the relationship of employer and employee between the parties, though such relationships may be created by other means.

There is no dispute that Mr Kearney paid a total of \$20,000 to Mr Mani and I have seen evidence (by way of bank statements) that this money was lodged to the Percent Group Ltd bank account. Although it is not clear how this money was dispersed, as sole director of The Percent Group Ltd that was a matter entirely within Mr Mani's authority and control.

[21] I do not accept this McTavish Butler's submission that the share transaction *arose from or was related to the employment relationship*. This transaction was separate from and, in my finding, not dependent of the employment relationship. It follows that **the Authority has no jurisdiction to investigate the payment or disposal of this money or to order its repayment to Mr Kearney**. This may be an issue which is of interest to the liquidator when he is considering whether any further action should be taken against Mr Mani.

Determination

[22] By way of summary if the findings set out above

- (i) Mr Kearney was employed by the first respondent, Sales Dynamics Ltd.
- (ii) As Sales Dynamics Ltd is in liquidation Mr Kearney is unable to pursue his claims against that company without the approval of the liquidator or the High Court. The liquidator has declined to give his consent.
- (iii) Mr Kearney was aware that he was employed by Sales Dynamics Ltd and I have declined his request that Mr Mani be personally required to pay any awards that would have been payable to Mr Kearney by his employer.
- (iv) The Authority has no jurisdiction to investigate or make orders in relation to moneys paid by Mr Kearney to The Percent Group Ltd for the purchase of shares in Sales Dynamics Ltd

Costs

[23] Costs are reserved. If the parties are unable to settle the question of costs between themselves then any party seeking costs should file and serve submissions within 28 days of the date of this determination. The other parties will then have 14 days in which to file a response.

James Wilson

Member of the Employment Relations Authority