

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 51
ARC 128/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN HEALTH AND BODY CLINIC LIMITED
First Plaintiff

AND MURRAY ARNESEN
Second Plaintiff

AND LYNETTE ARNESEN
Third Plaintiff

AND ANITA ZHAO
Defendant

Hearing: 23 May 2011
(Heard at Auckland)

Counsel: Murray Arnesen on his own behalf and on behalf of the third plaintiff
No appearance for the defendant

Judgment: 23 May 2011

ORAL JUDGMENT OF JUDGE M E PERKINS

[1] Mr Murray Arnesen and Mrs Lynette Arnesen, the second and third plaintiffs in this proceeding, have filed a challenge against a costs determination¹ of the Employment Relations Authority dated 19 November 2010.

[2] They were not originally parties before the Authority in these proceedings, which alleged a personal grievance by the defendant Ms Zhao against the first plaintiff, Health & Body Clinic Limited. The name of that company was changed from an earlier name appearing in the bank statements to which I am going to refer shortly.

¹ AA369A/10, 19 November 2010.

[3] The outcome of the personal grievance was successful for Ms Zhao and the determination² of the Authority dated 26 March 2010 awarded her reimbursement of lost wages together with compensation. There was a further determination on costs dated 2 June 2010.³

[4] Ms Zhao then took enforcement proceedings to the Authority. She sought compliance orders. Mr and Mrs Arnesen were joined for the first time as parties to the proceedings. A compliance order was made against them ordering them to take steps to cause the payments ordered against the first plaintiff company to be made. Mr and Mrs Arnesen were the directors of the first plaintiff. That determination was dated 19 August 2010.⁴ The jurisdiction for the Authority to make such determinations against Mr and Mrs Arnesen is contained in s 137 of the Employment Relations Act 2000 (the Act). The Authority Member also relied upon precedent decisions in reaching her decision namely: *Smith v Pacific Palms International Resort & Golf Club Ltd*;⁵ *Northern Clerical Workers IUOW v Lawrence Publishing Co of NZ Ltd and John Tony Holdings Ltd & Anor*;⁶ and *McLennan v Internet Productions Ltd (in liquidation)*.⁷ There is no dispute that the Authority had such jurisdiction to make such rulings if properly factually based.

[5] On 19 November 2010, the Authority in a subsequent costs determination in respect of the compliance application ordered all of the plaintiffs, including Mr and Mrs Arneson, to pay costs to Ms Zhao of \$1,000 plus disbursements of \$220. The present challenge before the Court is by Mr and Mrs Arnesen against that costs determination against them. It does, however, rely upon the reasoning adopted in the determination of 19 August 2010.

[6] The challenge is in the name of Health and Body Clinic Limited as first plaintiff and Mr and Mrs Arnesen as second and third plaintiffs respectively. However, the first plaintiff company is effectively taking no steps in the proceedings. Nor can it do so for, as I shall discuss shortly, it no longer has any status being a company struck from the Register. Ms Zhao, the defendant, has been served with the documents commencing the challenge to this Court. This includes the statement of claim. She has taken no steps.

² AA144/10, 26 March 2010.

³ AA144A/10, 2 June 2010.

⁴ AA369/10, 19 August 2010.

⁵ AA 280/08, 5 August 2008.

⁶ (1990) ERNZ Sel Cas 667.

⁷ [2003] 1 ERNZ 282.

[7] The challenge was set down for hearing on 11 March 2011. Mr Arnesen was the only person who appeared. However, he indicated that he appeared not only on his own behalf but also represented his wife. I indicated the outcome of that hearing in a minute issued by me following the formal proof hearing. That minute was dated 14 March 2011 and set out my reasons for adjourning this challenge part heard, and I repeat now paras 7-15 of that minute for the purposes of this decision:

7. I did not require any evidence to be adduced at the hearing as that did not appear to be necessary. Mr Arnesen spoke to the matter by way of submissions and repeated the information contained in the statement of claim, which has not been disputed by Ms Zhao. Mr Arnesen reiterated that he and Mrs Arnesen should not have been ordered to pay costs in respect of the compliance proceedings. He reiterated the Authority Member's statement in the original compliance determination that no order can be made rendering Mr and Mrs Arnesen personally liable for the awards made on the personal grievance. He submitted that by making himself and his wife responsible for the costs as a result of the determination on the application for compliance, the Authority would be penalising them for the company having no funds and being in a hopeless financial position. He reiterated the information contained in the statement of claim that the Authority Member had been advised that the plaintiff company had ceased trading, had no funds and was in a hopeless financial situation. He submitted that Ms Zhao and her legal representative had chosen to pursue the matter at their own cost knowing full well that the company would not be in a position to make good on any decision against it. He reiterated a further allegation contained in the statement of claim that the Employment Relations Authority has attempted to force him and his wife to make good on payments from the company accounts after being advised months prior that the business had closed and had no funds.

8. I informed Mr Arnesen that I would reserve my decision on the matter as I wished to check a point relating to the Authority's jurisdiction and that I would issue a judgment next week. Having now heard the submissions from Mr Arnesen I have reviewed the various determinations of the Employment Relations Authority. I have also considered legal authority relied upon by the Authority Member and am satisfied jurisdiction exists to make the orders now challenged.

9. In the determination dated 19 August 2010, in which the compliance orders are contained, the Authority Member has stated as follows:

[7] Prior to the hearing of the substantive issues the Authority had been advised that the business of Health and Body Clinic Limited had been sold and steps were being taken to remove the company from the Companies Register. On the day of the investigation meeting and again on issuing the substantive determination, checks of the Companies Register confirmed that Health and Body Clinic remained registered as a legal entity. A check of the register today, confirms Health and Body Clinic remains a registered company.

10. There was no indication in the determination that Mr Arnesen informed the Authority Member that the company had no funds and was in a hopeless financial position. It may well be that that is the correct position, but it certainly does not appear to have been presented to the Authority in that way.

11. On the face of it and in view of the information presented, the Authority Member has formed the view that Mr and Mrs Arnesen are simply trying to hide behind the company entity and that the company did have sufficient assets to meet the awards made against it in favour of Ms Zhao. In paragraph 16 of the same determination the Authority Member stated as follows:

[16] With regard to Health and Body Clinic Limited, Mr Arnesen has advised the Authority that the business has sold. The accounts provided to the Authority, have not been audited, but more importantly do not contain any information about the sale and do not show the proceeds of the sale.

Information therefore provided to the Authority Member prior to the compliance orders suggested that if the business has been sold the proceeds of sale had not been entered into the accounts. Mr Arnesen informed me that the company has now in fact been struck from the Register.

12. I consider, in view of what I have now set out, the matter should be allocated a further hearing so that Mr Arnesen can appear and present the accounts for the company for the financial year during which Ms Zhao was employed by the plaintiff and up until the time when the company was struck from the Register. Mr Arnesen should also provide evidence confirming the fact that the company has been struck off. He should also provide evidence as to what happened to the proceeds of sale of the business if they do not appear in the company accounts. He should produce copies of the bank statements for the company for the same period. To prove sale of the business and the consideration for such sale he will be required to produce the agreement for sale and purchase and the other legal documents relating to the sale including the financial documents. For instance the settlement statement showing the consideration for the sale should be provided.

13. The alternative is that Mr Arnesen provides this information by way of an affidavit annexing the accounts and documents as specified.

14. While I indicated that I was prepared to decide this matter on the basis of Mr Arnesen's submissions, having read and considered the determinations of the Authority it appears the matters contained in the statement of claim and reiterated in submissions may not be correct or at the very least do not disclose the full circumstances of the matter. Obviously if the company had had no funds or certainly insufficient funds to meet the awards in Ms Zhao's favour, then the Court would consider the de novo challenge to the costs determination in a different light than it would if it were disclosed that the company had or procured adequate funds from the sale to meet the awards.

15. If Mr Arnesen wishes to have the hearing reopened for the purposes I have mentioned, then a further hearing date can be allocated. If, however,

he wishes to deal with the matter by way of affidavit then that affidavit with documents properly annexed should be prepared and filed with the Court within **14 days**. There is no need for any service on any other party as no other parties have taken steps in the proceedings.

[8] Pursuant to those directions Mr Arnesen has filed a bundle of documents and I have set the hearing today in resumption of the earlier part-heard hearing. Mr Arnesen has been sworn in as a witness, confirmed the documents, and I have questioned him on them. I am not sure to what extent, if at all, the documents now relied upon by Mr Arnesen were presented to the Authority prior to its determination on 19 August 2010. At that date the enquiries made by the Authority Member disclosed that the company remained on the Register. It appears that it was probably not finally struck from the Register until 17 December 2010. Nevertheless, in a letter dated 16 July 2010, the accounting firm representing the company wrote a letter generally stating that the company had by that date been sold and was in the process of being wound up. The company was stated to have no cash or assets.

[9] The documents provided to the Court now also include the financial statements for the company for the year ended 31 March 2010. These may have been available to the Authority Member, but it seems on questioning Mr Arnesen today that it may be more likely that they were the accounts for the year ended 31 March 2009. That would be the explanation as to why there were no entries relating to the sale of the assets of the business. The accounts that I now have show the company in an insolvent position as at 31 March 2010.

[10] A set of “final accounts” for the company dated 30 September 2009, obviously prepared upon the sale of the assets show a series of creditors of the company at that date and a credit against such debts of one half of the consideration received upon sale. The sale and purchase agreement dated 30 September 2009, which has also been produced, shows a total consideration for sale of the assets of \$15,000. There is some confusion between the company and Mr and Mrs Arnesen arising from the agreement as to who owned those assets. The company accounts list the plant and equipment owned by the company, but the asset list attached to the agreement shows assets not on the plant and equipment list and therefore probably owned personally by Mr and Mrs Arnesen rather than the company. Indeed Mr

Arnesen has confirmed that is the position in his evidence today. I note that the agreement for sale and purchase shows Mr and Mrs Arnesen as sellers of the assets rather than the company.

[11] The statements from the company's bank also show that the balance of the initial payment of money received from the sale was paid into the company bank account. The account soon returned to overdraft after payment of the debts. I also note that Mr and Mrs Arnesen periodically made reasonably substantial payments into the company's bank account from their own joint funds. Obviously they were using their own funds to prop up the company. It is unclear whether the second half of the consideration for sale and purchase of the assets was in fact entered into the company accounts. I am informed by Mr Arnesen today that the final payment has only just been received and has been used to meet the final debts of the company in the winding up. It is also unclear whether Mr and Mrs Arnesen were ever reimbursed for their personal loans. Probably they were not and those loans were simply shown in their shareholder accounts in the company.

[12] Finally, when dealing with the documents produced, one has to keep in mind that compliance costs are incurred when a company is wound up. There are accounting and registration fees, there is a final resolution needed on tax with the Inland Revenue Department and there are requirements for final levies with the Accident Compensation Corporation. Mr and Mrs Arnesen have produced one or two documents relating to this.

[13] I now turn to the issues raised in this challenge. The Authority, in its determination of 19 August 2010, obviously took the view that the company did own assets sufficient to pay Ms Zhao , that there were grounds for believing that the company was simply refusing to pay, and that the Arnesens had power to ensure payment. When the matter was not resolved by the compliance order, the Authority, when determining costs, which it had reserved in the hope of resolution of the compliance issues, felt that the costs award should also include Mr and Mrs Arnesen. At that stage and in view of the clearly limited information provided, that view at that time was understandable.

[14] In the *Lawrence* decision I have referred to, similar orders to those made in the present case were made against the proprietors of the employer company to enforce remedies provided in a personal grievance. That case considered powers under predecessor legislation to the Act, but nevertheless the same considerations apply. In that case the Court formed the view that the third party could take steps to ensure the company, which had the financial means to do so, made payment.⁸ In that case, unlike the present, the third party was ordered directly to make compliance as agent of the company. In this case Mr and Mrs Arnesen were simply ordered to take steps to cause the payment to be made by the company.

[15] While I have indicated that it is likely Mr and Mrs Arnesen did not provide the Authority with all the documents now provided to the Court, this is a challenge *de novo*. I am entitled to consider the matter on the basis of the evidence now before the Court. If the correct financial position had been presented to the Authority Member, despite the fact that the company at that time was not struck from the Register, it is possible and likely that she would not have made the compliance orders against Mr and Mrs Arnesen, or the subsequent order for costs. It is true that the Authority Member had the unaudited company accounts at the time of the decision on 19 August 2010. She stated they showed no information about the proceeds of sale.⁹ If she was referring to the 2010 accounts then that is not correct, but it is understandable that she reached that view without the other documents now provided. If she was referring to the 2009 accounts then it is obvious that the proceeds of sale would not be reflected in those accounts because they would have been prepared prior to the sale.

[16] This is clearly not a position where Mr and Mrs Arnesen are deliberately hiding behind the company entity to purposely avoid Ms Zhao's claim. I have no evidence on Mr and Mrs Arnesen's present personal financial position but it is clear that they, as shareholders, would have suffered a loss as a result of the first plaintiff's demise. They have, from time to time, clearly propped the company up from their own funds. It is likely they personally owned much of the plant and chattels sold, but have nevertheless, to date at least, applied the funds from the sale to the company

⁸ At 674.

⁹ At [16].

debts. All of this appeared to have occurred prior to Ms Zhao's personal grievance being heard and determined. Nevertheless, it appears Ms Zhao has not been included as a creditor in the final accounts, that is the 2010 accounts, as she should have been.

[17] It is a pity that Mr Arnesen did not take the trouble to present all of this documentation to the Authority. That is probably symptomatic of the dangers of lay persons becoming involved in litigation beyond their comprehension. However, having considered the information now before me, the challenge should succeed. It would not be fair or reasonable in the circumstances, nor in the interests of justice, for Mr and Mrs Arnesen to be required to comply with an order they could not possibly achieve, nor would it be reasonable for them to be required to pay costs on such an order. The challenge is allowed and the determination of the Authority as to costs against Mr and Mrs Arnesen dated 19 November 2010 is set aside. There will be no further orders.

M E Perkins
Judge

Oral judgment delivered at 2.54pm on Monday 23 May 2011