

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 5  
5445326

BETWEEN	JULIO (JOE) ALBERTO TOSCHI Applicant
AND	TRADEWORKERS 2012 LIMITED (IN LIQUIDATION) Respondent
AND	AUTOGLAS STIEGER AUCKLAND LIMITED Proposed second respondent
AND	AUTOGLAS STIEGER LIMITED Proposed third respondent
AND	STIEGER INVESTMENTS LIMITED Proposed fourth respondent

Member of the Authority: Christine Hickey

Representatives: John Cuttance, advocate for the applicant  
Franz Stieger, representative of the respondent and of the  
proposed second, third and fourth respondents

Investigation Meeting: On the papers

Date: 26 January 2015

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

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- A. The application against Tradeworkers 2012 Limited (in liquidation) is struck out.**
- B. I decline to join Autoglas Stieger Limited, Autoglas Stieger Auckland Limited or Stieger Investments Limited to the proceedings.**

**Employment relationship problem**

[1] Mr Toschi seeks to add three further companies to his claim by way of an amended statement of problem lodged on 26 August 2014.

**Procedural history**

[2] Mr Toschi was employed under an individual employment agreement (IEA) by Tradeworkers 2012 Limited (Tradeworkers). He claims that he was unjustifiably dismissed on 18 November 2013. He also claims that he was unjustifiably disadvantaged in his employment. He filed a claim with the Authority for both those personal grievances on 16 January 2014 with the named single respondent being *Tradeworkers 2012 Limited T/a Autoglas-Stieger Dunedin*.

[3] Franz Stieger, sole director of Tradeworkers, lodged a Statement in Reply on behalf of the company on 31 January 2014. Tradeworkers disagreed with Mr Toschi's claims. Mr Stieger noted that Mr Toschi was employed by Tradeworkers and was contracted to *Autoglas Stieger Dunedin Branch as an (sic) Branch Manager*.

[4] On 3 February 2014 the parties were referred to mediation. On 9 July 2014 the Authority was advised that mediation did not resolve matters.

[5] The Authority Officer attempted to set a teleconference to schedule an investigation meeting. Mr Toschi's advocate, Mr Cuttance, advised that he intended to file an amended statement of problem and that he would not be in a position to do that until after 6 August 2014. He asked that any teleconference be delayed until after he had filed an amended statement of problem.

[6] On 26 August 2014 Mr Cuttance lodged an amended statement of problem in which he named three additional companies as respondents; Autoglas Stieger Auckland Limited, Autoglas Stieger Limited and Stieger Investments Limited. The amended statement was essentially an application to join the three further companies:

*..to the Applicants personal grievances and be held jointly and severally liable in respect of any Orders made by the Authority as a result of the Applicant's personal grievances.*

[7] The Authority attempted to serve the four named companies with the amended statement of problem but service was only able to be made on Autoglas Stieger Auckland Limited at its registered office on 28 August 2014. The amended statement of problem was returned undelivered to the Tradeworkers, Autoglas Stieger Limited and Stieger Investments Limited registered offices.

[8] On 19 September 2014 Mr Cuttance sent the Authority a copy of an email from the Companies Office informing him that his objection to the removal of Tradeworkers from the register had been accepted and that action to remove the company from the register had been suspended.

[9] On 16 October 2014 the Authority held a teleconference with Mr Cuttance and Mr Stieger on behalf of Tradeworkers and the other three companies Mr Cuttance had applied to join to the proceedings. Mr Stieger indicated that he could represent the three companies.

[10] Mr Stieger said that he intended to file an amended statement in reply and would attach to that accounting and financial records of Tradeworkers for the financial years ending 2013 and 2014. Mr Stieger was directed to lodge the amended statement in reply and financial records by 31 October 2014.

[11] It was agreed that the Authority would determine the application for joinder of the three companies on the papers. Mr Cuttance was directed to make written submissions by 21 November 2014 and the respondents were to make submissions in reply by 5 December 2014.

[12] Later that day Mr Stieger requested the Authority Officer to remove the second, third and fourth respondents from the file. He was advised that the Authority member would make a decision about that once she had received the submissions that were due to be provided on 28 November and 5 December 2014 as had been discussed at the teleconference.

[13] On 31 October Mr Stieger sent in financial statements for Tradeworkers for the years ended 31 March 2013 and 31 March 2014 but no amended statement in reply.

[14] On 11 November 2014 the Authority Officer asked if Mr Stieger still intended to lodge an amended statement in reply. There was no response and no amended statement in reply has been lodged.

[15] On 20 November 2014 the Authority member directed that the Tradeworkers accounts be certified as true and correct by Mr Stieger by way of affidavit by 28 November 2014.

[16] On 24 November 2014 Mr Cuttance was advised that Victoria Toon had been appointed as liquidator of Tradeworkers and did not agree to legal proceedings being continued against the company. He sent the Authority a copy of a letter he sent to Ms Toon seeking Mr Stieger to certify the Tradeworkers' financial statements.

[17] On 28 November 2014 Mr Cuttance filed his submissions in support of joinder of the three further companies.

[18] On 5 December 2014 Ms Toon wrote to the Authority advising that the company had been placed into liquidation on 13 November 2014. Ms Toon advised that she did not agree that the proceedings against Tradeworkers could continue. That effectively disposed of Mr Toschi's application against Tradeworkers and is the reason that I have struck out the proceedings.

[19] On 11 December 2014 Ms Toon sent the Authority a copy of letter she wrote to Mr Cuttance on 27 November 2014 advising him that due to the liquidation Mr Stieger has lost his powers as a director and could not certify the accounts. She confirmed that Mr Toschi had been employed by Tradeworkers and was listed with the IRD on Tradeworkers monthly employee schedules while he worked for the company.

### **Applicant's submissions**

[20] Mr Cuttance submits that I should exercise my power to direct the three companies become respondent parties because the substantial merits and equities of this case require it. He gives the following reasons:

- That the Authority needs to hold responsible the company or companies which was or were Mr Toschi's real and effective employer.
- Mr Toschi now says that although he entered into an IEA with Tradeworkers that company was not his real employer.
- The three companies that should be joined, like Tradeworkers, have Mr Stieger as the sole director and except for Stieger Investments the companies have a common shareholder which is Stieger Investments Limited.
- Mr Stieger has set out to structure his myriad of businesses and has acted in a manner that attempts to avoid the good faith obligations and other liabilities of the Employment Relations Act and employment law.
- Tradeworkers was set up to be a worthless shell with no funds or assets but has been used as a sham company to employ the employees that operate Autoglas Stieger businesses.
- Tradeworkers was at best an agent of the operating businesses and at worst a sham and a fraud.
- Although Mr Toschi's IEA provides that his services will be contracted out to other companies it should have been done with prior discussion and agreement between him and Tradeworkers.
- Mr Toschi's business cards described him as the Dunedin branch manager of Autoglas Stieger Limited. Advertising and the signs at the premises also were in the name of Autoglas Stieger Limited. However, the suspension letter and the letter advising of dismissal both said Mr Toschi was contracted to Autoglas Stieger Auckland Limited.
- All of Mr Toschi's wages may not have been paid by Tradeworkers as its accounts show that the total wages paid by it are less than those paid to Mr Toschi during his employment.
- Mr Stieger has failed to ensure that the annual return for Tradeworkers was filed in July 2014 and so the Companies Office proposed striking the company from the register. Mr Stieger is likely to have deliberately failed to file the return so that the company would be struck off.

### **Submissions on behalf of the three companies**

[21] On 8 December 2014 the Authority Officer wrote to Mr Stieger giving him until 12 December 2014 to provide submissions in response to Mr Cuttance's submissions for joinder of the three companies. Mr Stieger has not made any submissions on behalf of the companies Mr Toschi seeks to join. However, I note that Mr Stieger's position is likely to have remained that Mr Toschi was employed by Tradeworkers.

### **Determination**

[22] The test I need to apply is whether joining the parties would more effectually dispose of the matter before me according to the substantial merits and equities of the case<sup>1</sup>.

[23] The legal principles Mr Cuttance relies on begin with Chief Judge Colgan's observation in *Square 1 Service Group Ltd v Butler*<sup>2</sup> that:

*The Court or Tribunal could use its equity and good conscience jurisdiction to lift the corporate veil.*<sup>3</sup>

[24] Mr Cuttance submits that I need to examine the question of whether a subsidiary (presumably Tradeworkers) was carrying out the business of the parent company (presumably Stieger Investments Limited which was the sole shareholder in Tradeworkers) or acting on its own. He submits Tradeworkers was not acting on its own and that I should join<sup>4</sup> all three companies, or either Autoglas Stieger Limited, Autoglas Stieger Auckland Limited or Stieger Investments Limited as employers and perhaps even Mr Stieger personally.

[25] Mr Cuttance submits that the companies appear to be operated as one business without distinction and relies for that on the fact that Mr Stieger is the sole director of all three of the companies.

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<sup>1</sup> Section 221 of the Employment Relations Act 2000

<sup>2</sup> [1994] 1 ERNZ 667

<sup>3</sup> Ibid, at 668

<sup>4</sup> Or perhaps, now that Tradeworkers is in liquidation and proceedings against it cannot continue, more accurately substitute one or all of the three companies.

[26] Mr Cuttance refers to a number of cases in which the Employment Courts and the Authority have found that they had the power to lift the corporate veil to ensure justice was done.

[27] In *The Official Assignee as Assignee of the Bankrupt Estate of Alan Cliff Armitage v Sanctuary Propvest Ltd*<sup>5</sup> Justice Asher noted at para [32] that New Zealand courts would not interfere with lawfully created entities provided the structures were genuine and intended to operate in accordance with their tenor; and that transactions would be enforced even if they were for an ulterior commercial purpose. The parties could choose whatever legal arrangements they wanted, provided they were not shams.

[28] In general the cases establish that there are three broad grounds for lifting the corporate veil. These are that the company is merely an agent of the shareholders, or the arrangement is a sham or façade, or the corporate structure is being used to perpetrate a fraud.

[29] I am satisfied that this is not an appropriate case for lifting the corporate veil or mask on Tradeworkers in an attempt to sheet home any liability to either of the three companies not party to the employment agreement. The appropriate time for an enquiry into which company the true employer is or was is at the beginning of the employment relationship.

[30] At the beginning of the employment relationship Mr Toschi signed an employment agreement with Tradeworkers. The IEA allowed Tradeworkers to contract out his services to other companies and Mr Toschi was aware of that from the beginning.

[31] Mr Toschi's IEA states that contracting out of his services would be by way of discussion and with Mr Toschi's agreement. Mr Cuttance says that Mr Toschi's evidence is that there was no discussion with him, or agreement from him or advice to him as to which company he was contracted to.

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<sup>5</sup> Unreported, Auckland High Court, 11 June 2009, CIV-2009-404-852

[32] Whether or not that is the case Tradeworkers had signalled in the IEA that his services would be contracted out. Mr Toschi's business cards and the signage at the premises and on the work vehicles named Autoglas Stieger Limited as the business of the branch he managed. He was well aware of that from the beginning of and throughout his employment, and also aware his employment was with Tradeworkers.

[33] When Mr Toschi was dismissed and first raised his personal grievance he raised it with Tradeworkers 2012 Limited. The letter raising the grievance was sent to Mr Stieger as the director of that company at his home address. Mr Toschi did not name Autoglas Stieger Limited or Autoglas Stieger Auckland Limited at that stage as also being his employer or employers despite being aware of the business cards and signage and the fact that Mr Stieger's letters referred to Mr Toschi's services having been contracted to Autoglas Stieger Auckland.

[34] When Mr Toschi filed his application in the Authority on 16 January 2014 it named Tradeworkers 2012 Limited trading as Autoglas Stieger Dunedin as his employer.

[35] There is insufficient evidence to show that Tradeworkers as the employer was acting as an agent for any of the other three companies or that Mr Stieger when employing Mr Toschi through Tradeworkers was acting as an agent of any of the other three companies.

[36] Mr Stieger and Stieger Investments Limited were entitled to operate a company by which staff were employed (Tradeworkers 2012) and operate the Autoglas business around New Zealand through another company or companies.

[37] I am not convinced that any of the three companies can be said to have been established to allow Tradeworkers to operate as a sham or a façade or to perpetrate a fraud.

[38] I do not accept Mr Cuttance's submission that the liquidation or the proposed striking off of Tradeworkers from the Companies register were ploys engineered by Mr Stieger and/or one or more of the other three named companies to avoid Tradeworkers' responsibilities to its former employee.

[39] Unfortunately for Mr Toschi Tradeworkers is now in liquidation and his proceedings against it cannot continue.

### **Orders**

[40] I decline to join any of the three companies because I do not consider their joinder would enable me to more effectually dispose of the proceedings according to the substantial merits and equities of the case.

[41] There are now no longer any proceedings that Mr Toschi may bring against Tradeworkers and his application is struck out.

### **Costs**

[42] The issue of costs is reserved. However, it is likely in the circumstances that costs should lie where they fall.

Christine Hickey  
Member of the Employment Relations Authority