

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 111  
3019752

BETWEEN CHRISTOPHER BARTON  
Applicant

AND SAMANTHA DAGGE  
First Respondent

AND JAMES DUTHIE  
Second Respondent

Member of Authority: Tania Tetitaha

Representatives: A Sluiters, counsel for the Applicant  
Respondents in person

Investigation Meeting: On the papers

Submissions [and further 22 October and 3 December 2018 from the Applicant  
Information] Received: 5 November 2018 from the Respondent

Date of Determination: 28 February 2019

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**DETERMINATION OF THE AUTHORITY**

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**A. This application for leave is dismissed.**

**B. Each party is to meet their own costs.**

**Employment Relationship Problem**

[1] This application seeks leave to bring proceedings against the respondent directors of Concrete Cutting Solutions Limited (CCS) now in liquidation. Christopher Barton was employed by CCS. He alleges CCS breached his employment agreement by failing to:

- (a) Treat his position as redundant and pay the applicant a redundancy compensation pursuant to clause 25 and appendix 1 of the individual employment agreement (IEA);
- (b) Treat the applicant in a fair and equitable manner and act in good faith, pursuant to clause 4.2 of the IEA including failing to:
  - (i) Engage in a genuine consultation process in respect of closing the Auckland operations on 5 February 2017 which was deliberate, serious and sustained; and
  - (ii) Failing to treat the applicant in a fair and reasonable manner by commencing an unwarranted disciplinary process against him and dismissing him without undertaking a fair process or having substantive justification;
- (c) Provide the applicant with meaningful work in accordance with his position description and the implied term with the IEA;
- (d) Pay the applicant his wages when they fell due, pursuant to clause 5 in appendix 1 of the IEA;
- (e) Pay the applicant his holiday pay owed when it fell due pursuant to clause 10 in appendix 1 of the IEA.

[2] In respect of the named respondents, he seeks penalties for “inciting, aiding and or abetting” each of the CCS’s breaches of the IEA. He alleges they acted deliberately, with knowledge and as the “mind” of the company.

### **Relevant Facts**

[3] This determination has proceeded upon the papers. Therefore the facts below have been taken from the parties pleadings only.

[4] CCS is a concreting business based in the South Island. It appears in 2016 CCS was seeking to expand its business into the North Island.

[5] Mr Barton was employed as the North Island Business Development Manager on 21 November 2016 based in Auckland. His individual employment agreement contained a redundancy compensation clause that provided for payment of 3 month’s salary.

[6] In February 2017 the respondents' young child developed a serious illness. This required them to be solely based in Christchurch to meet their child's medical needs. It appears around this time a decision was made to restructure and reduce the North Island business.

[7] Mr Barton alleges he was told he was to be made redundant together with other staff on 24 April 2017. This was due to the closure of the Auckland branch effective 5 May.

[8] The respondents allege on 24 and 28 April 2017 Mr Barton approached two of CCS's client employees seeking to obtain details of CCS's contract and offering the client a deal that Mr Barton could keep two employees on site working under his own company to be formed to finish the job and/or hire or sell cutting equipment to the client. This is alleged to have been serious misconduct.

[9] On 27 April 2017 at 9:17 am Mr Barton emailed a client advising that CCS "must discontinue its operations in Auckland" meaning they were unable to continue with the existing contract. This is alleged to have been serious misconduct.

[10] On 4 May 2017 the client emailed stating Mr Barton's email was "official confirmation" that CCS has terminated its sub-contract. Further it alleged CCS had no right to do so and was in breach. The client sought to recover its losses as a result of the breach. This necessitated the first respondent contacting the client directly to avoid further damage. This is alleged to have been serious misconduct.

[11] On 5 May 2017 the respondents allege Mr Barton also removed \$100,000 of CCS's equipment and placed it in a caravan near his home without permission. The equipment was uninsured during the period he retained it. The respondents recovered the equipment at a later date. This is alleged to have been serious misconduct.

[12] The Auckland branch of CCS was closed on 5 May 2017. There is a dispute whether there was work offered to Mr Barton from 5 May 2017 and whether he was in fact redundant.

[13] On 12 May CCS sent a letter setting out the above allegations and attaching emails and transcripts of an interview with a client employee. A meeting was held on 29 May.

[14] On 7 July CCS advised the allegations had been substantiated and serious misconduct found. It sought his response to the proposal to terminate his employment.

[15] Mr Barton's employment was terminated on 13 July 2017 for serious misconduct. His final pay was paid on 19 July 2017.

[16] The statement of problem was filed on 15 September 2017. At the time it was filed, Mr Barton was aware CCS was the subject of an application for liquidation. CCS was placed in liquidation on 21 September 2017. As a consequence the applicant filed an amended statement of problem seeking removal of CCS as a party to this proceeding on 5 December 2017.

[17] On 7 February 2018 the parties were advised by the Authority that the liquidator had declined permission to progress any claims against CCS.

### **Application for Leave**

[18] This application seeks leave from the Authority to recover wages and money payable to the applicant from the respondents pursuant to s 149 of the Employment Relations Act 2000 (the Act) because:

- (a) There has been a default in payment of wages and other money payable to the applicant namely redundancy compensation of \$23,750 and four weeks' notice at \$7,307.69 totalling \$31,057.69;
- (b) The default is due to a breach of employment standards, in particular the Wages Protection Act 1983;
- (c) The respondents were involved in the breach as they aided and abetted the breach, were knowingly concerned in the breach and can be treated as involved in the breach by virtue of their positions as officers; and
- (d) CCS is unable to pay the arrears in wages.

[19] The respondents submit that on 29 November 2017 the liquidator paid the applicant any wage arrears and holiday pay. They are not aware of any further amounts outstanding. They also deny this was a redundancy situation. They have no funds available to pay anything further.

[20] The Liquidator has advised there are funds available to meet the amounts claimed by the applicant. Payment can only be made if the applicant obtains an order of the High Court to progress its claim against CCS.

[21] The relevant sections for seeking leave under the Employment Relations Act 2000 (Act) are set out below:

**142Y When person involved in breach liable for default in payment of wages or other money due to employee**

- (1) A Labour Inspector or an employee may recover from a person who is not the employee's employer any wages or other money payable to the employee if:
  - (a) There has been a default in payment of wages or other money payable to the employee; and
  - (b) The default is due to a breach of employment standards; and
  - (c) The person is a person involved in the breach within the meaning of s 142W
  
- (2) However, arrears in wages or other money may be recovered under sub-section (1) only:
  - (a) In the case of recovery by an employee, with the prior leave of the Authority or the Court; and
  - (b) To the extent that the employee's employer is unable to pay the arrears in wages or other money.

[22] Section 142W sets out what is required to prove involvement in breaches:

**142W Involvement in Breaches:**

- (1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—
  - (a) Has aided, abetted, counselled or procured the breach; or
  - (b) Has induced, whether by threats or promises or otherwise, the breach; or
  - (c) Has been in anyway, directly or indirectly, knowingly concerned in or a party to, the breach; or
  - (d) Has conspired with others to effect the breach,
  
- (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
  
- (3) For the purposes of sub-section (2), the following persons are to be treated as officers of an entity:
  - (a) A person occupying the position of a director of a company, if the entity is a company;
  - (b) A partner of the entity is a partnership;
  - (c) A general partner if the entity is a limited partnership;

- (d) A person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership;
- (e) Any other person occupying the position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.

**Has there been a default in payment of wages or other money “payable to the employee”**

[23] “Payable” is not defined in the Act. It is defined in the Oxford Dictionary as either “required to be paid or due” or “able to be paid”.<sup>1</sup> The Supreme Court has defined payable in the context of specific legislation as “legally due if demanded”.<sup>2</sup> The dictionary and Supreme Court definitions suggest money must be legally owed to be “payable”.

[24] There has not been any determination that Mr Barton is owed redundancy compensation. Until this has occurred, there is no money “payable” as required by the s142Y of the Act.

***Can Mr Barton seek a ruling about his redundancy compensation in absence of CCS?***

[25] To circumvent this issue, Mr Barton suggests the Authority make ruling about his entitlement to redundancy compensation and the disciplinary process leading to his dismissal in absence of CCS. This is because CCS is in liquidation. Section 248 of the Companies Act 1993 requires the liquidators consent or a High Court order to bring or continue proceedings against a company in liquidation:

**248 Effect of commencement of liquidation**

- (1) With effect from the commencement of the liquidation of a company,—
  - (a) the liquidator has custody and control of the company’s assets;
  - (b) the directors remain in office but cease to have powers, functions, or duties other than those required or permitted to be exercised by this Part;
  - (c) unless the liquidator agrees or the court orders otherwise, a person must not—

<sup>1</sup> Oxford Dictionary Online <https://en.oxforddictionaries.com/definition/payable>.

<sup>2</sup> *Westpac Banking Corporation v Commissioner of Inland Revenue* [2011] NZSC 36 at [21] and [49] discussing the meaning of “payable” in s4(1)(e) Unclaimed Moneys Act 1971 and approving the Privy Council decision in *Commissioner of Inland Revenue v Thomas Cook* [2005] UKPC 53, [2005] 2 NZLR 722.

- (i) commence or continue legal proceedings against the company or in relation to its property; or
- (ii) exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company:

...

[26] As noted the liquidator does not consent to the continuation of proceedings against CCS. The applicant also has not sought a High Court order allowing it continue proceedings against CCS.

[27] The issue of liability to pay redundancy compensation cannot be determined in absence of CCS. This is because it is primarily liable for the alleged breaches. Further the liquidator has confirmed it holds sufficient funds to pay the redundancy compensation claimed if Mr Barton was successful. CCS would have to be a party to any proceeding against the respondents before disgorgement of funds could occur by virtue of s248 of the Companies Act. Any ruling about liability cannot be made in its absence. CCS must be a party to any proceeding seeking to resolve Mr Barton's redundancy claims. To do so would undermine the requirements of s248 of the Companies Act 1993.

[28] Therefore the current application cannot progress to determination in the circumstances.

**Has there been a default is due to a breach of employment standards?**

[29] The alleged default cannot be a breach of minimum employment standards until there is a determination as noted above.

**Are the respondents "a person involved in the breach within the meaning of s 142W"?  
Have they aided and abetted CCS's breaches?**

[30] The pleadings evidence there is substantial disagreement about whether Mr Barton was redundant or unjustifiably dismissed by CCS. Given the existing dispute, the respondents cannot be said to have aided or abetted any breach until that is determined as noted above.

[31] Further non-payment has resulted because the liquidator holding the funds has refused to pay Mr Barton's claim. It is the liquidator's refusal to pay an undetermined claim that has resulted in non-payment. It is not the actions by the respondents.

[32] The grounds for granting leave under s 142Y of the Employment Relations Act 2000 have not been met. This application for leave is dismissed.

[33] Given the respondents were self-represented, each party is to meet their own costs.

**TG Tetitaha**  
**Member of the Employment Relations Authority**