

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: 3156-20
Applicant: Nader Norouzi
First Respondent: La Piazza Cafe
Second Respondent: Workers Compensation Nominal Insurer
Date of Determination: 8 September 2020
Citation: [2020] NSWCC 309

The Commission determines:

1. That the application for reconsideration of the order made on 12 August 2020 striking out these proceedings is refused.

A brief statement is attached setting out the Commission's reasons for the determination.

Josephine Bamber
Senior Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JOSEPHINE BAMBER, SENIOR ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. This matter was listed before me for telephone conference on 7 July 2020 at 10.30am. At that time, Mr Steve Walker solicitor appeared for the applicant with his para-legal assistant Mr Evika Sickovic. Mr Ainsworth appeared for the Workers Compensation Nominal Insurer. As the matter could not resolve it was listed for Conciliation/ Arbitration hearing to take place on 12 August 2020.
2. On the afternoon of that telephone conference at 3:39pm at my request, the Commission's staff send the following email to Mr Walker, with a copy to Mr Ainsworth:

"Dear Mr Walker

Senior Arbitrator Bamber has requested I email you to raise concerns she has following the telephone conference held today in this matter.

She is concerned that you have not sued the correct legal entity for the uninsured employer, the First Respondent.

On the taxation return at page 182 of the Application to Resolve a Dispute is the "Payer's Australian Business Number 35617655195" and an ASIC ABN search shows this to be held by "The Trustee for the Sahlon Family Trust".

She is additionally concerned that "La Piazza Café" is not a legal entity.

Senior Arbitrator Bamber seeks for you to urgently confirm the correct legal entity of the employer, check whether they have insurance and if need be discontinue these proceedings."

3. The proceedings were not discontinued. However, the applicant's solicitor filed in the Commission an Application to Admit Documents dated 9 July 2020 attaching a Google search of La Piazza Café from Trip Advisor dated 8 July 2020, an ABN Lookup from the Australian Business Register made on 8 July 2020 and Employer Lookup from icare made on 8 July 2020.
4. None of these documents solved the issue raised in the email to Mr Walker. The "ABN Lookup" confirmed the ABN 35617655195 was held by "The Trustee for the Sahlon Family Trust". The icare document just confirmed that "ABN-number 35617655195 is not *currently* registered with icare (as at 05-JUL-2020)" (my emphasis).
5. No attempt was made by the applicant from the time of the telephone conference to the conciliation/arbitration hearing to rectify the pleadings. The plain fact was that the applicant had not sued a legal entity. The proceedings were therefore incompetent. The matter could not proceed as the Commission could not make orders against the first respondent.
6. During the discussions about the matter, the respondent's solicitor telephoned Mr Inderveer Singh, who was identified in his statement as being the manager of La Piazza Café. He apparently advised that his family was involved in the legal entity that owned the Café business.

7. An oral application was made by the applicant to amend the name of the first respondent. The second respondent's counsel made submissions opposing such an amendment. Oral reasons were given by me refusing this application, noting that no proper searches had been undertaken to establish the correct legal entity. Also, it seemed that persons in addition to Mr Singh could have liability in the matter if he and they were directors of an uninsured company and it would be necessary for any Amended Application to Resolve a Dispute to be served on the correct legal entity. They would need an opportunity to engage legal representation.
8. The applicant sought an adjournment to enable such steps to be undertaken. The second respondent opposed this application on the basis that the Commission operates as a front-end loaded tribunal, and these were steps that should have been taken before the proceedings were filed. I accepted that submission.
9. A further application was made for an order under section 357 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) for a direction for production to be issued to Mr Singh and/or The Sahlon Family Trust to obtain documents to identify the correct legal entity. I refused to issue such a direction as the information could be obtained by a proper ASIC historical search.
10. I also noted that when the applicant was ready to proceed, he could file a fresh Application to Resolve a Dispute, naming the correct legal entity for the employer, and the Application would be listed for telephone conference before an Arbitrator of the Commission 28 days after the filing. So, the delay in re-filing the proceedings was not great.
11. As the proceedings were incompetent, I struck them out under Rule 15.1 of the Workers Compensation Commission Rules 2011. I gave oral reasons which were sound recorded. On 14 August 2020, the Commission issued a Certificate of Determination- Oral Decision recording my determination.
12. On 18 August 2020, Mr Walker filed in the Commission an Application for Reconsideration of the order striking out the proceedings in the Commission. In his covering letter to Mr Ainsworth, he advised him that he had 21 days to respond to the applicant's submissions.
13. On 1 September 2020, the second respondent's submissions in reply dated 31 August 2020 were received by the Commission, opposing the Application for Reconsideration.
14. On 7 September 2020, the applicant filed with the Commission his submissions in response to those of the second respondent. In the covering letter, Mr Walker seeks for Mr Ainsworth to supply submissions in response advising another new matter 4545/20 is listed for telephone conference at 2pm on 11 September 2020. It is unclear why the second respondent would need to file further submissions.
15. It is also unclear why the Applicant is persisting with an Application for Reconsideration of the strike out order of matter 3156-20 when it appears he has in fact filed new proceedings. I note the telephone conference in the new matter 4545/20 is listed before another Arbitrator of the Commission.
16. I propose to deal with the Application for Reconsideration 'on the papers' as I consider I have sufficient information to do so.

EVIDENCE

Documentary Evidence

17. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) Application to Resolve a Dispute and attached documents;
 - (b) Application to Admit Documents dated 3 July 2020 attaching the Second Respondent's Reply and annexed documents;
 - (c) Application to Admit Documents dated 9 July 2020;
 - (d) Application for Reconsideration dated 18 August 2020;
 - (e) Submissions in response from Second Respondent dated 31 August 2020; and
 - (f) Applicant's submissions in reply dated 7 September 2020.

FINDINGS AND REASONS

Applicant's Submissions for Reconsideration

18. The submissions have been reproduced below:
1. The Applicant has on two occasions sought to proceed with claims for weekly compensation and payment of his medical expenses in respect of an injury alleged to have been sustained in the course of his employment at a café with the name "La Piazza Cafe" in Coffs Harbour.
 2. The first set of proceedings, under Matter No: 651/19, was brought against "La Piazza" as First Respondent, and Workers Compensation Nominal Insurer ("Icare"), as Second Respondent (after it had been ascertained that the Applicant's employer did not have a workers compensation insurance policy).
 3. The proceedings under Matter No.651/19 advanced to the stage of an Arbitration hearing at which the Applicant was subjected to cross- examination. The Applicant's legal representatives determined, following cross-examination of the Applicant, that the matter should be discontinued in order to secure evidence from a material witness to address the issue that was being pressed by Icare regarding late notification of the claim.
 4. The Applicant commenced further proceedings, under Matter No.3156/20, on 5 June 2020.
 5. Relevantly, the Reply lodged by Icare included two statements by Inderveer Singh. In his statement dated 27 June 2018, Inderveer Singh stated that he was "currently employed as manager of La Piazza Café" and had "managed this location since October 2015". At that time, Inderveer Singh did not disclose that he the Director of the company which conducted the business of operating the "La Piazza Café".
 6. Following the telephone conference, the Senior Arbitrator caused an email to be sent to the parties, raising her concern regarding whether the First Respondent, cited in the Application as "La Piazza Café", was a legal entity capable of being sued.

7. The Applicant's legal representatives conducted a search in respect of the Australian Business Number on the Applicant's payslip and proceeded to lodge a document which recorded that the relevant ABN was held by "The Trustee for the Sahlon Family Trust" ("the Trustee"). The Applicant's legal representatives had no knowledge of the identity of the Trustee at that stage.
8. On 12 August 2020, at a Conciliation Conference and Arbitration hearing, the Senior Arbitrator expressed her concern that the party cited as First Respondent was not a legal entity, that it was not known who the Trustee is, that the matter could not proceed in the absence of this information, and that the Application should be discontinued.
9. After the parties had had the opportunity to obtain further instructions, Counsel for Icare advised that Icare's solicitor had spoken to Inderveer Singh, and been informed that:
 - (a) the Trustee was a company, Bhatti Pty Ltd, which had changed its name to 607 735 080 Pty Ltd
 - (b) the Directors of Bhatti Pty Ltd were the parents of Inderveer Singh,
 - (c) and the current Directors of 607 735 080 Pty Ltd are Inderveer Singh and his wife (subsequent investigation has established that only Inderveer Singh is a Director of the company).
10. Given the disclosure at the hearing of the identity and status of Applicant's employer, the Applicant's legal representatives reasoned that the Senior Arbitrator's concern regarding the identity of the First Respondent could be addressed by the simple step of amending the name of the First Respondent, as cited in the Application, in accordance with Inderveer Singh's disclosure.
11. The Senior Arbitrator refused the application to amend. As those representing the Applicant understand the Senior Arbitrator's reasoning, she remained concerned that it was not clear who the relevant Directors and Shareholders of the company were at relevant times.
12. Following the Senior Arbitrator's refusal to permit the Applicant to amend the Application to record the identity of the First Respondent as disclosed by Inderveer Singh (via Icare's solicitor), the Applicant made a further application to secure Directions that would require Inderveer Singh to produce material confirming particulars of the company to the Commission. That application was also refused, on the basis that the Applicant could make his own enquiries via ASIC, and that the consequent delay would not be extensive. The Senior Arbitrator stated that the Applicant could lodge a new Application after obtaining information pertaining to the employer, and that the matter would come before the Commission for telephone conference in 28 days.
13. The Senior Arbitrator proceeded to strike out the proceedings.
14. Following the hearing, the Applicant's legal representatives took steps to conduct searches to ascertain information pertaining to the company disclosed by Inderveer Singh (as having the names noted above).

The ASIC records confirm that the company with the Australian Company Number 607 735 080:

- (a) was registered on 18 August 2015;
 - (b) was named "Bhatti Pty Ltd" until 24 October 2018;
 - (c) had the following Directors from 19 August 2015 until 11 May 2018: Jasbir Kaur Singh and Ranjit Singh;
 - (d) of the two shares issued, the Shareholders were initially Jasbir Kaur Singh and Ranjit Singh (1 share each), and currently Inderveer Singh (2 shares);
 - (e) is currently named "CAN 607 735 080 Pty Ltd";
 - (f) has had the following Director from 11 May 2018: Inderveer Singh;
 - (g) the "Principal Place of Business" of the company is 14 Barnes Street, Woolgoolga NSW 2456, is the same address recorded as that of Jasbir Kaur Singh, Ranjit Singh and Inderveer Singh.
16. The foregoing information appears from the records obtained by the Applicant's legal representatives, annexed hereto as "A" 1 to 4, and "B" 1 to 4.
 17. As Counsel for Icare stated at the hearing on 12 August 2020, Inderveer Singh advised Icare's solicitor that his parents were previously the Directors of the company. Having regard to the ASIC records, it follows that Inderveer Singh's parents are Jasbir Kaur Singh and Ranjit Singh.
 18. Noting Inderveer Singh's statement dated 27 June 2018, it is apparent that he was the manager of his parents' business from October 2015. He proceeded to assume comprehensive responsibility as manager, Director and Shareholder from 11 May 2018.
 19. The chronological detail of the composition of directors and shareholders of a company, from month to month, does not, in any respect, affect the enduring liability of that corporate entity to other parties (in respect of whom it might offend statutory provisions, breach agreements or commit torts). The continuity of legal rights and responsibilities and obligations of a company, as a legal person (distinct from its directors and shareholders), is a fundamental principle and point of reference according to which commercial activity is conducted.
 20. In the current matter, the business of La Piazza Café has been conducted by a single corporate entity - a company registered on 19 August 2015. The manager of that business has disclosed, in his communications with Icare's solicitor, that the Trustee is the corporate entity identified at the hearing on 12 August 2020.
 21. Inderveer Singh has, since taking over the relevant corporate roles from his parents on 11 May 2018, been exclusively responsible for the business of La Piazza Café, as Director and Shareholder of CAN 607 735 080 Pty Ltd. He has provided evidence to assist in resisting the claim, notably statements dated 27 June 2018 and 6 July 2018 (at which stage he was the only director and shareholder of the company, and was served with the Application papers in Matter No: 651/19 and Matter No:3156/20.
 22. Those representing the Applicant have proceeded to lodge two Applications on the basis that there has not been any issue pertaining to the identity of the First Respondent. That was not a matter raised in any dispute letter, or in the Replies lodged in Matter No: 651/19 and Matter No:3156/20. As noted, Matter No: 651/19 proceeded to Arbitration.

23. The Senior Arbitrator refused to permit the Applicant to amend the Application to accurately record the name of the First Respondent because she was concerned (so those representing the Applicant understand from the what she said) that there could be parties who would be prejudiced by orders she might make.
24. There is only ONE PARTY which conducted business under the name “La Piazza Café” at the time of the Applicant’s employment and injury: the company registered on 19 August 2015, and of which Inderveer Singh is the sole Director and Shareholder.
25. Insofar as the Senior Arbitrator understood, at the time of the hearing on 12 August 2020, that the different directorships, shareholding details, and names of the company might affect recovery proceedings in due course, a single legal entity will be subject to recovery proceedings: CAN 607 735 080 Pty Ltd. The Applicant wishes to make an amendment to record the name of that company as the First Respondent.
26. The information disclosed by Inderveer Singh, and communicated by Counsel for Icare at the hearing on 12 August 2020, confirmed that there is no substantive issue regarding the true identity of the First Respondent. Insofar as that was not appreciated on 12 August 2020, the records independently obtained by the Applicant’s representatives leave no room for doubt regarding the identity and legal status of the Applicant’s employer.
27. In the circumstances, there is no reason to delay determination of the real issues that have been placed in dispute. No constructive purpose is to be served by requiring the parties to wait for 28 days for a telephone conference (which has already been conducted) and then a further period of up to three weeks, pending a Conciliation Conference (i.e. the passage of an aggregate period of seven weeks to bring the parties to the point which they had reached on 12 August 2020).
28. As regards the name of the First Respondent, that formality can be readily addressed by an amendment, in accordance with the information disclosed by Inderveer Singh and confirmed by ASIC records.
29. The interests of the parties warrant restoration of the proceedings, and listing of the matter for hearing. Counsel for the Applicant is available to participate in a resumption of the hearing on Friday, 21 August 2020 (at 10.00am and 2.00pm), and at 2.00pm on 25, 26, 27 and 28 August 2020.
30. Applicant therefore seeks the following Orders:
 1. The decision to strike out the proceedings on 12 August 2020 is reconsidered, pursuant to section of the 350(3) of the Workplace Injury Management and Workers Compensation Act 1998, and is hereby rescinded.
 2. The Application to Resolve a Dispute is amended by recording that the name of the First Respondent is CAN 607 735 080 Pty Ltd (formerly named Bhatti Pty Ltd) as the Trustee of for Sahlon Family Trust trading as La Piazza Café.
 3. The matter is listed for Conciliation Conference and Arbitration on the earliest date suitable to counsel for the parties and the Senior Arbitrator (or an alternative Arbitrator who is available to hear the matter in August).”

Respondent Submissions

19. The respondent's submissions are reproduced below:

- “1. We refer to the letter from the Applicant's solicitors dated 18 August 2020 enclosing submissions in relation to an Application for Reconsideration (**Application**).
2. Pursuant to section 350(3) of the *Workplace Injury Management and Workers Compensation Act 1998 (1998 Act)*, the Applicant seeks reconsideration, and rescission, of the decision of the Arbitrator to strike out proceedings.
3. We are instructed by the Second Respondent, the Workers Compensation Nominal Insurer, in those proceedings.
4. Under s 350(1) of the 1998 Act, a decision of the Commission is considered to be *'final and binding on the parties and is not subject to appeal or review'*.
5. The Commission Practice Direction No 17 - 'Reconsideration Application' (**Practice Direction 17**) requires the Application to identify *'the ground/s for consideration'*.
6. The Second Respondent observes that the Applicant has not clearly identified any ground/s for reconsideration. The Application appears to proceed on the ground that the Applicant ought to have been given the opportunity to amend the Application to Resolve a Dispute (**ARD**) in order to identify the First Respondent correctly. This argument was made in advance of the decision the subject of the reconsideration request.
7. In *Samuel v Sebel Furniture Ltd* [2006] NSWCCPD 141 (**Sebel Furniture**), Acting Deputy President Roche considered the Commission's power of reconsideration under s 350(3) of the 1998 Act and relevantly emphasised the following principles:
 - (a) Section 350(3) gives the Commission a wide discretion to reconsider its previous decisions;
 - (b) Whilst this discretion is wide, it must be exercised *'fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration'*;
 - (c) A factor to consider in deciding whether this discretion is exercised in favour of the moving party is *'the public interest that litigation should not proceed indefinitely'*;
 - (d) *'Reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result'*;
 - (e) *'The Commission has a duty to do justice between the parties according to the substantial merits of the case'*.

8. Similarly, Practice Direction 17 provides that the following matters will be taken in account in deciding the reconsideration application:
- (a) *The relevant reconsideration power;*
 - (b) *The objectives of the Commission under s 367 of the 1998 Act;*
 - (c) *The reason for and extent of any delay;*
 - (d) *Any fresh evidence, additional evidence or substituted evidence, that could not have reasonably been obtained prior to the decision and which would have likely led to a different result if before the original decision maker;*
 - (e) *The public interest in finality of litigation;*
 - (f) *That mistake or oversight by a legal representative or agent may not, in itself, be determinative of whether relief should be granted; and*
 - (g) *The interests of justice.*
9. The Second Respondent submits that none of the above principles or grounds articulated in Sebel Furniture and Practice Direction 17 had been established.
10. To the extent that the Applicant seeks to rely on 'fresh' or 'additional' evidence, in the form of current and historical company searches of the First Respondent, the Second Respondent contends that such evidence was reasonably available to the Applicant prior to the Arbitrator's decision to strike out the proceedings, and ought to have been discovered had due diligence been carried out.
11. Turning to a consideration of the objectives of the Commission under s 367 of the 1998 Act, the Second Respondent observes that these include, inter alia, providing a fair and cost effective system for the resolution of disputes and reducing administrative costs across the workers compensation system. If the Application is accepted by the Commission, the Second Respondent submits that, contrary to these objectives, the parties will unnecessarily incur costs by entitling the Applicant to reignite an otherwise *'final and binding decision'* of the Commission.
12. The Second Respondent submits that no result can be achieved by this Application in circumstances in which the Applicant has already separately re-commenced proceedings in the Commission, having rectified the issues raised by the Arbitrator in these proceedings.
13. The Applicant submits that the relevant amendment ought to have been made on the basis that a current director of the First Respondent was already aware of the proceedings. The Second Respondent observes, however, that the current director of the First Respondent was not the director at the time of the Applicant's alleged injury and employment and that two other directors, not previously notified of the proceedings, would be the 'culpable directors' for the purposes of s145A of the *Workers Compensation Act 1987*.
14. For the above reasons, the Second Respondent submits that it would therefore be appropriate for this Application to be dismissed without the necessity for further argument and to avoid additional unnecessary costs being incurred by all parties involved."

Applicant's submissions in response and Determination

20. Mr Walker has served submissions in response to that of the respondent in 22 paragraphs. There are a number of submissions which I consider are not appropriate such as at point 4 wherein it is submitted that:

"The only conceivable benefit which stands to be advanced by resisting reconsideration of the orders made on 12 August 2020, and requiring the matter to be considered weeks away, would be if an additional set of fees will become payable to the representative of the Second Respondent. If the representatives of the Second Respondent do not expect to be paid a second set of fees, they are requested to confirm the same."

21. Also, at point 8 Mr Walker refers to the "Second Respondent's opportunistic conduct on 12 August 2020 and in resisting the application for reconsideration, does not meet the standard expected of a model litigant."
22. Such submissions are not warranted. The applicant seeks to blame others for his errors.
23. The plain fact is that the applicant was not ready to proceed with his Application to Resolve a Dispute on 12 August 2020 because he had not sued a legal entity, being the employer of the applicant. The respondent's point is valid that the applicant's advisors could have and, indeed, should have, undertaken the complete ASIC searches to reveal the correct legal entity *before* the proceeding were filed.
24. The applicant's solicitors were advised of my concern about the pleadings on 7 July 2020 but did not take appropriate steps to undertake the complete ASIC searches until after the matter had been struck out on 12 August 2020.
25. Naming a party as a respondent that is not a correct legal entity is not a triviality. It was a fundamental problem with the ARD, rendering it incompetent.
26. Even though the respondent had spoken to Mr Singh during the discussions on 12 August 2020, I did not consider it appropriate to amend the ARD on the strength of a conversation particularly when at that stage there was uncertainty if all the directors, of whatever the correct legal entity was, knew about the proceedings.
27. I also find this application is somewhat incongruous. The covering letter dated 18 August 2020 serving the application for reconsideration informs Mr Ainsworth he has 21 days to put on his submissions. Yet one of the matters raised in my determination to strike out the ARD was that the delay in re-filing was not extensive as any new ARD would be listed for telephone conference 28 days after filing. It therefore seems incongruous to file a reconsideration application giving the respondent 21 days to reply, when a new ARD could be at telephone conference stage in 28 days.
28. Furthermore, at [29] of his original submissions the applicant states,

"The interests of the parties warrant restoration of the proceedings, and listing of the matter for hearing. Counsel for the Applicant is available to participate in a resumption of the hearing on Friday, 21 August 2020 (at 10.00am and 2.00pm), and at 2.00pm on 25, 26, 27 and 28 August 2020."

Yet the covering letter serving the reconsideration application was dated **18 August 2020**. Therefore, the above submission giving availability for hearing dates from 3 days later is incongruous, particularly with the reference to Mr Ainsworth having 21 days to respond, that would be by 8 September 2020.

29. Also, troubling is nowhere in the original submissions does Mr Walker disclose he has actually filed new proceedings. This is evident from the respondent's submissions at [12]. In his submissions in response Mr Walker discloses he has issued the new ARD matter number 4525/20 which has a telephone conference on 11 September 2020 at 2pm. These submissions bear the date of Friday 4 September 2020 but the covering letter is dated Monday 7 September 2020. He proposes that the telephone conference being held a few days later on Friday 11 September 2020 be a conciliation/arbitration hearing. This is completely unrealistic proposition given other listing considerations in the Commission
30. Enquiries made by me of the Commission reveal that matter 4525/20 is listed before another Arbitrator who will conduct the matter as they determine.
31. I consider there is no merit in the Application for Reconsideration. The application largely canvasses matters discussed on 12 August 2020. At that time the respondent opposed the various applications made by the applicant and gave cogent reasons for so doing, which I accepted. The only new evidence is the ASIC searches. They should have been undertaken before the proceedings were issued. Furthermore, the applicant was on notice from 7 July 2020 that there was an issue with the proceedings having been brought against La Piazza Café. The applicant could have then undertaken the full ASIC searches, but he did nothing until after the matter was struck out.
32. I find there is no prejudice to the applicant because a strike out order does not preclude a further application to resolve a dispute being filed, which in fact has happened.
33. The applicant in the submissions in reply refers to the objects in section 3 of the *Workplace Injury Management and Workers Compensation Act 1998* including to deliver the objectives efficiently and effectively. I find it is neither efficient nor effective for the Commission to permit amendments "on the run" at a hearing. Applicants are expected to be ready to proceed when they file proceedings and the error in this matter was significant.
34. For all of the reasons given above, the application for reconsideration of the strike out order in matter 3156-20 made on 12 August 2020 is refused.