Determination Number: AA 319/06
File Number: AEA 430/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Paula Hardy (Applicant)
AND	Scoopy's Ice Cream Parlour (Whangarei) Limited (First Respondent) **AND** Scoopy's Holdings Limited (proposed Second Respondent)
REPRESENTATIVES	Timothy Oldfield, Advocate for Applicant Alan Heward, Counsel for First Respondent No appearance for proposed Second Respondent
MEMBER OF AUTHORITY	R A Monaghan
INVESTIGATION MEETING	28 June 2006
FURTHER INFORMATION RECEIVED	4 and 28 August 2006
SUBMISSIONS RECEIVED	28 September 2006
DATE OF DETERMINATION	12 October 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Paula Hardy says her former employer unjustifiably and constructively dismissed her in June 2004, and affected her employment to her disadvantage by various unjustified actions between March and May 2004.

[2] The first two statements of problem filed on Ms Hardy's behalf cited only Scoopy's Ice Cream Parlour (Whangarei) Limited ("SICPWL") as the respondent employer. By a further amended statement of problem the applicant asked the Authority to pierce the corporate veil to 'assign liability for any personal grievance jointly' to Scoopy's Holdings Limited ("SHL"). I have treated that as an application to join SHL as a party to Ms Hardy's grievances.

[3] This determination addresses the application for joinder. The application requires a finding about whether SHL should be treated as Ms Hardy's employer, since Ms Hardy cannot raise personal grievances against SHL unless it is her employer. That, in turn, raises the central question of whether the corporate veil should be pierced or lifted.

Scoopy's corporate structure

[4] Ms Hardy's employment began in December 2003. SICPWL was incorporated in September 2003 and was the trading entity for the associated ice cream parlour business in Whangarei. Robert Noel and Esme Jill Aitken (known as Jill Aitken) were the registered directors and shareholders. They also worked in the business. SICPWL was an operating company at the time, and was the employer party in the employment relationship.

[5] In her statement of evidence Ms Hardy said she was aware in March 2004 that the Aitkens were attempting to 'sell the shop'. That would not be surprising as SICPWL's annual accounts for the year ended 31 March 2005 showed a significant net deficit for that year. They also showed the company had been carrying significant debt by way of shareholder advances and bank loans in the period before that. I was told the business required capital which the shareholders were unable to provide.

[6] 'The shop' (being SICPWL's assets and business) was eventually sold in December 2004, and SICPWL ceased to trade. I was told the plant was sold at a loss, and the proceeds of the sale went towards retiring debt. The company is now a shell. The assets and business of another company in which the Aitkens were the directors and shareholders, Scoopy's Ice Cream Parlour (Manukau) Limited, were sold at the same time. The Manukau company had been incorporated in June 2004. I was told it, too, had been running at a loss.

[7] SHL purchased the assets and business of both companies. It was incorporated in November 2004. At the time there were two directors, Thomas Bleier and Mr Aitken. Mr and Mrs Aitken held 51,000 shares and Mr Bleier held 49,000. By 16 May 2005 Mr Bleier had increased his shareholding to 99,000. Another 250,000 shares were issued later in May 2005. The record does not show to whom, but there was no suggestion the shares were issued to Mr or Mrs Aitken or their interests. In October 2005 Mr Aitken ceased to be a director of SHL.

[8] I was told Mr Bleier has been managing the Whangarei business. The Aitkens do not claim they have done so, and Ms Hardy says Mr Bleier is now attempting to sell the Whangarei business. As at the date of the investigation meeting, and for a period prior to that, Mr and Mrs Aitken had been living in Dunedin. They were deriving income from the original Scoopy's ice cream business they started there. Both are directors and shareholders of the associated company, Scoopy's Ice Cream Parlour Limited ("SICPL"), as was Mr Bleier from September 2004 to October 2005.

[9] I have no reason to believe the circumstances in which Messrs Bleier and Aitken resigned their respective directorships have any relevance to the issues here. However the activity since December 2004 means that, as at mid-2006, Mr Bleier was the sole director and probably the majority shareholder in SHL, Mr and Mrs Aitken were the sole directors and shareholders in SICPL, and SICPWL continued to be a shell.

Determination

[10] SHL was not in existence during the period of Ms Hardy's employment in the Whangarei ice cream parlour, or for several months afterwards. On the face of the matter it is clear SICPWL was Ms Hardy's employer and is appropriately cited as the employer party to her personal grievance.

[11] Mr Oldfield referred to the general grounds on which I might nevertheless lift the corporate veil and find SHL should be treated as Ms Hardy's employer for the purposes of her personal grievances. I did not understand him to be relying on strongly on arguments that SICPWL was acting as an agent for SHL[1], or that the transfer of assets between SICPWL and SHL was a sham.[2] Indeed I would not accept there was any agency, but will return to whether the transfer of assets was a sham.

[12] The ground on which Mr Oldfield relied most strongly was that SHL and SICPWL are one economic unit, with SICPWL being controlled by SHL and carrying out business as a subsidiary of

[1] See **NZ Seamen's IUOW v Gearbulk Shipping (NZ) Limited** [1990] 1 NZILR 688
[2] See **Square 1 Service Group Limited v Butler** [1994] 1 ERNZ 667

SHL. He submitted that the circumstances here are analogous with those in **NZ Seafarers IUOW v Silver Fern Shipping Limited (No 2).**[3]

[13] In support Mr Oldfield pointed to Mr Bleier's becoming a director of SICPWL prior to the sale of its assets in December 2004, and alleged he was in 'partial control' at the time. I assume that is a reference to Mr Bleier's status as a director, as there was no other evidence concerning Mr Bleier's activities in the business at the time. I was told only that he was a business consultant and investor, and note that his registered addresses for contact are in Auckland. Mr Oldfield also said SHL and Mr Bleier are now 'in control' of the SICPWL business, but that is not an accurate representation of what has happened. SHL purchased the assets and business of SICPWL in late 2004. It owns them, and of course it controls them. SICPWL does not, whether nominally or otherwise. There is no need to lift or look through any veil. The circumstances do not amount to evidence of an ongoing association in the nature of a corporate group between SICPWL and SHL.

[14] Finally it was alleged that Mr and Mrs Aitken continued to be involved in running and maintaining both the Whangarei and Manukau ice cream parlours after the 'capital injection' from SHL and they continued to work there. This was a valiant effort to breathe life into a company – SICPWL - which is not operating following a sale of everything (other than the people) that gave it life, but I do not accept it.

[15] I understood the submissions to be an attempt to illustrate that the businesses of SHL and SICPWL were interwoven, as the relevant businesses were found to be in the **Silver Fern** case. However SHL is not the parent of SICPWL – it merely purchased the assets and business leaving SICPWL an inoperative shell. The 'tests' or 'guidelines' discussed in the **Silver Fern** case are based on the continuing economic operation of a parent and a subsidiary, or at least of more than one company. They do not assist here.

[16] The **Square 1 Service Group** approach has potential to be of more assistance. There, Square 1 Service Group Limited was incorporated on the same date as it agreed to purchase the assets of another cleaning company. The latter company was left as an inoperative shell. The aggrieved employee was apparently dismissed from that company on the day after Square 1 Service Group Limited settled the purchase. In deciding the appeal before it the Employment Court referred back to the Employment Tribunal the question of whether the corporate veil should be lifted, but made a number of comments on the point. They included reference to the need to determine the real reason for the incorporation of Square 1 Service Group Limited, and comments on the indicia of the reality of the employee's employment by Square 1 Service Group Limited.

[17] The court also discussed the relevant law, saying:

> "… the court … may lift the corporate veil but still ensure the **Salomon** principles are not abused or employed to prevent the veiled company or other entity to avoid its lawful or proper obligations. This may be done, …. in equity and good conscience and where there are sufficient elements of artificiality or a sham is apparent." (p 679 – 680)

[18] There is no evidence here that SHL was incorporated to avoid any obligation SICPWL might have had to Ms Hardy. SHL was incorporated a little less than 6 months after Ms Hardy's employment ended and some 4 months after her grievances were formally raised. I am satisfied the timing arose from its purchase of the assets and business of SICPWL, where – to Ms Hardy's knowledge – those assets and business had been for sale since before the end of her employment. Further, SICPWL's accounts support the proposition that there was a genuine reason for the sale. I find accordingly.

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[3] [1998] 3 ERNZ 786

[19] Mr and Mrs Aitken had a continuing involvement in the Whangarei ice cream parlour in the form of their directorship and shareholding in SHL. However, and particularly given the extent of Mr Bleier's interest in the company, I do not consider that in itself to be significant without more. There was no evidence to suggest Mr and Mrs Aitken's activities after the sale were at all comparable with those of the managing director in the **Square 1 Cleaning Services** case for example. Even if they did continue to work in or manage the ice cream parlour for a period after the sale, that is not uncommon when a business such as theirs (or significant interest in it) is sold.

[20] I am not persuaded I should lift or pierce the corporate veil to find that SHL was Ms Hardy's employer in addition to or instead of SICPWL. Accordingly I conclude that SHL was not an employer of Ms Hardy's, and decline to join it as a party to her personal grievance.

The next step

[21] The Authority convened an investigation meeting on 21 March 2006 in order to address the merits of Ms Hardy's personal grievances. At the time SICPWL was the only respondent and the Authority had been advised it was no longer trading. Although Mr Heward had filed a statement in reply on its behalf, in December 2005 he advised his firm was no longer instructed. Despite this, he forwarded some documents to the Authority in March 2006 and at the commencement of the meeting Mr Aitken asserted that he had instructed counsel. I adjourned the meeting and sought to resolve the confusion.

[22] My intention was to reconvene the meeting at the earliest possible date. However on 30 March 2006 Mr Oldfield filed the application in respect of SHL. In the circumstances I hoped to be able to address that matter quickly, efficiently and on the papers, but such proved not to be the case. The application and the notice of investigation meeting were served on SHL, but it has not responded. Mr Heward was again instructed, and at my request was eventually able to provide the information and documentation on which this determination is based.

[23] Now the status of SHL has been addressed, but the merits of Ms Hardy's grievances have not been investigated. The next step is to do so. Unless, having now seen SICPWL's most recent set of accounts, Ms Hardy decides not to proceed, the Authority's support staff will contact the parties to arrange for a resumed investigation of those merits.

Costs

[24] Costs are reserved.

R A Monaghan
Member of Employment Relations Authority