

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2023] NZERA 441  
3212699

BETWEEN	HAYDEN BRUCE Applicant
AND	THREE65 NEW ZEALAND LIMITED First Respondent
AND	CONTINUOUS SPOUTING WELLINGTON LIMITED Second Respondent
AND	SCOTT NEVILLE PHILLIP JOHNSTON Third Respondent

Member of Authority:	Michael Loftus
Representatives:	Applicant in person assisted by Paul Mathews, advocate Scott Johnston for the Respondents
Investigation Meeting:	10 August 2023 at Wellington
Submissions Received:	At the investigation meeting
Date of Determination:	14 August 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This is an application for compliance, along with other orders. In particular Mr Bruce asks that Scott Johnston be ordered to take all necessary steps to ensure the first and second respondents comply with the compliance order it is expected I will make.

[2] Costs and interest are also sought.

## Background

[3] Hayden Bruce was employed by both the first and second respondents of which Mr Johnston was the sole director.

[4] On 26 March 2021 Mr Bruce was dismissed and he subsequently took a personal grievance which he raised no later than 9 April 2021.

[5] On 12 September 2022 I issued a determination in which I found Mr Bruce's dismissal unjustified.<sup>1</sup> I ordered the first and second respondents pay, on a joint and several basis, sums totalling \$19,022.08. Of this \$17,250.00 was tax free but the residue was to have tax deducted and forwarded to the IRD prior to payment which was to be made no later than 7 October 2022.

[6] Mr Bruce claims nothing has been paid and Mr Johnston concedes that is correct. He advises Three 65 has not traded for some considerable time, has no money and few assets. Continuous Spouting has not only ceased trading, it no longer exists as an entity with its business having been sold some time ago. While the sale realised a return those proceeds have been distributed and Continuous Spouting removed from the companies register.

[7] In support of the way Continuous Spouting's cessation was handled Mr Johnston emphasises the process was not designed to deprive Mr Bruce. He says the business was going to be sold in any event and staff were aware of that at the time. Mr Bruce agrees.

[8] Mr Johnston says that when Mr Bruce's grievance was raised he was approached by MBIE's mediation service. He says he advised them of the situation and that neither company was, by then, trading. He says that in response the mediation service advised it was closing its file and no further action would be taken. Interpreting this as the end of matter Mr Johnston felt the dissolution of Continuous Spouting, which he says had been decided by its shareholders, could continue.

[9] Mr Johnston cannot advise when the proceeds of the sale were distributed other than to say it occurred after the medication service closed the file which occurred on 23 July 2021. Continuous Spouting was removed from the companies register on 19 December 2022.

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<sup>1</sup> *Bruce v Three65 New Zealand Limited and Continuous Spouting Wellington Limited* [2022] NZERA 456

[10] Finally I note Continuous Spouting was, and Three65 continues to be, wholly owned by an entity identified as “Ocean beach trust” which records its service address as Mr Johnston’s residential home.

### **Analysis**

[11] The fact the respondents admit the failure to pay means it is inevitable compliance will be ordered. That is because the debt has been established and Three65’s financial statements indicate assets remain though it is accepted their value appears insufficient to address the debt to Mr Bruce in its entirety.

[12] Also favouring a compliance order is the second order sought by Mr Bruce, namely that Mr Johnston be ordered to do all in his power to ensure compliance occurs. There is precedent supporting the adoption of such an approach, *Allen Chambers Limited v Palabon*.<sup>2</sup> A key issue in *Chambers v Palabon* was whether or not an earlier judgement of the Labour Court, *Northern Clerical Workers Union v Lawrence Publishers Co of New Zealand Ltd*,<sup>3</sup> remained good law.

[13] In *Lawrence* and following an award of remedies associated with a personal grievance, the applicant sought payment through compliance orders against the employing company, its holding company, and the managing director who also held a majority shareholding in the parent company. The Labour Court concluded the dispute could be decided without disrupting the corporate veil. It said the focus should be on “*who is responsible to carry out the act [the employer] had been ordered to perform*” but had not done so. It referred to a number of similar cases and said:

In each of those cases third persons were bound by compliance orders, not to make payment of a respondent’s debt from their own pockets, but to take the steps which were in their power to ensure the liability was met by the person upon whom the liability fell<sup>4</sup>.

[14] The Court found the director and the holding company in that matter had complete control over the employer company. It held it was well within the power of each of them to put the employer in a position where it could pay the monies owed. To this end the Court concluded it had jurisdiction to make orders to have all three respondents ensure the employer made the payment, including that the holding company advance whatever funds necessary to

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<sup>2</sup> *Allen Chambers Limited v Palabon* [2019] NZEmpC 45

<sup>3</sup> *Northern Clerical Workers Union v Lawrence Publishers Co of New Zealand Ltd* [1990] 1 NZILR 717

<sup>4</sup> Above n 9 at 722

the parent company “*whether from its own resources or not will be a matter ... for the three respondents.*”

[15] *Chambers v Pelabon* confirmed this remained good law<sup>5</sup> and the evidence, both here and in the earlier substantive investigation, satisfies me a similar situation exists here. Mr Johnston is, as the sole Director, the personification of Three65 as he was with respect to Continuous Spouting prior to its winding up. Furthermore, he is also one of three trustees of Ocean beach trust and a significant player in any decisions it might make or instructions it might give.

[16] It is in this context I must also raise two further issues that warrant consideration and over which Mr Johnston appears to have had some control and might, upon receipt of advice, be in a position to remedy.

[17] The first is that while I can understand the rationale Mr Johnston adopted when winding up Continuous Spouting I do not agree it was correct. The fact the mediation service chose to close its file for an apparent administrative reason does not mean the grievance, which had already been raised, had itself been withdrawn or ceased to exist. It therefore follows the proceeds of the sale may have been distributed without proper consideration of a contingent liability. It follows repayment might be a possibility though that will fall to someone else to decide and is beyond the scope of my consideration.

[18] The second issue is the shareholding. Mr Johnston is not sure whether or not the trust is incorporated though my investigations show nothing to suggest it is. If that is the case, then there is a question as to whether or not it could have ever owned a company which again raises questions about the recovery of funds.<sup>6</sup>

[19] As a result I suggest Mr Johnston seek advice but order he do all in his power to rectify any impropriety that might have occurred in order to ensure compliance with my earlier orders.

[20] That leaves interest. Interest is to reimburse someone for the loss of use of money properly theirs. By being unable to use the money previously ordered it is clear Mr Bruce has

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<sup>5</sup> Above n 8

<sup>6</sup> Section 92 of the Companies Act 1993

been so deprived. According to the Ministry of Justice's calculator the amount is \$662.24 and that is now payable.

### **Conclusion and Orders**

[21] For the above reasons I make the following orders:

- a. Three65 New Zealand Limited is ordered to comply with the requirements of determination [2022] NZERA 456 and pay Mr Bruce a total of \$19,022.08 (nineteen thousand and twenty-two dollars and eight cents). Payment is to be made no later than Thursday 31 August 2022 and appropriate tax may be deducted and forwarded to the Inland Revenue; and
- b. Three65 New Zealand Limited is ordered to pay a further \$662.24 (six hundred and sixty two dollars and twenty four cents) being interest due on (a) above; and
- c. That Mr Johnston is required to takes all necessary steps to ensure Three65 New Zealand Limited complies.

[2] Neither party was represented at the investigation meeting though Mr Bruce had the assistance of Mr Matthews who prepared a submission. It may well be there is therefore an issue as to costs, though they are likely to be minimal.

[3] Costs are therefore reserved with the parties being encouraged to resolve the issue between themselves. If they are unable to do so and an Authority determination on costs is needed Mr Bruce may, as the successful party, lodge a memorandum on costs within 21 days of the date of issue of this determination. From that date the respondents will have 14 days to lodge any reply memorandum.<sup>7</sup>

Michael Loftus  
**Member of the Employment Relations Authority**

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<sup>7</sup> [www.era.govt.nz/assets/Uploads/practice-note-2.pdf](http://www.era.govt.nz/assets/Uploads/practice-note-2.pdf)