

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 157
5329858

BETWEEN

RICHARD
DOWNEY
First Applicant

BENJAMIN

ALAN LESTER THOMAS
Second Applicant

DARAL JOHN WALLIS
Third Applicant

A N D

X FACTOR SERVICES
Respondent

Member of Authority: M B Loftus

Representatives: Shane Robinson, Advocate for Applicants
No appearance for Respondent

Investigation Meeting 12 October 2011 at Invercargill

Date of Determination: 14 October 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an arrears claim with the applicants alleging the respondent, X Factor Services (X Factor), owes various amounts for unpaid wages and holiday pay.

[2] Whilst X Factor was unrepresented, a letter written by one of its principles and attached to the application show that the claims are disputed.

Non-appearance of the respondent

[3] X Factor was not represented at the investigation meeting, though given both the applicants' and Authority's experience with it, this was not a surprise. The non-appearance does, however, raise the issue of whether or not the investigation should proceed in the respondent's absence.

[4] Whilst not the situation at the time these claims relate to, X Factor was subsequently incorporated as a limited liability company. This occurred on 1 June

2010 though the records of the Companies Office, along with information provided by the Insolvency and Trustee Service of the Ministry of Economic Development, confirm that the principals remained essentially unchanged. They were Mr Mike Wilton and Ms Nicola McLaren. The company's address for service was initially recorded as 90 Paterson Street, Invercargill, though this later changed to 586 Tay Street, Invercargill. Both are residential addresses with the former being owned by Ms McLaren, though she has now sold the property.

[5] I am satisfied that the appropriate documents – the statement of problem, the applicants' briefs of evidence and the notice of investigation meeting have been served at both addresses.

[6] There is also a cellphone, purportedly owned by Ms McLaren, and for which a consistent number has been advised by the applicants, X Factor's previous solicitor and the Insolvency and Trustee Service. With one exception, attempts to contact X Factor on that number have also been unsuccessful. The exception was a call answered by Ms McLaren who then passed the phone to Mr Wilton but which did not result in any meaningful participation by the respondent.

[7] Finally there was advice from the Insolvency and Trustee Service that Mr Wilton has, in accordance with obligations he has as a bankrupt, advised that since June he is travelling the South Island and of no fixed abode. It is understood Ms McLaren is with him. Mr Wilton has, however, advised the Insolvency and Trustee Service of a delivery address care of New Zealand Post in Invercargill and I understand that copies of the relevant documentation have now been sent to that address, albeit rather recently.

[8] In the circumstances, I consider that every reasonable attempt has been made to contact X Factor and advise it of these proceedings. The fact those attempts have not resulted in the respondent's attendance should not disadvantage the applicants as one should not be allowed to avoid responsibility by simply running away.

[9] In the circumstances, I believe the matter should proceed in X Factor's absence.

Background

[10] X Factor is in the business of providing lawnmowing and gardening services to various clients. At the time of the events giving rise to the claim it was, according to the Insolvency and Trustee Service, the name used by the firm established under a partnership formed by Mr Wilton and Ms McLaren (s.7 of the Partnership Act 1908).

[11] The firms' existence was brought to the attention of the three applicants by Work & Income, a service of the Ministry of Social Development. Work & Income arranged employment for the three with X Factor on work subsidy schemes. Whilst it would appear from the evidence that the three arrangements were not under one identical scheme, the general approach was the same. Work & Income would pay a subsidy to X Factor provided it engaged each of the applicants for a minimum number of hours each week and provided written employment agreements.

[12] Mr Wallis commenced on 17 August 2009; Mr Downey on 23 August and Mr Thomas on 12 October. Notwithstanding the requirement that each of the three be provided written employment agreements, this did not occur until December 2009.

[13] By that time (December 2009) each of the three applicants was having concerns about the arrangement and their pay in particular. Notwithstanding a contractual requirement that payment be made on the 5th day of each month to a bank account of the employee's nomination, the actual practice varied with intermittent and inadequate payments being made by various means.

[14] The three tried to raise their concerns with Mr Wilton but to no avail. Indeed, it is alleged that on one occasion he advised Mr Thomas that notwithstanding the provisions of the employment agreement, he was not required to pay for a public holiday.

[15] The three also raised their concerns with Work & Income which attempted to assist by providing calculations of what they thought should have been paid and raising the issue with Mr Wilton, but to no avail. Ultimately the Work and Income contact suggested that the three consider whether or not it was viable remaining and that they seek legal assistance.

[16] By 27 January 2010, Mr Downey and Mr Thomas had had enough. They advised Mr Wilton that they would not be returning to work until he had addressed

their concerns about deficient pay. They say Mr Wilton promised to pay them the following Friday (29 January), but the money never materialised. That led to the formalisation of their resignations. Mr Thomas gave notice by letter and Mr Downey did so by text. On 15 February 2010, and for the same reason, Mr Wallis followed.

[17] The three then sought the assistance of the Southland Community Law Centre which subsequently raised claims on behalf of each. A letter was sent on behalf of Mr Downey on 15 February, Mr Thomas on 24 February and Mr Wallis on 15 March.

[18] By that latter date, and unbeknown to the applicants, Mr Wilton had been adjudged bankrupt. That occurred on 10 March 2010 and the partnership dissolved as a result. Notwithstanding that, and in apparent contravention of s.149(1)(a) of the Insolvency Act 2006, Mr Wilton responded on 18 March 2010 as a manager of X Factor Services. He disputes the claim on the grounds that each of the three had been falsifying their time sheets which, in his view, had resulted in a considerable overpayment of wages.

[19] There then commenced what turned out to be a protracted period of negotiation between Mr Robinson, as representative of the applicants, and an Invercargill solicitor acting on behalf of X Factor.

[20] On 14 June 2010, the Official Assignee consented to an application from Mr Wilton that he be allowed to be employed by X Factor Services Limited, a company incorporated on 1 June with Ms McLaren as the sole director and shareholder. That consent was withdrawn on 19 April 2011 as a result of complaints about Mr Wilton's activities, apparent breaches of the terms and conditions under which the consent was granted and concerns about the company's failure to file PAYE returns.

[21] It was about this time that the protracted negotiations between Mr Robinson and the company's solicitor ceased, with the matter remaining unresolved. It was also around this time that Mr Wilton and Ms McLaren seem to have left Invercargill and become difficult to contact. It would also appear from information gathered by the Authority's staff when trying to ascertain the whereabouts of Mr Wilton that they departed before paying their solicitor and that he, like the applicants, is also somewhat unhappy.

Determination

[22] While the three applicants state that the amounts claimed can only be considered a best guess, their calculations are supported by considerable documentary evidence in the form of timesheets, bank statements and information provided by Work & Income. Having perused the documents, I accept their claims as an accurate reflection of the amounts that should rightly be contended as owing.

[23] Mr Downey seeks \$3,874.25, Mr Thomas \$5,138.29 and Mr Wallis \$8,682.23. Each sum represents the total of three components. These are unpaid wages, unpaid holiday pay and recompense for a day in lieu for having worked on Labour Day 2009.

[24] In deciding whether or not the claims are valid I have to weigh the evidence of the applicants against Mr Wilton's accusations. Therefore I have, on one hand, evidence that was presented credibly and was supported by a considerable amount of documentary evidence. There was also a highly plausible response to Mr Wilton's accusations.

[25] Against that is Mr Wilton's allegation that the applicants have acted dishonestly. Ironic coming from a man with a history of failed business (refer Real Estate Connections Limited struck off on 6 July 2007), a series of unfulfilled promises regarding payment and a willingness to indulge in activities capable of drawing the wrath of the official assignee.

[26] By way of summary, I conclude that Mr Wilton has no credibility and his unsubstantiated accusations are worthless. I conclude the moneys' claimed are owing.

[27] That conclusion raises the question of where does responsibility for payment lie? It cannot lie with X Factor Services Limited as that entity did not exist at the time these liabilities were accrued. The extant trading entity at that time was X Factor Services, the 'firm name' of a partnership entered into by Mr Wilton and Ms McLaren.

[28] Section 12 of the Partnership Act 1908 provides that the partners are jointly liable for any debts incurred by their firm which makes Mr Wilton and Ms McLaren jointly, and personally, responsible for any award made.

[29] However s.76 of the Insolvency Act 2006 precludes the continuation of any action against Mr Wilton and excuses him from liability. There is no evidence, however, that Ms McLaren enjoys such protection and here it should also be noted that there is evidence, in the form of a job advertisement recently placed in an Invercargill supermarket that X Factor Services Limited is still operating.

[30] In these circumstances, I conclude that Ms McLaren is liable for the amounts sought and will order payment accordingly.

Interest

[31] Each applicant seeks, in addition to the claimed arrears, interest on any award made. Interest is to reimburse someone for use, by others, of money that is theirs. In this instance there can be no doubt that by failing to make payments properly due the respondent has continued to have use of money rightfully belonging to the applicants. This is therefore a circumstance in which interest should be payable, especially in the absence of a contrary argument.

[32] The rate to be applied is prescribed under the Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177). It is currently 5%. The interest becomes payable as of the date of resignation but while that is known for Mr Wallis (15 February 2010) there is some uncertainty as to the exact date upon which Messrs Downey and Thomas gave their notice. That said, there is no debate that it was no later than the day upon which Mr Robinson first wrote to X Factor on Mr Downey's behalf, namely 15 February 2010 so I shall use that date for all three. This means that the interest payable as of the date of this determination is as follows: Mr Downey gets \$322.15, Mr Thomas \$427.25 and Mr Wallis \$721.93. These amounts will increase with each calendar day that passes between the date of this determination and payment (see 34 below).

Penalties

[33] There is, through reference to ss.134 and 135 of the Employment Relations Act 2000 a suggestion that penalties were sought. The application was not, however, express and was not pursued through evidence or submission. I will not, therefore, take the question of penalties any further.

Orders

[34] For the reason given Ms Nicola McLaren, a former member of the partnership trading as X Factor Services, is ordered to pay:

- (a) To Mr Richard Downey the sum of \$4,196.40 (Four thousand, one hundred and ninety six dollars and forty cents) as recompense for unpaid wages, holiday pay and interest to 14 October 2011. This amount will increase by 53 (fifty three) cents with each calendar day that passes between 14 October 2011 and the date of payment; and.
- (b) To Mr Alan Thomas the sum of \$5,565.54 (Five thousand, five hundred and sixty five dollars and fifty four cents) as recompense for unpaid wages, holiday pay and interest to 14 October 2011. This amount will increase by 70 (seventy) cents with each calendar day that passes between 14 October 2011 and the date of payment; and.
- (c) To Mr Daral Wallis the sum of \$9,404.16 (Nine thousand, four hundred and four dollars and sixteen cents) as recompense for unpaid wages, holiday pay and interest to 14 October 2011. This amount will increase by \$1.19 (one dollar and nineteen cents) with each calendar day that passes between 14 October 2011 and the date of payment.

Costs

[35] I reserve the issue of costs. In the event the applicants seek a contribution towards the costs they have incurred in making their claim, they are required to file an application within 28 days of this determination. A copy must be sent to the postal address advised as that of Mr Wilton by the Insolvency and Trustee Service as that is now the only known address for either he or Ms McLaren. Should Ms McLaren wish to dispute the amount sought, she is required to do so within 14 days of the application being sent.

