IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2014] NZEmpC 83
CRC 34/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MARK EDWARD WILSON Plaintiff
AND	BRUCE WILSON PAINTING & DECORATING LIMITED First Defendant
AND	BRUCE WILSON trading as WILSON PAINTING & DECORATING Second Defendant

Hearing:	5 May 2014 (heard at Nelson)
Appearances:	A Sharma, counsel for the plaintiff T Stallard, counsel for the defendants
Judgment:	23 May 2014

JUDGMENT OF JUDGE B A CORKILL

Background

[1] This proceeding is a challenge by hearing de novo to a determination of the Employment Relations Authority (the Authority) where the plaintiff, a painter and decorator, was found to have been employed by the first defendant company.[1] The Authority went on to conclude that the plaintiff had been unjustifiably dismissed from his employment in an alleged redundancy situation; remedies were awarded and a costs order was made.

[1] *Wilson v Bruce Wilson Painting & Decorating Ltd* [2013] NZERA Christchurch 104 [Authority determination].

[2] Following the Authority's determinations, the plaintiff issued a distress warrant against the first defendant. The bailiff who attempted distraint reported that the company had no assets for seizure, that the business had been wound up and that the second defendant now ran a new painting and decorating business. As a result, the plaintiff, Mr Mark Wilson (Mr M Wilson), issued a de novo challenge now asserting that the employer was the second defendant, Mr Bruce Wilson trading as Wilson Painting & Decorating (Mr B Wilson). The plaintiff and the second defendant are brothers.

[3] Prior to the substantive hearing, there were issues as to whether the correct defendant(s) had been cited. The plaintiff initially sought judgment against the second defendant only; ultimately the plaintiff filed and served a second amended statement of claim which cited the first defendant company, Bruce Wilson Painting & Decorating Limited, and the second defendant, Bruce Wilson t/a Wilson Painting & Decorating. Although the primary issue is the identification of the correct employer, the plaintiff elected to proceed by way of a de novo challenge which means that all issues are at large.

[4] Standard pre-hearing directions were made. The plaintiff was directed to present his case first. There was also a direction that a common bundle be filed after consultation between the parties; this duly occurred. The bundle contained all documents relevant to the identification of the employer and as to the circumstances of the alleged unjustified dismissal. Also included were the briefs of evidence which had been submitted to and considered by the Authority. Intended briefs of evidence from all parties were also directed to be filed and served; this duly occurred.

[5] At the hearing, Mr M Wilson gave evidence by reading his prepared brief of evidence as well as his brief in reply which responded to the brief of evidence which had been filed and served by Mr B Wilson. After Mr M Wilson had given evidence and closed his case, counsel for the defendants' stated that the defendants elected not to call any evidence.

[6] The challenge falls for determination, therefore, on the basis of the oral evidence given by the plaintiff and the documents in the common bundle as well as two further exhibits which were introduced at the hearing. Although Mr M Wilson

referred to a brief of evidence of Mr B Wilson that had been filed and served, because the defendants elected to give no evidence that brief was not read and so did not become evidence.

[7] The result is that Mr B Wilson's brief of evidence as submitted to the Authority is before the Court, as are the findings of the Authority as to his credibility in its determination. What is the status of each? The Court may consider Mr B Wilson's brief since it is evidence which the parties agreed to submit to the Court in the common bundle. But the weight is to be attributed to it is a different issue. Mr B Wilson made many assertions which Mr M Wilson did not accept. Mr M Wilson did give evidence but only some of the contested issues were put to him in cross-examination (principally as to the identity of the correct employer).

[8] In a proceeding such as the present, a party must cross-examine a witness on significant matters that are relevant, in issue and that contradict the evidence of that witness, if he or she could reasonably be expected to be in a position to give admissible evidence on those matters.[2] The Court is not bound by the provisions of the Evidence Act, but may apply its provisions by analogy.[3] Section 92 codifies the common law requirement that a party must put its case.[4] The policy for doing so is uncontroversial especially where there are credibility issues. As Harrison J in *Tootell v Police* said: [5]

> This is a fundamental rule of fairness. It also serves the purpose of enabling the trial Judge to make a comparative evaluation of the evidence of both complainant and defendant when taxed with the others story.

[9] Consequently, where it is apparent from Mr B Wilson's brief as submitted to the Authority that his account differs from Mr M Wilson's account on an issue that requires a credibility assessment and that issue was not put to Mr M Wilson, little weight can be attached to the evidence contained in Mr B Wilson's brief of evidence.

[10] As to findings made by the Authority in respect of Mr B Wilson's evidence, s 183(1) of the Employment Relations Act 2000 (the Act) makes it clear that the

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[2] Evidence Act 2006, s 92.
[3] See *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 (EmpC).
[4] See *Browne v Dunn* (1983) 6 R 67 (HL); and DL Mathieson (ed) *Cross on Evidence* (8th ed, LexisNexis, Wellington, 2005) at [9.58].
[5] *Tootell v Police HC Rotorua* CRI-2005-470-37, 16 November 2005 at [9].

Court must make its own decision as to a challenge to a determination of the Authority under s 179 and any relevant issues; this means the Court must reach its own conclusions as to the credibility of witnesses; in circumstances such as the present it cannot defer to findings made by the Authority in respect of one witness only.

[11] In short, where a party elects not to give evidence in a case where there are credibility issues – as here that party runs a risk of adverse findings being made against that party if criticisms of that party are unanswered.

The issues

[12] The issues for determination are:

(a) Who was the employer? In the Authority, the plaintiff accepted that the employer was Bruce Wilson Painting & Decorating Limited and the Authority determined that this was correct.[6] In this Court, however, the plaintiff contended that the employer was Mr B Wilson himself. For the defendants it was submitted that the Authority reached the correct conclusion.

(b) Was there an unjustified dismissal, substantively and/or procedurally? The plaintiff submitted that the dismissal was unfair on both grounds. This was the conclusion which the Authority reached.[7] For the defendants it was acknowledged that the dismissal was procedurally unfair. However, the statement of defence put in issue the question of whether there was substantive unfairness, although this was not seriously contested by the defendants at the hearing. Nonetheless it will be necessary to resolve this issue on the basis of the evidence submitted to the Court.

(c) If the Court is satisfied that there was indeed an unjustified dismissal it will be necessary to determine appropriate remedies. The Authority

[6] Authority determination, above n 1, at [1]-[6].
[7] At [22]-[30].

awarded the plaintiff lost remuneration in the sum of $14,050.25 plus interest,[8] but the plaintiff seeks $31,275.79 plus interest; the Authority awarded compensation in the sum of $8,000 but the plaintiff seeks $20,000.[9] The Authority declined to make a penalty order; but the plaintiff seeks a penalty of $5,000. A costs order was made by consent that the first defendant pay the plaintiff $3,500; now the plaintiff seeks an order that this sum be paid by the second defendant. By its statement of defence the defendants deny liability for all such sums.

Applicable legal principles

[13] The principles which apply when considering the identity of a correct employer were conveniently summarised by the Court in *Colosimo v Parker*:[10]

(a) The onus of proving the identity of the employer rests on the employee (where the employee is putting that fact in issue).[11]

(b) The standard of proof is on the balance of probabilities.[12]

(c) The question of who the employer was must be determined at the outset of the employment.[13]

(d) It is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties; the question to be asked is who would an independent but knowledgeable observer have said was the employer.[14]

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[8] At [38]-[39]. Interest was awarded from 28 November 2012 (the date the statement of problem was lodged with the Authority) until the date of payment at the rate of 5 per cent.
[9] Although in the second amended statement of claim he sought $18,000.
[10] *Colosimo v Parker* (2007) 8 NZELC 98,622 (EmpC).
[11] At [28]. If a defendant is asserting that the employer was some other party then that party may well carry the onus, see *Heritage Expeditions Limited v Fraser* [2011] NZEmpC 157 at [49].
[12] At [28] citing *Service Workers Union of Aotearoa v Chan* [1991] 3 ERNZ 15 (EmpC) at 21.
[13] At [29] citing *Mehta v Elliot* [2003] 1 ERNZ 451 (EmpC) at [22]-[23].
[14] At [29] citing *Mehta*, above n 13, at [22]-[23].

(e) Failure to notify or make an employee aware of the identity of the employer is not conclusive.[15]

[14] In *Hutton v Provencocadmus* the Court stated:[16]

> [78] Section 5 of the Employment Relations Act 2000 (the Act) defines an "employer" as "a person employing any employee or employees". Section 6(1)(a) defines an "employee" as "any person of any age employed by an employer to do any work for hire or reward under a contract of service". In determining whether a person is employed by another person under a contract of service, the Court is required to determine "the real nature of the relationship between them": 6(2). The Court must consider "all relevant matters, including any matters that indicate the intention of the persons "and is not to treat as a determining matter" any statement by the parties describing the "nature of their relationship" in making this assessment: 6(3).

[15] That Court also observed that in *McDonald v Ontrack Infrastructure Ltd*, the full Court had confirmed that s 6 is not limited to determining issues of status (contractor or employee) but may be referred to in circumstances where the identity of an employer is in issue. [17]

[16] Also of assistance is the dicta of the Supreme Court in *Bryson v Three Foot Six Ltd.* It held that "all relevant matters" includes the written and oral terms of the contract between the parties as well as any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice.[18]

Chronology

[17] Before applying the above principles, it is necessary to describe the chronology.

[18] In August 2003 Mr M Wilson commenced working as a painter and decorator for Mr B Wilson in his personal capacity. Mr B Wilson was then trading as Wilson Painting & Decorating.

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[15] At [31] citing *NZ Insurance etc IUOW v Parsons t/a The Insurance Centre* [1988] NZILR 547 (LC) at 549.
[16] *Hutton v Provencocadmus Ltd* (in rec) [2012] NZEmpC 207, [2012] ERNZ 566.
[17] *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132, [2010] ERNZ 223
[18] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [32].

[19] From about 2003 Mr M Wilson had the use of a van on which appeared the words "Wilson Painting & Decorating"; this was still the position in 2011 when Mr M Wilson was dismissed.

[20] Mr M Wilson was provided with a sign which was to be placed in a window of a house that he was painting so it could be observed by passersby. He was provided with this sign in about 2005 or 2006, and continued to use it until he was dismissed. It bore the words "Wilson Painting and Decorating".

[21] In 29 April 2005 the company Bruce Wilson Painting & Decorating Limited (BWPDL) was incorporated. Mr B Wilson was its sole director. Thereafter this name was utilised by the first defendant company for IRD purposes including payment of wages. Although there had been no attempt to agree with Mr M Wilson that his employer would now be the first defendant company, IRD records show that the company was in fact paying his wages as from 1 July 2005.

[22] On 9 December 2006, an employment agreement between Wilson Painting & Decorating Limited and Mr M Wilson was signed. The version of the document presented to the Court was unsigned by Mr M Wilson, but he accepted that he had signed it. The Court accepts that Mr B Wilson approached him when he was working and said something like "we need to have a contract" pointing out the hourly rate and commenting that signing the agreement would not "change anything".

[23] Mr B Wilson did not explain that he was no longer the employer in his personal capacity and that a recently incorporated company was.

[24] Mr M Wilson signed the contract then and there. In evidence he said that he was not given a copy of it and there is no evidence to the contrary: the Court accepts that he was not provided with a copy.

[25] Furthermore, it is apparent that Mr M Wilson finds reading difficult. That is not a criticism of him but it is a reality which the Court has to consider. I find that it is inherently unlikely that Mr M Wilson realised when signing the document that his employer was now a company, especially as Mr B Wilson gave him no advice to that effect. The working relationship did not otherwise change.

[26] From April 2007, Mr M Wilson was presented regularly with payslips which had the name Bruce Wilson Painting & Decorating Limited printed on it. An accountant produced these payslips for the company. Their format contrasted with the handwritten "wage receipts" previously provided on behalf of Mr B Wilson which had clearly indicated that he personally was the employer.

[27] Although it is clear that BWPDL paid wages from 1 April 2005 to Mr M Wilson the direct credit on Mr M Wilson's bank statements carried the narration "Bruce Wilson wages"; there was no reference to a company.

[28] On 25 February 2009, a variation of the employment agreement was entered into between Wilson Painting & Decorating Limited and Mr M Wilson; it was signed by Mr B Wilson for the company as employer and Mr M Wilson as employee. It recorded an increase in Mr M Wilson's hourly rate. A copy of the document was not provided to Mr M Wilson who did not see it until after the statement of reply was filed in the course of the proceedings in the Authority. The Court finds again that due to Mr M Wilson's reading issues he did not learn from this source that the employer was a company which was purportedly known as Wilson Painting & Decorating Limited. Understandably the matter of interest to him was the increase in the hourly rate. As before, the working relationship did not otherwise change in its essentials.

[29] An extract was produced from the 2007/08 Yellow Pages book for the area in which the business operated. It showed an advertisement under a logo which bore the name "Wilson Painting & Decorating"; later in the advertisement the name "Bruce Wilson" appeared.

[30] In approximately 2009, employees were provided with a t-shirt and polar fleece jackets. On these garments were the words "Wilson Painting & Decorating"; immediately below were the words "Bruce Wilson".

[31] Up until a few weeks before Mr M Wilson's dismissal, timesheets were supplied for employees to complete. They did not show the identity of the employer. However, in approximately mid 2011 a different form of timesheet was supplied under the name "Bruce Wilson Painting & Decorating Limited". There was no

evidence of an explanation being given to employees as to the reasons for the change or whether this change was supposed to be significant.

[32] On a number of occasions Mr B Wilson told staff including Mr M Wilson that he was going to close his business because he was "over it". Mr M Wilson and his fellow employees regarded this as something of a standing joke because such remarks never came to anything.

[33] On 22 August 2011 while Mr M Wilson was working on a sub-division with another painter at Motueka, Mr B Wilson attended the site bringing a vacuum cleaner to help clean up. He repeated an earlier comment that he had had enough, and that he was going to "close up shop". He said he was going to give all staff four weeks' notice to find another job, or words to that effect. As before, this brief remark was not taken seriously by Mr M Wilson or his fellow employee.

[34] On 24 August 2011 Mr M Wilson was working on another site. Mr B Wilson arrived and engaged in friendly conversation. No reference was made to the business operation or whether there were any particular issues with it. This conversation lasted for about 20 minutes. Without warning Mr B Wilson then departed. As he left he gave Mr M Wilson an envelope. He did not tell him what was in it. A short time later Mr M Wilson opened the envelope and found to his significant surprise that he had been given a letter terminating his employment. The letterhead referred to "Wilson Painting & Decorating Limited" and was signed by its managing director, Mr B Wilson. It relevantly stated:

> Further to our conversation on [22 August 2011] I confirm that your employment with us is terminated with effect from Tuesday 30th August 2011 being your final working day.
>
> The reason for terminating your employment is that through hard economic times the house companies are not worth pursuing any more, with this being your main working environment I will no longer have the work available for you.
>
> You will need to return any property belonging to Bruce Wilson Painting & Decorating Ltd including toolbox, crescent, pliers, nail-punch, screwdrivers, 5 mtr tape, stopping knife 75mm, hacking knife, chisel knife, hammer, dusting brush, 1 mtr folding rule, trimming knife or NT cutter, paint, trays, rollers, lights, heaters, steps etc to myself on your final day.
>
> …

[35] Mr M Wilson was shocked after reading the letter, since he was being forced to find another job suddenly. However, he believed that all staff would be receiving the same letter and resigned himself to the fact that his job was gone because Mr B Wilson was ceasing operations. He then fell ill and did not see Mr B Wilson for the remaining days of his employment. He received no further communication from Mr B Wilson about the letter prior to the final day of his employment, 30 August 2011.

[36] After the termination he discovered that the business was not in fact closing down, and that he was the only employee of nine who had been made redundant. He became aware that another painter, Mr Leigh Poindgestre, who had not previously worked for the employer, now appeared to be doing so. Two weeks after his dismissal he saw Mr Poindgestre driving the van which he had formerly driven. Another contractor also commenced working regularly for the employer. Other employees, Mr Ray Barnett and Mr Brian Daly, continued to work for the business. Two others, Mr Luke Mitchell and Mr Mitchell Waine did leave but Mr M Wilson understood they left of their own accord and not for reasons of redundancy.

[37] Mr M Wilson's evidence was not challenged by cross-examination or contradicted by any contrary evidence. I accept his account as being accurate. In short, Mr M Wilson was the only employee made redundant; some others left apparently for their own reasons; and additional employees were engaged.

[38] In the letter of termination reference was made to Mr M Wilson's employment being terminated because Mr B Wilson said it was no longer worth pursuing work from building companies who erected homes, which had been the type of work in which Mr M Wilson was engaged. Whilst there was some evidence of a downturn in that regard in early 2011, there was also evidence that in the weeks following the dismissal vans operated by or on behalf of Mr B Wilson as part of the painting business were parked at the work sites of various building companies and that a painting business was still being operated by the employer. It was apparent to Mr M Wilson that Mr B Wilson was continuing to carry out building companies' work. This evidence was not challenged by cross-examination or contradicted by any contrary evidence. I find that that this type of work was indeed ongoing.

[39] On 16 July 2012, Enterprise Painting & Decorating Limited (EPDL) was incorporated with Mr B Wilson being its sole director. The evidence establishes that the painting and decorating business formerly undertaken by BWPDL was transferred to EPDL which became the trading entity for the painting and decorating business, which Mr B Wilson continued to direct.

Submissions

[40] The plaintiff submitted that on an objective assessment of the evidence there were the following indicators that the employment agreement was with Mr B Wilson personally:

(a) The plaintiff was paid personally by Mr B Wilson.

(b) There was no mutual agreement that the employer would change.

(c) The employment agreement did not correctly specify a company name.

(d) The employment agreement was signed by Mr B Wilson in his personal capacity rather than on behalf of the company.

(e) Signage such as was endorsed on work clothing pointed to Mr B Wilson being the employer.

(f) There were incorrect references to the company in relevant correspondence after the dismissal, and in the Authority by the defendants themselves.

[41] With regard to the assertion of unjustified dismissal it was submitted there was obvious procedural unfairness and that the decision to dismiss was not genuine. Submissions were also made with regard to the applicable remedies.

[42] The defendants submitted that Mr M Wilson had clearly indicated acceptance of the fact that the employer was the company in the Authority's proceedings. The plaintiff's decision to challenge the Authority's determination only came after it was clear there may have been a difficulty with enforcement; enforcement was a separate issue which was not relevant to the issue as to the identity of the employer. It was

submitted the evidence before the Court established that there was no misleading of Mr M Wilson and this was particularly reinforced by the timesheets. It was confirmed that the first defendant company still exists and has not been dissolved or struck off the Companies' Register. No detailed submissions were given on the issue of whether the dismissal was unjustified.

Identity of Mr M Wilson's employer

[43] There is no dispute that Mr M Wilson's employer from 2003 to 2006 was his brother, Mr B Wilson, in his personal capacity.

[44] Although IRD records suggest that from 1 April 2005 wages were paid to Mr M Wilson by BWPDL, there was no attempt to regularise the contractual position with Mr M Wilson until December 2006.

[45] Mr B Wilson continued to be the employer until that point. Then an employment agreement was entered into between a company named as Wilson Painting & Decorating Ltd (Mr B Wilson clearly signed it on behalf of that purported entity) and Mr M Wilson; however:

(a) Prior to signing, he was not given a copy of the intended employment agreement which would have given him a proper opportunity to consider the effect of the document, including the apparent identity of the employer. [19]

(b) At the time of signing Mr M Wilson was not expressly advised of a change of employer;

(c) He did not understand that this change had occurred at the time of signing.

[46] However, a failure to notify or make an employee aware of the identity of an employer is not conclusive.[20]

[19] Contrary to s 63A(2)(a) of the Act.
[20] See [13](e) above.

[47] BWPDL continued to pay Mr M Wilson's wages. As from April 2007 this was evident from payslips that were provided to Mr M Wilson. This fact was not evident from his own bank statements which referred to "Bruce Wilson". However it is unclear who was responsible for preparing the authority which caused wages to be credited to his bank account, so little weight can be attributed to this factor.

[48] There were other confusing indicators as to the identity of the employer such as the unchanged sign on the van, the unchanged sign placed in windows of homes which were being painted, and the language endorsed on the work clothing which was provided. Similarly, the Yellow Pages entry did not refer correctly to the company, although there was no evidence that Mr M Wilson knew of this during his employment with BWPDL.

[49] Summaries of earnings were forwarded to Mr M Wilson by the IRD for each of the years from 2007 to 2011. They correctly referred to the company as BWPDL; as did the timesheets which were provided as from mid 2011.

[50] At the hearing it was put to Mr M Wilson that he had accepted in the Authority proceedings his employer was BWPDL. He accepted that he had conceded this but it is clear that he did so in reliance of representations made to the Authority by and on behalf of Mr B Wilson. Mr M Wilson accepted what he was told at face value. That he effectively conceded this point in the Authority is of little assistance in resolving the factual issue as to what the position was during the period of employment.

[51] To this point, by applying the principles identified at [11] above the position can be summarised as follows:

(a) The signing of the employment agreement in 2006 meant the employer was from that time a company, as Mr M Wilson accepted when giving his evidence.

(b) It was correctly described in other documents, particularly those issued by the IRD such as summaries of earnings and on the payslips that were provided from time to time.

(c) The company was not correctly described in the agreement entered into in 2006, or in its variation in 2009; nor was it was correctly described on the letterhead of the letter of termination (although it was within its text) and in correspondence sent by the employer's lawyer after the termination.

(d) Otherwise, the company in its clothing apparel, signage and Yellow Pages publication did not represent itself as being a company; rather the focus was on Mr B Wilson himself.

[52] However, it is clear that the painting and decorating business was operated by BWPDL. I find that the signing of the employment agreement and its variation constituted the company as Mr M Wilson's employer. However, it is also necessary to consider the issues arising from the fact that the company was not correctly described in the employment agreement and its variation.

Section 25, Companies Act 1993

[53] The Court raised with counsel a question as to whether s 25 of the Companies Act 1993 had application in this case. That section prescribes the manner and form by which a company must publish its name. It states as follows:

> **25 Use of company name**
>
> (1) A company must ensure that its name is clearly stated in–
> (a) every written communication sent by, or on behalf of, the company;
> (b) every document issued or signed by, or on behalf of, the company that evidences or creates a legal obligation of the company.
>
> (2) Where–
> (a) a document that evidences or creates a legal obligation of a company that is issued or signed by or on behalf of the company; and
> (b) the name of the company is incorrectly stated in the document,–
>
> every person who issued or signed the document is liable to the same extent as the company if the company fails to discharge the obligation unless–
> (c) the person who issued or signed the document proves that the person in whose favour the obligation was incurred was aware at the time the document was issued or signed that the obligation was incurred by the company; or
> (d) the court is satisfied that it would not be just and equitable for the person who issued or signed the document to be so liable.

> (3) For the purposes of subsections (1) and (2) of this section and of section 180 of this Act (which relates to the manner in which a company may enter into contracts and other obligations), a company may use a generally recognised abbreviation of a word or words in its name if it is not misleading to do so.
>
> …

[54] The Court of Appeal considered s 25(2) in *Clarence Holdings Ltd v Hall*.[21] In that decision, McGrath J stated:

> [39] The general policy of s 25 of the 1993 Act … is first, every company should state its name clearly and accurately in its written communications and in all documents which evidence or create legal obligations for the company. Imposition by statute of civil liability on those persons who issue or sign documents of obligation on behalf of the company which incorrectly state its name is the principal means of giving effect to the policy. Where the company fails to discharge such an obligation those who issued or signed the document are made personally liable, subject to the section, to the same extent as the company, if the company fails to discharge the obligation. They are made sureties of the company by the Act in relation to its failure to discharge the obligations concerned.

[55] When considering the application of this section to a situation where the name of a company is incorrectly stated, the following issues will accordingly arise:

(a) Has a generally recognised abbreviation of a word or words been used as the company's name? If so, was it misleading to have done so?

(b) Has the person who issued or signed the document proved that the party in whose favour the obligation was incurred was aware at the time the document was issued or signed that the obligation was incurred by the company?

(c) Alternatively, is the Court satisfied that it would not be just and equitable for the person who issued or signed the document to be so liable?

[56] Counsel for the defendants submitted "Wilson Painting & Decorating Limited" could be regarded as a "generally recognised abbreviation of a word or words" for the purposes of the section. However the word "Bruce" was not

[21] *Clarence Holdings Ltd v Hall* (2001) 9 NZCLC 262, 566 (CA).

abbreviated to the letter "B"; the name was omitted altogether. Nor was there any evidence that the words used were a "generally accepted abbreviation". The evidence established that the abbreviation often adopted omitted the word "Ltd", which was misleading. Accordingly s 25(3) does not apply.

[57] Turning to the next requirement, Mr B Wilson – who issued and signed the employment agreement and its variation in favour of Mr M Wilson – has not proved that Mr M Wilson knew at the time of signing that the obligation was incurred by the company. Indeed, I have found that he was not told about and was unaware of the change.

[58] However, for the following reasons I am persuaded it would not be just and equitable to impose personal liability for obligations arising under the employment agreement on Mr B Wilson personally:

(a) Although there was a failure to explain the position accurately to Mr M Wilson and there were the various other inconsistent representations as described earlier, I consider these were evidence of sloppy business practices rather than evidence of a deliberate intent to mislead.

(b) By the time of the dismissal sufficient indicators had been given as to the correct identity of the employer. Mr M Wilson had received four IRD summaries of earnings indicating the correct identification of the employer from 2007; regular payslips correctly referred to BWPDL; and a practice was adopted shortly before the dismissal of utilising a timesheet which indicated the correct identity of the employer.

[59] The provisions of s 25 of the Companies Act 1993 do not justify a finding of personal liability against Mr B Wilson.

Unjustified dismissal

[60] Section 103A requires consideration of whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

Section 103A(3) requires the Court when applying that test to consider in a situation such as the present whether the employer raised the concerns that it had with the employee before dismissing him; and whether the employer gave the employee a reasonable opportunity to respond to its concerns before dismissing the employee.

[61] The fundamental elements of consultation are reinforced by s 4(1)(b) of the Act: the employer must not do anything to "mislead or deceive" employees or act other than in "good faith" in a redundancy situation.[22] The essential elements of consultation require that there must be more than mere notification which proceeds change. Sufficiently precise information must be provided, and time allowed, to enable an employee to consider and state a view, which must then be treated genuinely and with an open mind.

[62] In the present circumstances there was no consultation whatsoever. The employee was simply provided with a letter of termination. There was a brief statement two days earlier where Mr B Wilson said he was going to "close up shop". That explanation was quite inadequate. Having said four weeks' notice would be given only five workings days notice was provided. That too was quite inadequate. It is obvious – as was effectively conceded for the first defendant – that there was procedural unfairness.

[63] Turning to justification, the issue is whether the employer acted genuinely and/or without any ulterior motive.[23] It is not sufficient for an employer simply to state that there was a genuine business decision.[24]

[64] In the present case, the following factors are relevant:

(a) Mr M Wilson was the only employee from a total of nine employees who was made redundant. This was in spite of the fact that Mr B Wilson said that all employees would be given four weeks' notice.

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[22] See also *Simpson's Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at [34].
[23] At [67].
[24] *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39, (2013) 10 NZELR 391 at [54].

(b) In the letter of termination it was stated that this was because "house companies are not worth pursuing any more". But there is reliable and uncontradicted evidence that the employer continued to undertake "house company work". Mr M Wilson observed the van which he formerly operated at a number of house company work sites and understood this work was continuing. He was not cross-examined to the contrary. The company has not persuaded the Court that work was no longer available from this source and that this was a legitimate reason for terminating Mr M Wilson's employment.

(c) Financial statements before the Court relating to the company show that for the year ending 31 March 2012 there was an increase of gross profit over the previous 12 months from $466,232 to $481,201; and an increase in wages from $299,123 to $357,438. Complimenting this evidence is the fact that a worker was retained by the company whether as a contractor or employee using the van which Mr M Wilson had previously used, within two weeks of his dismissal; in short Mr M Wilson was promptly replaced.

(d) The evidence placed before the Court which was not disputed by any cogent evidence from the company was that it was expanding its operation, not closing it down.

(e) The Court does not overlook the fact that Mr B Wilson's salary decreased in the 12 months to March 2012 as did his drawings; that does not change the fact that there was a significant increase in wages of employees suggesting an expansion of its operation.

[65] In all these circumstances, I am not satisfied that the reason given in the termination letter was genuine. It is unclear whether there was some other reason that motivated the dismissal. There were no known performance issues at that time, although subsequently an issue was raised as to whether Mr M Wilson had stolen fuel from the business. There was no evidence whatsoever to substantiate such an assertion.

[66] Mr M Wilson also told the Court that after terminating his employment, he learned that Mr B Wilson had told a number of potential employers not to employ his brother. Mr B Wilson told the Authority that he did not contact any other firm in relation to Mr M Wilson's employment; however the employer's lawyer wrote to Mr M Wilson on 7 September 2011 alleging that Mr M Wilson had contacted various painting companies and painters and that this was undermining the employer's existing contractual arrangements. Plainly Mr B Wilson had been in communication with other entities and had discussed Mr M Wilson's communications with them contrary to his assertion to the Authority. Mr B Wilson was not cross-examined on this point. I consider Mr M Wilson's evidence to be reliable, and I accept it.

[67] In short Mr B Wilson, for unexplained reasons, determined he did not want his brother continuing to work for BWPDL and having done so deliberately, made it difficult for him to obtain alternative work.

[68] This course of conduct establishes that the dismissal was not given for genuine business reasons and was substantively unfair.

[69] The dismissal was unjustified on both procedural and substantive grounds. It must be concluded that no fair and reasonable employer could have terminated Mr M Wilson's employment as occurred here.

Remedies

[70] The first remedy sought is for lost wages up until March 2013. The Court has a discretion to order that an employer pay a sum greater than three months' ordinary time remuneration.[25] The plaintiff claims for 19 months' lost wages, that is until the end March 2013.

[71] The plaintiff accepts that he has a duty to mitigate his losses. It is clear that Mr M Wilson made several applications for employment with appropriate potential employers. Fortunately he was able to obtain work with another painting and decorating company as from 2 October 2011, although his earnings thereafter were

[25] Employment Relations Act 2000, s 128(3).

less than that which he had been able to obtain from BWPDL; and he had to work as a contractor.

[72] Detailed evidence was provided as to the quantum of losses when comparing wages actually earned with income received from BWPDL. I accept the accuracy of that evidence (which was not challenged by the first defendant).

[73] Having regard to the inappropriate conduct of Mr B Wilson on behalf of the first defendant after the termination, I am satisfied that it is appropriate to award more than three months' lost remuneration. I order the first defendant to pay lost remuneration for a period of seven months to 31 March 2012. Recognising the principle of moderation it would not be fair and reasonable to award lost remuneration beyond that point. [26] The sum of $14,051.25 is accordingly payable, together with interest at five per cent from 28 November 2012 to the date of payment. There is no evidence of contributory conduct on the part of Mr M Wilson which would justify modifying the amount so ordered.

[74] Turning to the s 123(1)(c)(i) claim, the legal position is well settled: compensation must adequately rectify the hurt and humiliation suffered.[27] I do not accept the submission made for the first defendant that the assessment of a claim for such compensation cannot consider humiliation, loss of dignity and injury to feelings suffered as a result of the dismissal but at a later point in time. If the causes of the humiliation, loss of dignity and injury to feelings are casually connected to the established grievance they may be considered.[28]

[75] Here the following factors are relevant:

(a) Mr M Wilson was given less than one weeks' notice following some eight years employment with no reliable evidence of unsatisfactory performance.

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[26] See *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [79].
[27] *Ballylaw Holdings Ltd v Henderson* [2003] 1 ERNZ 313 (EmpC), at [78].
[28] See *Nutter*, above n 26, at [93] where the Court of Appeal took into account what it considered was a "consequent loss".

(b) Mr M Wilson understandably felt humiliated and distressed when he discovered the dismissal was not in fact genuine as he had first assumed was the case.

(c) As already mentioned there was uncontradicted evidence before the Court that Mr B Wilson spoke negatively about the plaintiff to third parties – principally those from whom he was trying to obtain work following the unjustified dismissal. That added significantly to Mr M Wilson's problem and created additional unnecessary stress.

(d) Eventually Mr M Wilson had to work as a contractor not an employee. An adverse consequence of this as far as he was concerned is the fact that he no longer has rights under the Holidays Act 2003, which has created stress given his financial responsibilities.

(e) The dismissal was entirely unexpected for Mr M Wilson, who had no appreciation that his employment would be terminated. This occurred at a relatively late stage in his working life which the Court accepts was stressful.

(f) The litigation has been protracted and at times became needlessly disputatious. That has aggravated Mr M Wilson's stress.[29]

[76] In all these circumstances and having regard to the principles enunciated by the Court of Appeal in *Nutter*,[30] the Court determines that an appropriate award under s 123(1)(c)(i) is $12,000.

[77] A penalty is also sought against the employer. Section 135(5) provides that an action for recovery of a penalty under the Act must be commenced within 12 months after the earlier date of when the cause of action first became known to the person bringing the action, or when it could reasonably have become known to the person bringing the action.

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[29] Such a factor was considered relevant by the Court in *Bailey v Minister of Education* [1992] 3 ERNZ 1 (EmpC) at 11. This finding was undisturbed on appeal: *Minister of Education v Bailey* [1993] 2 ERNZ 321 (CA).

[30] Nutter, above n 26, at [84]-[85] and [93].

[78] I have found that Mr M Wilson was able to obtain work from 2 October 2011. It is reasonable to infer that he either was aware or should have been aware of his personal grievance rights by that date. The statement of problem, which first claimed a penalty was filed on 28 November 2012. Accordingly, the penalty action is out of time and I consider it no further.

[79] A challenge was also raised in respect of the costs order made by the Authority by consent, the first defendant being ordered to pay the plaintiff the sum of $3,500. The variation sought in this proceeding was that the Court should order the second defendant to pay those costs to the plaintiff. Given the conclusion reached as to the identity of the employer such an order is not appropriate.

Conclusion

[80] The plaintiff's employer at the time of dismissal was the first defendant.

[81] The plaintiff's dismissal was unjustified on both procedural and substantive grounds. No fair and reasonable employer could have terminated the plaintiff's employment in the circumstances which occurred in this case.

[82] The first defendant is ordered to pay lost remuneration for a sum of $14,051.25, together with interest of 5 per cent from 28 November 2012 to the date of payment.

[83] The first defendant is ordered to pay to the plaintiff the sum of $12,000 for humiliation, loss of dignity and injury to feelings.

[84] The plaintiff's challenge accordingly succeeds partially as to one remedy.

[85] Costs are reserved; counsel should attempt to resolve this issue informally. In the absence of an agreement, the plaintiff is to file submissions within seven days and the defendants are to file submissions in reply within seven days thereafter.

Addendum

[86] In evidence Mr M Wilson agreed that if BWPDL had paid the sums ordered by the Authority he would not have instituted the present challenge.

[87] It was instituted because of difficulties in enforcement. As recorded earlier a nulla bona return was received from the bailiff who was unable to locate any assets of the company over which distraint could be exercised. However, it emerged in evidence that as at March 2012 Mr B Wilson owed the company $67,000 by way of a current account debt. After the incorporation of EDPL the assets of BWPDL were transferred to it. The Court has no evidence as to whether there was an adequate consideration for doing so and/or its quantum and/or whether EPDL is thereby a creditor of BWPDL. These are matters which may need to be explored further, if need be, in the context of a liquidation of BWPDL.

B A Corkill
Judge

Judgment signed at 4.00 pm on 23 May 2014