

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 160  
3150201

BETWEEN	JACOB ALEXANDER Applicant
AND	GREENBACK ECOMMERCE LIMITED (IN LIQ) Respondent

Member of Authority: Nicola Craig

Representatives: Paul Brown, counsel for the applicant  
Andrew Thorn for the respondent and as proposed  
respondent

Investigation meeting: On the papers

Date of determination: 26 April 2022

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**The claim and response**

[1] Jacob Alexander lodged a claim in the Authority regarding his alleged employment with Greenback Ecommerce Limited (now in liquidation) (Greenback or the company).

[2] Greenback asserted that Mr Alexander was an independent contractor having signed an agreement to that effect and that there were proceedings in the District Court involving a statutory demand by the company against Mr Alexander. The company was represented in its dealings with the Authority by its sole director Andrew Thorn.

**The Authority's process**

[3] A few days after the Authority directed the parties to mediation, Greenback was put into liquidation.

[4] The Authority enquired regarding Mr Alexander's intentions as under s 248(c)(i) of the Companies Act 1993 the proceedings in the Authority could not continue without the agreement of the liquidator or by order of the High Court.

[5] Mr Alexander's representative Paul Brown told the Authority that he did not intend to seek consent as it was not expected to be forthcoming and there was little purpose in pursuing a company in liquidation.

[6] At a later stage Mr Brown indicated that he may by then have sought, but been declined, consent. By contrast Mr Thorn understood that no request had been made. In any event, there is no evidence that Greenback's liquidator has consented to this matter proceeding against the company in liquidation.

[7] An application was made on behalf of Mr Alexander to join Mr Thorn as a second respondent to this proceeding.

[8] Mr Thorn initially resisted an attempt to arrange a case management conference to discuss the joinder application but later sought a change of date. A new date was arranged, with Mr Thorn and his then legal representative attending the Authority's case management conference, along with Mr Brown.

[9] At the case management conference the nature of the claims against Mr Thorn were discussed along with the parties' views on joinder. Mr Thorn informed the Authority that there was a summary judgment issued to Greenback against Mr Alexander in the District Court.

[10] Mr Thorn later provided the judgment. The claim appears to be based on a debt said to be owing under a contractor agreement. The Court's oral decision is recorded in a two-paragraph written judgment. There was no appearance by or for Mr Alexander. The Court was satisfied that Mr Alexander had no defence to Greenback's summary judgment application. Summary judgment was given to what is described as the new party. This may be the liquidator of Greenback.

[11] The Authority communicated a proposal to the parties that, if Mr Alexander wished to pursue his claim, the parties would have seven days to provide any comment on the joinder of Mr Thorn and striking out of Greenback. This was extended for a further seven days as the confirmation that Mr Alexander wished to proceed was not immediately forthcoming.

[12] No response was received within the deadline on Mr Thorn's behalf. On enquiry from the Authority, Mr Thorn's legal representative indicated that her barrister employer had been liaising with Mr Thorn but they were currently without instructions and thus unable to advance argument regarding the Authority's proposal by the set time.

[13] The Authority granted Mr Thorn an additional two weeks to provide any comment, noting that if nothing further was received he would be taken to oppose joinder and a determination would be issued. Mr Thorn's legal representative was directed to promptly provide him with the email containing the deadline.

[14] On the last day of the two-week period the legal representatives advised they were no longer acting for Mr Thorn but passed on an extension request for an indefinite period until Mr Thorn was able to instruct other counsel. Mr Thorn was informed that he was given a final opportunity of eight days to seek representation and provide comment regarding joinder extension.

[15] On the closing day for comment, Mr Thorn sought an additional week for (unnamed) new counsel to finalise the response. This was declined as extensions had already been granted. Mr Thorn lodged what were entitled draft submissions on behalf of Greenback and himself along with other material.

## **Joinder**

[16] The claim against Greenback included claims for minimum wage payment, unjustified dismissal and a penalty for a breach of the duty of good faith.

[17] The Authority has exclusive jurisdiction to make determinations about employment relationship problems.<sup>1</sup> This includes consideration of whether a person is an employee.<sup>2</sup>

[18] Therefore the Authority has the power to consider whether Mr Alexander is an employee. That can proceed despite the District Court decision.

[19] The claim against Mr Thorn, as described in a memorandum, referred to joining Mr Thorn in his personal capacity to the existing personal grievance claim of Mr Alexander. In addition reference was made to s 142Y of the Employment Relations

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<sup>1</sup> Employment Relations Act 2000 (the Act), s 161(1).

<sup>2</sup> The Act, s161(1)(c) and *Gill Pizza Limited & Ors v A Labour Inspector* [2021] NZSC 184 at [49] – [52].

Act (the Act). That section allows recovery claims for wages or other money payable for employment standards defaults against a person involved in the breach.<sup>3</sup>

[20] It is not clear that there is a claim that Mr Thorn personally was Mr Alexander's employer. On that basis it is hard to see a ground to pursue Mr Thorn regarding the unjustified dismissal personal grievance claim.

[21] The s 142Y matter is different. Claims may be brought against people involved in breaches of employment standards including directors of employer companies.<sup>4</sup> Mr Thorn is a director of Greenback and has been for the entire period of Greenback's existence.

[22] In light of *Lawton v Steel Pencil Holdings Limited (in liq)*, an application against Mr Thorn could be considered despite there being no finding against Greenback and seemingly no likelihood of the claim against the company proceeding.<sup>5</sup>

[23] Mr Thorn's submissions emphasize the written agreement entered into between Greenback and Mr Alexander was a contracting agreement. It is suggested that the Authority must first determine whether it has jurisdiction to adjudicate a claim by deciding whether Mr Alexander is an employee of Greenback, before it can consider joining Mr Thorn.

[24] I do not accept that a determination on whether Mr Alexander was an employee must be made before Mr Thorn can be joined. In the absence of consent from the liquidator it is not evident that such a determination could necessarily be made whilst Greenback remained a party as that could be seen to be continuing with a proceeding involving a company in liquidation contrary to s 248 of the Companies Act.

[25] The better process is to join Mr Thorn and then consider the question of whether Mr Alexander was an employee. That way Mr Thorn can be involved in that investigation. There is sufficient basis on which to join Mr Thorn to this proceeding in order to allow that question to be considered and, if necessary, whether Mr Alexander has a valid claim against Mr Thorn.

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<sup>3</sup> The definition of person involved in a breach is set out in s 142W of the Act.

<sup>4</sup> The Act, s 142W(3)(a).

<sup>5</sup> *Lawton v Steel Pencil Holdings Limited (in liq)* [2021] NZEmpC 199.

[26] Mr Thorn also objects on the basis of a personal grievance not having been raised within the 90-day period in s 114 of the Act, there being no consent from the employer, leave not having been sought to raise the grievance out of time and there being nothing to warrant leave being granted. These are concerns which Mr Thorn is entitled to raise if the matter proceeds to investigation of a personal grievance claim against him. They are not sufficient grounds to avoid Mr Thorn being joined as a party.

[27] Under s 221(a) of the Act I order that Andrew Thorn is joined as a respondent to this proceeding.

### **Striking out**

[28] There is no consent from the liquidator to the claim proceeding against Greenback and no order from the High Court. The proceeding against Greenback therefore cannot be continued. In the absence of any objection I order that Greenback ECommerce Limited (in liq) be struck out as a party to this proceeding.

### **Next steps**

[29] By 9 May 2022 Mr Alexander is to lodge and serve an amended statement of problem setting out the matters he pursues against Mr Thorn. Mr Thorn shall have 14 days from receipt to lodge a statement in reply.

Nicola Craig  
Member of the Employment Relations Authority