

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 28  
5386729

BETWEEN	GRANT PHIBBS and ROSALIND WILSON Applicants
A N D	POUTIRI COMMUNITY PRACTICES LIMITED First Respondent
A N D	POUTIRI TRUST Second Respondent
A N D	RINGAKAHA PRIME CARE LIMITED Third Respondent
A N D	DR JOHN ARMSTRONG Fourth Defendant

Member of Authority: James Crichton

Representatives: Fraser Wood, Counsel for Applicants  
Richard Harrison, Counsel for First and Second  
Respondents  
Miharo Armstrong, Counsel for Third and Fourth  
Respondents

Investigation Meeting: On the papers

Date of Determination: 28 January 2014

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**FIRST DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] In a statement of claim filed in the Authority on 22 June 2012, the applicants (Drs Phibbs and Wilson or the applicants) allege that they were denied the payment of redundancy compensation to which they were entitled by either the first respondent

(the company) or the second respondent (Poutiri Trust) and further contend that there were “*various breaches of good faith*” by the company, Poutiri Trust, the third respondent (Ringakaha) and the fourth respondent (Dr Armstrong).

[2] Those claims are all resisted by the respondents.

[3] Drs Phibbs and Wilson were employed as general practitioners in the Owata Surgery in Rotorua. Their employment documentation identified the company as the employer. Poutiri Trust owns 100% of the shares of the company.

[4] There was an employment agreement between the company and the applicants. Amongst other things, that provided for redundancy compensation equivalent to 6 months’ salary each on certain terms and conditions.

[5] On 10 February 2012, Drs Phibbs and Wilson were advised that the medical practice was for sale. The ultimate purchaser of the medical practice was Ringakaha. Ringakaha’s governing director was Dr Armstrong.

[6] Before the sale and purchase of the medical practice was completed, Dr Armstrong sought to recruit Drs Phibbs and Wilson to the new business but was unsuccessful.

[7] On 14 March 2012, Drs Phibbs and Wilson were advised that the redundancy compensation payable pursuant to their respective independent employment agreements might not be able to be paid because of the financial position of the company. The following day, the sale of the medical practice to Ringakaha was settled.

[8] By memorandum filed in the Authority on 2 July 2012, counsel for the company and Poutiri Trust sought a preliminary determination from the Authority as to which entity was the employer of Drs Phibbs and Wilson. That position was subsequently adopted by counsel for the third and fourth respondents in a memorandum filed in the Authority on 10 July 2012.

[9] Counsel for Drs Phibbs and Wilson filed a memorandum in the Authority on 20 July 2012 indicating that the applicants were not opposed to the suggested course of action but felt that mediation between the parties might be a useful precursor. In the result, mediation was directed by the Authority.

[10] By email dated 29 January 2013, the Authority was advised that mediation had taken place but was unsuccessful.

[11] Before the matter was referred back to the Authority for the convening of a telephone conference with counsel, the Authority's support staff gave counsel a further opportunity to file memoranda for the Authority to consider in anticipation of the telephone conference.

[12] In the memorandum filed on behalf of Drs Phibbs and Wilson, counsel identified a number of documents in the possession of the respondents to which the applicants sought to have access, and also indicated that the applicants no longer wished to proceed against the third respondent, Ringakaha.

[13] A memorandum on behalf of the company and the Poutiri Trust was filed on 12 June 2013 confirming that a preliminary determination on the identity of the employer was still sought and denying the necessity for any discovery prior to that preliminary matter being disposed of.

[14] A memorandum from the third and fourth respondents was filed on 12 June 2013 which confirmed that those respondents agreed with the proposed determination of the preliminary issue but also indicated their displeasure that Dr Armstrong was still identified as a respondent, notwithstanding that in their memorandum of 5 June 2013, Drs Phibbs and Wilson confirmed that they were no longer proceeding against Ringakaha.

[15] A further memorandum filed on 13 June 2013 was received from the applicants in which they persevered with their claim that matters relating to the production of documents needed to be dealt with by the Authority.

[16] The telephone conference proceeded with the Authority on 25 July 2013 which agreed on the exchange of some information and the filing of further memoranda in anticipation of another telephone conference with the Authority.

[17] The first of that next round of memoranda was filed by counsel for the applicants on 17 September 2013. That memorandum sought further disclosure of documentation and sought agreement to the sharing of the documentation already provided with Drs Phibbs and Wilson on the basis that the original material disclosed had been provided explicitly on a counsel-to-counsel basis.

[18] The next telephone conference with the Authority took place on 19 September 2013. Subsequently, on 11 October 2013, counsel for the first and second respondents agreed to the release of the financial accounts of the company to Drs Phibbs and Wilson but objected to their seeing the agreement for sale and purchase of the medical practice.

[19] Having received that intimation, and considered the other matters discussed in the telephone conference, the Authority issued a Minute dated 16 October 2013.

[20] That Minute first confirmed the Authority's refusal to order further disclosure of material as was sought in the applicants' memorandum of 17 September 2013. The Authority's view on that matter was that any further information would not assist it in resolving the question of who the employer of the applicants was.

[21] As to the second substantive issue in the 17 September 2013 memorandum from the applicants, the Authority allowed release of the financial accounts of the company to Drs Phibbs and Wilson but declined to order the release of the agreement for sale and purchase.

[22] Subsequently the Authority and counsel agreed on the exchange of submissions supported by affidavit evidence for the Authority to consider and determine the outstanding issues.

[23] Those submissions have now come to hand and accordingly the Authority is able to complete its consideration of this matter.

### **Issues**

[24] Two issues fall for determination in this first determination between these parties. The most important of these two issues is the identity of the employer of Drs Phibbs and Wilson. But there is a second issue for determination as well and that is whether the fourth respondent, Dr Armstrong, is properly a respondent in this proceeding.

[25] Because the matter can be dealt with shortly, and has already been the subject of some clear oral observations by the Authority during the telephone conferences with the parties, the Authority intends to deal with the issue concerning Dr Armstrong first.

### **Do the applicants have a claim against Dr Armstrong?**

[26] As the Authority indicated in the previous section of this determination, this matter has already received some comment from the Authority in the telephone conferences with counsel.

[27] It is apparent from the course of these proceedings that the applicants have thought better of their claim against the third respondent, Ringakaha, because in their memorandum of 5 June 2013, they confirmed that they were no longer proceeding with their claim against that party.

[28] Dealing first with that matter, counsel for the third and fourth respondents has made the point in memoranda filed in the Authority that both the third and fourth respondents have incurred costs in defending their respective positions against the claims brought by Drs Phibbs and Wilson. Dealing at this stage only with the claim against Ringakaha, the third respondent, the Authority is satisfied that Ringakaha will have sustained a costs impost in defending itself against the proceedings up until the point at which Drs Phibbs and Wilson indicated in their memorandum of 5 June 2013 that the proceedings against Ringakaha were no longer on foot.

[29] Accordingly, the Authority now directs that counsel for Ringakaha is to seek to settle costs with counsel for Drs Phibbs and Wilson and failing settlement, is to file and serve submissions in the Authority seeking the fixing of costs. Drs Phibbs and Wilson are to have 14 days from the date that Ringakaha files and serves its submissions in which to file submissions in response.

[30] The Authority will then determine costs in the usual way.

[31] The memorandum of 5 June 2013 from the applicants effectively removed Ringakaha from the respondent group. However, the same memorandum made it plain that Dr Armstrong remained a respondent. Submissions for Dr Armstrong seek his removal on the footing that there is no justiciable basis within this jurisdiction for Dr Armstrong to be a party in these proceedings.

[32] The Authority has already expressed views in telephone conferences on this subject and now formally confirms that it accepts counsel for Dr Armstrong's position that there is no justiciable basis in the employment jurisdiction for Dr Armstrong to be

a party to these proceedings, whether in the preliminary process that the Authority is about now or in the substantive claim by Drs Phibbs and Wilson.

[33] Whatever else is true, Dr Armstrong was never the employer of Drs Phibbs and Wilson. Drs Phibbs and Wilson are, by common consent for the purposes of this proceeding, employees of one or other of two entities. Neither of those potential employer entities is Dr Armstrong.

[34] However, Dr Armstrong was a director of one of those entities, namely the company, Poutiri Community Practices Limited.

[35] It is the juxtaposition between his position as a director of that company and the subsequent purchase of the subject medical practice by Ringakaha, a company of which Dr Armstrong became a director, that is the cause for Drs Phibbs and Wilson's complaint against Dr Armstrong.

[36] Drs Phibbs and Wilson say that Dr Armstrong was at best in a conflict of interest situation as a director of the selling entity and within a short passage of time, a director of the purchasing entity and was the link between the two.

[37] But the short point is that the Employment Relations Authority has no jurisdiction whatever to address any concerns, whether real or imagined, that Drs Phibbs and Wilson have about Dr Armstrong's behaviour. This is because the Authority is a creature of statute and as such its writ does not run beyond the aegis of the employment relationship.

[38] It is apparent that Dr Armstrong was never in an employment relationship with Drs Phibbs and Wilson, that in consequence Dr Armstrong cannot owe Drs Phibbs and Wilson a duty of good faith or indeed be obligated to them in any other way, within this jurisdiction.

[39] Accordingly, the claim by Drs Phibbs and Wilson against Dr Armstrong is struck-out for want of jurisdiction. Again, as with Ringakaha, the issue of costs arises. Counsel for Dr Armstrong is directed to engage with counsel for Drs Phibbs and Wilson and seek to settle costs.

[40] If that proves impossible, counsel for Dr Armstrong is to file a memorandum in the Authority seeking costs to be fixed. Forthwith on receipt of that memorandum,

and in any event within 14 days, counsel for Drs Phibbs and Wilson is to file submissions in response. The Authority will then address those submissions and fix costs in the usual way.

### **Who employed Drs Phibbs and Wilson?**

[41] It is common ground that there were employment agreements between the applicants and the company and that the company paid the applicants remuneration throughout the employment. Notwithstanding that, Drs Phibbs and Wilson maintain that in reality their employer was Poutiri Trust. They invite the Authority to either lift or pierce the corporate veil so that, presumably, Poutiri Trust can be seen as the guiding hand behind the activities of the company.

[42] But the Authority needs to say at the outset that it does not accept either the factual premise or the legal basis for this contention. As a matter of fact, the relationship started, continued and finished with the company which was a separate legal entity from Poutiri Trust.

[43] Poutiri Trust was the sole shareholder of the company and the evidence is that the company was incorporated to enable Poutiri Trust to purchase and operate the Owata medical practice and that the company did that until the financial results from the business were such that either the practice needed to be sold or there was the potential that it degenerate into receivership or liquidation.

[44] It is apparent at the end of the commercial life of the company that it was financially supported by the trust to ensure that payments of holiday pay and wages were able to be met, but the fact that a shareholder should choose to provide further funds to a company it owned in order that the company could meet some of its obligations does not make the two entities one and the same.

[45] It is apparent on the facts that the only occasion when any argument can be advanced of the trust being involved in the affairs of the company is at the very end of the company's ownership of the medical practice when, contrary to the views advanced for the applicants, the practice was not doing well. That encouraged the company to look at on-selling the practice as an alternative to winding the business up, and there is nothing before the Authority to suggest that the decision to on-sell the medical practice was anything other than a decision of the board of directors of the company.

[46] While Poutiri Trust supported the company financially at the end of the applicants' employment, that is not evidence that the two entities were one and the same or that Poutiri Trust was effectively a grey eminence that directed the activities of the company.

[47] The Authority is not attracted by the applicants' contention that recourse can be had to s.6 of the Employment Relations Act 2000 (the Act) to assist in determining the employer's identity. As counsel for Poutiri Trust correctly observes, this section is about identifying whether a relationship is one of employment or one of principal and agent or contractor. The correct starting point for identifying who the employer is is the employment documentation (where that exists) and the details about who paid the remuneration.

[48] Here those factors are as plain as can be. There are employment agreements in place and they identify the company as the employer and it was the company which paid the remuneration identified in the employment agreements.

[49] Furthermore, those employment agreements identify that any variations to the agreements must be in writing. There is no such variation before the Authority.

[50] That last mentioned provision is in accord with the law on this matter. As counsel for Poutiri Trust correctly observes, the legal position is that one starts with the position at the beginning of the employment and the test, if there is doubt, is what an independent and knowledgeable observer would identify as the employer. But of course, in the present case, there is no issue about who the employer was at the beginning of the relationship because even Drs Phibbs and Wilson do not appear to contend that when they started out, their employer was somebody other than the company. In para.2(a) of the statement of problem for instance, the applicants state:

*We were employed by Poutiri Community Practices Limited (the company) ...*

[51] But by the end of their employment, the applicants' position is different, particularly when they become aware that the company may not be able to meet its redundancy payments.

[52] What the applicants appear to be saying is that while the company employed them at the beginning of the employment, by the end of the employment, Poutiri Trust was somehow in charge. But if that is their position, the law requires them to identify

“evidence of mutual agreement to that change”: see *Heritage Expeditions Ltd v. Fraser* [2011] NZEmpC 157 per Judge Couch. On the evidence the Authority heard, there is no such “*mutual agreement* .”

[53] Drs Phibbs and Wilson rely on the well known cases involving the Seamen’s Union culminating in *New Zealand Seafarers Union Inc v. Silver Fern Shipping* [1998] 3 ERNZ 786 where His Honour Judge Colgan said that the question for the Court was “... *whether the use of the corporate structure in place is pretence*”.

[54] There is no pretence here in the Authority’s considered view. The company was established by Poutiri Trust to own a medical practice and to operate that medical practice. That is what happened and the company continued to run the medical practice until it became apparent that the financial results might well impel a winding-up of the business altogether unless a purchaser could be found. None of that is commercially unusual or in any way in breach of the law.

[55] There simply is no evidence at all before the Authority that Poutiri Trust and the company were one and the same or that the one controlled the other.

[56] What happened was that the relationship commenced between Drs Phibbs and Wilson with the company and there is no evidence whatever that the parties to that employment relationship ever changed. There was no variation to the employment agreement and Drs Phibbs and Wilson were paid by the company throughout the employment, the accounting arrangements showed the company as a separate accounting and tax entity from the trust and the nature of the company’s business was materially different from the nature of the business of Poutiri Trust.

[57] It follows from the foregoing that, on the evidence, there is no merging of the financial resources of Poutiri Trust and the company. Indeed, as counsel for Poutiri Trust makes clear, they are materially different entities. The company is a commercial organisation, albeit in latter years an unprofitable one, while Poutiri Trust is a not-for-profit charitable trust with a far wider scope of activity than the concentrated focus of the company which was running a medical practice.

[58] The people actually involved in the company had a day-to-day focus on the medical practice and were not appointed by Poutiri Trust.

[59] Plainly, the operation of a medical practice is a specialised undertaking and there is nothing to suggest that Poutiri Trust had that specialist expertise.

[60] Whatever the substantive merits of Drs Phibbs' and Wilson's claim, the Authority is satisfied that the claim they have is a claim that must be directed at Poutiri Community Practices Limited (the company) and not at Poutiri Trust.

### **Determination**

[61] The Authority is satisfied that the correct employer of Drs Phibbs and Wilson is Poutiri Community Practices Limited.

[62] The Authority has determined that the claim against Dr Armstrong by Drs Phibbs and Wilson be struck-out for want of jurisdiction.

[63] The Authority has directed that costs be fixed against Drs Phibbs and Wilson in relation to their claims or former claims against Ringakaha Prime Care Limited and Dr Armstrong.

### **Costs in this matter**

[64] Costs are reserved and it may be, given the substantive matter has yet to be heard, that the parties wish to leave the question of costs in relation to this proceeding until all matters have been dealt with in the Authority.

[65] However, if the parties wish to deal with costs in respect of this aspect of the matter, they should first try to settle matters between themselves and failing that, the first and second respondents are to file and serve an application for costs and the applicants are to respond within 14 days of receipt of that application.

James Crichton  
Member of the Employment Relations Authority