New Zealand Employment Relations Authority Decisions

Gibson v Crane (Auckland) [2018] NZERA 360; [2018] NZERA Auckland 360 (20 November 2018)

Last Updated: 24 November 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 360
3009692

BETWEEN	JORDAN GIBSON Applicant
AND	MURRAY CRANE Respondent

Member of Authority: Robin Arthur

Representatives: Michael Smyth, Counsel for the Applicant

Garry Pollak, Counsel for the Respondent Investigation Meeting: 21 August 2018

Last information from the parties:

3 September 2018

Determination: 20 November 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jordan Gibson began employment with 1949 Limited on 1 April 2015. The company was set up by Murray Crane, an experienced fashion retailer, to operate a new business trading as Gubb & Mackie. Mr Gibson worked as day to day manager of a store opened by the business in leased premises in downtown Auckland. He was given the job title of Creative Director.

[2] Mr Crane was the sole director and, initially, the sole shareholder of 1949 Limited. Mr Gibson had been working for about two years in another fashion business operated by Mr Crane, through another company, when Mr Crane offered him the opportunity to be involved in the new Gubb & Mackie business.

[3] The offer Mr Gibson accepted in March 2015 had two components. Firstly, he was employed on a salary “plus allowances and bonuses” on terms recorded in a written employment agreement. Secondly, in a separately documented offer, he was

given an opportunity to “take up equity” in 1949 Limited. He was to be issued with a ten per cent shareholding in 1949 Limited with the promise of more shares over following years if the business met agreed targets. A Particulars of Shareholding document registered with the Companies Office in May 2015 noted Mr Gibson was allocated ten per cent of the

shares.

[4] Over the following two years the business did not meet sales targets and Mr Gibson was not allocated any more shares.

[5] In March 2016, around the end of the company's first financial year, Mr Crane talked to Mr Gibson about payment for his work changing from a salary basis to "drawings". In his response to Mr Gibson's claim in the Authority Mr Crane said Mr Gibson had agreed to that change at the time. Mr Crane's view was that this amounted to an end of Mr Gibson's status as an employee of 1949 Limited. However Mr Gibson said he was only told the change was beneficial to the company and would have no effect on him. Whether Mr Gibson had understood or accepted the change was intended to end his employment relationship with 1949 Limited became a hotly contested point in early 2017.

[6] From April 2016 Mr Gibson received weekly payments to his bank account that were for the same net amount he had received from April 2015. However from around September 2016 and through to February 2017 his pay was sometimes delayed or short as Mr Crane juggled limited cash flow to pay staff, suppliers, rent and other business costs. In February 2017 Mr Gibson raised concerns about that situation. He took issue with an explanation that he had "switched to drawings" and no longer had entitlements as an employee. By early March 2017 Mr Crane began steps to close the business which he described as insolvent. Mr Gibson made a proposal to take over the business which Mr Crane declined as it did not meet commitments he had for business loans and the lease of the premises for which he was a personal guarantor. On 31 March 2017 Mr Crane told Mr Gibson "there is no requirement for you to be at work" as the store would close the next day.

[7] Soon after Mr Gibson raised a personal grievance for unjustified dismissal and in May 2017 lodged an application in the Authority. He was unable to pursue that grievance after 1949 Limited went into liquidation by special shareholders' resolution

on 27 June 2017.1 Some of the subsequent procedural developments in his application are outlined in an earlier determination of the Authority issued on 18 April 2018.2 Ultimately Mr Gibson pursued only his claims against Mr Crane, seeking leave to pursue him for arrears and a penalty for aiding and abetting breaches of Mr Gibson's employment agreement.

Issues

[8] By the time of the Authority's investigation meeting in August 2018 the issues for resolution had become:

(i) Did Mr Gibson's employment relationship with 1949 Limited end by agreement from April 2016 or did he remain its employee until he was told to stop working in the store in late March 2017?
(ii) If he was its employee, was 1949 Limited in default in payment of wages and other money due to Mr Gibson?
(iii) If 1949 Limited was in default, was the default due to a breach of employment standards?
(iv) If employment standards were breached, was Mr Crane a person involved in those breaches, and, if so, should Mr Gibson be given leave to recover arrears in wages or other money from Mr Crane?
(v) If Mr Gibson was granted leave to recover against Mr Crane, what amounts of arrears should Mr Crane be required to pay Mr Gibson?
(vi) If payment of arrears was ordered, should Mr Crane also be ordered to pay Mr Gibson interest on those amounts and, if so, for what period?
(vii) Should Mr Crane be required to pay a penalty for aiding and abetting breaches of Mr Gibson's employment agreement with 1949 Limited?
(viii) Should either party be required to contribute to the costs of representation of the other party in this matter?

The Authority's investigation

[9] Mr Gibson, Mr Crane and Mike Mathews lodged written witness statements. Mr Mathews is a friend of Mr Gibson's family and a businessman. Mr Mathews accompanied Mr Gibson to some meetings with Mr Crane and Mr Crane's lawyer before the liquidation of the business and closure of the store. The witnesses, under

1 Companies Act 1993, s 248(1)(c).

2 *Gibson v Crane* [2018] NZERA Auckland 120.

oath or affirmation, confirmed their statements and answered questions asked by me and the parties' representatives. The representatives also gave oral closing submissions speaking to written synopses.

[10] At the end of the investigation meeting arrangements were made for Mr Gibson to provide more detailed information about his holiday pay claim and for Mr Crane to have the opportunity to comment on that information. On 3 September Mr Crane, through counsel, advised he had nothing further to add.

[11] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Did the employment relationship end in March 2016?

[12] Mr Crane's defence to Mr Gibson's claims rested on the notion that in March 2016 Mr Gibson had agreed he would only receive drawings. As a result Mr Gibson was said to have ceased to be 1949 Limited's employee by early April 2016, at the latest. His subsequent involvement was said to be solely as a working shareholder receiving drawings, not wages. For the following reasons I have not accepted that proposition.

[13] Mr Crane's evidence did not establish, on the balance of probabilities, that Mr Gibson had agreed to such a change in any way binding on him.

[14] Mr Crane recalled having a conversation with Mr Gibson in late March 2016 in which he raised the topic of Mr Gibson being paid drawings rather than wages. He said the catalyst for that conversation was the approach of the end of the financial year and a review of the business results so far. He said his accountant had told him it was "ridiculous" to have Mr Gibson paying tax, that is PAYE as an employee, while Mr Gibson was also a shareholder and the business was not in a tax paying position because it was not making any money.

[15] Mr Crane said his conversation with Mr Gibson about that topic was "not structured". It had occurred in the context of a wider discussion, between just the two of them, about financial results so far and plans for the new season. Mr Crane, in his oral evidence, said he did say to Mr Gibson that "nothing would change" but said that was "in the context of how much he was taking home each week". Mr Crane did not accept Mr Gibson had not understood at the time that such a change would also have consequences on his tax obligations, holiday pay and Kiwisaver contributions. Rather, Mr Crane said in his oral evidence: "He never questioned any of it and my assumption was that he understood it". Soon after Mr Crane sent an email to his business accounts staff, copied to an external accountant and the company's lawyer, that said: "I have met with Jordan and discussed moving him on to drawings for new financial year. He has agreed". A few days later, on 4 April 2016, Mr Crane sent a further email to his accounts staff and copied it to the lawyer. Under the subject heading of "Jordan Drawings" he wrote: "We will need to formalise this arrangement". The lawyer's reply email, also sent on 4 April, said: "Jordan has been a shareholder since May 2015. Nothing needs to be done at our end".

[16] None of that established Mr Gibson had agreed, at that time, to termination of his employment relationship with the company. Rather it is more likely that he only acquiesced to what he understood was a change in how his pay was labelled for accounting purposes. In reaching that view I have also taken account of the fact that Mr Gibson was a young man, in his mid-twenties at the time, and new to business. Mr Crane was a middle-aged man, with 30 years' experience in his industry and around 18 years' experience of running his own businesses.

[17] In email correspondence between Mr Gibson and Mr Crane in March 2015, at the time they were discussing how he would get some shares in the business, Mr Gibson had made it clear that his priority was to be an employee of the company because his income would be guaranteed. It was unlikely he would have knowingly given that up a year later.

[18] At the time of the March 2016 discussion Mr Gibson was an employee. In respect of changes to his terms of employment, he was subject to the protection of statutory good faith obligations. If the changes Mr Crane proposed would have an adverse effect on the continuation of Mr Gibson's employment, Mr Gibson was entitled to fuller information about that prospect before making a decision.3 It was Mr Crane's obligation, as director of 1949

Limited, to ensure that happened, both as a matter of good faith and to establish mutual intention for any binding change.

3 Employment Relations Act 2000, s 4(1A)(c).

[19] Mr Gibson's written employment agreement did allow for changes to be made, with such changes to be mutually agreed and recorded in writing. However it also provided that if the employment relationship was to end, this would be done in accordance with the terms of that agreement. Those terms included one month's notice of termination. No such notice was given. Neither was any settling of final pay, including accumulated holiday entitlements, made or arranged at the time.

[20] This occurred in a context where Mr Crane had the benefit of assistance from his accounts staff, a lawyer and an external accountant who provided advice to his business. He and those advisors were undoubtedly familiar, from their dealings over other employees of that business and Mr Crane's other ventures, with the requirements around the end of an employment relationship.

[21] Mr Crane's s 4 April email to his company's lawyer, referring to a need to "formalise this arrangement" showed he had at least an inkling something more needed to be done if a change to the nature of the relationship with Mr Gibson was to be made. The lawyer's response clearly missed the point. Nothing more was done at that time to establish Mr Gibson was advised that the company intended (if that was the case) a change in description of payments made to him also amount to the end of the employment relationship. If that had been done, and was not what Mr Gibson had understood he had agreed to, he would have been alerted to a possible difference of understanding and thereby have had an opportunity to question it. He was not.

[22] Around 11 months later, as Mr Gibson made inquiries about irregular payments, he was referred to the fact that those payments were now accounted for as drawings. In an email to Mr Crane he made the following comment:

I would prefer as per my original agreement that I would be paid in a salary rather than drawings. I wasn't aware of the implications of being paid in drawings when the change was made when you told me my remuneration was changing from salary to drawings and that nothing would change, I just took this at face value. Now I am confused about whether I have been paid a salary, is PAYE being withheld etc, because my understanding is I am still an employee.

[23] In a subsequent response Mr Crane gave this explanation:

I will get the exact date for you.

The decision was made to do this to ease pressure on cash flow with the PAYE exposure, especially given we were losing money. You were also

being paid non-taxable allowances and getting the benefit there. Obviously it can be reviewed. ...

[24] For most of the intervening period Mr Gibson had been receiving, most weeks, the same net amount deposited into his bank account as he had earlier received in wages. If he had looked at the company accounts, he would have seen payments to him labelled as drawings, not wages, but have not understood this signified a substantive change in his relationship with the company. Neither would he have known that PAYE tax was no longer being paid on the amounts deposited in his bank account and that no Kiwisaver contributions were being paid. It was also unlikely he would, knowingly, have agreed to getting drawings for the same net amount he had received as salary if he was then liable to pay tax on the net amount received.

[25] Against that background and on the balance of probabilities, the employment relationship between 1949 Limited and Mr Gibson was not ended in March 2016. The relationship continued in existence and in effect up until 31 March 2017 when it was finally severed by the direction not to come to work in the store.

[26] This is a finding that the real nature of the relationship between Mr Gibson and 1949 Limited remained one of employment throughout.4 The evidence has not established a common intention to change the employment terms initially agreed. The divergence in practice, by labelling payments to him from April 2016 as drawings, amounted to an accounting exercise, not a change to the nature of the relationship. There was nothing in Mr Gibson's behaviour that suggested he acted differently than an employee. His ten per cent shareholding did not inherently change his status. Holding shares in a company is not unusual for an employee in a managerial role, offered the incentive of building a larger share over time through 'sweat equity'. Neither did his proposal to buy the business,

attempted unsuccessfully in February 2017, change the nature of his earlier involvement as an employee. In respect of control, integration and fundamental tests, nothing indicated Mr Gibson was anything other than an employee with managerial responsibilities.5

4 Employment Relations Act 2000, s 6(2) and (3).

5 *Bryson v Three Foot Six Limited (No. 2)* [2005] NZSC 34 at [32].

Was 1949 Limited in default for money due to Mr Gibson?

[27] Mr Gibson identified five categories of wages or other money in which he claimed 1949 Limited had defaulted on payments due to him or for his benefit.6 These were:

(i) $6,590.55 for a shortfall in wages due to him over the 30 week period between 13 September 2016 and 4 April 2017; and
(ii) $5,833.33 as one month's notice on the termination of his employment in March 2017; and
(iii) $5,923.08 as holiday pay for 22 days annual leave entitlement owed by the end of his employment; and
(iv) $3,955.53 as Kiwisaver contributions not made for his benefit over the last year of the employment; and
(v) $14,992.64 as PAYE for a 52 week period from 1 April 2016.

[28] As explained below, Mr Gibson established 1949 Limited was in default for those payments. The fifth category (for PAYE), however, does not fall within the s 142Y(1)(a) definition of wages or other money payable to the employee.

[29] Mr Gibson calculated that about $288.32 should have been deducted as PAYE and remitted to IRD for the regular net weekly payments he received during the last year of his employment. He claimed that amount (annualised to $14,992.64) on the basis that he was now responsible to pay tax on those net payments. However it is excluded for two reasons. Firstly, he received only what he was entitled to receive as net salary (albeit wrongly labelled drawings). 1949 Limited, not Mr Gibson, was liable for the difference between that amount and the gross salary for which PAYE should have been calculated, deducted and remitted to IRD. Secondly, the defaults at issue are only those that fall within the definition of "employment standards" found in s 5 of the Act. The legislation covered by those standards does not extend to the tax legislation. On my reading those failures in PAYE payments are a matter between 1949 Limited and IRD, not Mr Gibson and IRD.

[30] The amount he claimed as the holiday pay he should have been paid at the end of the employment was adjusted to 17 days from 22 days after Mr Gibson more carefully checked information he had about what leave he had taken during his two

6 Employment Relations Act 2000, s 142Y(1)(a).

years of employment with 1949 Limited. My calculations resulted in a higher daily rate than the amount of $269.23 he put forward for the calculation. However, taking the slightly lower figure he calculated was applicable, the failure to pay him for his accumulated holiday entitlement of 17 days gave a total default in holiday pay of

$4,576.91.

[31] The evidence drawn from bank statements, tax records and company records established that there were also defaults of the amounts claimed by Mr Gibson for shortfalls in wages, notice due on termination and amounts that should have been transferred for his benefit as Kiwisaver contributions.

Was the default due to a breach of employment standards?

[32] Excluding the PAYE amount claimed for reasons given above, the other four categories of default each fell within the definition of being "due to a breach of employment standards".7

[33] The failure to pay Mr Gibson's holiday pay was a breach of the employment standard referring to minimum entitlements under the Holidays Act 2003.8 Those entitlements required payment of outstanding annual holiday entitlements in the pay that related to Mr Gibson's final period of employment.9 In his case that was immediately after 31 March 2017.

[34] The employment standards include all the provisions of the Wages Protection Act 1983.10 Under section 4 of that Act an employer must pay the entire amount of wages payable at the time they become due. In Mr Gibson's case breaches occurred in respect of his regular weekly wage and the allocation of Kiwisaver contributions throughout the last year.11 The full amounts of the defaults in paying those wages and Kiwisaver contributions became due from 1 April 2017.

[35] Mr Gibson's employment agreement with 1949 Limited provided that where his employment was terminated without one month's notice, equivalent wages should

7 Employment Relations Act 2000, s 142Y(1)(b) and s 5 definition of "employment standards".

8 Paragraph (c) of the definition of "employment standards" in s 5 of the Employment Relations Act 2000.

9 Holidays Act 2003, s 24 and s 27(1)(b) and (2).

10 Paragraph (f) of the definition of "employment standards" in s 5 of the Employment Relations Act 2000.

11 Kiwisaver Act 2006, s 66.

be paid. While Mr Gibson was aware the business could close or be sold by the company, he did not receive the required notice of the end of his employment and 1949 Limited was liable to pay him the equivalent wages for one month.

Was Mr Crane a "person involved" in the breach?

[36] Having found there was a default in the payment of wages or other money payable to Mr Gibson and the default was due to a breach of employment standards, the question turned to whether Mr Crane was "a person involved in the breach".12 If so, s 142Y of the Act allowed for the prospect that Mr Gibson could recover those sums from Mr Crane even though 1949 Limited was the legal entity who employed him, not Mr Crane.

[37] For such a finding of involvement by Mr Crane, his actions must meet at least one of the four alternative or overlapping criteria given in s 142W of the Act. Two of those criteria appeared to apply in answer to the following questions drawn from the wording of the provision:

> (i) Was Mr Crane "in any way, directly or indirectly, knowingly concerned in, or party to, the breach;13 and/or
> (ii) Did Mr Crane aid, abet, counsel or procure the breach;14 and
> (iii) If so, do any defences relating to breach of minimum entitlement provisions apply to Mr Crane's conduct? 15

(i) Knowingly concerned in the breach

[38] Mr Crane was the sole director of 1949 Limited. He owned 90 per cent of the shares. He was also the personal guarantor for the lease of premises and for bank loans he arranged to fund the fledgling business, using a rearrangement of a mortgage on his family home to do so.

[39] In his oral evidence Mr Crane did not flinch from accepting he made all key decisions, including that Mr Gibson would be paid drawings rather than salary and, at the end of its second financial year, to close the store.

12 Employment Relations Act 2000, s 142Y(c).

13 Employment Relations Act 2000, s 142W(1)(c). 14 Employment Relations Act 2000, s 142W(1)(a). 15 Employment Relations Act 2000, s 142ZD.

[40] Sporadic shortfalls in wages paid during the year were the result of discussions between Mr Crane and the company's accountant about not having enough money in some weeks to pay staff. On some occasions Mr Crane then made the decision to delay or miss some of the wage payments. On other occasions, he said, the accountant told him after the event. In both circumstances the actions of accounts staff were made under the authority or direction of Mr Crane.

[41] Similarly the accounting changes that included labelling payments to Mr Gibson as drawings and stopping

Kiwisaver contributions resulted from the decision Mr Crane took in March 2016. The accounts staff implemented his decisions.

[42] The failure to pay holiday pay entitlements and one month's notice was also a decision taken at that time, due to a lack of funds but in the knowledge that Mr Gibson considered they were payments he was entitled to have accepted as due to him. However, at that time and for reasons this determination has held were incorrect, Mr Crane did not accept 1949 Limited was liable because he believed Mr Gibson had no employment relationship with the company at that time.

[43] Mr Crane was, therefore, knowingly concerned in those breaches. In this context knowledge does not need to amount to being aware that the actions of not paying the wages, holiday pay and so on were wrong. Rather the necessary knowledge is that Mr Crane knew the amounts were not being paid. He was then "knowingly concerned" because he directly made or was indirectly responsible for the decisions that resulted in those breaches.

(ii) Procuring the breach

[44] Having found Mr Crane was knowingly concerned because of decisions he directly made or was indirectly responsible for, he also clearly met the criterion of having procured the breach. In this context procuring means causing something to happen. The actions that amount to breaches of employment standards were caused to happen by the directions Mr Crane gave about what payments should be made or not be made to Mr Gibson.

[45] By email to Mr Crane on 29 March 2017 Mr Gibson had made his position about his employment and his arrears claim very clear:

... It has also been alluded to that 31 March would be the date the business would trade until, that is now two days away and I am yet to hear anything with regards to the status of the business and my employment.

I am effectively now working in place of [another employee] although I continue not to get paid a wage. There also haven't been any payments made towards the arrears owed to me, this amount now exceeds $10,000. This is having a significant financial impact on me. I am now being pressured to take legal action to recover my unpaid wages, and while I am reluctant to do this your silence on this matter is not giving me any other choice. I need to have this amount paid out immediately.

The other important detail that I need to have clarified is whether my employment will continue beyond March 31st.

[46] After the store closed on 31 March and before the company went into liquidation on 27 June 2017 Mr Gibson lodged his application in the Authority seeking wage and holiday pay arrears, naming both 1949 Limited and Mr Crane as respondents. The reply for the respondents, lodged on 2 June 2017 and before the company went into liquidation denied Mr Gibson was an employee from March 2016 and, although not expressly stated, impliedly denied any liability for the breaches. Mr Crane as sole director was responsible for the contents of that reply and denying liability for any arrears. In that way he continued to procure the breaches.

(iii) No available defences excuse Mr Crane's involvement

[47] In proceedings that include an action to recover wages or other money not paid in breach of a minimum entitlement provision there are two defences available to a person found to be involved in the breach.16 In this case, where 1949 Limited is the "person" (in the sense of a legal entity) that technically did not meet employment standards for payments due to Mr Gibson, Mr Crane as "another person involved in the breach" has a defence if he can prove that:17

(a) his involvement in the breach was due to reasonable reliance on information supplied by another person; or
(b) he took all reasonable and proper steps to ensure that 1949 Limited complied with the relevant statutory provision needed to meet the employment standard.

16 Employment Relations Act 2000, s 142ZB(a) and s 142ZD.

17 Employment Relations Act 2000, s 142ZD(2)(a) and (b).

[48] There is an important qualification to defence (a). "Another person" does not include a director, an employee or an agent of Mr Crane.18 This might initially appear to exclude the accounts staff involved in processing payments and the external lawyer and accountant with whom he discussed various relevant events. However

those individuals were not his personal employees or agents. Accounts staff, as I understood his evidence, were employees of the other company of which Mr Crane was a director. Technically, then, the other company was providing accounting and payroll services to 1949 Limited. The lawyer and the external accountant, involved in varying stages, were providing their services to 1949 Limited and Mr Crane's other company, not him personally.

[49] However, even with that qualification, there was no evidence sufficient to establish Mr Crane's involvement in the breaches was due to reasonable reliance on information supplied by the accounts staff, the lawyer or the external accountant. As a director, acting within the scope of his actual or apparent authority, Mr Crane's conduct must be treated as having been engaged in by 1949 Limited.19 The accountant may have, as Mr Crane said he did, advised that transferring Mr Gibson to a drawings payment system, as a shareholder, was a good idea but there was no evidence that he had led Mr Crane to believe that this did not require termination of the employment relationship to be mutually agreed and to be properly carried out (including by paying out holiday pay entitlements accumulated by that time). The same can be said of what is known of communications with the lawyer. Mr Crane had told the lawyer that Mr Gibson had agreed to the change and the lawyer's 4 April email that "nothing needs to be done at our end" (and appearing to refer to Mr Gibson's status as an existing shareholder) did not amount to advice that the employment relationship was over and the employment standards need not be met. On those matters, and the accounts staff role in short payments made some weeks, Mr Crane bore the responsibility as the company director who ultimately made the decisions to act in those ways.

[50] Neither could Mr Crane be said to have satisfied the grounds necessary to rely on the second defence. He said he believed the employment relationship was extinguished from 1 April 2016. As a result he saw no need to comply with the

18 Employment Relations Act 2000, s 142ZD(3).

19 Employment Relations Act 2000, s 142ZA(1)(a).

relevant statutory provisions to meet the employment standards. He took no steps at all to do so, rather than "all reasonable and proper ones". In the circumstances of having failed to terminate the employment relationship by mutual agreement, the failure was neither reasonable nor proper.

Should leave be granted for Mr Gibson to recover arrears from Mr Crane?

[51] Having established the three criteria for when an employee may recover wages and other money from a person who was not the employer, the Act required two further hurdles to be crossed. Firstly, the Authority must grant prior leave. Secondly, recovery may be authorised "to the extent that the employee's employer is unable to pay the arrears".

[52] Two questions arose:

(i) Were there grounds to grant or decline leave for Mr Gibson to recover arrears in this case?
(ii) Was 1949 Limited (in liquidation) unable to pay the arrears?

Leave to recover?

[53] The Act provides a statutory discretion for the Authority to grant or decline an application for prior leave to recover. The word 'prior' does not mean the application needs to be made and granted before an employee can begin an action to recover arrears. The question of seeking to recover against a person involved in the breach only arises after liability for arrears and involvement of the person has been established. As a matter of practicality a single Authority investigation and determination may consider both the issues of liability for arrears, leave to recover against another person and orders for the relevant amounts. The leave application, during the course of that proceeding, is simply a check that the necessary statutory requirements have been met. This is what must be done "prior" to considering which legal or personal entities may be subject to orders for recovery of arrears.

[54] The Act sets no express grounds on which leave could otherwise be granted or declined. However neither is leave stated to be mandatory so the apparent discretion must be exercised on a principled basis. There is, as yet, no judicial guidance about this specific provision as enacted in 2016 and what grounds or principles might guide that discretion to decline leave if the three criteria in s 142Y(1) have been met.

[55] It is clear that the leave can only allow recovery of arrears due after the provision came into effect on 1 April 2016. In Mr Gibson's case the amounts sought all relate to entitlements that arose during the period 1 April 2016 to 1 April 2017 or that became due to him at the end of the employment on that latter date.

[56] Considering an earlier, similar but now repealed provision in the Act, the Court of Appeal endorsed the approach that granting leave, or authorisation as it was then termed, to join a director to proceedings for recovery need only a "tenable cause of action" to be shown.20 In that decision the Court noted that the 2016 amendments concerning liability of person involved in breach of employment standards (sections 142W–142ZD) created a new defence which arguably would not be necessary if knowledge of default was a prerequisite of liability.21 That reference to liability appears to include the liability of a person involved in a breach for recovery of arrears. The present provision also uses different words to fix the liability of an involved person. Unlike the now-repealed s 234, s 142(1) does not refer to whether actions in default were "directed or authorised" but has more detailed or specific criteria. These include where the involved person aided, counselled, procured, induced, was directly or indirectly knowingly concerned, or conspired with others.

[57] While the provision may be said to reduce protections provided by limitation of corporate liability, the new wording shows Parliament intended to allow for responsibility for arrears to be fixed on involved persons. Speaking in the third reading of the Bill that enacted these sections the then-Minister for Workplace Relations and Safety, the Hon Michael Woodhouse said:22

The provisions also make it harder for individuals or other third parties to hide behind corporate structures of the employer and evade responsibility when they are knowingly and intentionally involved in breaching employment standards. Being able to target both individuals and companies will strengthen the incentives to comply with these important legal obligations.

[58] Mr Crane had the necessary extent of knowledge and intention, not negated by the notion that he was acting under a mistaken or misguided belief that his actions were right. He procured and was knowingly concerned in the change to payment of

20 *Brill v Labour Inspector* [2017] NZCA 169 at [17].

21 *Brill*, above n 20, at [16].

22 www.parliament.nz/en/pb/hansard-debates/rhr/document/51HansD_20160310_00000012/third- readings.

drawings and the denials of liability for arrears at the time that employment ended and Mr Gibson raised his claims. He did not say the company owed the money and could not pay. He denied anything was owed. He did so knowing Mr Gibson contended he was an employee with concomitant rights to wage arrears, holiday pay and notice.

[59] Part of Mr Crane's argument was that Mr Gibson should forgo his employment entitlements because he was a shareholder (by grant) and had to bear the risk of a new venture and share the losses resulting from its failure. Such an argument would be persuasive if an employment relationship had not been formed and they were, genuinely and from the outset, fellow venturers. However the parties had taken the care to formalise Mr Gibson's employment and had not properly extinguished it or the rights arising from it.

[60] Having satisfied the s 142Y criteria, and with no sufficient grounds being established not to, leave is granted for Mr Gibson to recover arrears from Mr Crane.

Is the employer unable to pay the arrears?

[61] Recovery is permitted to the extent that the employee's employer is unable to pay the arrears in wages or other money.23 The Act does not state at what time the ability to pay the arrears should be assessed.

[62] In the case of the liquidation of a company owing wages and other money to its former employees there is (at least theoretically) a prospect that the process of cashing up assets might eventually generate funds to meet some or all of those obligations. In closing submissions Mr Gibson submitted it would be a perverse outcome for workers if this meant they had to wait until the end of the liquidation process to commence their claim or have such a claim determined. The better interpretation is that the very act of liquidation is a declaration by a company that it is unable to meet its debts. The date of liquidation should, prima facie, be taken as the time at which the employer is unable to pay the arrears in wages or other money. As a matter of fact that proposition can be tested at the time of

the Authority's investigation, by information requested from the liquidator or from what is apparent from the liquidator's reports registered with the Companies Office. If the extent of the ability to pay the arrears has changed, this could be taken into account in setting

23 Employment Relations Act 2000, s 142Y(2)(b).

any orders allowing recovery from another person. A worker may have lodged a creditor's claim form with the liquidator. The extent to which any of such a claim (including, perhaps, some preferential parts) had been met by the time of the investigation would be a relevant factor. There is unlikely to be any real risk of double recovery by an employee who gets the benefit of order for a person involved in a breach to pay arrears. The person subject to that order would, presumably, then be entitled to recover through the liquidation process any amount paid out in arrears if the assets of the company (that is the employer) eventually generated some funds to cover those amounts. In such an (albeit quite unlikely) scenario, the effect is that a worker's claim for those arrears, as a creditor of the liquidated company, would transfer to the person involved in a breach who had been ordered to pay those amounts in the meantime.

[63] In Mr Gibson's case he made a creditor's claim for $22,372 comprising unpaid net salary, unpaid Kiwisaver contributions, pay for the notice period and unpaid holiday pay. Neither of the two reports of the liquidator had lodged with the Companies Office by the date of this determination indicated there was an likelihood the liquidation process would generate funds sufficient to meet any of Mr Gibson's claim, if it was accepted in the liquidation. Put another way, there was no evidence that the employer (that is the liquidated company) had any ability to pay the arrears, even to some extent. Accordingly, that factor in allowing recovery of arrears against another person under s 142Y of the Act was satisfied.

What amount of arrears should Mr Crane be required to pay?

[64] For the reasons given Mr Gibson is granted leave to recover arrears in wages and other money from Mr Crane. Mr Crane must pay Mr Gibson the following net amounts in arrears:

(i) $6,590.55 (net) for wages; and
(ii) $5,833.33 (gross) for notice; and
(iii) $4,576.91 (gross) for holiday pay (for 17 days annual leave); and
(iv) $3,955.53 (less applicable tax, if any) for Kiwisaver contributions.

[65] Mr Crane must pay these amounts by no later than 52 days after the date this determination is issued. The somewhat longer than usual period allows for both the

intervention of the festive season and some time that may be required to arrange the necessary funds.

Should Mr Crane have to pay interest on the arrears?

[66] Mr Gibson sought an order for interest. As this determination has found he was entitled to amounts ordered as arrears from 1 April 2017 and he has been denied the use of the net value of those amounts since then, it was fit to make the order sought.

[67] Calculation of the actual amount of interest is left to the parties once the net figures for the four categories of arrears are worked out. The amount is to be calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016.24 Interest is awarded for the whole of the period from 1 April 2017 to the date that the amounts now due are paid in full. Leave is reserved to revert to the Authority if the parties are not able to agree on the necessary figure to satisfy the order.

Is Mr Crane also liable to a penalty for aiding and abetting breaches?

[68] Mr Crane was not liable to a penalty under s 142X of the Act, for involvement in a breach of employment standards, as only a Labour Inspector may seek such a penalty. However Mr Gibson sought an order imposing a penalty on Mr Crane for aiding and abetting breaches of his employment agreement, available under s 134(2) of the Act.

[69] The breaches in payments of Mr Gibson's wages, holiday pay, Kiwisaver contributions and notice on termination of the employment were, at law, the deeds of 1949 Limited as a separate legal entity. Those deeds breached expressed and implied terms of Mr Gibson's employment agreement. Mr Crane, as director of the company, was responsible for the decisions which resulted in those breaches. There is ample authority in case law to confirm that, as the architect of the non-compliance with the terms of Mr Gibson's employment agreement, Mr Crane was liable to a penalty as a director or manager, even if he thought he could rely on professional advice that the impugned actions were lawful.25

24 Employment Relations Act 2000, Schedule 2 clause 11.

25 *Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corp (NZ) Limited* [1993] NZEmpC 142; [1993] 2 ERNZ 513 at 536. See also *Peacock v The New Zealand Performance Workers Union* [1990] 2 NZILR 257 (CA) at 260.

[70] In determining an appropriate penalty for Mr Crane's actions in aiding and abetting the breaches, regard has been had to the relevant matters set out in s 133A of the Act and judicial guidance on setting penalties.26 The factors and steps considered are set out in summary form.

[71] A penalty was appropriate in this case considering the object of the Act to address the inherent inequality of power in employment relationships. While Mr Gibson was incentivised in his work by the prospect of building a holding in the company, he was a young man who was throughout in an employment relationship with the company. Changes to that status were sought, and effectively imposed, by Mr Crane, an experienced businessman, without observing the good faith obligations necessary to achieve mutual intention and agreement to any change. While a detailed analysis of the events and circumstances involved breaches of separate Acts, the breach for penalty purposes could sensibly be regarded as an ongoing breach, from March 2016 through to the end of the employment on 1 April 2017. The provisional liability of Mr Crane as an individual for that ongoing breach was a penalty of

$10,000. Mr Crane's reasoning for acting as he did, denying Mr Gibson's status as an employee and his concomitant rights, was legally flawed but, certainly by February and March 2017, his actions were deliberate and intentional in light of the dispute about that very point. The resulting loss to Mr Gibson is quantified in the arrears amounts ordered. The company, of which Mr Crane was director and financially exposed as guarantor for some of its costs, reduced its losses by the amounts not paid to Mr Gibson. The order for recovery of arrears from Mr Crane provides a substantial level of restitution to Mr Gibson for the actual effects of the breach. The vulnerability of Mr Gibson as a relatively young employee has already been touched upon. There was no evidence Mr Crane, or the companies through which he conducted business, had been involved in any similar conduct on previous occasions. Deterring Mr Crane and other employers who might be tempted to breach employment standards in this way favoured imposition of a penalty. He was intimately involved in and controlled all key decisions made so bore a high level of culpability. Consistency with other cases imposing penalties for aiding and abetting breaches of employment agreements put this case in a range of appropriate penalties from $2000 to $6000. While there was evidence Mr Crane had gone to considerable effort to rearrange his finances as a result of the failure of this particular business venture, there was nothing to suggest

26 See *Nicholson v Ford* [2018] NZEmpC 132 at [14]- [19].

that he could not call upon existing assets or arrangements to fund a penalty of $5000. Having regard to all the relevant factors considered and whether such an amount was proportionate and just in all the circumstances, a further adjustment was warranted. Accordingly Mr Crane is ordered to pay $3000 as a penalty for his actions in aiding and abetting breaches of Mr Gibson's employment agreement.

[72] Mr Gibson sought a portion of any penalty be awarded to him, effectively as a de facto compensatory payment because he "endured considerable stress" in pursuing his claim. Compensation is not the purpose of a penalty. In the circumstances of this case, and particularly the orders for recovery of arrears with interest, no part of the penalty is to be paid to Mr Gibson. Mr Crane must pay the penalty of $3000 to the Authority for transfer to the Crown Account. He must do so by no later than 31 January 2019.

Costs

[73] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[74] If they are not able to do so and an Authority determination on costs is needed Mr Gibson may lodge, and then should serve, a memorandum on costs by no later than 25 January 2019. From the date of service of that

memorandum Mr Crane would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[75] A contribution to costs of representation in the Authority is usually assessed from a notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.27

Summary of orders

[76] As a person found by this determination to have been involved in breaches of employment standards, Mr Crane must pay the following sums in arrears to Mr Gibson by no later than 52 days after the date this determination is issued:

(i) $6,590.55 (net) for wages; and

27 *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]- [108].

(ii) $5,833.33 (gross) for notice; and
(iii) $4,576.91 (gross) for holiday pay (for 17 days annual leave); and
(iv) $3,955.53 (less applicable tax, if any) for Kiwisaver contributions.

[77] Mr Crane must also pay to the Authority, for transfer to the Crown account, a penalty of $3000 for aiding and abetting breaches of Mr Gibson's terms of employment. The penalty must be paid by no later than 31 January 2019.

[78] A timetable for consideration of costs has been set if the parties cannot resolve that matter themselves.

Robin Arthur

Member of the Employment Relations Authority
