

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 555
3064092 and 3070173

BETWEEN	SOPHIE MCKEICH First Applicant
AND	SHANE HANSON Second Applicant
AND	DDUP NZ LIMITED First Respondent
AND	YONG LIU Second Respondent

Member of Authority: Michael Loftus

Representatives: Greg Lloyd, counsel for Applicant
No appearance for Respondent

Investigation Meeting: On the papers

Written record issued: 27 September 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In their first application (3064092) the applicants ask I ... *pierce the corporate veil and have the second respondent named as the true employer for the purposes of compliance* with two previous determinations.¹

[2] In the second application (3070173) the applicants ask I remove the original application to the Employment Court on the grounds the claim raises an important question of law.² It is that application this determination addresses.

¹ [2018] NZERA Wellington 102 and [2019] NZERA 276

[3] Neither respondent's position is known given both have chosen to ignore the proceedings and made no attempt to reply.

Background

[4] The applicants were both successful with respect to personal grievance and wage arrears claims they brought against the first respondent. They were, between them, beneficiaries of awards totalling \$105,580.³

[5] The awards were not paid leading to a compliance action. Unsurprisingly they were again successful.⁴ Costs were also added.

[6] Again the respondent failed to comply but that is not a surprise – indeed the probability of that occurring was commented on in the determination.⁵ There I said:

As I have no confidence these orders will be complied with I consider a very short time appropriate if, for no other reason, than to allow the applicants to progress this matter in the Employment Court where they will have access to greater range of options and remedies.

[7] The above failures and the respondent's complete disregard of these proceedings, has led to the current applications.

DDUP's failure to participate

[8] All companies are required to have an address for service.⁶ DDUP's is 65 Cuba Street, Wellington. I am satisfied copies of both applications have been served at that address.

[9] Mr Liu was the sole Director of DDUP at the time of the events which led to the original claims. As with a company a director is required to maintain an address at which documents can be served if necessary.⁷ When a Director of DDUP Mr Liu recorded his address as 34b Seccombes Road, Epsom, Auckland. While he is no longer a Director of DDUP I note he still uses that address with respect to other

² Section 178(2)(a) of the Employment Relations Act 2000

³ [2018] NZERA Wellington 102

⁴ [2019] NZERA 276

⁵ Above n 2 at [17]

⁶ Section 192(1) of the Companies Act 1993

⁷ Section 387A(1)(b) of the Companies Act 1993

companies in which he still holds office. I am again satisfied the relevant documents have been served at that address and note personal service had to be arranged.

[10] Finally I note Mr Liu still uses 65 Cuba Street, Wellington, as his Director's address for further entities of which he remains a Director. As already said documents relating to these applications have been served there.

[11] Those documents included advice that should DDUP fail to respond by 15 August the removal application would be determined on the papers. There is no response. In the circumstances I consider it appropriate to continue and address the removal application as was foreshadowed.

The removal application

[12] Section 178(2), provides:

The Authority may order the removal of the matter, or any part of it, to the court if—

(a) an important question of law is likely to arise in the matter other than incidentally; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or

(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[13] The removal application relies on section 178(2)(a) with it being argued an important question of law is likely to arise.

[14] The question is:

Whether or not the corporate veil can be pierced, and the second respondent treated as the employer for compliance purposes in circumstances where the Authority has already issued a determination finding the first respondent liable in respect of the personal grievances raised by the applicants.

[15] I have to say I have doubt the question posed raises a question of law that should be removed to the Court. The law concerning corporate veils is relatively well settled and I have some doubts someone can be retrospectively added as an employer.

[16] That said I consider there are valid reasons for removing this to the Court and I believe I should do so under s 178(2)(d). The reasons are based on the factual background and earlier observations about the respondent's conduct which also reflect negatively on Mr Liu who was, at the relevant times, the personification of DDUP.

[17] I noted DDUP's reluctance to accept documents which includes the fact it simply returned some that had been personally served. Comment has also been made about a propensity to adopt disruptive tactics regarding its address for service, the changing of directors and business names and what I characterised as attempts to mislead the Authority.⁸ A more accurate portrayal of the later would be to come straight out and say Mr Liu made assertions which were totally dishonest.

[18] I have also had cause to conclude DDUP should have indemnity costs awarded against it as a result of unreasonable conduct which improperly causes loss of time to the Authority and the other parties.⁹ I can only conclude Mr Liu, who I reiterate was the personification of DDUP at the time, is totally contemptuous of the law and his responsibilities under it.

[19] As already said I believe the circumstances raise reasons why it is more appropriate the Court now deal with this.

[20] First, and this was commented on in the original determination, part of the award relates to arrears and it may ultimately fall to a Director to make good this payment.¹⁰ That raises the fact Mr Liu ceased to be a Director though not on the day of determination as asserted by the Applicants but the day before.¹¹ As the applicants evidence about Mr Liu's conduct would suggest it highly likely that was done to avoid personal liability it raises questions about the extent there-of and what are the are limitations thereon in such circumstances. I am not aware of any consideration of these issues in identical or similar circumstances (at least in this jurisdiction) and consider it appropriate the Court do so in the first instance.

⁸ [2018] NZERA Wellington 102 at [5]

⁹ [2019] NZERA 276 at [11] and [12]

¹⁰ Above n 3 at [37]

¹¹ Application for removal at [2.7] and Companies Office records

[21] There is also the fact that while I have said the law concerning corporate veils appears well settled a possible issue arises in the fact recent legislative changes suggest parliament intends extending a directors responsibilities so as to enhance the protection provided to workers deprived of their entitlements. Maybe it is time the Court had an opportunity to review the issues in light of this legislative direction.

[22] Finally there were my observations concerning a belief there would be neither compliance nor payment. That said there are grounds to believe assets may well remain. If that is the case and they can be used to address the debts owed to the applicants the Court has powers which may be used to address this – the Authority no longer does given the present circumstances of this case.

Conclusion

[23] Therefore, though not for the reasons pleaded, I consider it appropriate I remove the substantive application, Authority file 3064092, to the Employment Court.

[24] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority