

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA100/08
CEA411/05

BETWEEN ALAN SPENCER
 Applicant

AND HUGHES DAIRY FARMS
 LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Mr Owen Johnstone, Advocate for Applicant
 Mr James Mee, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 14 March 2007 from Applicant
 14 May 2007 from Respondent

Determination: 17 July 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination dated 6 September 2005 the respondent was ordered to pay Mr Spencer \$12,000 compensation, lost remuneration in the sum of \$7,519.45 net, relocation costs in the sum of \$4,089.70 and a contribution to costs of \$1,300.00. The total due to Mr Spencer was \$24,909.15.

[2] The respondent failed to pay these sums as ordered and failed to issue a challenge to the Authority's determination. Extensive efforts to effect payment by Mr Spencer's representatives proved fruitless.

[3] On 12 September 2006 the company was struck off the Companies Register and therefore ceased to exist. This event was over 13 months after the date of issue of

the Authority's orders. The Authority is advised that following the company being struck off, the farming enterprise continued to trade and operate.

The application

[4] In a statement of problem lodged with the Authority on 22 December 2005 the applicant sought a compliance order against the respondent company. He also sought an order joining Mr A W (Wayne) Hughes and Mr A P (Tony) Hughes who were the directors of the respondent company at the time of Mr Spencer's dismissal as parties to the proceedings. The applicant also reserved his rights to seek penalties in respect of the then continuing non-compliance with the Authority's determination.

[5] In an amended statement of problem lodged with the Authority and received on 28 March 2006, the applicant sought compliance, joinder of the directors of the respondent and sought a penalty against the respondent itself in the sum of \$10,000 and a penalty of \$5,000 each from the two directors. This latter claim was made under s.135(2)(a) of the Act in respect of the company and under s.135(2)(b) of the Act from the directors. This latter claim relies on s.134(2) which states:

- (2) *Every person who instigates, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.*

The history

[6] On 13 March 2001 a company, A P and A W Hughes Limited was incorporated. The company's registered address was given as 493 Counsell Road, RD6, Invercargill. Both Wayne and Tony Hughes were appointed directors and each held 500 of the total 1,000 shares.

[7] On 6 July 2001 several parcels of land were purchased by A P and A W Hughes Limited, at and close to, 493 Counsell Road, RD6, Invercargill.

[8] On 24 October 2003, a company Hughes Dairy Farms Limited was incorporated, the directors being Wayne Hughes and Tony Hughes, each of whom held 50 of the 100 shares.

[9] On 9 September 2004, Mr Johnstone wrote to the respondent's resident director on behalf of Mr Spencer notifying a personal grievance.

[10] Mr Spencer, the applicant in this matter, resigned his employment with Hughes Dairy Farms Limited in circumstances set out in the Authority's original determination and which the Authority found to have amounted to a dismissal. That resignation occurred on 10 September 2004.

[11] Following an unsuccessful mediation on 30 March 2005 the matter was referred back to the Authority for investigation.

[12] On 25 April 2005 Tony Hughes resigned as a director the respondent, transferring his 50 shares to Wayne Hughes, who then became the sole director. The registered office was transferred to 33 Union Street, Opotiki.

[13] The Authority's investigation meeting was originally scheduled for 6 July 2005 and Wayne Hughes was notified using Form 6 as stipulated in the Regulations. That form carried the note:

If the respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the respondent, issue a determination in favour of the applicant.

[14] The attached notice of direction advised:

[2] The applicant is to lodge and serve his statements of evidence by 4pm on Friday 8 July 2005.

[3] The respondent is to lodge its statements of evidence with the Authority and serve a reply of each on the applicant's representative by 4pm on Friday 15 July 2005.

[15] An amended notice of investigation meeting confirmed that it would now occur on 25 July commencing at 11am. Both this notice and the notice of direction are dated 30 May 2005.

[16] On 5 June 2005 Wayne Hughes emailed the support officer advising:

We are in receipt of the notice of hearing. The date that we are required to respond by is 15 July 2005. In the earlier email I had informed you of the fact that Tony Hughes (main witness) is overseas until 14 July. I thought you would have taken this into account when setting the dates. Can we get the 15 changed until the 22 July which gives us a week.

[17] The support officer replied:

Wayne, you were offered the opportunity to participate in the teleconference held with the applicant's representative and the Authority Member. This was the appropriate forum for parties to arrange a mutually agreeable timetable.

However, I have referred your request to the Authority Member for his consideration. Mr Montgomery has agreed to accept your statements of evidence no later than the definitive date of Wednesday 20 July at 12 noon.

The Authority on the basis of this request from Wayne Hughes had reason to believe that the company intended to participate in the investigation meeting, and granted the leave requested.

[18] On 29 June 2005 Mr Johnstone emailed the applicant's statements of evidence to Mr Wayne Hughes. In spite of the extension granted to the respondent at Wayne Hughes' request, no statements were ever lodged by the respondent.

[19] On 19 July 2005, following Tony Hughes' return from an overseas trip, a company, Counsell Road Farm Limited was incorporated. The sole director appointed was Tony Hughes who held all of the 100 shares in this new entity.

[20] On 20 July 2005 Wayne Hughes advised the Authority as follows:

We have reviewed the position of the company and it does not have enough assets for us to hire a lawyer or to justify me flying down. The costs exceed the worth of the company. We have decided that on this basis we will not attend the investigation meeting.

[21] The investigation meeting proceeded in the absence of the respondent on 25 July 2005. The Authority issued its determination on 6 September 2005. On 5 October 2005, at the request of the applicant, the Authority issued a sealed certificate of determination confirming the orders made against the respondent.

[22] On 11 October 2005 a certificate of judgment or order was issued under the Seal of the District Court, Invercargill. This distress warrant was served on Wayne Hughes by Mr Barry John Shiels, a District Court Bailiff, and the notes attached to a *nulla bona* return state in his own handwriting

I have seen the director Adrian Wayne Hughes at the registered office of the company at 33 Union Street, Opotiki and can find no assets of the company at this address. Mr Hughes advises he is in the process of winding the said company up and there are no assets. This operation was run in Invercargill and only the registered office was in Opotiki and this was a dwelling house.

[23] The *nulla bona* return was dated 11 November 2005 at the Whakatane District Court.

[24] Hughes Dairy Farms Limited was removed from the Register of Companies on 12 September 2006. If, as the bailiff states, Mr Wayne Hughes was in the process of winding up Hughes Dairy Farms Limited on 11 November 2005 the question needs to be posed as to how the winding up was managed.

[25] Enquiries of the Companies Office confirm that Wayne Hughes, the sole director of the company, failed to file an Annual Return knowing this would, in time, inevitably lead to the company being struck off the register. This is consistent with the statement Wayne Hughes made in his affidavit *I believe we had no option at that time but to allow the company to be struck off*. Whether such inaction amounts to a breach of his obligation as a director to *act in good faith when exercising powers or performing duties* lies beyond the Authority's jurisdiction.

The issues

[26] To resolve this matter the Authority needs to determine the following issues:

- Does the Authority have jurisdiction to order compliance of a company which has ceased to exist; and
- Does the Authority have jurisdiction to join former directors and senior executives of a former company and to order them to pay remedies ordered by the Authority prior to the demise of the company; and
- Does the Authority, should it find the applicant's employment to have been breached, have jurisdiction to levy penalties against former directors or senior executives.

[27] The applicant was supplied with a certificate of determination under the Seal of Authority and sought to enforce the Authority's order through the District Court. As referred to above the bailiff visited the registered office of the respondent and spoke with Wayne Hughes. As there were no assets belonging to the company the bailiff was unable to distrain and accordingly advised the Whakatane District Court. .

The submissions

[28] For the applicant, Mr Johnstone urged the Authority to issue an order that the respondent comply with the determination of 6 September 2005, and that the company's directors be joined as parties as persons who had aided and abetted in the breaching of the applicant's employment agreement. Among other things Mr Johnstone submits:

The applicant submits that it cannot be within the spirit and intention of the legislation that the respondent be allowed to ignore the legal process, ignore the Authority and deprive the applicant of his ability to seek any form of redress simply because the persons who are the mind of the respondent chose to try to hide behind the corporate veil of a company that has all the appearance of a shell company set up as a device to do exactly what the directors have done here – deliberately avoid legal liability.

The applicant accordingly asks the Authority to use the discretion which it has under the terms of s.137 of the Employment Relations Act. The Authority's ability to issue orders of compliance is not restricted. The Authority has power to issue an order of compliance against "any person" and is not restricted to the respondent in this case. The Authority is able, it is submitted, to issue an order of compliance against the respondent's directors individually in their capacity as directors requiring them to ensure the respondent meets the obligation to the applicant established by the determination of the Authority.

[29] In this context Mr Johnstone refers the Authority *Northern Clerical IUOW v. Lawrence Publishing Company of New Zealand Ltd* [1990] 1 NZLR 717, where Mr Johnstone submits the Labour Court, in circumstances similar to the instant case where monies were owed as a result of grievance proceedings, ordered compliance against non-parties to the original proceedings where those non-parties were in a position to ensure payment was made.

[30] Further, in respect to the alleged aiding and abetting in the breach of Mr Spencer's employment agreement, the applicant seeks penalties against the respondent and also against the respondent's director under s.134 of the Act. In this context it is submitted that the breaches the directors are responsible for, have been *wilful, deliberate and dismissive of the law.*

[31] For the respondent, Mr Mee submits the fact that the company is no longer in existence citing s.15 of the Companies Act: *a company is a legal entity in its own right separate from its shareholders and continues in existence until it is removed*

from the New Zealand Register. He submits that having been removed from the Register the respondent company is therefore no longer in existence.

[32] Further, he submits that in order to lift the *corporate veil* there must be evidence that the company or its personality was being used as a façade in an attempt to disguise the reality of the situation. He says there is no evidence of any fraud in the intention which led to the establishment of the respondent company. He says *it is clear that there was good reason for the company to be incorporated ... and there is no evidence to suggest otherwise than for good reason.*

[33] Counsel for the respondent then goes on to submit that as the Authority was alerted some days prior to the investigation meeting that the company was going to take no further part in the application, *the Authority had the time, as did the applicant, to seek to join the Messrs Hughes prior to the determination, which it should or could have done, given the indication by the then director of the respondent company.* I will return to this point shortly.

[34] Mr Mee further submits that the *Lawrence Publishing* case is of little use as Finnigan J made the order not against the directors personally, but rather as agents for the publishing company. As he correctly says, there is of course no company in existence in this particular matter. He cites several other precedents in which the terms of the compliance orders were to ensure that the original party complied with the orders being in force not that joined parties should themselves comply by personally paying sums of money ordered.

The legal principles

[35] The general rule to be applied in an application for joinder is that it is for the applicant to decide whom he or she will sue. Any person named as a respondent may oppose being joined or apply for strike out if he or she considers there is no arguable cause of action. See *Auckland Regional Services Trust v. Lark* [1994] 2 ERNZ 135.

[36] In this present case the application to join Adrian Hughes the sole director of the respondent and his brother Tony Hughes, the respondent's local representative at Makarewa, has been made after the Authority's determination was issued. As is evident, neither was cited as a party prior to the Authority's investigation meeting. Had an application for joinder been lodged with the Authority, all parties would have been heard on that matter as an issue preliminary to the substantive issue.

[37] The Authority is, on its own motion, able to join parties but rarely does so relying on the principles referred to above. The purpose of the joinder rules is to secure the determination of all disputes relating to the same subject matter without the delay and expense of separate proceedings. The matter before the Authority was a single issue personal grievance claim of unjustifiable dismissal and the Authority had no grounds to depart from its standard procedures. It is not unknown for respondent parties not to appear at an investigation meeting. However, they do so at their own risk given the clear warning set out in every notice of investigation meeting issued by the Authority.

[38] Turning to the application for a compliance order and the application of discretion to be applied by the Authority in such matters, it is clear that the Authority's discretion must be exercised in a principled matter and not arbitrarily. See *United Food etc. Union v. Talley* [1992] 1 ERNZ 790. In considering this aspect of the claim, the Authority needs also to consider the practical benefit of issuing an order for compliance. In *New Zealand (with exceptions) Electrical IUOW v. Remtron Lighting Limited (in receivership) and Ors* [1990] 1 NZILR 608, Colgan J, as he then was, remarked *even if it were established that any of the defendants have been in breach of an award or awards, the reality of the position now is that the first defendant company is in a hopeless financial state and is not trading so therefore does not employ any workers who might benefit by the imposition of a compliance order.*

[39] Similarly, Goodard CJ in *NZ Clerical Workers Union v. Huysers Books Limited* 17/12/91 WEC 28/91 declined an application as compliance would have been impossible in view of the company's financial position. In both of the cases referred to the respondent was in receivership. The situation in this matter is one step further removed in that the company has ceased to exist.

[40] While accepting that at the relevant time Wayne and Tony Hughes were the *mind* of the company – the Authority is unsure who may have been its conscience – the principles enshrined in the *Laurence Publishing* case and in *McLennan Internet Products Limited (in liquidation)* prevent me ordering compliance against the then directors personally. Judge Colgan, as he then was, in closing his decision on the *McLennan* matter said:

Whilst employment tribunal decisions should be complied with and it is one of this Court's roles to enable parties to enforce the obligations of others, it cannot do so where other statutory provisions would be breached or where the law does not allow this.

[41] Turning now to the application for penalties as set out in ss.133 – 136 of the Act. Relevant in this particular case is s.134 which states:

- (1) *Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.*
- (2) *Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.*

[42] Section 135(5) prior to the 1 December 2004 clarification of this sub-section read:

An action for the recovery of a penalty under this Act must be commenced within 12 months after the cause of action has arisen.

[43] The application for penalties was received by the Authority in the amended statement of problem on 28 March 2006. The breach in respect of which penalties are sought occurred on 6 September 2004. This application is time barred being caught by s.135(5), and the Authority has no discretion on this issue.

The determination

[44] Returning to the issues set out above in this determination I find:

- The Authority is unable to order compliance of a company which has ceased to exist as there is no practical benefit in doing so.
- The Authority does have jurisdiction to join former directors and senior executives of a company but is unable to order them to personally pay the remedies ordered by the Authority to be paid by a separate legal entity.
- The Authority is unable to consider the issue of remedies in this particular case as the applicant's claim is time barred.

Comment

[45] As the member of the Authority in this matter, I genuinely regret that I unable to assist Mr Spencer and his family enforce the determination made in his favour. Attempts to assist him have involved two other members of the Authority and the support of the legal research team at the Department of Labour. While this has taken longer than Mr Spencer and I envisaged, and for what can only be described as an unsatisfactory outcome for the applicant, the statutory framework prevents me from delivering an outcome in his favour.

[46] I also acknowledge the persistent and committed attention to this case by the Amalgamated Workers Union, and in particular Mr Owen Johnstone and his support team.

[47] In an affidavit lodged with the Authority in relation to this matter Wayne Hughes deposed that he was at the relevant time a *qualified Chartered Accountant*. While explaining the reasons for the formation of Hughes Dairy Farms Limited (which I accept were valid) was helpful to the Authority, much of the affidavit's content was hearsay. There was also concerted attempt to speak in defence of the decisions he had made. To be blunt, Mr Hughes had the opportunity to present that evidence at the investigation meeting but chose not to. As this belated evidence does not bear on the issues before the Authority in the present application, and in the light of the company waiving its right to challenge the original determination, I have accorded it virtually no weight.

[48] The Authority is of the considered view that a Chartered Accountant, director, and employer, acting in good faith would not have behaved in the manner he has. It does him little credit that he omitted to mention in his affidavit the formation of Counsell Road Farm Limited the day before he advised the Authority of his intention not to attend the investigation meeting, whatever the purpose of that incorporation may have been.

[49] Given the timing of its establishment and the structural separation of the milking operation from the ownership of the farm that had obtained to that point, it appears the Hughes brothers, knowing that Hughes Dairy Farms Limited was under pressure, required an alternative, more secure conduit through which the dairy company could channel milk payments.

Costs

[50] There will be no order for costs.

Paul Montgomery
Member of the Employment Relations Authority