

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 534
3055372

BETWEEN	DAVID ALLISON Applicant
AND	HESTIA LIMITED (T/A CERES NEW ZEALAND LLC) First Respondent
AND	CERES NEW ZEALAND LLC Proposed Second Respondent

Member of Authority: Helen Doyle

Representatives: Anna Oberndorfer, advocate for the Applicant
Sarah Townsend and Shaesta Nand, counsel for the
Respondent

Investigation Meeting: On the papers

Submissions [and further
Information] Received: 20 March 2019, 22 March 2019, 21 May 2019, 29 July
2019 from the Applicant

21 May 2019, 28 June 2019, 15 July 2019 from the
Respondent

Date of Determination: 16 September 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination resolves two matters.

[2] The first is an application by Hestia Limited to strike out the statement of problem dated 5 March 2019 naming Hestia Limited (t/a Ceres New Zealand LLC) as respondent. Costs are sought and there is a request that the matter be dealt with as a preliminary matter.

[3] The second is the proposed joinder of Ceres New Zealand LLC (Ceres) to the proceedings.

[4] By agreement with Ms Townsend and Ms Oberndorfer both matters are to be determined on the papers. The Authority has been provided with affidavit evidence from David McIntyre who is a director of Hestia Limited (Hestia) and sole director of Ceres and from David Allison.

[5] In determining this matter I have considered the Statement of Problem, Statement in Reply, memoranda lodged by counsel, affidavit evidence, and submissions.

Application to strike out the claim against Hestia Limited

[6] One of the most important steps for an applicant when lodging a statement of problem in the Authority is correctly identifying the respondent. Often this is a straightforward exercise because of a written employment agreement and/or knowledge an employee has about their employer.

[7] In this matter Hestia says that it did not employ Mr Allison and that the proposed second respondent Ceres is the employer.

[8] Mr Allison says that there is “an arguable cause of action” against Hestia and that the claim should not be struck out but rather should proceed against both Hestia and the proposed second respondent. He says that Ceres and Hestia were his joint employers.

Relevant matters for consideration

[9] Under s 221 of the Employment Relations Act 2000 (the Act) the Authority may, to more effectively dispose of any matter according to its substantial merits and equities, amongst other matters direct parties to be joined or struck out.

[10] In *Colosimo v Parker*¹ the Employment Court set out the principles that apply when considering the identity of the correct employer. These principles had been applied and

¹ *Colosimo v Parker* (2007) 8NZELC 98,622

referred to in a later judgment of the Employment Court in *Wilson v Bruce Wilson Painting & Decorating Limited*.²

[11] They can be summarised as follows. The onus of proving the identity of the employer rests on the employee where the employee puts that fact in issue. The standard of proof is on the balance of probabilities and the question of who the employer was must be determined at the outset of the employment. The Authority should objectively assess the employment relationship at its outset and ask who an independent but knowledgeable observer would have said was the employer. Failure to notify or make an employee aware of the identity of the employer is not conclusive.

[12] An employee may be employed by more than one employer.³

[13] Section 5 of the Act defines an employer as “a person employing any employee or employees”....

[14] Section 6 (1)(a) of the Act defines an employee as “any person of any age employed by an employer to do any work for hire or award under a contract of service...”.

The employment agreement

[15] Mr Allison entered into a written individual employment agreement which was signed on 5 February 2016.

[16] The cover page of the employment agreement refers to Ceres New Zealand LLC and David Allison. There is also a logo of Ceres Environment NZ fixed to the front cover.

[17] In the body of the agreement under the heading “parties” the employer is referred to as Ceres New Zealand Limited. On the signatory page the employer is referred to as Ceres New Zealand LLC.

² *Wilson v Bruce Wilson Painting & Decorating Limited* [2014] NZEmpC 83 at [13], (2014) 11NZELR 712

³ *Orakei Group (2007) Limited v Doherty* WC12A/08 15 at [12]

Raising of a personal grievance by Mr Allison

[18] On 5 November 2018 a grievance was raised on behalf of Mr Allison with Ceres that he was unjustifiably dismissed and disadvantaged and there was a breach of the good faith obligations.

[19] On 20 December 2018 Ceres responded through its solicitors to the grievance raised.

[20] On 5 March 2019 the statement of problem was lodged with the Authority naming Hestia as the respondent.

[21] On 14 March 2019 Ms Townsend wrote to Ms Oberndorfer advising, amongst other matters, that Ceres and Hestia are separate legal entities. Extracts from the Companies Office were attached to support that. There was reference to communication from Ms Oberndorfer that had been addressed to Ceres. Ms Oberndorfer was invited to withdraw her client's claim against Hestia to avoid an application to strike out. On the basis that the claim against Hestia was withdrawn there was advice Ceres consented to be joined to the proceedings.

[22] The response from Ms Oberndorfer's office was contained in a letter dated 15 March 2019. Ms Oberndorfer stated that the individual employment agreement names Ceres New Zealand Limited as party to the agreement. She set out that Ceres New Zealand Limited changed its name to Hestia Limited in October 2013 and that it showed, or was at least arguable therefore, a contractual relationship existed between Hestia and Mr Allison.

[23] Ms Oberndorfer attached a copy of her client's business card that showed both the names of Ceres and Hestia. She also referred to paperwork and information on the website that shows the names used interchangeably altogether and that had there been an intention to separate the two entities then that could have done so. Whilst she did not disagree that it may be sensible to join Ceres to the claim against Hestia she was not prepared to withdraw the claim against Hestia.

Affidavit evidence

Mr Allison

[24] Mr Allison before he was employed by either the first or proposed second respondent states that he was contracted by a recruitment company to undertake work repairing demolition machinery owned by Hestia. He was paid by the recruitment company.

[25] He set out in his affidavit that Hestia leases the equipment it owns to Ceres which is a demolition company. He also refers to another company Factory Road Holdings Limited that leased property to Hestia. He states that all companies are owned by David McIntyre and that he believes there are other limited liability companies in New Zealand that Mr McIntyre owns and that many have Bernard De Vere as a Director. Mr De Vere was a director of Hestia until recently.⁴

[26] As a contractor Mr Allison deposes to repairing Hestia's equipment on the demolition site of the old Christchurch police station. In December 2015 Mr Allison deposes to being called into a meeting with David McIntyre and Mr De Vere. It is at this meeting that Mr Allison deposes to being offered employment and there was provision of the individual employment agreement.

[27] Mr Allison said that Ceres did not have any clear definitions of roles, positions or lines of authority. He said that he often reported to and received instructions from either Mr McIntyre or Mr De Vere.

[28] Mr Allison deposes to being paid by Ceres. He further deposes to doing purchasing for both Ceres and Hestia and being required to separate all bill payments to whatever company he was serving. He noted that the majority of purchasing he did was for Hestia. He further deposes to being required to work for Factory Road Holdings Limited from January 2018 onwards managing the development of the Factory Road property and the clearance of Ceres' workshop.

[29] He also states that he prepared the new property on Factory Road and organised the move of the Hestia workshop.

⁴ Companies register shows Mr De Vere ceased to be a director of Hestia on 21 August 2019

[30] There is also reference toward the end of the employment in September 2018 being provided with new business cards. The business cards listed Mr Allison's name and Ceres and Hestia. He deposes that it was the office manager who called him and suggested both companies should be listed.

Mr McIntyre

[31] Mr McIntyre in his first affidavit deposes that Hestia owns a number of assets including heavy construction equipment leased to other companies from time to time but does not conduct any other business and does not employ any staff.

[32] He deposes that Ceres operates and trades as Ceres Environmental NZ and is in the business of providing contracting services, specialising in the planning and execution of large scale complex construction, disaster recovery, demolition and deconstruction, environmental remediation, and material recycling projects.

[33] He deposes to there being no overlap between Hestia and Ceres and that before receiving the statement of problem Hestia had not been made aware of any claims or potential claims against it by Mr Allison. Further that Hestia does not trade as Ceres.

[34] He agrees that Ceres New Zealand Limited is named as an employer in one instance in the employment agreement and that Ceres New Zealand Limited changed its name to Hestia in 2013 which was three years before the employment agreement was entered into between Mr Allison and Ceres. At the time the employment agreement was entered into there was no company named Ceres New Zealand Limited.

[35] He also deposes about the business cards that he was not aware at an earlier stage that Mr Allison had business cards and further that he had not approved or consented to Hestia being named on the card. He sets out that he had made further enquiries and has attached an email chain ordering the business cards that is attached to his affidavit.

[36] Mr McIntyre deposes to the business cards being initially ordered by an accounts administrative employee of Ceres on 20 July 2017 and that one year later on 25 June 2018 a proof with only Ceres listed as the company was approved by Mr Allison. Then on 16 July 2018 the accounts administrations employee asked the printing company to amend the business cards by adding Hestia to the proof. Mr McIntyre deposes to being unclear why and on what basis the accounts administration employee added Hestia to the business cards and

that that employee was not authorised to complete purchase orders or transactions on behalf of the company. Further Mr McIntyre deposes that Mr Allison's job title on the business cards is Workshop Manager but Mr Allison's employment agreement states he was employed as a Welder/Boilermaker.

[37] Mr McIntyre deposes to making enquiries into the assertion that Hestia is referred to on Ceres Environmental New Zealand's website but he has not found any such reference. He deposes that he does not believe there are any factors supporting the existence of an employment relationship between Hestia and Mr Allison and that he is concerned that Mr Allison has brought frivolous and vexatious proceedings against Hestia and that these have serious implications for the company and would cause loss and damage.

[38] In his second affidavit Mr McIntyre disputes that Ceres did not have clear definition of roles, positions or lines of authority. He refers to schedule 3 of the employment agreement which contains a job description and the identity of two Ceres employees who Mr Allison is to report to. One of those individuals left Ceres and there was a change to the reporting line Mr Allison had with the other. Mr McIntyre deposes that he then arranged for Mr Allison to report to a Project Manager employed by Ceres and attached an email exchange between Mr Allison and the person he reported to about a pay increase.

[39] He deposes to Mr De Vere being employed by Ceres to manage its real estate investments and states that there was nothing unusual in Mr Allison reporting to him as part of the performance of his duties. He attached an email from Mr Allison to Mr De Vere.

[40] He deposed that machinery is leased from Hestia to Ceres. Further that any work carried out by Mr Allison was invoiced by Ceres to Hestia on a monthly basis and attached a copy of one such monthly invoice.

Analysis and conclusions

[41] Ms Oberndorfer submits that there was ambiguity at the commencement of Mr Allison's employment about who employed him in the employment agreement. She has also asked the Authority to consider whether Mr Allison was jointly employed by Hestia and Ceres because she submits there is a sufficient degree of relationship between the companies

and control of Mr Allison to support a similar finding to that made in *Orakei Group*⁵ that there was joint employment persisting in that case throughout the employee's employment.

[42] The onus of proving the identity of his employer rests on Mr Allison.

[43] I accept that Mr Allison had undertaken work earlier whilst employed by a recruitment company and that may have created some uncertainty about his employer. He then became an employee and had a written employment agreement. Objectively the only real ambiguity in that agreement was the reference in one instance to Ceres New Zealand Limited as the employer. That company had changed its name in 2013 to Hestia. The employment agreement set out Ceres New Zealand LLC was to sign for and on behalf of the Employer on the signatory page and the front of the employment agreement referred to Ceres New Zealand LLC.

[44] Ms Townsend suggests a typographical error in her submissions of a failure to refer to LLC instead of Limited. That could be an explanation. Ms Oberndorfer says that Ceres New Zealand Limited changed its name to Hestia in 2013 and on that basis the employer referred to in the employment agreement could have been Hestia. That could be another explanation.

[45] I have then considered whether there was other information to support continued ambiguity as in *Orakei Group*.⁶

[46] Mr Allison was paid by Ceres throughout. That was not the situation with the employee in *Orakei Group*⁷ where the identity of the payer changed.

[47] Mr Allison's email address refers to Ceres and not Hestia. The communication the Authority was provided with that was attached to the affidavit evidence did not make any reference to Hestia at all. The documents attached to the statement of problem about the restructuring from Mr McIntyre are all addressed to Mr Allison c/- Ceres NZ LLC. Each letter from Mr McIntyre at that time is also headed with Ceres Environment NZ that Mr McIntyre deposes was the trading name of Ceres but not Hestia.

[48] Mr Allison raised his personal grievance with Ceres. The first reference to Hestia as employer was in the statement of problem.

⁵ Above n 3

⁶ Above n 3

⁷ Above n 3 at [48]

[49] Whilst Ms Oberndorfer suggests the names Ceres and Hestia and/or the trading name are used interchangeably on the website I cannot be satisfied of that. There is no evidence to support a reference to Hestia on the website even if there is some confusion about the trading name.

[50] I am not satisfied that there is particular ambiguity from the employment agreement as to the intended employer. The employment agreement was provided at the outset of the employment. It supports aside from one reference to Ceres as a limited liability company instead of LLC that Mr Allison was to be employed by Ceres and not Hestia.

[51] That is not the end of the matter because Ms Oberndorfer submits that Mr Allison was jointly employed by Hestia.⁸ Commonality of directors does not automatically mean an employee is jointly employed by more than one company. A careful read of *Orakei Group* and the authorities relied on in that case supports that there has to be a sufficient degree of a relationship between the two legal entities and elements of common control.

[52] These elements were satisfied in *Orakei Group* in a way that I do not find is so readily apparent in this matter. Both companies in *Orakei Group* provided the same services and were found to be “acting in concert” in their employment of the employee.⁹

[53] The affidavit evidence from Mr McIntyre is that Hestia owns heavy construction equipment and leases it to other companies and does not employ staff.

[54] Ceres provides contracting services amongst other matters for complex construction, disaster recovery, demolition and deconstruction. It is a different business.

[55] In *Orakei Group* there were other elements that supported one company was not at arm’s length from the other. This included the lack of a proper explanation as to why one company would have an interest in the employee waiving rights to holiday pay and notice period for the other company if there was no relationship between the companies.¹⁰

[56] One of Mr Allison’s duties in his job description was to carry out repairs to machines and attachments. Mr McIntyre deposes that Hestia was invoiced for that work and a copy of an invoice for the month of January 2018 from Ceres to Hestia for work carried out by Mr

⁸ Above n 3

⁹ Above n 3 at [58]

¹⁰ Above n 3 at [44]

Allison on the machinery owned by Hestia was attached to his second affidavit. That is supportive of an arm's length relationship between the two companies and points away from the conclusion Ms Oberndorfer asks me to reach that the companies are inextricably linked and operate indistinguishably. Rather there is support that the companies operate as separate entities carrying on different businesses.

[57] Mr Alison deposes that Ceres did not have a clear definition of roles, position and line of authority. There was however a fairly comprehensive job description in schedule 3 of the employment agreement with two employees identified in the schedule that Mr Allison was to report to from Ceres. This later changed to another employee from Ceres.

[58] Mr Allison deposes to working from January 2018 for another company Factory Road Holdings Limited of which Mr McIntyre is also a director. He also deposes to working for Hestia for example on purchasing. Ms Oberndorfer listed nine companies in which Mr McIntyre holds directorship. She submits that although Mr Allison did not claim to be equally employed by all the companies there appeared no separation between them.

[59] I accept Ms Townsend's submission as more likely when all the information is objectively assessed that Mr Allison worked under the direction of employees of Ceres which included Mr De Vere and directions from the director and shareholder of Ceres, Mr McIntyre. He may have carried out duties elsewhere as directed but I cannot be satisfied of the merging of control from other companies that Ms Oberndorfer persuades me existed over Mr Allison.

[60] I do not find much assistance is gleaned from the business card in the circumstances when matters are viewed overall.

[61] I find objectively assessed that Mr Allison has failed to establish on the balance of probabilities that he was employed by Hestia at the outset of employment within the meaning of s 5 and 6 of the Act. An independent but knowledgeable observer would have concluded his employer was Ceres.

[62] I find that Ceres employed Mr Allison at the outset of his employment and remained his employer throughout until his employment terminated.

[63] In light of that conclusion the Authority will not be able to more effectually dispose of the matter according to the substantial merits and equities of the case if Hestia remains a party

to the matter before the Authority. That is because of the finding that Hestia did not employ Mr Allison.

[64] The claim against Hestia is therefore struck out under s 221 of the Act.

[65] I reserve the issue of costs on the strike out application.

Application to Join Ceres New Zealand LLC

[66] There is agreement by Ceres that it be joined to the proceeding if the claim against Hestia is struck out.

[67] I am satisfied that such joinder will enable the Authority to more effectually dispose of the matter.

[68] I join Ceres New Zealand LLC to the matter in file number 3055372.

Next Steps

[69] I direct the parties David Allison and Ceres New Zealand LLC to attend mediation.

Costs on joinder

[70] I reserve the issue of costs on the joinder until the matter between David Allison and Ceres New Zealand LLC has been substantively resolved.

Helen Doyle
Member of the Employment Relations Authority