IN THE EMPLOYMENT COURT
AUCKLAND

AC 68/06
ARC 73/05

IN THE MATTER OF	a point of law challenge to a determination of the Employment Relations Authority
BETWEEN	MICHAEL COLOSIMO First Plaintiff
	AND TAFFY'S BAR LIMITED T/A THE KINGSLEY JONES Second Plaintiff
AND	GORDON PARKER Defendant

Hearing: 16 October 2006
(Heard at Tauranga)

Appearances: L Campbell, counsel for first plaintiff
No appearance for second plaintiff
H Russ, advocate for defendant

Judgment: 6 December 2006

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] In a decision of the Employment Relations Authority dated 11 August 2005, the first plaintiff Mr Michael Colosimo was held to be the true employer of the defendant Mr Gordon Parker. It is uncontested that regardless of the identity of the employer Mr Parker was unjustifiably dismissed from his position as a kitchen hand at a bar and restaurant, known as The Kingsley Jones in Tauranga. It is further uncontested that as a result of the unjustifiable dismissal the remedies awarded by the Authority are appropriate.

[2] In the determination of the Authority, Mr Colosimo was ordered to pay Mr Parker lost remuneration of $1,869.78, $306.25 unpaid wages and holiday pay interest and compensation of $6,000. Costs were reserved. While not specifically mentioned, it can be inferred that the Authority found no contributory conduct on Mr Parker's part.

[3] In an unusual twist to the decision, Mr Colosimo was found as employer to have failed to keep time and wage records in the required format and failed to supply them when requested. Pursuant to ss130(4) and 135(2)(a) of the Employment Relations Act 2000, Mr Colosimo was ordered to pay a penalty of $4,000 for such breaches. Of this sum $1,000 was to be paid to Mr Parker and the remaining $3,000 to the Authority. Such a penalty can only be awarded against an employer. Resolution of the sole issue in this case will therefore also be determinative of the person or entity required to pay the penalty.

[4] Following the award of the Authority, Mr Colosimo and the second plaintiff, Taffy's Bar Limited, filed a challenge with this Court. This was a challenge otherwise than by hearing de novo where the only issue was the finding that Mr Colosimo was the true employer. However, the relief sought in the statement of claim consists of declarations that:

a) The second plaintiff was the employer of the defendant from 28 April 2004 until about 24 November 2004;

b) The second plaintiff terminated the employment of the defendant;

c) The remedies ordered by the Authority should be paid to the defendant by the second plaintiff.

[5] The pleadings amount to a somewhat curious turn of events in view of the fact that the second plaintiff was also a challenger to the Authority's decision. However, by the time that the matter reached a hearing, I was informed that the second plaintiff, Taffy's Bar Limited, was no longer trading and had been struck from the register of companies. This raises issues as to whether assets could be traced and the orders enforced against it or possibly its shareholders and directors, should it be reinstated. There is further evidence that the company had earlier met claims of other employees in the same position as Mr Parker. The second plaintiff

was not represented at the hearing and did not appear by way of any representative, even though Mr Colosimo was a shareholder and director.

[6] Prior to the hearing before the Court, it appears that there was a consent order by the Authority that Mr Colosimo was to pay into Court the full amount of the award of the Authority, pending hearing of the challenge. No money has been paid into Court. No stay of the challenge has been sought by Mr Parker on the ground of Mr Colosimo's failure to comply with the consent order.

Evidence

[7] While the challenge relates to the narrow issue of whether it was Mr Colosimo personally or his company Taffy's Bar Limited, which was the employer, it is helpful to set out more fully the factual background to this matter. Mr Colosimo gave evidence with one witness in support, Mr Peter Ward. Mr Ward is a restaurant manager employed by one of Mr Colosimo's other companies. Mr Parker travelled from Australia to give evidence and was supported by his mother, Christine Wade. Mrs Wade is the joint proprietor of a tavern in Tauranga: Flannigan's Irish Pub. The circumstances surrounding Mr Parker's initial engagement, period of employment and final termination are largely not in dispute. Regardless of his true employer's identity, the way in which Mr Parker and his fellow employees were treated is nothing short of disgraceful. Quite frankly I am surprised that the Authority did not award higher sums to Mr Parker by way of compensation. Mr Colosimo's own involvement and attitude in the matter were arrogant, high-handed and cavalier. This, I think, is reflected by his attitude to production of documents and his blatant breach of the Authority's order that he pay the full amount of the award into Court pending the outcome of the challenge. Even though a company is regarded as a separate entity in law, its activities and integrity may be judged by the actions of its directors and shareholders.

[8] On 5 March 2004, Taffy's Bar Limited was incorporated. This company was formed for the purpose of acquiring the lease of premises at 55 The Strand, Tauranga and operating a tavern business there. It was to be called The Kingsley Jones after the name of the manager. Taffy's Bar Limited was one of the inter-linked enterprises, which Mr Colosimo established. The evidence provided has all the hallmarks of Mr Colosimo, with the assistance of his business advisors, arranging his

business affairs to provide as limited exposure to himself personally as was possible. That was his entitlement. For instance Taffy's Bar Limited was owned by Garnfach Trust and One Red Dot Limited. The latter is another of Mr Colosimo's companies. Taffy's Bar Limited was capitalised by advances from Garnfarch and One Red Dot in exchange for shares.

[9] The premises leased had formally been used as a Chinese restaurant. They were substantially refurbished and upgraded for the tavern business. On 24 March 2004, an application was made for an on-licence. This was granted on 29 April 2004. A copy of the licence was displayed in a prominent position just inside the entrance to the tavern. It was in the name of the second plaintiff.

[10] There was little dispute between the evidence of Mr Colosimo and the defendant's mother, Christine Wade as to a conversation, which took place between them in the street just after Easter 2004. Mrs Wade was keen to get her son into employment and raised that prospect with Mr Colosimo. He told Mrs Wade to send her son to The Kingsley Jones. He may have referred to it as his new venture. He stated that Mr Parker should see Mr Ward. Mr Colosimo says that he referred Mrs Wade to "*Peter (Imbibe), Phil (Kingsley Jones) or John (Amphora Restaurant)*". The entities in parenthesis are other restaurants owned by Mr Colosimo. I find Mr Colosimo's assertions in this respect unlikely. They appear to be an attempt to distance himself from connections in the matter by displaying an ambivalent casual attitude as to exactly which of the business entities would provide Mr Parker with employment if he was suitable. That I believe was intended to persuade me that there are no circumstances under which his conversation with Mrs Wade could be interpreted as agreement that Mr Parker would indeed be employed at The Kingsley Jones. On the other hand, I believe Mrs Wade has embellished her evidence also for prejudicial purposes. She said in evidence that the impression she got from Mr Colosimo was that her son should simply turn up and the job was his. She also endeavoured to take her evidence beyond the mere fact of her meeting Mr Colosimo by including hearsay evidence about Mr Colosimo's business dealings in Tauranga and information, which could only clearly have been given to her by her son or other persons in Tauranga. I find that the contact was brief and that Mr Colosimo referred only to The Kingsley Jones as a potential place of employment for Mrs Wade's son.

[11] I can understand that in a situation where the prospect of the defendant being unable to recover damages now clearly owing to him by a company that has ceased trading, he would be anxious to see if some other entity or individual could be held responsible. It is also understandable that his mother would support him in that goal. Much time has been spent in these proceedings dealing with Mr Colosimo's position in relation to his companies. However, if the basis upon which Mr Parker claims to have secured a contract of employment in the tavern with Mr Colosimo personally, is the brief conversation between his mother and Mr Colosimo in the street, then he is sadly mistaken as to the legal effect of that conversation. The conversation clearly took place. However, the nature of the discussion simply could not create a binding employment contract. Mr Campbell, counsel for Mr Colosimo, made a cursory reference to the issue of offer, acceptance, consideration and intention in his submissions.

[12] Mr Parker did see Mr Ward. He was put on trial for a day at the tavern. His employment was then confirmed. There was some conflict on this in the evidence between Mrs Wade, Mr Parker and Mr Ward. Mrs Wade said, and again it can be only hearsay, that her son simply turned up and started working. Mr Ward said Mr Parker arrived, he spoke to him briefly, referred him to the head chef and he was then given employment. Mr Parker suggested in his evidence that he was employed before the tavern even opened, assisting with the setting up of the premises. He said that he then drifted toward the kitchen as a kitchen hand when it was up and running. The Authority Member found that there appeared to have been a day's trial before his employment was confirmed.

[13] I do not accept that Mr Parker's employment contract commenced at the time of the brief conversation between Mr Colosimo and Mrs Wade in the street. That all may be part of the background leading to the employment but in contractual terms it simply would not be a valid way of constituting binding legal relations.

[14] Mr Parker continued working in the tavern until November 2004. A dispute arose then, but unknown to the employees, between Mr Colosimo and his fellow director, on the one hand, and Mr Kingsley Jones on the other. The business had failed and had closed down. A new proprietorship took it up. In keeping with Mr Colosimo's business dealings it appears the new proprietors were other entities in which he had an interest. The Authority Member in her decision stated that the

outcome of her investigation was that the new proprietor was Calabria Enterprises Ltd, which traded as the Cornerstone. The directors of Calabria were Messrs Harvey and Colosimo. The sole shareholder was Mr Colosimo's company, One Red Dot Ltd.

[15] When this unfortunate turn of events occurred, Mr Colosimo and his fellow directors adopted a careless attitude to the fate of their employees effectively left stranded. At the instigation of the employees, attempts were then made to arrange a meeting to discuss termination, presumably re-employment with the new owner, and possibly redundancy compensation. Matters took a turn for the worse when the Police were called to evict the employees from the premises where such a meeting was to be held. As the Authority Member stated in her decision:

> *It is hard to think of a more disrespectful way of terminating the employment relationship.*

[16] In the circumstances that is probably a considerable understatement.

[17] While the way the employees were treated was very bad indeed, I must be careful not to allow prejudicial facts or condemnation of Mr Colosimo's behaviour to cloud the real issue arising in this case. It is clear from the contemporaneous documents that regardless of what I make of the conversation between Mr Colosimo and Mrs Wade, Taffy's Bar Limited owned and operated the tavern The Kingsley Jones. The liquor licence was in the name of the company, the licence was displayed prominently in the premises. Clearly the company paid the wages of all the employees including Mr Parker. PAYE deductions from wages were accounted for to the Inland Revenue Department by the company. It is equally clear, however, and I accept the defendant's evidence, that he was never told that his employer was the company. Nevertheless, I think it unfortunate that he did not make more of an enquiry into this. It appears that those employees who claimed against the company at the time of termination of employment, were paid outstanding wages. It may still be possible for him to recover. The company, while having ceased trading, is not in liquidation.

[18] Other documentation shows that pay slips nominated The Kingsley Jones as the employer, that holiday pay in December 2004 was given to Mr Parker by a

cheque drawn in the name of Taffy's Bar Limited. The final pay record prepared shows The Kingsley Jones as employer.

[19] Taxation documentation prepared and signed by Mr Parker at the outset of the employment is not available. It may not be of assistance anyway because the form of the documents engrossed and printed by the Inland Revenue Department do not necessarily specify the employer.

[20] Mr Parker asserted in evidence that following commencement of employment Mr Colosimo, on occasion, came to the restaurant to enquire how he was getting on. This he asserted was consistent with Mr Colosimo being his employer. That was not specifically put to Mr Colosimo although he did concede that on occasion he visited the tavern.

[21] Sometime after commencing employment Mr Parker was asked to sign a written individual employment contract. That document is dated 27 July 2004. It was signed by Mr Parker. No signature appears for the employer. The document has a title page, which I annex to this judgment. It shows a list of business entities (including The Kingsley Jones) under a heading "*Michael Colosimo Group of Companies*". At the end of an annexure to the agreement headed "*House Rules*" the following words are endorsed:

> *The establishment names mean's* [sic] *all the establishments that are owned or part owned by Michael Colosimo.*

[22] Some reliance was placed on this document by Mr Parker as establishing that Mr Colosimo personally employed him. The final words are inconvenient for Mr Colosimo's position. However, the heading page tends to suggest that an entity other than Mr Colosimo personally was the employer. That, in conjunction with the other contemporaneous documents relating to taxation and the like are significant.

Legal submissions

[23] Mr Russ made final oral submissions that Mr Colosimo personally was the employer because of the conversation with Mr Parker's mother and his behaviour in a supervisory way after commencement by asking or enquiring how Mr Parker was getting on. He submitted that Taffy's Bar Limited could not be the employer because until the final cheque for holiday pay was given to him, Mr Parker was

never aware of that entity. In the face of the overwhelming documentary evidence, he submitted Mr Parker was employed by Mr Colosimo, then lent to Taffy's Bar Limited although that entity was never made known to him.

[24] Of course as I have indicated, if Mr Colosimo personally was to be regarded as employer he would have had to enter into legal relations with Mr Parker. There is no evidence they even met prior to commencement of employment. It is extremely hard to infer offer and acceptance, or an intention to enter into legal relations from the evidence I have of the conversation on the street between Mr Colosimo and Mrs Wade.

[25] Mr Campbell for the first plaintiff, Mr Colosimo, in his opening submissions outlined briefly the corporate structure of Taffy's Bar Limited. This was essentially confirmed in evidence. In closing he iterated his opening submission that the onus rests upon the employee to prove the identity of the employer. The test is objective: *Service Workers Union of Aotearoa v Chan* [1991] 3 ERNZ 15; *Mehta v Elliott (Labour Inspector)* [2003] 1 ERNZ 451.

[26] Insofar as the contract is concerned Mr Campbell made the following submissions to support his contention that the true identity of the employer was Taffy's Bar Limited:

a) There is no reference to Mr Colosimo personally being the employer.

b) The header page refers to the group of companies and the enterprise The Kingsley Jones.

A reasonable inference to be taken is that The Kingsley Jones is owned by one of the group of companies.

c) Clause 1.1.1 refers, in the context of the common interest of employer and employee, to the *"establishment"*.

d) In performance of the employer's obligations under the contract none were performed by Mr Colosimo but rather those responsible for the day to day running and management of the tavern.

[27] The evidence, which Mr Campbell submits supports the contention that Taffy's Bar Limited was Mr Parker's employer, is quite substantial. He pointed to the fact that the company was incorporated prior to Mr Parker's employment and

that there was a clear intention that the company would be Mr Parker's employer from the outset. In addition, the liquor licence for the tavern was obtained in the name of the company and prominently displayed in the tavern. Mr Colosimo did not at any stage prior to the commencement of employment speak to Mr Parker. The employment agreement, to which I have referred, was handed to Mr Parker by the managers of the business rather than Mr Colosimo. Pay slips showed The Kingsley Jones as employer rather than Mr Colosimo. Mr Parker carried out all of his duties at The Kingsley Jones, which was the only business operated by Taffy's Bar Limited. Mr Colosimo owned other establishments in Tauranga, but Mr Parker did not work at any of those enterprises. The PAYE deduction certificate shows that Taffy's Bar Limited deducted the PAYE and passed it on to the Inland Revenue Department on behalf of all the staff employed at the tavern. In addition to this the final holiday pay cheque for Mr Parker was drawn on the account of Taffy's Bar Limited.

Principles applying

[28] The onus of proving that Mr Colosimo and not Taffy's Bar Limited was the employer rests on Mr Parker. The standard is on the balance of probabilities: the *Service Workers Union* case.

[29] In *Mehta v Elliott (Labour Inspector)*, at p458 to 459, Colgan J established the nature of the enquiry to be made in deciding who was the employer:

> *[22] The question of who was the employer must be determined as at the outset of the employment. If that changed during the course of the employment, there must be evidence of mutual agreement to that change. Because Messrs Sheikh and Mehta give different accounts of who they believed employed Mr Sheikh, it is necessary to apply an objective observation of the employment relationship at its outset with knowledge of all relevant communications between the parties. Put another way, who would an independent but knowledgeable observer have said was Mr Sheikh's employer when he commenced employment?*
>
> *[23] The first evidence of discussions between Mr Sheikh on the one hand and Mr Mehta and Dr Gujral on the other was after Mr Sheikh's arrival in Auckland. Mr Mehta offered him work in the completion of the restaurant premises and its commencement in business. It is very clear, taking that independent objective view, that Mr Sheikh was employed by Mr Mehta. The basis and method of payment (cash taken from the till at irregular intervals without tax) was more consistent with employment by Mr Mehta than by a New Zealand limited liability company. So too was the continuity of Mr Mehta's personal involvement that had begun with his consultancy, A & NZ Consultants in India. Although employees engaged later in 2000*

> *were contracted to the company Exotiqa Ltd and had written individual employment agreements with it, I conclude from all the evidence that the Tribunal correctly decided that Mr Sheikh was employed by Mr Mehta personally and not with his company Exotiqa Ltd and that situation did not change before Mr Sheikh's dismissal. I agree with the Tribunal that the employment contract was between Mr Sheikh and Mr Mehta. Mr Mehta's appeal against the Tribunal's findings in respect of Mr Sheikh is dismissed.*

[30] Much has been made in this case of the fact that Mr Parker was never made aware that Taffy's Bar Limited was the employer. However, the real issue is whether Mr Colosimo ever held himself out to be the employer and if so, the circumstances which would entitle the Court to say he personally entered into binding legal relations with Mr Parker. While it is desirable that the true identity of the employer should be made known to the employee at the outset, that unfortunately is not always the case. That is so in the present case. The Court is then placed in the position of having to make an objective assessment.

[31] Several of the cases coming before the Court, both under the Employment Contracts Act and the Employment Relations Act, have involved circumstances where the identity of the employer has been determined in situations where the employee was clearly never made aware during the course of employment. Principles applying are the same regardless of the legislation under which the proceedings were commenced. In *NZ Insurance etc IUOW v Parsons and Hobdell (t/a The Insurance Centre)* [1988] NZILR 547 at 549, it was made clear that failure to notify or make the employee aware is not conclusive:

> *In respect of question (i), Mr Parsons when opening the case for the respondents sought to emphasise that his main point was that the employer was Messrs Parsons and Waymouth and not "The Insurance Centre" as claimed by the union. In his words, that essential point is what the whole case is about. From our findings of fact above it is already clear that we agree with him. The facts are not in dispute and they lead in our view only to that conclusion. It is also clear however that neither the worker nor the union were aware of those facts until the hearing.*

[32] A somewhat different approach was taken in *Xu v McIntosh* [2004] 2 ERNZ 448. However, the circumstances in that case were somewhat different. It can be distinguished from the present. However, the principles established provide assistance in resolving the present case. The Court stated at paragraphs [32] and [33]:

> *[32] The law is quite straightforward. It is no doubt possible for directors and other agents to contract on behalf of companies or other principals without disclosing the identity of their principal. But it is necessary in all such cases that the fact of the agency should at least exist. There was no evidence to show that Naenae Auto Service Station Ltd had authorised Mr Xu to enter into an employment agreement with the defendant on the company's behalf or that it had formed an intention to do so. It would not have required much evidence to establish this because the company was entirely controlled by Mr Xu. But there is a considerable difference between demonstrating that such an intention existed in August 2001 and asserting 3 years later that it had then existed. There is simply no evidence of it, and no evidence that it was ever made clear to the defendant that she was contracting with a company called Naenae Auto Service Station Ltd.*
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> *[33] There is not a single scrap of paper either among the company's internal documents or its external correspondence to show that it was operating the service station business. Correspondence with Mobil, the supplying oil company, shows references only to Mobil Naenae or to Naenae Service Station. The WINZ document that the defendant signed similarly refers to the employer as Naenae Service Station. I have already noted that Mr Xu, who admitted making all the entries in ink on the form other than the defendant's signature, corrected the address of the service station but not its name, although he did write "Director" as his designation. The implication is, and I find this to be established, that the employment agreement that the defendant entered into was made with Mr Xu trading as Naenae Service Station. If evidence exists to counter this inference, Mr Xu could easily have given it but he did not. I can only conclude that it does not exist. In coming to this conclusion, I accept the possibility that his intention may have been to contract through his company but he needed to communicate that to the defendant and he never did.*

[33] It is clear that if Mr Xu had provided the documentary evidence the outcome would have been different even though the employee's ignorance of the true identity of the employer remained unchanged. In the present case Mr Colosimo has produced such documentation.

[34] A case where the contemporaneous documentation confirmed the employer as the individual director rather than his company is *Shaw v Bosnyak Investments Ltd* unreported, Finnigan J, 27 May 1994, AEC26/94. Judge Finnigan in the following passages from his judgment outlines circumstances similar to those existing in the present case:

> ***THE ISSUES FOR DETERMINATION***
>
> *The first issue is, who was Mr Shaw's employer? Mr Pollak for the respondents made not a great deal of this, arguing the case on its merits. Mr France on behalf of Mr Shaw alleged that it could only be one or other of the two respondents. In his submission, it was Mr Bosnyak.*

> *I agree. The evidence in my view points clearly to Mr Bosnyak himself. It was Mr Bosnyak who employed Mr Shaw. He employed him to administer the financial affairs of each of the companies in what was loosely described as the Bosnyak Group of Companies. The group was not itself an entity at law. Nonetheless, in writing a reference for Mr Shaw (Exhibit H), Mr Bosnyak headed the document "Bosnyak Group of Companies" and signed it as "Governing Director, Bosnyak Group of Companies". When he wrote earlier to Mr Shaw, on 23 September 1992, with the complaints about his work he addressed Mr Shaw as "Accountant, Bosnyak Investments Ltd". When Mr Shaw prepared his notice under s 218 of the Companies Act 1955, enforcing a claimed debt of holiday pay due to him, he addressed the notice to Bosnyak Investments Ltd. When Mr Bosnyak wrote to Mr Shaw on 21 January the letter set out above, he headed the letter "Bosnyak Group of Companies". It happens however that when he employed Mr Shaw, Mr Bosnyak opened a new bank account in his own name and as I understand the evidence always paid Mr Shaw's salary from that account, although the name of the account changed in November 1992, to that of one of the companies. He clearly employed Mr Shaw to administer the financial affairs of all of the companies which he owned and operated, and he made this clear in writing his letter of 21 January 1993 and the reference. He employed Mr Shaw to work for the group. He was the major shareholder of each of the companies in the group and they were his businesses. That fact, and the fact that he paid Mr Shaw personally, from a personal account, persuades me that Mr Shaw was his personal employee. I hold accordingly.*

[35] However, that was a case where clearly the individual director, unlike Mr Colosimo in the present case, specifically held himself out as the employer by the actions he took. Mr Colosimo in the present case took no such actions separate from his company from which it could be assumed he was the real employer.

[36] Another case where clearly the employee was unaware of the true identity of the employer is *Jury v Fonseca* [1998] 2 ERNZ 548. The following passage from Colgan J's decision at p554, 555 demonstrates some similarities with the present case, which assist in its resolution:

> *I am satisfied that the Tribunal wrongly decided that Ms Jury was herself the employer. Not only was that conclusion reached in the erroneous belief of the adjudicator that Ms Jury had made a concession to this effect in the course of the hearing but the evidence called on the appeal clearly establishes that it was Ms Jury's company, Beefit International Ltd, that was the employer. It is not difficult to understand that Ms Fonseca may have assumed that her employer was her friend Ms Jury. Evidence to the contrary, however, includes the following. Ms Jury operated and had for some years operated her clothes manufacturing business as a limited liability company, Beefit. Her short-lived expansion into the retail trade in 1995 and 1996 which sold, among other things, clothes manufactured by her company Beefit was also by the vehicle of that company. Tax and other Inland Revenue Department records, produced or generated before the question of the identity of Ms Fonseca's employer was in issue, confirm that*

> *it was the company Beefit that employed the respondent and other persons engaged in the business. Ms Fonseca was paid by cheques drawn on the account of "Beefit International Limited t/a El Toro". To the extent that there was a conflict of evidence between Ms Fonseca and Ms Jury as to whether Ms Fonseca's IR12 return form bore the name of Beefit International Ltd upon it when it was completed by Ms Fonseca, I was persuaded by Ms Jury that her evidence that it was should be preferred. That was for three reasons.*
>
> *To the extent that the documents could be examined (originals not having been produced to the Court but no objection having been taken to facsimile machine copies) it appears that the employer's name Beefit International Ltd was endorsed on Ms Fonseca's IR12 at a different and logically earlier time than when this document was completed for sending to the Inland Revenue Department on 2 February 1996.*
>
> *Next, I was unconvinced by Ms Fonseca's assertion in evidence that she did not receive and bank to her own credit a final cheque from Beefit dated 27 December 1995. Ms Fonseca denied receiving any money from her employer after the last day of work, 22 December. I find it more probable, however, that a cheque issued to her by Beefit on 27 December 1995 was banked on the same day and, consistently with the cases of other cheques that Ms Fonseca acknowledged she had received for wages, was returned to Beefit's bankers and a copy eventually produced at the hearing. In this regard I prefer Ms Jury's evidence, and consequently do not accept Ms Fonseca's to the contrary, that this final payment was made to Ms Fonseca.*
>
> *Third, although I am satisfied that the legal identity of her employer was not a matter to which Ms Fonseca understandably gave much thought in the course of her employment, it was a matter that her solicitors were alerted to when she consulted them after her dismissal. A series of correspondences between the parties confirm, again at a time before issues of disputed identity of employer were raised, that Ms Jury was both written to as "Beefit International Limited" and responded on Beefit letterhead. When the proceeding was issued in the Tribunal, Ms Fonseca's solicitors took care to nominate Ms Jury (then Ms Mana) as first respondent and Beefit as second respondent, alleging that the employer was either one or other of the respondents.*
>
> *Taken together, all of those factors have persuaded me that it is more probable than not that the employer was Beefit. As already set out, I am not satisfied that there was evidence to the contrary given in the Tribunal. The Tribunal was in error to have concluded that Ms Jury conceded the point. She did not.*

[37] This again is a case where the Court was able to place reliance upon the documentation created during the relevant period.

Conclusion

[38] I have already indicated that the conversation between Mrs Wade and Mr Colosimo cannot possibly constitute the creation of an employment contract. There is no other evidence, which the defendant Mr Parker can point to, where Mr

Colosimo held himself out as the employer. That means the Court is left to consider other factors on an objective basis.

[39] There can be no suggestion that the company Taffy's Bar Limited was simply a subterfuge in this case to enable Mr Colosimo to escape personal liability. The company was incorporated well in advance of the tavern opening. It took on the lease. It applied for the liquor licence, which was prominently displayed in the premises. The company as a matter of fact, confirmed by contemporaneous documents, paid Mr Parker's wages, deducted PAYE, accounted to the Inland Revenue Department and in all respects carried out the functions and performed the responsibilities required in law as Mr Parker's employer.

[40] Approaching the matter in accordance with the principles established in the authorities referred to, it is clear that the true employer of the defendant Mr Parker was the second plaintiff, Taffy's Bar Limited. That company was the employer right from the commencement of employment on 28 April 2004 until the termination on or about 24 November 2004.

[41] I am of a view that Mr Parker, like some of the employees referred to in the decisions, which I have cited, was really unconcerned as to the identity of his employer throughout the period of employment. It is only as a result of the inability of Taffy's Bar Limited to meet his claim, by virtue of its removal from the register, that he has concentrated on Mr Colosimo personally.

[42] In addition to the documentation, to which I have referred, there is also the significant feature of the employment contract, which was given to Mr Parker part way into the period of employment. While the wording of the document is not ideal and the final endorsement is a little inconvenient for Mr Colosimo, the fact is that the document does refer to the corporate entities of Mr Colosimo rather than to him personally. Also the enterprises, which were operated by one or more of those corporate entities, are listed. Significantly, however, there is nowhere in the agreement where Mr Colosimo is referred to personally as the employer or anything which would indicate that he is holding himself out to personally be the employer of Mr Parker. There is no evidence that he personally traded in the name of the enterprises.

[43] I turn to the relief sought. In addition to the declarations as to employment the plaintiff also seeks declarations that the second plaintiff terminated the employment of the defendant and that the remedies ordered by the Authority should be paid to the defendant by the second plaintiff. This was a non-de novo challenge concentrating effectively on the narrow point of the identity of the employer.

[44] Nevertheless, the second plaintiff was a party in the Authority proceedings. It chose not to be represented or participate in the hearing of the challenge. Accordingly, there will be a declaration that the second plaintiff was the employer of the defendant. It terminated the employment of the defendant. The remedies, including the penalty, should therefore be levied against the second plaintiff. There will be orders that the reimbursement of remuneration, compensation, penalty, interest and any costs awarded by the Authority be paid by the second plaintiff.

[45] The second plaintiff is of course a company no longer registered. It may well be an empty shell. It was never placed in liquidation. If reinstated its directors and shareholders may have residual responsibilities to remaining creditors of whom the defendant is one. It may well be that Mr Parker will need to take steps against the officers and shareholders if he considers it worthwhile. However, that is not a matter within the jurisdiction of this Court.

Costs

[46] Mr Campbell sought that costs be reserved. While Mr Colosimo has prevailed in his challenge he was a director and indirectly is a shareholder in the second plaintiff. The actions of the company were carried out by him. I am not satisfied as a matter of equity and good conscience that he should recover costs against Mr Parker. There will be no order for costs.

ME Perkins
Judge

Judgment signed at 2.45pm on Wednesday, 6 December 2006

Representatives:	James Keat, Solicitors, PO Box 99 680, Auckland Hamish Russ, PO Box 665, Tauranga

Solicitors: