Determination Number: AA 3A/06
File Number: AEA 1131/04

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND OFFICE**

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| **BETWEEN** | Grant Woodhouse (Applicant) |
| **AND** | Bond St 2004 Ltd t/a Bond Street Lodge (Respondent) |
| **MEMBER OF AUTHORITY** | Robin Arthur |
| **REPRESENTATIVES** | Ken Nicolson for the Applicant<br>Heugh Kelly for Oyster Investments Limited |
| **SUBMISSIONS** | Applicant (10 May 2006), Respondent (24 May), and Applicant in reply (16 June 2006) |
| **DATE OF DETERMINATION** | 27 July 2006 |

SUPPLEMENTARY DETERMINATION OF THE AUTHORITY

[1] The applicant seeks an order joining Oyster Investments Limited ("OIL") to these proceedings for the purpose of enforcing outstanding remedies. The respondent made no reply. Oyster filed a statement in reply opposing the application. Neither party asked to be heard in person on the issue. It is determined on the papers filed.

[2] By determination AA 319/05 (27 September 2005) the Authority found the applicant was unjustifiably dismissed by the respondent and awarded him remedies of lost wages, reimbursements, and compensation. By determination AA 319A/05 (13 December 2005) the applicant was awarded costs.

[3] In January 2006 the applicant sought correction of an error in the entituling of the certificate of determination. This was provided by determination AA 3/06 (11 January 2006). A certificate issued by the Authority on 12 January 2006 certifies that a sum of $18,776.07 together with $2320.00 costs is to be paid by the respondent to the applicant.

[4] The applicant's present application states that he has not been paid the award amounts because the respondent "claims that it has no funds or assets as it has been sold off".

[5] The applicant has filed no documents or affidavits evidencing any measures to enforce the award or the alleged response from the respondent.

[6] OIL's reply to this application confirms that OIL and the respondent each have the same sole director, Julie Elizabeth Duffy, and that Ms Duffy holds all 100 shares in each company.

[7] The applicant's employment agreement, signed by Ms Duffy and the applicant, gave the employer parties as "*Oyster Investments Ltd and Bond St 2004 Ltd t/a Bond St Lodge*". The position was described as "*General Manager of Kingsland Apartments and Bond St Lodge*". His job description was prominently headed with the names of both companies. It refers to being responsible for 'total operations' of Kingsland Apartments and Bond St Lodge.

[8] During his employment the applicant communicated by email with Ms Duffy and her personal partner Mark Giordani. Each had an email address at "*oysterinvestments.co.nz*".

[9] Mr Giordani and Ms Duffy both directed the applicant's work. Mr Giordani dismissed him in circumstances and in a manner that the Authority found showed "*the employer had abandoned the well-established and well-known measures required by law*" so that the applicant was not treated fairly and the dismissal was unjustified.

[10] Within the required 90-day period the applicant's representative raised a personal grievance addressed to Mr Giordani and Ms Duffy as "*owners/directors*" of "*Bond Street 2004 Limited t/a Bond Street Lodge/Kingsland Apartments (Oyster Investments Ltd)*".

[11] Three months later the problem was filed in the Authority with the respondent stated to be "*Bond St Lodge 2000 Ltd T/a Bond St Lodge Kingsland*". The reference to the year 2000 was subsequently corrected to 2004.

[12] The applicant's brief of evidence refers to "*employment with Bond St 2000 Ltd in April 2004 as the general manager of the hotel motel complex*". Attached was a copy of his employment agreement referring to both OIL and the respondent. The applicant did not refer elsewhere in his evidence to OIL.

**Joinder**

[13] The applicant submits that OIL was also his employer and should be joined to these proceedings for the purpose of enforcing remedies and costs against the employer. He urges the Authority to lift the corporate veil between the two companies of which Ms Duffy is sole director and shareholder to prevent the applicant's employer avoiding liability for his unjustified dismissal.

[14] OIL submits that it cannot be joined as a party to a proceeding where the matter has been determined.

[15] The Authority's discretionary powers under s221 of the Employment Relations Act 2000 ("the Act") allow for directions to join a party "*at any stage of the proceedings*" in order "*to more effectually dispose of <u>any matter before it</u> according to the substantial merits and equities of the case*".

[16] I accept OIL's submission that this power – at least in this case – does not appear to apply after a determination has been issued. The argument generally would be at that point that the Authority is *functus officio*.

[17] However that is not necessarily the end of the matter, as this case demonstrates. Firstly, the Authority has certain powers to enforce its determinations – that is by compliance order under s137. Secondly, it has the power to reopen investigations under Schedule 2, clause 4 of the Act.

**Whether the investigation should be re-opened?**

[18] The Authority's discretion to reopen an investigation does not have an express statutory time limit. It may stay the effect of any order previously made – which confirms that an investigation may be reopened after a determination and any consequent orders have been made.

[19] There are no set criteria for reopening an investigation but I would expect the grounds advanced in an application of this type to be supported by some credible evidence, either documentary or by way of affidavit. The overarching principle is that an investigation may be reopened to avoid a likelihood of a miscarriage of justice.[1]

[20] I do not consider the difficulty of the applicant enforcing the determination against the respondent to be a sufficient ground to re-open the investigation in this matter. The applicant knew of the existence of OIL at the time of filing his application in this Authority. There is nothing that amounts to new evidence in this respect. Neither was it hidden from him at the time of filing in the Authority. He chose to proceed against the respondent alone and not both companies. Neither has he produced any evidence of enforcement measures attempted against the respondent.

**Further action**

[21] However I do not accept OIL's submission that it was not an employer of the applicant. (Its reply says "employer of the *respondent*" but this is clearly a typographical error).

[22] Neither can I accept its submission that the applicant has not raised a personal grievance with OIL within the required 90-day statutory period.

[23] Both these propositions are matters of evidence which have not been heard and tested.

[24] OIL submits that the respondent owned the Bond Street Lodge and employed the applicant. It says that it owned the Central Road apartments and did not employ the applicant. Rather it says that the respondent and OIL had a management services contract whereby the respondent provided the services of the applicant to OIL for work needed in the Central Apartments.

[1] NZ Waterfront Workers Union v Ports of Auckland [1995] 2 ERNZ 85, 88 (CA)

[25] Again this is a matter which would need to be established in evidence. The applicant's employment agreement clearly refers to both companies. His job title and job description refers to both the apartments and the lodge.

[26] The personal grievance letter – addressed to Ms Duffy and Mr Girodani – within the 90 day period following the applicant's dismissal includes in its address a reference to OIL.

[27] On this basis it may be that the applicant can still file an application against OIL. If OIL insists that it is not the same party or privy as the respondent, it cannot resist such a claim as a matter which is *res judicata*. If it were accepted that the applicant's representative's letter of 18 August 2004 also raised the grievance with OIL, s114(6) of the Act provides that an action may be commenced in the Authority within three years from that date.

[28] If it were established that OIL was an employer of the applicant – subject to the evidence on whether he was employed directly by OIL or was the respondent's servant performing its management services contract with OIL – then the investigation need not revisit all the evidence regarding his work history and dismissal. The actions of Ms Duffy – as OIL's sole director and shareholder – and Mr Giordani – acting as an agent of the company – may be subject to issue estoppel in respect of their actions in the same roles on behalf of the respondent. In short, the applicant's argument in such as claim would no doubt be that if OIL was an employer and Ms Duffy and Mr Giordani acted on its behalf as well as the respondent in dismissing the applicant, that too would be unjustified.

[29] That the applicant may have an alternative means to pursue his claim confirms my view that there is no likely miscarriage of justice in not treating his present application for joinder of OIL as an application to reopen the investigation of this matter.

[30] The applicant's application for joinder of OIL is dismissed.

Robin Arthur
Member of the Employment Relations Authority