

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 399/08  
5134860**

BETWEEN      SUSAN RUNHAM  
                         Applicant

AND              MISSION BAY HOLDINGS 2005  
                         LIMITED T/A WYLIES PHARMACY  
                         Respondent

Member of Authority:      Leon Robinson

Representatives:          Mark Nutsford, Advocate for Applicant  
   Jawahar Bhaskar Musuku, Advocate for Respondent

Investigation Meeting:      20 November 2008

Determination:              20 November 2008

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**DETERMINATION OF THE AUTHORITY AS TO PRELIMINARY MATTER**

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**The problem**

[1]    The applicant Ms Susan Runham ("Ms Runham") applies to the Authority for an investigation into the termination of her employment from Mission Bay Holdings 2005 Limited t/a Wylies Pharmacy ("Wylies Pharmacy").

[2]    Wylies Pharmacy has not lodged a statement in reply.

[3]    The application was set down for investigation meeting today, but that meeting did not proceed because the Authority was asked to deal with applications for leave to defend the matter out of time and for adjournment, by Mr Jawahar Bhaskar Musuku as director of Wylies Pharmacy ("Mr Musuku"). This determination disposes of those two preliminary matters.

**The application for leave**

[4]    Mr Musuku attended the investigation meeting today assuming he was entitled to defend the application. I informed Mr Musuku he was not entitled to do so without my leave. That is no mere technicality. I advised him I would hear him to seek leave and did so. I administered an oath and took Mr Musuku's evidence on oath.

[5] Ms Runham's statement of problem was lodged in the Authority on 29 August 2008.

[6] Wylies Pharmacy has its registered office c/- its accountants at 280 Great South Road, Greenlane Auckland. It has its address for service recorded as 9D Patteson Avenue, Mission Bay.

[7] The Authority's couriers returned the statement of problem as undelivered and marked "Moved".

[8] Mr Nutsford then arranged service on Wylies Pharmacy and confirmed to the Authority in writing on 5 September 2008, that the statement of problem had been served at Wylies Pharmacy's registered office accountants and was accepted by an employee of the accountants on 3 September 2008.

[9] When the prescribed time for lodging a statement in reply had passed, the file was referred to me. By Minute dated 10 October 2008, I directed the matter was to proceed to investigation meeting today and further advised that Wylies Pharmacy could seek leave to defend the matter out of time. That Minute and a Notice of Investigation Meeting were served on the registered office accountants on 13 October 2008. There is verification of receipt on the Authority's file.

[10] Mr Musuku acknowledges his accountants advised him of the service of those documents and sent them to him by email. Mr Musuku says he also received the statement of problem with the Minute and Notice of Investigation Meeting. He confirmed to me that he did not receive the statement of problem served at the registered office accountants on 3 September 2008.

[11] I telephoned the registered office accountants in the presence of the parties. I spoke with the receptionist. She informed me relying on her memory, that she received documents from the Authority on 3 September 2008 and she posted those documents to Mr Musuku. Notwithstanding that information, Mr Musuku did not resile from his evidence that he did not receive any such documents.

[12] Mr Musuku presents an email from his accountants dated 13 October 2008. The accountants advise they telephoned the Authority and were advised that a response was required and further, that they advised the Authority that Mr Musuku was not in a position to make decisions.

[13] Mr Musuku tells the Authority he had heart surgery on 10 October 2008 and was incapacitated from 27 September 2008 until 13 October 2008.

[14] He says he did not see the email from his accountants until two weeks later when he returned to work on or about 27 October 2008.

[15] He also produces at the same time an email from a very experienced employment lawyer in relation to assisting him to take steps to defend Ms Runham's application. When I emphasised to Mr Musuku that there is still no statement in reply lodged in the Authority, he responded that he was not prepared to meet the cost of the lawyer's assistance as specified in the email from the lawyer. That is his prerogative.

[16] Mr Nutsford in reply says that he has very serious doubts about Mr Musuku's credibility having been party to discussions with Mr Musuku leading up to the investigation meeting today.

[17] I advised the parties today that I would grant leave to Wylies Pharmacy to defend the application out of time. I am not convinced that Mr Musuku did not receive the statement of problem served on the accountants on 3 September 2008. Even though he says it was provided to him with my Minute dated 10 October 2008, he still did not take any steps to lodge a statement in reply in the Authority.

[18] However, I accept that Mr Musuku has been incapacitated and it is certainly possible that he has not been able to attend to his affairs or these proceedings with the normal diligence, courtesy or respect that could be expected from one not so incapacitated. For that reason, and because I prefer to determine the matters in contention on their merits with the respondent's input instead of on a default basis, **I grant leave to the respondent to defend the matter out of time.**

## The application for adjournment

[19] When I announced I would grant leave to the respondent, Mr Musuku advised he desired professional assistance. Mr Nutsford objected citing costs and repeating his mistrust of Mr Musuku.

[20] I advised I would grant Wylies Pharmacy a short adjournment. I did so because I consider it would be of significant benefit to Wylies Pharmacy to take wise counsel. I also consider the respondent would be assisted by the representation of an experienced advocate in the forthcoming investigation meeting. Those were the reasons that I granted a short adjournment.

[21] The application is therefore adjourned to either 3, 8, 9 or 10 December 2008 as shall be fixed by the support officer in consultation with the parties.

## Other directions

[22] I have considered whether mediation might be of assistance to the parties. Having heard the parties views I do not consider mediation would contribute constructively to the resolution of the matter.

[23] The respondent is to lodge a statement in reply by 5.00 pm on 27 November 2008. If it fails to do so again, the application will be undefended and shall proceed to investigation meeting on that basis.

## Costs

[24] I shall deal with the costs on these applications with costs following the substantive investigation.

Leon Robinson  
**Member of Employment Relations Authority**