

Attention is drawn to the order  
prohibiting publication of certain  
information

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 486  
3035714

BETWEEN      GAYLE CLEARWATER  
Applicant

AND            B L RAYNER (1993) LIMITED  
Respondent

Member of Authority:      Andrew Dallas

Representatives:          Janet Copeland, counsel for the Applicant  
Matthew Dearing, counsel for the Respondent

Investigation Meeting:      10 April 2019 at Invercargill

Submissions and further  
information received from  
the parties up to and  
including:                      16 May 2019

Date of the Determination:      19 August 2019

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1]      Under clause 10 (1) of the Second Schedule to the Employment Relations Act 2000 (the Act), I prohibited from publication the financial statements for B L Rayner Limited (Rayner) lodged in these proceedings.

## **Employment Relationship Problem**

[2] Gayle Clearwater was employed by Rayner at its Invercargill Branch as a sales person and personal assistant in its solid fuels team in March 2015. She was subsequently promoted to operational planner for the branch in 2016.

[3] Ms Clearwater says she was subject to an unjustified disadvantage due to the failure by Rayner to provide her with a safe working environment after she made a complaint about a co-worker. Ms Clearwater also said she was unjustifiably dismissed by Rayner as a result of a “sham” redundancy process. Rayner denied Ms Clearwater’s allegations.

[4] Rayner has now ceased trading. However, it remains a registered company under the Companies Act 1993. Its sole director is Geoffrey Thompson. Geoffrey Thompson appears to have extensive business interests including involvement with and/or ownership of the Distinction Hotels Group. Rayner’s shareholders are Geoffrey Thompson and Jillian Jackson. Based upon evidence heard at the investigation meeting, Rayner’s assets have now been transferred to the “MFT Property Trust”, of which Geoffrey Thompson is trustee, in payment of debts said to be owed to it by Rayner.

### **The Authority’s investigation**

[5] During the investigation meeting, I heard evidence from Ms Clearwater, her mother and former Rayner employees, Mariska Du Preez, Donna Moore, Nikita Thomas and John Bowman. For Rayner, I heard evidence from its financial controller, William (Bill) Potter.

[6] Having regard to s 174E of the Act while I have not referred to all the evidence received from witnesses or the submissions advanced by the representatives in this determination, I record that I have fully considered this material.

## Issues

[7] Issues for investigation and determination are:

- (i) Was Ms Clearwater's dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?
- (ii) Was Ms Clearwater unjustifiably disadvantaged in her employment?
- (iii) If the employer's actions were not justified, what remedies should be awarded, considering
  - a. Lost wages;
  - b. Compensation under s 123(1)(c)(i) of the Act;
- (iv) Was there a breach of good faith by Rayner?
- (v) If so, should a penalty be imposed for breach of good faith, in what amount and should be this wholly or partially paid to Ms Clearwater?
- (vi) Should the Authority lift Rayner's "corporate veil"? and
- (vii) Should either party contribute to the costs of representation of the other?

### **What caused Ms Clearwater's employment relationship problems?**

[8] On 13 July 2017, an incident occurred where a co-worker of Ms Clearwater, Larry Thompson told two of her other co-workers that he had seen Ms Clearwater's "Tinder" profile and it had "a picture of her tits on it". Ms Clearwater was told this by one of the co-workers to whom Mr Thompson had made this comment. Ms Clearwater said Mr Thompson's statement was not true and that her profile picture only displayed her head and shoulders. Indeed, evidence she would subsequently provide to the Authority supported this.

[9] Ms Clearwater then spoke to Operations manager, Mariska Du Preez and another colleague about the incident. Ms Clearwater also directly approached Mr Thompson in the workshop where he was working, and by her own account, asked him why he was telling some of her male colleagues she had her "tits out" on a public dating site and told him to "shut his mouth" and not "lie about shit".

### *Formal complaint*

[10] Ms Clearwater said that when she arrived at work on 14 July 2017, Ms Du Preez was meeting with Mr Thompson. Ms Du Preez left the meeting, approached Ms Clearwater and she that Mr Thompson believed that Ms Clearwater had behaved unprofessionally when she “had a go at him” in the workshop the previous day. Ms Clearwater told Ms Du Preez that interaction was a personal matter between her and Mr Thompson but she did not want to be in the same room as him again. Ms Clearwater said Ms Du Preez asked her if Mr Thompson had apologised to which Ms Clearwater responded by saying he had not.

[11] Later than day, Ms Clearwater emailed a written complaint to Ms Du Preez and Rayner Chief Executive Officer, Dave Simpson. Ms Clearwater’s complaint, in summary:

- (i) stated she was feeling upset and extremely uncomfortable being alone in the office with Mr Thompson;
- (ii) denied the existence of the photo Mr Thompson claimed to have seen;
- (iii) stated Mr Thompson’s comments were unfounded because the image did not exist; and
- (iv) requested Rayner provide a response by the end of the day.

[12] Rayner did not respond to the complaint but Ms Du Preez did advise Ms Clearwater that she was dealing with the complaint. Ms Du Preez also asked Ms Clearwater to provide her with Tinder profile picture Mr Thompson was referring to, which she duly did.

### *Rayner’s investigation into Ms Clearwater’s complaint*

[13] As Mr Simpson was overseas, he advised Ms Du Preez to contact Mr Potter and ask him to assist in dealing with the complaint. Ms Du Preez also sought advice from a human resources practitioner. Ms Potter said he sought advice from an employment relations consultant. Ms Du Preez said there was an “imbalance in direction” after Mr Potter became involved which made it “very difficult to work under and make sound decisions regarding staff and utilisation”.

[14] Mr Potter said immediately upon taking his own advice he asked Ms Du Preez to arrange interviews the following day with the two employees Mr Thompson allegedly made the comment to. These interviews were to be followed by interviews with Ms Rayner and then Mr Thompson.

[15] Ms Rayner said that Mr Potter advised her that Mr Thompson's alleged conduct was not "full on" sexual harassment. Ms Rayner said from that point on she doubted Mr Potter was taking her seriously or would deal with her complaint correctly.

[16] Ms Du Preez said she interviewed Mr Thompson. Ms Du Preez said Mr Thompson described his conversation where Ms Clearwater's Tinder profile was raised with the other male co-workers as "boys talk". Ms Du Preez also said that Mr Thompson effectively acknowledged to her that he said to the co-workers that Ms Clearwater "had her breasts out on Tinder". Ms Du Preez said after the meeting, Mr Thompson denied saying this and just denied the allegations. Ms Du Preez said she believed Mr Thompson "protested too much" for a person who had done nothing wrong.

[16] Ms Du Preez said Mr Potter "handled" the investigation and told her what decisions had been made and what she needed to implement. Ms Du Preez said Mr Potter took notes and drafted written correspondence throughout the investigation and forwarded them to her for distribution to the appropriate person.

[17] Ms Du Preez said that Mr Potter decided Mr Thompson should remain in the workplace during the investigation because there were never any "valid" grounds for suspending him. Ms Clearwater was of the clear view Mr Thompson should have been suspended by Rayner pending the investigation into his conduct. However Ms Du Preez did say Mr Potter said that Mr Thompson should be directed to stay away from Ms Clearwater through the imposition of a series of "restrictions" on his activities.

[18] Ms Du Preez said the restrictions were very difficult to implement because Ms Clearwater was required to interact with Mr Thompson as part of her job and he would "push the boundaries" to deliberately interact with her in the tea room or around the ablution facilities. On two occasions this pushing of the boundaries

resulted in, in Ms Du Preez's view, Ms Clearwater feeling clearly threatened by Mr Thompson. Ms Du Preez said she advised Mr Potter on each occasion. Mr Thompson breached the restrictions but Rayner did not discipline him for this. Mr Potter said Rayner did all it could to minimise the contact between Ms Clearwater and Mr Thompson and deal with her complaints about him.

[19] Ms Du Preez said the delay in dealing with the situation and that it was never really satisfactorily resolved took a toll on everyone including Ms Clearwater. Ms Clearwater thought so too and formally complained about the process and highlighted Mr Thompson's non-compliance with the restrictions. In her complaint, Ms Clearwater requested that Mr Thompson be deployed to another work area so their paths did not cross, a proper and fair investigation be completed, the parties attend mediation to resolve the issue, all communications about the matter should be in writing and she should be provided with minutes of any meeting held.

[20] Mr Potter said the following points arose for his out of his investigation:

- (i) Only one employee heard Mr Thompson's comment about Ms Clearwater's tinder profile and he believe this was on 10 July 2017;
- (ii) This employee told another employee about the comment;
- (iii) Both employees then told Ms Clearwater about Mr Thompson's comment;
- (iv) When told by the employees, Ms Clearwater reportedly said "fuck off" and denied the veracity of Mr Thompson's comment;
- (v) The employees and Ms Clearwater denied there had been any "collusion" between them;
- (vi) Ms Clearwater had recently had cause to "admonish" Mr Thompson for driving a forklift without the requisite licence;
- (vii) Ms Clearwater assumed Mr Thompson had made the comment to both employees;
- (viii) Ms Clearwater had confronted Mr Thompson in the workshop before making the complaint; and

- (ix) Mr Thompson accepted he had been shown Ms Clearwater's Tinder profile but denied making the comment.

[21] Mr Potter, having considered all the material, concluded there was insufficient evidence to support the claim that Mr Thompson had made the comment about Ms Clearwater's Tinder profile. Mr Potter said in arriving at his decision he took into account that no previous allegations of a "sexual/inappropriate" nature had been made against Mr Thompson and no others interviewed during his investigation made such claims. Mr Potter did observe, however, that Mr Thompson could have "attitude issues".

[22] Mr Potter said while he accepted a conversation took place between one of Rayner's employees and Mr Thompson about Ms Clearwater's Tinder profile, he could not reach a definitive conclusion that Mr Thompson had made the comment due to his strong denial and lack of other, similar, prior conduct. Mr Potter said as he could not substantiate the allegation, he could not take stronger action against Mr Thompson than setting out his behavioural expectations to him.

[23] Ms Du Preez said the decisions made by Rayner during the investigation into Mr Thompson's conduct were motivated to protect its own interests and took no consideration of Ms Clearwater's needs or safety. Further, on Ms Clearwater's evidence, supported by that of Ms Du Preez, Mr Thompson almost immediately, and virtually continuously from then on, breached the behavioural expectations imposed on him by Rayner. Meetings were held with Mr Thompson and he was reminded of Rayner's expectation on a number of occasions, including in writing, during the period July to October 2017. However, his insubordination went without sanction from his employer.

[24] Ms Clearwater raised a personal grievance on 4 October 2017. In summary, Ms Clearwater alleged Rayner:

- (i) dismissed her concerns about Mr Thompson's comment as "not a full-on sexual harassment case" including, and despite, in circumstances where its own employee handbook characterised sexual harassment as "serious misconduct";
- (ii) failed to take account of her safety in the work environment;

- (iii) failed to hold Mr Thompson to account for breaching the restrictions it had imposed upon him;
- (iv) breached its obligations of good faith towards her by failing to properly address her concerns;
- (v) failed to provide her with any notes or written information about its investigation;
- (vi) failed to suspend Mr Thompson despite having grounds to do so.

[25] Mr Potter acknowledged receipt of Ms Clearwater's personal grievance on 5 October 2017 and advised Rayner would respond "next week". However, "next week" Ms Clearwater would receive correspondence of a different kind from her employer.

#### *Restructuring*

[26] On 9 October 2017, Mr Potter provided Ms Clearwater with a letter during a meeting (for which she had no prior notice of) advising her of a "proposed restructure" of Rayner's Invercargill branch which if implemented would result in her redundancy as managerial functions in the Otago and Southland regions would be centralised in Dunedin. Ms Clearwater said this was the first time she became aware of any proposed restructuring.

[27] Mr Potter said the reasons for the restructuring were driven by profitability, cost structure, forward outlook and the requirement for continued capital injection. Mr Potter said the owner had instructed another manager to restructure the business but this had only been partially undertaken. Mr Potter said the owner had injected significant funds into the business and was not prepared to supply further funding.

[28] On 20 October 2017, Ms Clearwater responded to Rayner's restructuring proposal. She said she had no prior notice of the meeting advising her of the proposed restructuring, the proposal to make her redundant was predetermined, her role was integral of Rayner's operations and she had previously raised concerns about some of Rayner's projects and planning with management but these had been ignored.

[29] Ms Clearwater said she found it “interesting” that Rayner decided to restructure its Invercargill operation five days after she raised her personal grievance. Ms Clearwater also said to make matters worse, a new employee was employed by Rayner less than two months after her redundancy and she understood that person performed significant parts of her now redundant position.

[30] Mr Potter said the restructure which resulted in the disestablishment of Ms Clearwater’s position “was absolutely genuine and a proper process was followed”. Mr Thompson and Ms Du Preez were also made redundant as a result of the restructuring. Ms Du Preez said the restructure was a convenient way for Rayner to resolve its financial issues as well as the conflict between Ms Clearwater and Mr Thompson. She also suggested the restructure was motivated by a desire for the owner of Rayner to dispense with employees employed under the previous owner.

### **The Authority’s view of Ms Clearwater’s employment relationship problems**

#### *Did Rayner unjustifiably disadvantage Ms Clearwater in employment?*

[31] Ms Clearwater said she had a personal grievance against Rayner due to its failure to provide her with a safe working environment. It is tolerably clear this is a ground upon which to found a personal grievance.<sup>1</sup>

[32] Ms Clearwater said it is clear from the evidence that Rayner failed to take steps to provide her with a safe working environment after being put on notice, and repeatedly being reminded, that Mr Thompson was behaving in an inappropriate manner towards her and was breaching Rayner’s behavioural expectations of him. Indeed, on Ms Du Preez’s evidence, Mr Thompson’s conduct towards Ms Clearwater was “threatening” on two occasions.

[33] Rayner said it met its statutory obligations to Ms Clearwater seriously by thoroughly, fairly and reasonably investigating her complaint including engaging an “impartial” investigator.

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<sup>1</sup> See, for example, *FGH v RST* [2018] NZEmpC 60 at [191]

[34] Given Mr Potter was also Rayner's financial controller it's not clear how "impartial" he was, or could be, as an investigator. However, what is of greater concern is that Mr Potter advised Ms Clearwater, and I accept that he did do this, that Mr Thompson's conduct was not "full on" sexual harassment, whatever that means; but it was clearly disparaging of her complaint.

[35] Further, despite not substantiating Ms Clearwater's allegation against Mr Thompson over her Tinder profile, Rayner resolved to impose restrictions and behavioural expectations on him. On the face of it this seems an unusual response. However, given the investigation's presenting facts about Mr Thompson's ongoing conduct towards Ms Clearwater these actions came to be entirely justified. What is inexplicable then is why, having imposed these on Mr Thompson, Rayner did not enforce them or if it did, did so in an unenthusiastic and inconsistent manner.

[36] Even if Rayner believed it did not have grounds to suspend Mr Thompson pending the investigation of his comment about Ms Clearwater's Tinder profile – which, on the facts, is questionable – it would have almost certainly had grounds to suspend him following not one, but two, incidents of threatening behaviour towards her as reported by Ms Du Preez. Rayner's actions here are almost inexcusable.

[37] I find these were not the actions of a fair and reasonable employer and Ms Clearwater has a personal grievance for failure by Rayner to provide her with a safe working environment as a result.

*Did Rayner unjustifiably dismiss Ms Clearwater?*

[38] The law governing the challenging of redundancy dismissals including the interface between contractual and statutory obligations, including those of good faith, is now firmly established and does not need to be re-stated here.<sup>2</sup>

[39] Ms Clearwater said that her redundancy by Rayner was a "sham", non-genuine and carried out for an ulterior purpose – that is to remove an employee involved in difficult circumstances and dynamics within the workplace. Ms Clearwater said the argument here was ably assisted by Rayner's decision not to redeploy her into a role,

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<sup>2</sup> See, *Grace Team Accounting Limited v Brake* [2014] NZCA 541 (CA) and the line of cases following including *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28.

which contained large parts of her “redundant” position, she could perform and one which the company needed performing. Indeed, Rayner filled the position a relatively short time after her redundancy.

[40] Rayner said the process adopted was fair, it consulted with Ms Clearwater appropriately and the decision to dismiss by reason of redundancy was made for genuine business reasons.

[41] Having carefully considered the evidence lodged and heard by the Authority and the applicable law, I find Ms Clearwater has a personal grievance for unjustified dismissal arising out of a redundancy carried out for a pre-determined ulterior purpose other than for genuine business reasons as permitted by law.<sup>3</sup> I do so for the following reasons:

- (i) Mr Potter notified Ms Clearwater via letter of a restructuring process without notice and in the circumstances of her raising a personal grievance against Rayner arising out of her complaint against Mr Thompson;
- (ii) Ms Du Preez’s evidence, which I accept, that the restructure was a convenient way for Rayner to resolve its financial issues as well as the conflict between Ms Clearwater and Mr Thompson; and
- (iii) Rayner did not provide, and tellingly so, a substantive response to Ms Clearwater’s personal grievance before making her redundant.

[42] Those reasons are supported by the presence of the following defects in Rayner’s redundancy process. The absence of some or all of these defects may have assisted Rayner in rebutting Ms Clearwater’s contention the redundancy process was a sham or effected for an ulterior purpose:

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<sup>3</sup> I note this finding does not necessarily accord with that made by the Authority in *Thompson v B L Rayner Limited* [2019] NZERA 390 at para [38]. However, based on the evidence before the Authority in this matter, including the evidence of Ms Du Preez, this finding was available and one which was appropriate to make in the circumstances.

- (i) The letter provided by Mr Potter advising her of the proposed restructuring failed to clearly set out Rayner’s genuine and objectively verifiable business reasons justifying the proposal to make Ms Clearwater’s position redundant;
- (ii) Further, the reasons given by Rayner, such as they were, made consultation effectively meaningless;
- (iii) Rayner did not properly address, or only gave perfunctory consideration to, Ms Clearwater’s genuine attempts to provide feedback, within the context of a flawed consultation process, including a proposal for alternative arrangements;
- (iv) Rayner’s letter to Ms Clearwater proposed “the design team” assume responsibility for her work but Rayner employed a new employee to carry out the role which contained the duties she performed a short time after her redundancy; and
- (v) Rayner ought to have, at least, given consideration to redeploying Ms Clearwater into this role or offering the role to her.

*Did Rayner breach the good faith obligations it owed to Ms Clearwater?*

[43] Ms Clearwater sought penalties for breaches of good faith she said occurred as a result of Rayner’s failure to provide her with a safe working environment after she made a complaint about Mr Thompson and for the flawed restructuring process resulting in her dismissal. While an available remedy to her, the award of penalties for an established breach or breaches of good faith is discretionary.

[44] Ultimately in my view the allegations of breach of good faith have been effectively subsumed by her successful personal grievances and her employment relationship problem has been remedied as such. In arriving at this view, I rely on s 160(3) of the Act.

## **What remedies should Ms Clearwater receive?**

### *Lost wages*

[45] Having found Ms Clearwater was subject to an unjustifiable dismissal by Rayner, the Authority must under s 123(2) of the Act, even if it awards no other remedies, order payment of the lesser of a sum equal to lost wages or three months ordinary time wages.

[46] I am satisfied that Ms Clearwater made a reasonable attempt to mitigate the loss of her fulltime employment. While Ms Clearwater sought her actual lost wages or an amount of lost wages greater than three months, I have decided, in the circumstances of this case, to award her three months gross lost wages, which has been calculated as \$14,095.71, together with any applicable holiday pay on that amount.

[47] It is clear from the evidence that Ms Clearwater would have *eventually* been made redundant by Rayner because the company's assets have been sold and it has ceased trading. What is less clear is when that might have occurred and it would be unwise to extrapolate too far in this regard. Having said that, the closure of Rayner was not immediate and, indeed, it continued to trade into 2018. In these circumstances it is neither unreasonable nor unjust to award Ms Clearwater three months ordinary pay, being the default statutory position.

### *Compensation for humiliation, loss of dignity and injury to feelings*

[48] Ms Clearwater, relying on recent decisions of the Court, sought an award in excess of \$40,000 as compensation for humiliation, loss of dignity and injury to feelings.<sup>4</sup>

[49] I accept Ms Clearwater's evidence, supported by other witnesses, about the impact that the inadequate investigation of her complaint against Mr Thompson and the flawed restructuring process, which resulted in the termination of her employment had on her.

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<sup>4</sup> See, for example, *Richora Group Limited v Cheng* [2018] NZEmpC 113

[50] Ms Clearwater said she believed herself to be a valued employee of Rayner but its actions towards her after making a complaint against Mr Thompson found her believing she counted for nothing. Ms Clearwater said Rayner's actions significantly affected her self-esteem. Ms Clearwater said the failure to appropriately deal with Mr Thompson's conduct after she made her complaint against him left her feeling unsupported, vulnerable and undermined her emotional wellbeing.

[51] Ms Clearwater said the financial impact of the loss of her employment left her in a very vulnerable position. She said it was very demoralising to lose control of her finances and it was humiliating for her to rely on savings and the generosity of friends and family. At the time of the investigation meeting, Ms Clearwater said she was still attending counselling to help her move on from the traumatic phase of her employment giving rise to this determination.

[52] Having considered Ms Clearwater's evidence under this head, the corroborative evidence provided by other witnesses and recent compensatory awards by the Court and Authority, I award Ms Clearwater, subject to any consideration of contribution under s 124 of the Act, \$30,000 as compensation for that humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.

*Contributory conduct by Ms Clearwater?*

[53] Having found that Ms Clearwater is entitled to remedies for her personal grievances, I am required by s 124 of the Act to consider whether her actions were causative and blameworthy of the situation she found herself in.

[54] It was clear from Ms Clearwater's evidence and submissions advanced on her behalf that she believed she has not engaged in any blameworthy conduct. However, despite this, one aspect of the factual matrix needs to be examined here. As set out in paragraph [9] above, Ms Clearwater directly approached Mr Thompson in the workplace upon finding out what he allegedly had been saying about her Tinder profile. While this was potentially ill-advised, it occurred in the heat of the moment and was explicable when viewed in context. Consequently, I find, on the balance of probabilities, there was no blameworthy contribution on the part of Ms Clearwater.

## **Summary of Ms Clearwater's remedies**

[55] The remedial orders made for Rayner to resolve Ms Clearwater's employment relationship problem by paying her the following amounts within 28 days of the date of this determination:

- (i) Three months gross pay as reimbursement for lost wages calculated as \$14,095.71;
- (ii) Any applicable holiday pay on that amount; and
- (iii) A global award of \$30,000 as compensation for humiliation, loss of dignity and injury to feelings.

## **Application by Ms Clearwater to lift Rayner's "corporate veil"**

[56] During the investigation meeting, in response to questioning of Mr Potter about the transfer of Rayner's assets to the MFT Property Trust, Ms Clearwater made applications to pursue Rayner's director personally under s 142W of the Act and also to lift Rayner's "corporate veil". Both applications were opposed by Rayner. Ms Clearwater pressed her applications in subsequent written submissions. Rayner continued to oppose the applications in its own submissions. Subsequently, Ms Clearwater, after re-considering her legal position, abandoned her unsustainable application under s 142W of the Act but maintained her application to lift the corporate veil.

[57] The parties accepted that the legal principles applying to applications to lift the corporate veil were well established in the employment jurisdiction.<sup>5</sup>

[58] Ms Clearwater said she raised her personal grievance claims in October and November 2017 and there was no evidence to suggest there were discussions about the disposal of Rayner's assets at that point in time. Indeed, Ms Clearwater submitted it was only well after her matter was proceeding in the Authority that these discussions occurred. Ms Clearwater said the disposal of Rayner's assets was clearly carried out to avoid any potential liability arising from her personal grievance claims. She said it was apparent the disposal of the assets was conveniently timed to take place prior to the investigation meeting.

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<sup>5</sup> See, for example, *Square 1 Service Group Limited v Butler* [1994] 1 ERNZ 667 and *Bennett v Michaels* [2016] NZEmpC 137

[59] Ms Clearwater said she would be significantly disadvantaged if, upon being successful in the Authority with her claims against Rayner, her remedies were defeated by the disposal of the company's assets.

[60] Rayner, after traversing the relevant law, submitted that the reasons why the assets of Rayner were transferred to the MFT Property Trust was to reduce the operational costs of the business, realise assets and settle liabilities. Rayner said given a bulk of its debt was owed to the MFT Property Trust; the trust was the most appropriate vehicle to dispose of the assets and liabilities. Rayner also said Geoffrey Thompson had obligations to both itself and the MFT Property Trust as a director and trustee and was obligated to mitigate Rayner's operational losses continuing regardless of the Authority's proceedings.

[61] Having regard to the situation outlined in the proceeding paragraphs, I would observe that the timing of the disposal of Rayner's assets in circumstances where it was respondent to not one but two sets of proceedings in the Authority is curious indeed.<sup>6</sup> However, in order to assess whether mere curiosity provides a firm foundation to justify lifting Rayner's corporate veil it will be necessary to hear directly from Geoffrey Thompson and potentially Rayner's other shareholder, Ms Jackson. Leave is reserved for Ms Clearwater to return to the Authority to press her application if she deems that necessary.

[62] That said, and perhaps of some significance here, Rayner has, despite the disposal of its assets, been active in the Authority's investigation. It was represented throughout the proceedings and counsel confirmed, when asked by the Authority, that he was being remunerated for his services. Further, Rayner, through Mr Potter, provided instructions to counsel and supplied evidence and other information to the Authority. Consequently, this may be a situation similar to that found by the then Labour Court in *Northern Clerical Workers Union v Lawrence Publishers Co New Zealand Limited*<sup>7</sup> where it is potentially not necessary to lift the corporate veil because it is clear from the evidence who the person is (or persons are) who can take the necessary steps to ensure Rayner meets its obligations to Ms Clearwater under this determination.

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<sup>6</sup> These extant proceedings and the other proceeding footnoted in paragraph [41] above

<sup>7</sup> [1990] 1 NZILR 717

## **Costs**

[63] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Ms Clearwater has 28 days from the date of this determination in which to file and serve a memorandum on costs. Rayner will have a further 14 days in which to file and serve a memorandum in reply.

[64] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis of \$4500 for a one day investigation meeting unless particular circumstances or factors require an adjustment upwards or downwards.

Andrew Dallas  
Member of the Employment Relations Authority