

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 212/07
5093359

BETWEEN SUSAN BELICH
 Applicant

AND RUSTY PELICAN LIMITED
 (IN RECEIVERSHIP)
 Respondent

Member of Authority: Robin Arthur

Representatives: Chris Rowe for Applicant
 Blair Edwards for Respondent

Submissions received: 9 July 2007 from Applicant
 18 July 2007 from Respondent

Determination: 19 July 2007

DETERMINATION OF THE AUTHORITY

[1] This matter involves an issue about whether an order for reimbursement of lost wages made by this Authority under the Employment Relations Act 2000 (“the ER Act”) is subject to the preferential claims regime of the Companies Act 1993.

[2] The Applicant seeks a declaration and a compliance order regarding actions of the receiver of the Respondent in according preference to only part of the sum ordered in reimbursement of lost wages by the Authority in an earlier determination.

[3] Her application was accorded urgency and dealt with ‘on the papers’ because a sale of the company’s assets is expected to occur on or about 20 July 2007.

The background

[4] By determination AA97/07 (29 March 2007) the Applicant was found to have a personal grievance for unjustified disadvantage and dismissal. She was awarded remedies of \$8017.33 in

reimbursement of lost wages under ss 123 (1)(b) and 128(3) of the ER Act and a further \$6000 under s123(1)(c)(i) of that Act as compensation for distress caused by the respondent's unjustified actions.

[5] The Respondent was placed into receivership on 13 March 2007, two weeks after the Authority's investigation meeting about the Applicant's personal grievance claim and two weeks before the Authority's determination was issued.

[6] The determination at [89] noted the potential effect of the receivership on remedies:

Under s30(2)(b) and (3) of the Receiverships Act 1993 preferential payments are made in the same order as for liquidations under Schedule 7 of the Companies Act 1993. Under clause 2(bb) of that Schedule this includes reimbursement of lost wages ordered under s123(1)(b) and s128 of the Employment Relations Act up to a total of \$16,420 (see clause 6 and 6A). However distress compensation orders under s123(1)(c) appear to be excluded as preferential claims.

[7] Clause 2(bb) of the Schedule 7 of the Companies Act states:

*subject to clause 6, **any reimbursement** or payment provided for, or **ordered by, the Employment Relations Authority, the Employment Court, or the Court of Appeal under section 123(b) or section 128 of the Employment Relations Act 2000, to the extent that the reimbursement or payment does not relate to any matter set out in section 123(c) of the Employment Relations Act 2000, in respect of wages or other money or remuneration lost during the 4 months before the commencement of the liquidation.** (my emphasis)*

[8] For present purposes the reference to liquidation at the end of this clause is to be read as if it were a reference to receivership.

[9] By letter to the Applicant dated 20 June 2007 the Receiver advised his opinion of how clause 2(bb) applied to the award of remedies under Authority determination AA 97/07:

I have examined your award for lost wages of \$8017.33 and note that it applies to the period of 152 days from 9 July 2006 to 7 December 2006. As you know, the Company went into receivership on 13 March 2007. Therefore, the portion of your claim that falls within the defined period of 4 months prior to receivership is 25 days from 13 November 2006 to 7 December 2006. Accordingly, the portion of your claim that is preferential is \$1,318.64.

[10] He then stated that the balance of the Applicant's claim, which included (as I understand it) an agreed additional sum for her costs, was unsecured. He advised that he did not expect there to be any funds available to unsecured creditors following the sale of the business.

[11] The Applicant's present application challenges the receiver's analysis.

The parties' submissions

[12] The applicant says she has been disadvantaged by delays caused by the Respondent in dealing with her personal grievance, that the respondent's sole director at the time misled the Authority about the prospect and imminence of receivership, and that the Companies Act provisions should not override the Authority's order for a sum in reimbursement of lost wages.

[13] The respondent replies, in short, that the Authority does not have jurisdiction to direct the Receiver in such a way that would override the order of preference given to claims under the Companies Act, and that his approach to the application of that Act to the Authority's particular orders is, in any event, correct.

Discussion

[14] The Authority does, I find, have jurisdiction to determine the Applicant's claim for a declaration and compliance order. Her present application clearly arises out an employment relationship problem, and the Authority's earlier resolution by determination of that problem, and consequently are matters within the exclusive jurisdiction of the Authority under s161 of the ER Act, and under s137(2) may be the subject of a compliance order. Any declaration and order made applying to the Respondent would need to be acted on by the receiver.

[15] The Authority has jurisdiction to consider the application and inter-relationship of the Receiverships Act, the Companies Act and the remedies provisions of the ER Act to the present employment relationship problem, being a question of the construction of the ER Act "or of any other Act": Schedule 2 clause 1(b) of the ER Act.

[16] The essential issue is not jurisdiction but whether the approach taken to date by the receiver is correct or not. I find that it is, for the following reasons.

[17] Clause 2(bb) of Schedule 7 of the Companies Act expressly acknowledges and limits the extent to which orders of the Authority may give a worker's claim for wages greater or lesser preference than other creditors of a company in receivership. Those limits are not just on orders of the Authority. They are also, in appropriate cases, on orders of the Employment Court and the Court of Appeal.

[18] Clause 2(bb) must also be read in context with the provisions of clause 2(a) of the same schedule in order to identify the statutory policy being expressed:

*Subject to clause 6 of this Schedule, all wages or salary of any employee, whether or not earned wholly or in part by way of commission, and whether payable for time or for piece work, in respect of services rendered to the company **during the 4 months preceding the commencement of the liquidation.** (my emphasis)*

[19] Again, for present purposes the reference to liquidation at the end of this clause is to be read as if it were a reference to receivership.

[20] Clause 2(a) also limits preference to claims for wages or salary to amounts earned in the four months before the receivership began.

[21] Parliament clearly intended that whether a worker's wage claim was undisputed (and therefore within clause 2(a) provisions) or needed to be established and confirmed by way of an Authority or Court order (and therefore within clause 2(bb) provisions), no worker could gain preference for more than four months of wages she or he may be owed.

[22] That does not negate an Authority or Court order for lost wages and compensation – what does not fall into the preferential categories of claims remains as a debt of the company, albeit an unsecured debt, satisfaction of which depends on the extent of assets available.

[23] In the present case, according to the Respondent's statement in reply, the receiver has recorded the sum of \$1,318.64 as a preferential creditor claim and the balance of the amount awarded by the Authority and some agreed costs (that balance totalling \$22,759.06) as an unsecured debt. I accept that this is the correct position. It is not a position that could properly be changed by a compliance order requiring the receiver to pay the Applicant the full amount of the sum awarded to her in reimbursement of lost wages.

[24] The Respondent states that the preferential creditors are to be paid following the sale of company assets expected on or about 20 July 2007.

[25] I have considered the Applicant's submission that the Respondent's sole director at the time of the earlier investigation meeting, appears to have misled the Authority about the prospect and imminence of receivership. His evidence was to the effect that this was unlikely. It quickly proved to be otherwise. However I consider that this makes no difference to the present issue before the

Authority. It does not change the application of the Companies Act preferential claim provisions to the time span for which wages were lost – that remains the same whether the company was in receivership or not. It also made no difference to the remedy that the Authority could have awarded in the circumstances.

Determination

[26] Accordingly, I resolve the present employment relationship problem by declaring that the receiver has correctly applied the preferential claim provisions of the Companies Act to the Authority's earlier award to the Applicant of sums in reimbursement of lost wages and compensation for distress. Consequently no compliance order is needed.

[27] Neither party's submissions sought to reserve any question of costs in respect of this application. In all the circumstances no award for costs is warranted and none is made.

Robin Arthur
Member of the Employment Relations Authority