

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 1  
3055912

BETWEEN                      MICHAEL MACKINNON  
Applicant

AND                              CURRENT ELECTRICAL  
(2013) LIMITED (IN  
LIQUIDATION)  
Respondent

Member of Authority:        Nicola Craig

Representatives:              The applicant in person  
Bryan Williams, liquidator of the respondent

Investigation Meeting:        7 July 2020

Submissions and further  
information received:        At the investigation meeting and 9 and 13 July 2020 from  
the applicant  
At the investigation meeting and 8 October 2020 from the  
respondent

Date of determination:        6 January 2021

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**DETERMINATION OF THE AUTHORITY**

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- A.        Michael Mackinnon’s claim to 15% net profits of Current Electrical (2013) Limited is not within the Authority’s jurisdiction.**
- B.        Costs are reserved.**

**What is the Employment Relationship Problem?**

[1]        Michael Mackinnon originally trained as an electrician and had been a business owner for some years. He was an owner and manager of Current Electrical Limited (CE). In 2013 that company’s business was sold to Current Electrical (2013) Limited

(CE2013 or the company). Mr Mackinnon took a 15% shareholding in that company and was initially a director. He also worked for CE2013, undertaking tendering. He finished around August 2018.

[2] Mr Mackinnon claims that a significant sum of money is owed to him by the company. Mr Mackinnon was assisted, particularly as regards accounting issues, by his wife Lynne Wilkins, who is a chartered accountant.

[3] CE2013 went into voluntary administration from 26 July 2018. The administrator Bryan Williams consented to this proceeding continuing. He indicated to the Authority and Mr Mackinnon that as he saw it the company would go into liquidation. Mr Mackinnon lodged creditor claims with the administrator for the money he claims in this proceeding.

[4] Prior to the investigation meeting I pointed out that under Schedule 7 of the Companies Act 1993, preferential claims to salary and wages only apply “in respect of services provided to the company during the 4 months before the commencement of the liquidation”. More than four months had lapsed from the time Mr Mackinnon ceased work for CE2013 and the company was not yet in liquidation. However, he wished to proceed with his claim.

[5] The original investigation meeting was set for 23 April 2020 but had to be adjourned as a result of the COVID-19 lockdown being in place. An investigation meeting was held on 7 July 2020. I heard evidence from Mr Mackinnon, Ms Wilkins and Mr Williams.

[6] After the investigation meeting, the Authority became aware that CE2013 had gone into liquidation. The consent of the liquidator was sought for the proceeding to continue. Mr Williams as liquidator consented.

[7] Under s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all of the evidence or submissions received but states findings and expresses conclusions.

### **What are the issues?**

[8] The issues for investigation and determination were identified as:

- (a) Was Mr Mackinnon an employee of CE2013?

(b) If so, was there an agreement which formed part of his employment agreement to pay him 15% of the company's net profits?

(c) If so, what period did that agreement apply from and how much does the company owe Mr Mackinnon?

[9] The focus became whether the Authority had jurisdiction to consider Mr Mackinnon's claim.

[10] The prospect of Mr Mackinnon having a constructive dismissal claim was mentioned at a case management conference but Mr Mackinnon indicated that he would not be pursuing that as part of this proceeding. He was informed of the requirement to raise a personal grievance within 90 days and the three year limitation period.<sup>1</sup>

[11] During the investigation meeting Mr Mackinnon mentioned concerns about what had happened with his holiday pay when he started in late 2018 a job arranged by CE2013. However, he indicated that he did not wish to pursue this as it only concerned a small amount.

### **What is the liquidator's position?**

[12] Mr Williams acknowledged that Mr Mackinnon had assisted him in the administration. He found Mr Mackinnon to act with a sense of honour and operate in good faith, with his work able to be relied on.

[13] The two proof of debt claims add up to around \$137,000 (\$112,610.10 plus \$23,969). They were admitted for voting purposes. For dividend purposes the threshold would be different and much more scrutiny is required. It is not normal to admit for dividend purposes unless there is an ability to pay. A larger claim incorporating another year's profit claim was later filed.

[14] Mr Williams did not see that a dividend was at all likely to occur. He did not see Mr Mackinnon's claim as falling within the preference provisions on the basis that it was not an employment matter. In any event, it was for substantially more than the preference dollar cap and does not relate to the four months before liquidation.

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<sup>1</sup> The Act, ss 114 and 115.

### **Was Mr Mackinnon an employee?**

[15] Initially it was suggested on behalf of CE 2013 that Mr Mackinnon was not an employee of the company. However, by the time of the investigation meeting Mr Williams accepted that Mr Mackinnon had been, but was no longer, an employee of CE 2013.

### **How did Mr Mackinnon's claim arise?**

[16] Mr Mackinnon held a substantial share in Current Electrical Limited (CE) up until 31 March 2013. CE also had a wholly owned subsidiary in Fiji. The business was sold to another engineering company (the purchaser). CE2013 was established to purchase the New Zealand business and another company established to purchase the Fijian business.

[17] As part of the sale and purchase agreement, Mr Mackinnon took a 15% shareholding in CE2013 and was appointed as a director. He appears not to have received dividends or director's fees. Restraints of trade meant he had to commit to remaining with the company for three years as an employee. Mr Mackinnon also left vendor finance in the business.

[18] The April 2013 employment agreement provided for the rate of remuneration to be negotiated. Mr Mackinnon was paid an annual salary of \$120,000 and given a company vehicle.

[19] The purchaser was a family business. Initially two family members were the other CE2013 directors and one of those the CEO. Mr Mackinnon says he was treated like an employee.

[20] There were some difficulties for CE2013 and Mr Mackinnon resigned as a director in May 2016. A number of staff left the company. Another family member was appointed as sole director and an independent CEO hired. Mr Mackinnon made it clear to the new CEO that he had been underpaid for some time in his employment role. He had not had a salary increase since starting with CE2013 in April 2013. He regarded the salary as at the lowest end of the scale and not reflective of his significant industry experience.

[21] At the close of the investigation meeting I asked for correspondence leading up to a 9 December 2016 directors' meeting. This resulted in a 17 November 2016 email from Mr Mackinnon to the purchaser and CE2013's CEO being filed. In it Mr Mackinnon notes:

There has been talk of having me stay as a CE[2013] shareholder and maybe becoming a director again.

Briefly:

- CE[2013] has made a profit every year since we started together. ... I have never seen a penny. There is no point in remaining a shareholder on that basis. I'd like to see an agreed method for payment of profit. I've got suggestions for how that could work and will table these if agreed in principle.
- CE[2013] had one formal directors' meeting in 3 years. Every decision for CE[2013] was made by the ...[purchaser's] board. I would need to be involved as a "traditional" director.<sup>2</sup>

### **What happened at the directors' meeting?**

[22] Mr Mackinnon suggested a meeting was held. He attended a meeting on 9 December 2016 with the sole CE2013 director, directors of the purchaser and CE2013's CEO. He took Ms Wilkins with him. On her husband's behalf, she had been emailing CE2013's accountants about subvention.<sup>3</sup>

[23] Mr Mackinnon told me that he went to the directors' meeting as an employee. That is not in keeping with the email above. He was also a shareholder and there had been mention of returning to directorship. There were matters discussed at the meeting which would often not be discussed in front of a non-executive employee.

[24] Mr Mackinnon's recall of detail, particularly dates, was not strong. In his statement of problem which was taken as his witness statement, Mr Mackinnon says he agreed to accept a sum that would address the shortfall in his wages which was based on his performance, calculated on 15% of net profits. He says the 15% was not based on the 15% of his shareholding but rather he was asked at the meeting to suggest a figure and all agreed this was a fair basis for the calculation. There was some discussion of the mechanics of calculation and payment in a beneficial manner for CE2103.

[25] Mr Mackinnon was asked to take up a CE2013 directorship again. He says he felt pressured to accept and did so.

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<sup>2</sup> Material in square brackets added.

<sup>3</sup> Payments by a profit company to a connected loss company.

[26] At the investigation meeting Mr Mackinnon said that the purchaser's directors wanted him to become a CE2013 director again and he said he needed to be paid more, so the offer was made. He was quite well known in the industry so was wanted as a director. He was not sure how the discussion about the money went but thought it came from the CEO. When I asked whether there was a connection between his 15% shareholding and the 15% of net profits payment, he said it was just a tidy way of getting a number. He suggested it could have been higher or lower and he did not feel the shareholding was "the feeling" he had when he left the meeting.

[27] Under questioning Mr Mackinnon said that the others at the meeting "negotiated payment for me to become a director". He could not recall any discussion about the payment being an employment payment or not.

[28] Ms Wilkins describes the couple's pressured financial situation of maintaining an apartment in Auckland to enable her husband work, as well as their home in Raglan. The apartment's lease was to end in early 2017. She agrees that the 15% figure was not based on Mr Mackinnon's shareholding.

[29] Ms Wilkins does not consider that a performance-related payment could have been achieved by a dividend as that would have required a dividend to the purchaser and another shareholder as well. She also raises other reasons why a dividend would not have been suitable.

### **What do the minutes record?**

[30] A director of the purchaser took minutes of the directors' meeting. This may have been regarded as a meeting of the purchaser's directors who were present. However, the CE2013 sole director was also present.

[31] Under a heading "CE Shareholder Issues" the minutes record:

MM raises the issues arising from his perspective, sees doing less on his part as not realistic as he does not want to see CE fall-over. CE had made some profit but MM has not seen any pay-out, MM needs to see a path forward where he knows he's going to get a share of it [profit]. MM resigned as a director [17 May 2016] but is prepared to look at reinstating as long MM has direct involvement, not asking for more money to become a director but rather to see the returning of CE financial performance. MM has had a resurgence of interest and is enjoying his work again.

Subvention – MM says that this didn't matter when just the Lodge family involved but now different dynamic with his involvement. LW points out that subvention reduces retained earnings and says MM should get benefits before subvention. A general discussion around this including various aspects, eg credits increase each year, loans to CE, taxable areas etc. MM suggests 15% be paid to him on nett profit [as at 31 March 2016, so this would include the 1 April 2015- 31 March 2016 FY]. The 15% figure because he has 15% shareholding. ... All agree in principle, with AA saying need to run past Nixon Cate to ensure no unintended consequences. LW agrees. LW also raises need to issue end of year certificate for RWT/WHT ...NB: MM has been receiving 10%pa on his retained shareholder earnings...

Working hours – MM says going forward it was agreed with BB that MM would reduce to 3 days/week but he sees that as not practical now, MM plan to come up [from Raglan] Monday am until Wednesday pm – suggestion now if needed to work more MM to work from Raglan [salary same].

MM – better to price work accordingly and pay duty and then claim 15% WHT in NZ. CC comments it would be good for CE to have MM as a director because of his experience in the electrical contracting market. ...

MM - CEFiji bonus structure for Dom based on profit.... General discussion on bonus schemes. DD never been in favour of them...DD says he would rather pay what person worth. CC points out that sometimes pay rise is given and performance levels fall so difficult to take back pay rise. Presently ... have bonus scheme around \$5K. DD to draft framework for bonus scheme tied in to financial year and built into budget.<sup>4</sup>

[32] The bonus scheme discussion refers to particular named employees (not including Mr Mackinnon) who are on a scheme.

[33] Mr Mackinnon agreed that the minutes suggested that he raised the 15% amount and did not reject that that could have happened. He denied that the use of the "Shareholder Issues" heading was accurate. However, he did not ask, at the next meeting for example, for any changes to be made to those minutes.

[34] Ms Wilkins says the minutes do not accurately report the discussion on performance-based payment. Her use of "performance" may imply that the payment was based on her husband's work performance whereas it was CE2013's performance that was being discussed. Ms Wilkins suggests that she may have understood things about the possibility of paying a dividend that others in the room did not. Also, the minute taker may not have kept up with the technicalities of the discussion.

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<sup>4</sup> Square brackets in original meeting minutes. Other than Michael Mackinnon (MM) and Lynne Wilkins (LW), names changed to letters.

[35] Ms Wilkins talks about the discussion at the meeting being about Mr Mackinnon needing a “pay increase” to fund maintaining two households. I have some difficulty with that wording as it does not reflect the 17 November email, the minutes nor the fact that what was agreed was not an increase in the rate of his salary.

### **What happened after the meeting?**

[36] In 2017 Mr Mackinnon was made a CE2013 director again. Although there is a letter in late 2018 indicating his resignation, he is still shown in the Companies Register as director.

[37] CE2013’s CEO had some discussion with Mr Mackinnon later about the arrangement although Mr Mackinnon could not provide much detail about that. Although there was a profit in the year to 31 March 2016, which Mr Mackinnon knew about in December 2016, he did not pursue the 15% payment for that. He knew the company did not have enough money “to pay a dividend”. He agreed to wait until the company had better cash flow before he drew the profits. In the meantime the company was finally paying off Mr Mackinnon’s vendor finance so he had money coming in. He was happy to wait for the 15% net profits.

[38] Sometime later the business struggled and Mr Williams was appointed as administrator for the purchaser and CE2013.

### **What is the Authority’s jurisdiction?**

[39] Mr Mackinnon emphasises that he was underpaid as an employee by CE2013 for several years and his claim is a fair reflection of that. However, I must decide whether the Authority has jurisdiction to consider his claim.

[40] The Authority has exclusive jurisdiction over employment relationship problems.<sup>5</sup> That concept is defined widely to include a “personal grievance, dispute and any other problem relating to or arising out of an employment relationship”.<sup>6</sup> From that flows the jurisdiction under s 161(1)(r) of the Act to consider:

Any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship...

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<sup>5</sup> The Act, s 161(1).

<sup>6</sup> The Act, s 5.

[41] In *JP Morgan Chase Bank NA v Lewis* the Court of Appeal found that an employment relationship problem “must be one that directly and essentially concerns the employment relationship”.<sup>7</sup>

[42] Each case depends on its factual matrix. However, in *Telfer Electrical Nelson Ltd v Trotter* the High Court saw it as generally recognised that disputes involving a shareholder who happens to be an employee fall outside the Authority’s jurisdiction, along with disputes between a company and a director who also happens to be an employee.<sup>8</sup>

**Is this a claim arising from or related to the employment relationship?**

[43] Standing back and looking at the evidence objectively I am not persuaded that Mr Mackinnon’s claim can be said to directly and essentially concern Mr Mackinnon’s employment relationship with CE2013. Of influence are the following factors:

- (a) As well as being an employee, Mr Mackinnon was a CE2013 shareholder;
- (b) The email of 17 November 2016 emphasised Mr Mackinnon seeking profit as a shareholder, to the extent that he says there was no point in remaining one without payment;
- (c) He had been a director and was willing to consider resuming directorship prior to the directors’ meeting;
- (d) Mr Mackinnon agreed to resume directorship at the same meeting where the 15% payment was agreed. Mr Mackinnon’s evidence referred to payment negotiated for him to become a director;
- (e) The minutes include a number of references suggesting that this was a shareholder matter and that it is important to the company to have Mr Mackinnon back as a director. The minutes do not support the discussion being about Mr Mackinnon getting a pay rise or being paid more as an employee;

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<sup>7</sup> *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255 at [95].

<sup>8</sup> *Telfer Electrical Nelson Ltd v Trotter* [2017] NZHC 2528 at [33].

- (f) Mr Mackinnon himself suggested the rate of payment at 15% of net profit. He held 15% shareholding in CE2013. The attempts to disconnect the two in Mr Mackinnon and Ms Wilkin's evidence were not compelling;
- (g) Mr Mackinnon's employment agreement required variations to be agreed in writing and there was no written variation in an employment style manner;<sup>9</sup>
- (h) During his evidence Mr Mackinnon referred to the company not having enough money to "pay a dividend" and to wanting to be paid more to become a director again. Both suggested this was not an employment related payment; and
- (i) The decision at the time not to pursue payment for the year ending 31 March 2016 could be seen as more in the nature of a director/shareholder decision than an employee decision.

[44] As Mr Mackinnon's claim is not within the Authority's jurisdiction, I conclude my findings there.

### **Costs**

[45] Costs are unlikely to be applied for. However, I leave open that possibility and reserve costs.

**Nicola Craig**

**Member of the Employment Relations Authority**

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<sup>9</sup> Employment agreement, cl 46.0.