

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 227
5361805

BETWEEN RACHAEL LEE HARRINGTON
Applicant

A N D PICTURE VEHICLES LIMITED,
formerly known as CENTRAL
FREIGHT SERVICES LIMITED
First Respondent

THUNDERBIRD ONE LIMITED
Proposed Second Respondent

Member of Authority: M B Loftus

Representatives: Angela Boniface, Counsel for Applicant
Kieran Tohill, Counsel for Respondent

Investigation meeting: 16 October 2012 at Dunedin

Submissions Received At the investigation

Date of Determination: 17 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Rachael Harrington, claims she was unjustifiably dismissed, albeit constructively. She also raised claims of discrimination and sexual harassment.

[2] There are, however, two preliminary matters the parties agree should be addressed before the substantive claim is considered.

[3] They concern the identity of the respondent and an application filed on Ms Harrington's behalf that Thunderbird One Limited be joined as a respondent.

Background

[4] Ms Harrington was employed as a driver by a company operating a Mainfreight franchise in Central Otago. She believes the company to have been Central Freight Services Limited. She filed her grievance accordingly.

[5] Since the grievance arose, but before the statement of claim was filed, Central Freight Services Limited changed its name to Picture Vehicles Limited. In its statement in reply it advised it could not respond to the substantive allegations as it never employed Ms Harrington. The statement goes on to advise Ms Harrington was employed by Thunderbird One Limited, which traded as Central Freight Services.

[6] Ms Harrington responded by applying to have Thunderbird One Limited joined as a respondent. Notwithstanding that application she remains adamant she was employed by Central Freight Services Limited and would prefer to proceed against that company if possible. This is because a considerable period of time passed between the events giving rise to the grievance (late 2008) and the filing of a statement of problem (November 2011). In the intervening period the Mainfreight franchise had been sold and Thunderbird One Limited has become a shell company with no assets. That said, a similar fate has also overtaken Picture Vehicles Limited and it too is also no longer trading and without assets.

[7] Finally it should be noted both companies have the same registered office, address for service, directorship and shareholding.

Determination

[8] In support of her claim Ms Harrington relies upon her employment agreement and its content. It is in the name of Central Freight Services which it identifies as *the company*. Ms Harrington's considers it fair to assume that refers to the company of the same name (Central Freight Services Limited). She claims to have been unaware of the existence of Thunderbird One Limited until after she tendered her resignation and submitted the grievance.

[9] She also points out that s.65(2)(a)(i) of the Employment Relations Act 2000 requires the employer be identified in a written employment agreement. Again she states that as the entity identified as the company is Central Freight Services, it is fair to assume the reference is to the company of the same name and the failure to identify

or mention Thunderbird One Limited now precludes it being the employer. Here it should be noted Mainfreights name also appears on the cover of the employment agreement and the grievance was initially raised with it as well but there is no longer any suggestion it was the employer.

[10] Picture Vehicles Limited says there are multiple factors confirming Thunderbird One Limited was the employer as opposed to it. It notes the following:

- (a) Central Freight Services Limited is not, and never has been, anything other than a shell company designed to protect the trading name under which Thunderbird One Limited operated (Central Freight Services);
- (b) Central Freight Services Limited never traded during the period of Ms Harrington employment. That is confirmed by documentary evidence from the Inland Revenue Department;
- (c) The agreement under which the Mainfreight franchise operated was between Mainfreight and Thunderbird One Limited; and
- (d) Notwithstanding any deficiencies in respect to naming the employer in the employment agreement, Ms Harrington could not have failed to be aware of the existence of Thunderbird One Limited given:
 - (i) A transport service operators licence number and the owners identity must be marked on their vehicles. The identity painted on the vehicle Ms Harrington drove and affixed just behind the driver's door clearly visible whenever Ms Harrington boarded was Thunderbird One Limited;
 - (ii) the fuel card used by Ms Harrington was in the name of Thunderbird One Limited; and
 - (iii) the fortnightly timesheets Ms Harrington received were headed Thunderbird One Limited.

[11] Picture Vehicles Limited also claims the company's structure is normally explained at the time of interview though the sole director and principal shareholder, Mr Justin Marshall, did not interview Ms Harrington and accepts he cannot attest to what was said.

[12] Ms Harrington claims the structure was not explained. She responds to the claim that she should been aware of Thunderbird One Limited by saying *no*, her first awareness of it was when she received her final pay and noticed its identity at the top thereof. She says that really jumped out at her and caused concern given her grievance so she investigated further. She says her investigation clarified the company structures Mr Marshall had established but notwithstanding that she had not previously noticed the name Thunderbird One Limited despite her acceptance of the company's evidence it was identified on the fuel card, timesheets and vehicle she drove.

[13] I consider the company's points overwhelming. Notwithstanding Ms Harrington's claim, it is clear from the evidence the name Central Freight Services, as it appears in the employment agreement, was intended as a reference to the trading name under which Thunderbird One Limited operated and such a conclusion is not precluded by virtue of the fact the word *limited* is missing. More importantly though I note the points referred to by the company in 10 above and in particular the fact Thunderbird One Limited was identified on both documents and equipment Ms Harrington used on a daily basis. Against these facts I have to weigh Ms Harrington's evidence and her frequent use of the word *assumed* when she explains why she thought Central Freight Services Limited was her employer. Not once, did she actually say she was told that was the case.

[14] Having considered the evidence I conclude Thunderbird One Limited was the employer.

[15] That conclusion leads to a consideration of the application for joinder. Picture Vehicles Limited's position is that Thunderbird One Limited should always have been identified as the employer yet it objects to an application which would see an outcome it argues should have been the situation from the beginning. It does so for one reason only.

[16] It contends the passage of time, along with various changes in the company's circumstances now mean it would, if added as a respondent, be severely prejudiced and unable to defend the claim. In this respect it claims it would require at least six witnesses yet is unable to contact some who have shifted to Australia and whose whereabouts are unknown.

[17] This is not a position with which I can concur. While the above claims have been made, there is no supporting evidence. Indeed, and as already said, it is Picture Vehicles Limited's position that Thunderbird One Limited should always have been identified as the employer. Given the overlap in management and shareholding it was, once it had received the claim, in a position to address the acquisition and retention of relevant information. Furthermore, the delays have been occasioned by efforts to attain legal aid and the issue of delay would most likely still exist even if the employer had been correctly identified from the outset. In other words, the possible prejudice is arguably no different from that which would have existed anyway.

[18] Furthermore it should be noted that Parliament has, via statute, specified a period within which a grievance must be pursued in the Authority after it is initially raised. That period is three years. Ms Harrington has complied with her obligations in this respect and it would need, in my view, extraordinary circumstances to deprive her of a right Parliament has given her.

[19] I am not, on the evidence before me, convinced such circumstances exist.

[20] Therefore it is my conclusion that, as sought, Thunderbird One Limited should, as the actual employer, be joined as a party to these proceedings.

Conclusion

[21] For the reasons described above my conclusions on the two preliminary issues are:

- (a) Ms Harrington was employed by Thunderbird One Limited trading as Central Freight Services;
- (b) Thunderbird One Limited is to be joined as a party to the substantive proceedings.

