

Limited Liability is of Limited Protection

A recent case illustrates two ways in which the owner and manager of a business can be personally liable to employees despite having a limited liability company structure in place.

Identity of employer

Joanna Wilson was the manager and sole shareholder and director of The Ultimate Recruitment Corporation Limited (TURCL). Her friend Mr Ryan was engaged by TURCL to provide financial services for a monthly fee. Channele Bryan was employed by TURCL as a senior recruitment consultant.

TURCL went into liquidation on 18 April 2012. That is when TURCL ceased trading and therefore ceased to employ staff, but nothing changed on an operational level: "Ms Bryan did the same job from the same premises on the same terms and conditions she had with TURCL. Ms Wilson continued to run the business as if it were hers." Ms Bryan was not aware of the liquidation until much later. So who was Ms Bryan's employer after 18 April 2012?

Ms Wilson and Mr Ryan claimed that the trading name was sold before TURCL's liquidation to Ultimate Limited and then, before Ultimate's liquidation, to Ultimate Temps Limited (both owned by Mr Ryan but managed by Ms Wilson), then, after Ms Bryan's employment ended, to York Limited (owned by Ms Wilson).

The Employment Relations Authority held that Ms Wilson personally was Ms Bryan's employer after 18 April 2012. Ms Bryan could not have agreed to be employed by Ultimate Limited or Ultimate Temps Limited because Ms Wilson did not tell her they existed. By contrast "Ms Wilson was the person who held herself out as owning and operating the Ultimate recruitment business and she continued to be Ms Bryan's boss".

Ms Wilson was personally liable to pay Ms Bryan \$5,086.34 for wage arrears plus 5% interest. The employer's breaches described below gave rise to an unjustified constructive dismissal so Ms Wilson as employer also had to pay Ms Bryan \$2,691.84 for lost wages.

Penalties

TURCL owed Ms Bryan a total of \$21,095 in unpaid wages and KiwiSaver contributions. TURCL also breached Ms Bryan's employment agreement in other ways, for example under-reporting her earnings to IRD, incorrectly informing IRD that her employment had ended on 29 January 2012, and failing to inform TURCL's liquidator that she was a substantial creditor.

The Employment Relations Authority was satisfied that Ms Wilson was "responsible for inciting, instigating, aiding and/or abetting all of TURCL's breaches of Ms Bryan's employment agreement. It was Ms Wilson's actions and omissions which directly resulted in TURCL's breaches of Ms Bryan's employment agreement."

After TURCL's liquidation, Ms Wilson as employer breached many of her obligations to Ms Bryan, under the employment agreement, the Employment Relations Act, and the Holidays Act.

It is not only an owner/director who can be liable for penalties. The Employment Relations Authority was also satisfied that Mr Ryan incited, instigated, aided and/or abetted TURCL's breaches and Ms Wilson's breaches.

Ms Wilson and Mr Ryan were each ordered to pay penalties of \$10,000 for their involvement in TURCL's breaches and \$10,000 for Ms Wilson's breaches. Of the total penalties of \$40,000, \$30,000 was directed to be paid to Ms Bryan rather than to the Crown.