Note: An order prohibiting publication of some evidence is made in this determination.

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 163
5639690 & 5638988

	BETWEEN	JULIE DELLAWAY-SMITH Applicant in matter 5639690
	AND	GLENN SMITH Applicant in matter 5638988
	AND	WILDZOG INVESTMENTS LIMITED First Respondent
	AND	DAREN SAUNDERS Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Warwick Reid, Advocate for the Applicant Kate Ashcroft, Counsel for the Respondent
Investigation Meeting:	17 March 2017 in Tauranga
Determination:	6 June 2017

PRELIMINARY DETERMINATION OF THE AUTHORITY

A. Julie Dellaway-Smith may pursue her personal grievance against Daren Saunders as, more likely than not, Mr Saunders had not disclosed Wildzog Investments Limited (WIL) as the principal at the outset of the employment relationship entered into with Ms Dellaway-Smith.

B. Glen Smith may not pursue his personal grievance against Mr Saunders as the evidence has not established as more likely than not that Mr Smith was unaware at the outset of the employment relationship that WIL was the employer.

C. The parties are directed to attend further mediation.

D. Costs are reserved.

Employment Relationship Problem

[1] Julie Dellaway-Smith and Glen Smith, who are married to one another, each sought to pursue a personal grievance about how their employment with a Tauranga cleaning supplies business came to an end. At that time the business was owned by Wildzog Investments Limited (WIL) and traded under the name CleantechNZ. Daren Saunders is the sole director and shareholder of WIL.

[2] Ms Dellaway-Smith worked as the office manager for CleantechNZ from May 2014 until she was suspended from her duties in late May 2016. She was dismissed on 22 June 2016 for what was said to be serious misconduct. She was alleged to have sold products to a customer at reduced cost, without authorisation to do so.

[3] Mr Smith worked for the business from September 2014 until he was dismissed on the grounds of redundancy on 14 July 2016. Initially he worked as an account manager but later as a delivery driver for CleantechNZ. Mr Smith's grievance concerned why another person was employed to work as an account manager a few months before he was made redundant.

Preliminary issue

[4] A preliminary issue arose from their applications to the Authority: could they only proceed against WIL or could they elect to proceed against Mr Saunders in his personal capacity?

[5] Ms Dellaway-Smith and Mr Smith accepted they came to know WIL operated the business but alleged that, at the outset of their employment, Mr Saunders had not disclosed that their employer was the company, not him. Instead they said they understood Mr Saunders was trading in his personal capacity as CleantechNZ. As a result, applying the legal doctrine of "the undisclosed principal", they sought to exercise a choice to pursue their personal grievances against him as the agent of the

company rather than the company itself.[1] The effect of their argument was that, if the Authority later determined their dismissals were unjustified, Mr Saunders could be held personally liable to pay any remedies of lost wages and compensation that might be awarded.

[6] Alternatively, they also argued Mr Saunders could be liable under Companies Act 1993 s 25 for obligations owed to them by WIL because they said they did not get employment agreements that correctly stated the company's name. Section 25 allows two exceptions to its rule that the person issuing a contract with an incorrect company name can be liable for contractual obligations not met by the company. Firstly, the person who issued the agreement is excused liability if she or he can prove the person in whose favour obligations were incurred was aware those obligations were incurred by the company. Secondly, liability may be excused if it would not be just and equitable for the person who issued the agreement to be held liable.

[7] The following point was also relevant to the context in which Mr Saunders was alleged to be personally liable, either as the agent of WIL under the doctrine of the undisclosed principal or under s 25 of the Companies Act. On 28 October 2016 WIL sold the CleantechNZ business and its assets to a Hamilton businessman or his nominee. The nominee was Sunshine Enterprises (NZ) Limited (SEL), a company incorporated on 29 September 2016. SEL now operates the business. Mr Saunders has no known interest in SEL but, under the terms of the sale and purchase agreement, he was to be employed for a year after the sale. He is employed as SEL's general manager of CleantechNZ.

[8] WIL appears to have no remaining assets. Mr Saunders, through his accountant, has begun measures under s 318(1)(d) of the Companies Act 1993 to have the company removed from the register. The grounds for doing so were that WIL has ceased trading, has paid all its creditors and has distributed its surplus assets. According to his oral evidence at the Authority investigation meeting, Mr Saunders got most of the money from WIL's sale of its CleantechNZ asset.

[9] WIL and Mr Saunders did not accept Ms Dellaway-Smith and Mr Smith could genuinely claim they did not know of the existence of WIL at the outset of the

[1] *Cuttance (t/a Olympus Fitness Centres) v Purkiss* [1994] 2 ERNZ 321 at 332-333 and 338.

employment relationship or that Mr Saunders had not disclosed it. Rather Mr Saunders considers Ms Dellaway-Smith and Mr Smith have conveniently and belatedly constructed this part of their claim once they realised WIL probably had no money left but Mr Saunders would have the proceeds from the sale of the business.

The Authority's investigation

[10] For the purposes of the Authority's investigation of these preliminary issues Ms Dellaway-Smith, Mr Smith, Mr Saunders and two other witnesses lodged written statements. Those other witnesses were Jamie Campbell, who started work for the CleantechNZ business as an account manager when it was owned by WIL and had continued after its purchase by SEL, and Jenaffa Cooney, who had worked as a delivery driver for CleantechNZ from January to August 2016.

[11] The five witnesses attended the investigation meeting, confirmed their statements and answered questions from me and the parties' representatives. The representatives also provided written and oral closing submissions about the issues for determination.

[12] As permitted by 174E of the Employment Relations Act 2000 (the Act) this written determination has stated findings of fact and law, has expressed conclusions on issues necessary to dispose of the matter and had specified any orders made. It has not recorded all evidence and submissions received.

Order prohibiting publication of some evidence

[13] Documents and other written and oral evidence provided for the Authority investigation included some sensitive commercial information about the financial affairs of WIL and Mr Saunders and identified clients of the CleantechNZ business. Under clause 10 of Schedule 2 of the Act any publication in relation to these proceedings is prohibited from disclosing those financial details or the names of those clients referred to in that evidence. This determination has not included those details and names.

The issues and the standard of proof

[14] From the Authority's investigation the factual and legal issues for determination, broadly, were:

(i) what employment agreements were issued to Ms Dellaway-Smith and Mr Smith and what did they show?
(ii) what did Ms Dellaway-Smith probably know about the existence of WIL at the outset of her employment?
(iii) what did Mr Smith probably know about the existence of WIL at the outset of his employment?
(iv) If WIL was not an undisclosed principal, did the provisions of s 25 of the Companies Act 1993 apply to make Mr Saunders liable if WIL failed to meet any obligations owed to Ms Dellaway-Smith and Mr Smith?

[15] The civil standard of proof applied to determining disputed facts from the available evidence: what was more likely than not to have happened?

[16] In this case there was hotly contested evidence about what employment agreements were provided to Ms Dellaway-Smith and Mr Smith and particularly whether the words of those agreements referred only to CleantechNZ or also mentioned WIL. Mr Saunders alleged original signed copies of employment agreements for Ms Dellaway-Smith and Mr Smith had been removed, without his knowledge, from CleantechNZ's offices and copies of unsigned agreements that could be found contained wording different from a template he had prepared. Ms Dellaway-Smith and Mr Smith suggested Mr Saunders was responsible for the missing agreements and for alterations in unsigned versions of agreements that were among the copies of documents provided for the Authority investigation. Neither side of this contest had clearly conclusive evidence for their respective propositions and supposition. Conclusions expressed in this determination on those disputed points are the result of an assessment of likelihoods, not certainties.

The employment agreements and the words used

The agreement with Ms Dellaway-Smith

[17] Mr Saunders said he was certain an employment agreement he drafted for Ms Dellaway-Smith in May 2014 had referred to WIL as the employer, not just CleantechNZ as she alleges. He said a copy of this agreement, signed by him and her, was kept in a locked filing cabinet in the office. The key to the cabinet was in his desk and Ms Dellaway-Smith knew where the key was kept.

[18] He said he had drafted her agreement from a master template he created. He later used that template to prepare employment agreements given to Mr Campbell and Ms Cooney and signed in April 2016. Copies of those signed agreements, provided in evidence for the Authority investigation, referred to the employer as "Wildzog Investments Limited t/a CleantechNZ".

[19] However the copy of Ms Dellaway-Smith's employment agreement that WIL and Mr Saunders provided with their statement in reply in September 2016 had referred to the employer only as "CleantechNZ". Mr Saunders said he had not noticed this at the time that document was lodged in the Authority with the statement in reply. He said his lawyer had asked him to provide her with a copy of Ms Dellaway-Smith's employment agreement. When he could not find the signed copy he said was kept in the filing cabinet, he had printed off of a copy of the agreement that was on CleantechNZ's computer system.

[20] There were a number of reasons to doubt Mr Saunders' certainty that the agreement prepared for Ms Dellaway-Smith included wording that referred to WIL and not just CleantechNZ.

[21] The first was that his evidence, overall, revealed a limited grasp of legal or technical details to do with company affairs so that his recall on such matters was less likely to be accurate. He had told his lawyer, who had relayed those instructions to the Authority during a case management conference held in December 2016, that WIL was in the process of liquidation. However it transpired Mr Saunders had taken some steps in a different process, an application to remove WIL from the register. The distinction was important because liquidation, if entered, would have stopped proceedings in the Authority unless the liquidator consented to their continuation.[2] And while some CleantechNZ documentation, such as its credit account application form, referred to WIL, there were also technical inaccuracies in some wording used. The form, for example, referred to a trading name of Cleantech Supplies Tauranga, which Mr Saunders had used in a previous business. WIL's cheque book referred to WIL trading as Cleantech Supplies Tauranga Limited, again a reference to a previous business long since sold.

[2] Companies Act 1993 s 248(1)(c).

[22] A further example came from the employment agreement Mr Saunders had for his own role with SEL from October 2016 onwards. It referred to the employer only as CleantechNZ. It made no reference to SEL and whether that registered legal entity was, in fact and law, the employer. This was the same form of words on the agreement for Ms Dellaway-Smith that Mr Saunders gave to his lawyer when asked for a copy of it. He did so without noticing the omission of the company name he insisted he had included in the version given to Ms Dellaway-Smith in May 2014. It is not an easy detail to miss. The employer is defined in the first clause of the agreement at the top of the first page.

[23] Mr Saunders said his own employment agreement for his ongoing role with CleantechNZ was in that form because that was what SEL's director gave him. However it also indicated Mr Saunders attached little importance to an employment agreement referring to the name of the company intended to be the employer. In relation to his own employment agreement, a reference to only the trading name appeared to be sufficient for him. As a matter of likelihood, he probably also saw that as sufficient on the agreement he had Ms Dellaway-Smith sign in May 2014.

[24] The second reason to doubt Mr Saunders' certainty that the agreement with Ms Dellaway-Smith had referred to WIL related to the likelihood that the agreement, along with one for Mr Smith, was taken from Mr Saunders' locked filing cabinet. Mr Saunders said he had noticed the signed agreements were missing around April 2016. He had gone to check them because there were what he said were some "tense moments" around that time in the employment relationship with her. He also said more recent checks of the computer records showed alterations had been made in April 2016 to the copies of the agreements on CleantechNZ's computer system but he had not been able to provide evidence of that for the Authority investigation. His evidence on this point insinuated Ms Dellaway-Smith had engaged in some form of early and deliberate action to obscure the company's role as the employer. The problem with that notion, as a matter of credibility, was that this supposed activity would have occurred many months before there was any suggestion WIL might not be good for the money, if there was a dispute, and that it would be better to be able to pursue Mr Saunders personally. It would have required a degree of foresight not likely to have been present.

[25] Accordingly, as a matter of likelihood, I have not accepted that the written form of the employment agreement made with Ms Dellaway-Smith in May 2014 referred to WIL. Rather, it most likely only referred to CleantechNZ.

The agreement with Mr Smith

[26] The circumstances around entering the employment relationship with Mr Smith, in September 2014, were different. After talking with Mr Smith about working for CleantechNZ Mr Saunders arranged for Ms Dellaway-Smith to prepare the employment agreement for Mr Smith.

[27] Mr Saunders said Ms Dellaway-Smith was asked to prepare the agreement from the master template he had created. On his account this template defined the employer as WIL trading as CleantechNZ. As a result of the supposed removal or disappearance from Mr Saunders' filing cabinet of signed copies of employment agreements, there was a dispute over what form of agreement Mr Smith signed.

[28] Mr Saunders provided the Authority with a copy of an agreement that, on its first page, identified the parties as being Mr Smith and "CleantechNZ (Wildzog Investments Ltd)". He said he found this copy among papers left in a drawer of the desk Ms Dellaway-Smith used at CleantechNZ offices. On the second page of the provided copy of that document was a handwritten note with the words "Amount + commission structure". Ms Dellaway-Smith confirmed the handwriting was hers but said that page appeared to be from another employee's agreement. She said she had referred to that other agreement when preparing Mr Smith's agreement. The clause numbering between the two pages in the provided copy was not consecutive, which strengthened the suggestion that the pages were not from the same agreement, or at least the same draft of one.

[29] Mr Smith provided the Authority was a copy of an agreement that, on its first page, identified the employer as "CleantechNZ". There was no reference to WIL. In a space of the page beside the word "employee" Mr Smith had written his name. Each subsequent page was initialled by Mr Smith and signed by him on the last page with the date of 30 September 2014. It had no signature from Mr Saunders or anyone else on behalf of the employer.

[30] Mr Smith said this was the form of agreement he was given by Ms Dellaway-Smith to sign. He said he signed two copies, took one home and left the other copy with her to have Mr Saunders sign it. He had not asked for a copy of the agreement signed by Mr Saunders.

[31] Ms Dellaway-Smith's evidence was that she had started preparing Mr Smith's employment agreement using a template on the office computer system. She said Mr Saunders told her it had been copied from a Department of Labour website three months before. Ms Dellaway-Smith denied she had removed the name of WIL from the template in preparing an agreement for Mr Smith.

[32] By the time Ms Dellaway-Smith was preparing Mr Smith's agreement, more than four months after she began work for the CleantechNZ business, she was aware of the existence of WIL. She had taken phone calls where the callers asked for Wildzog. She had also used business documents bearing WIL's name. On 14 May 2014, for example, she signed a bank deposit slip which had WIL's name printed on it. On 3 and 5 September 2014 she signed credit account application forms on CleantechNZ's behalf. In the section of the form she filled in WIL was named twice with the following words: "Wildzog Investments Limited t/a Cleantech Supplies Tauranga".

[33] Ms Dellaway-Smith's evidence confirmed she had taken some time in drafting Mr Smith's agreement, including alterations needed for an addendum that set out specific employment terms. She had some business experience before working for CleantechNZ. She had previously worked for a financial services business in Britain and had once run a café business of her own. She also said she knew what a limited liability company was. It seemed unlikely that she would have deleted the name of WIL if it was on the template she used or, having seen its use on other documents used in the CleantechNZ business, not checked whether it should be used.

[34] On balance, the evidence from her, Mr Smith and Mr Saunders about whether the agreement Mr Smith signed did refer to WIL was so contradictory and lacking in corroboration, it was not possible to reasonably conclude one account was more likely than the other.

What they knew at the outset of the employment

Ms Dellaway-Smith

[35] Ms Dellaway-Smith met Mr Saunders when she was working at a café near Tauranga Airport. He had visited the cafe to take orders and to deliver disposable coffee cups and other supplies CleantechNZ provided. From business emails exchanged with him she saw his email signature described him as the managing director of CleantechNZ. During one visit he mentioned what he referred to as "his business" needed help and Ms Dellaway-Smith told him she was interested in a different job from the café. She sent him her curriculum vitae and attended an interview at CleantechNZ's office with Mr Saunders and his wife, who also worked in the business. At the end of the interview Ms Dellaway-Smith was offered a job. They agreed a start date and Mr Saunders said he would prepare an employment agreement for her.

[36] Ms Dellaway-Smith said Mr Saunders gave her an agreement on her first day of work and she signed two copies of it. Mr Saunders kept one and she kept the other. She said she put her copy in the drawer of her desk at the CleantechNZ office. She said she did not take it with her when she was suspended from her duties in May 2016 and told to leave the office. She said she assumed it was among paperwork Mr Saunders said had been cleared from her desk after her departure.

[37] Mr Saunders' written and oral evidence did not suggest he had mentioned WIL while talking with Ms Dellaway-Smith at the café or during the interview. Rather, he suggested she must have known of the existence of WIL for two reasons.

[38] Firstly, he said invoices she dealt with for the supplies provided to the café, and he assumed she saw, had WIL's name at the top alongside the CleantechNZ logo. Ms Dellaway-Smith denied dealing with those invoices as payments for supplies were made by another staff member. Mr Saunders' assumption she dealt with those invoices and saw WIL's name on them was not sufficient to establish she had done so and thereby learned WIL was the company operating the business.

[39] Secondly, he said WIL was identified as the employer on the agreement she signed. For reasons already given, this determination has found it was more likely than not that the agreement referred only to CleantechNZ.

[40] Accordingly, it is more likely than not Ms Dellaway-Smith was unaware Mr Saunders acted for WIL at the time he offered and she accepted employment with the CleantechNZ business. At the outset of the employment Mr Saunders had not met the onus of making plain to her that WIL was the principal and he was its agent. As a result his personal liability was not displaced. Under the doctrine of the undisclosed principal, she could elect to pursue him in the proceedings over her personal grievance.

Mr Smith

[41] Again, the circumstances regarding Mr Smith were different. In 2014 Mr Smith operated his own one-man window cleaning business. He purchased supplies for his work from CleantechNZ. Documents WIL and Mr Saunders provided for the Authority investigation showed Mr Smith first bought supplies from CleantechNZ in April 2014. Mr Smith said Ms Dellaway-Smith introduced him to Mr Saunders as her husband when he visited the CleantechNZ offices after she started work there in May 2014.

[42] Mr Smith said he paid cash for products purchased. A book of numbered packing slips showed handwritten entries for seven sales made to Mr Smith in May and July. The handwriting on those slips was that of Ms Dellaway-Smith. Each page of the packing slips book had the logo of CleantechNZ but no reference to WIL. However tax invoices generated for those sales were headed with both the logo of CleantechNZ and an address starting with the name of WIL. Each tax invoice bore a "paid' watermark and an invoice number corresponding to the packing slip number. Mr Saunders pointed to those tax invoices as documents from which Mr Smith should have learned WIL was the company operating CleantechNZ. Mr Smith said he never saw those tax invoices. He believed they were documents generated for CleantechNZ's business records by Ms Dellaway-Smith but were not sent or given to him as the product was already paid for in cash.

[43] Mr Saunders offered Mr Smith a job in September 2014. Mr Saunder's written and oral evidence did not suggest he had mentioned WIL in his discussions with Mr Smith before or at the time that he offered him a job. Rather, Mr Saunders relied on his understanding that the employment agreement for Mr Smith, which he

asked Ms Dellaway-Smith to prepare, had named WIL as the employer. He relied on a version of the agreement, with WIL's name on it, that he said he found among papers in Ms Dellaway-Smith's desk. For reasons already given in this determination, no firm conclusion could be reached from the competing versions of the supposed employment agreements. However there was one further factor that did not weigh in Mr Smith's favour.

[44] It was clear Ms Dellaway-Smith knew of WIL's existence by the time that she was preparing Mr Smith's employment agreement. From her previous work experience she knew of the significance and role of a limited liability company. It was unlikely she would not have mentioned the company sometime in talking with Mr Smith about her work before he started work for CleantechNZ, including when she was working on drafting his employment agreement.

[45] Allowing for those likelihoods and the inconclusive evidence about the content of the employment agreement Mr Smith signed, it could not be said it was more likely than not that the existence of WIL was concealed from him at the outset of the employment. On that conclusion the doctrine of the undisclosed principal could not be said to apply to Mr Smith's circumstances.

[46] As a result the alternative argument that Mr Saunders was liable under s 25 of the Companies Act then needed to be considered. This argument, based on Mr Smith's evidence, proposed that the employment agreement he signed was the version that named only CleantechNZ as the employer, not WIL. On that basis it was said the agreement, which WIL accepted created legal obligations on it as the employer, failed to correctly state the name of the company. Assuming that a complete omission of the company name fell with the scope of the statute's reference to failing to correctly state the name, Mr Saunders was said to be then liable if WIL failed to discharge its obligations because he was the person who issued and signed the agreement.

[47] Mr Saunders could be excused liability on one of the exceptions in s 25, that is if he could establish Mr Smith knew at the time that he was issued with or signed his employment agreement that its obligations were really incurred on WIL's behalf.[3] The combination of likelihoods and inconclusive evidence about the content of the

[3] *Knauf v Marshall* [2015] NZHC 1717 at [52] and *Clarence Holdings Limited v Hall* CA 176/00 22 February 2001 at [40].

employment agreements, referred to in paragraph [45] above, meant that exception probably applied to Mr Saunders.

[48] However, if it were not, the other exception applied. It would not be just and equitable for Mr Saunders to be liable for issuing an agreement which omitted WIL's name when he had charged Ms Dellaway-Smith with the task of preparing the agreement. She knew of the existence of WIL by the time she prepared her husband's employment agreement but omitted if from the agreement without talking to Mr Saunders about whether or not WIL' name should be included. At best both she and Mr Saunders overlooked an important point at the time.

[49] The Employment Court in *Wilson v Bruce Wilson Painting & Decorating Limited* considered application of s 25 and found it would not be just and equitable to impose liability in the circumstances of that case where there was "evidence of sloppy business practices rather than evidence of a deliberate intention to deceive".[4] It was a description as apt to what had happened with Mr Smith in this matter.

[50] In reaching that conclusion I note neither representative, in their closing submissions, agreed with doubt I raised as to whether the Authority had jurisdiction to reach conclusions about that second exception to liability under s 25 of the Companies Act. Section 25 says it is "the court" that must be satisfied. The Companies Act defines the court as the High Court. Both representatives took the view that if the Employment Court in *Wilson* had exercised the discretion about this exception to liability under s 25, it was open to the Authority to do so too. For that reason, without necessarily agreeing their view was correct, I have expressed the conclusion given above that the exception to liability does apply to Mr Smith's case.

[51] Accordingly, Mr Smith may not pursue his personal grievance against Mr Saunders as the evidence has not established he was more likely than not to have been unaware, at the outset of the employment relationship, that WIL was the intended employer. Neither is Mr Saunders personally liable under s 25 of the Companies Act if WIL fails to meet obligations it may be found to owe Mr Smith.

[4] [2014] NZEmpC 83 at [53]-[59].

Direction to further mediation

[52] In light of the conclusions reached in this determination, the parties are directed to further mediation within 30 days of the date of this determination. If the matter is not resolved there, arrangements will be made to proceed with an investigation.

Costs

[53] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority