

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

Determination Number:  
WA 57A/07  
File Number: 5073550

BETWEEN	EDWARD OSCAR HERTEL Applicant
AND	GCB CONSTRUCTION LIMITED First Respondent
AND	JENNY BRAWLEY Second Respondent
AND	GARY BRAWLEY Third Respondent

Member of Authority: Alastair Dumbleton  
Consideration of Papers: 17 September 2007  
Determination: 18 September 2007

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**DETERMINATION No 2 OF THE AUTHORITY**

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**Enforcement of Authority Order**

[1] Mr Edward Hertel seeks to enforce an order made by the Authority for the payment of money owed to him by an employer.

[2] In November 2006 he brought a claim to the Authority to recover holiday pay and unpaid bonuses, and he also brought a personal grievance in which he claimed that he had been unjustifiably disadvantaged in his employment. In his application Mr Hertel cited as parties the 3 above named respondents. They are a company, GCB Construction Limited (GCB), and two directors of that company, Mrs Jenny Brawley and Mr Gary Brawley. Also cited was a second company, Signature Homes Hawkes Bay Limited (SHHB).

[3] From July 2004 until November 2006 Mr Hertel was an employee of GCB. His employment ended when that company sold its Signature Homes building business to SHHB. Following that sale, for a short time Mr Hertel was an employee of SHHB.

[4] Among the terms and conditions of his employment with GCB as Project Manager of its building business, Mr Hertel had an express entitlement to a bonus of .45% of the gross contract price on each house built. There is no dispute that when his employment with GCB terminated Mr Hertel was entitled to bonus and holiday pay in a total sum of \$13,460.

[5] The money owed to Mr Hertel was not paid by GCB. It claimed that the amount owing was part of the purchase price of GCB's business. GCB claimed that it had to be paid by SHHB before GCB could pay Mr Hertel. SHHB denied any responsibility to pay GCB the money, claiming that GCB had not disclosed the existence of the arrears owed to Mr Hertel and that therefore, under express terms of the sale and purchase agreement, liability for the bonus payments did not arise.

[6] An investigation followed from Mr Hertel's application to the Authority. A written determination of his claims was issued by the Authority (Mr G Wood) on 19 April 2007 under WA 57/07. GCB was ordered to pay Mr Hertel \$10,275, the amount of bonus claimed, and also interest and costs. SHHB was referred to in the determination as having earlier been a respondent in the matter but as having resolved its issues with Mr Hertel. Apparently SHHB met Mr Hertel's claim against GCB for outstanding holiday pay. The grievance claim was also resolved without the need for a determination.

### **Personal liability of Mr Brawley**

[7] In the Authority's determination, any liability on the part of the Brawleys' personally to pay Mr Hertel's bonus was referred to as follows:

9. *I reserve the issue of Mr Brawley's personal liability for the purposes of enforcement action, if necessary. The claim against Mrs Brawley is dismissed.*

[8] The idea that Mr Brawley himself could be liable for the purposes of enforcement of the Authority's determination arose because of an undertaking that had been given by him to personally pay Mr Hertel the bonus monies in the event SHHB did not pay GCB the full amount of the purchase price claimed on the sale of the business. This undertaking was given in an email to Mr Hertel dated 21 November 2006, in which Mr Brawley said the following:

*While we believe the responsibility for the bonuses fall due to Signature Homes, due to Eddie's continual support to me I will personally take responsibility for the bonuses, if Signature Homes do not honour their agreement.*

[9] Through their solicitors in writing on 9 February 2007, GCB and the Brawleys offered to repay the bonuses due at \$500 per month "on account" until they could recover from SHHB. This offer was not accepted by Mr Hertel, his then representative noting that full repayment at the offered rate would take 21 months to complete.

[10] The Authority's determination of 19 April records the following about Mr Brawley's undertaking to pay Mr Hertel:

5. *At the Authority's investigation meeting Mr Brawley acknowledged that he had personally undertaken to make payment to Mr Hertel, but he has since resiled from that undertaking because he believes he cannot afford to make such a payment.*

[11] Following the issue of its determination, a request was made to the Authority by Mr Hertel to have the question of Mr Brawley's personal liability determined. Memoranda have been received from Mr Hertel and from Mr Brawley's solicitor addressing that issue. I have considered the matter and now determine as follows.

### **Contracts (Privity) Act 1982**

[12] Although Mr Hertel was not himself a party to the sale and purchase agreement between GCB and SHHB, he may potentially have a remedy exercisable against GCB and/or SHHB under s 4 of the Contracts (Privity) Act 1982. He would first have to show that the sale and purchase agreement conferred a benefit on him personally in relation to payment by SHHB of the money owed to him by GCB. To succeed with an action Mr Hertel would have to show that the sale and purchase agreement contained an undertaking by SHHB to pay the amount of bonuses owed by GCB. This of course is a matter in dispute between SHHB and GCB, the issue being whether GCB gave proper disclosure of the debt before the transfer of the business.

[13] Any action against SHHB will not lie in the Employment Relations Authority, as that company was not in an employment relationship with Mr Hertel at the time the bonuses were earned by him. The action would have to be commenced in the Disputes Tribunal or District Court.

### **Liability of parties to a breach of an employment agreement**

[14] Under s 134 of the Employment Relations Act, every person who incites, instigates, aids or abets any breach of an employment agreement is liable to a penalty imposed by the Authority. It

seems arguable in the circumstances of this case that as the hands and mind of the company Mr Brawley, and possibly Mrs Brawley too, instigated, aided or abetted GCB's breach of Mr Hertel's employment agreement in the company's failure to pay him his contractual entitlement to bonus. Therefore Mr Hertel could apply to the Authority under s 134 and if successful a penalty could be ordered against Mr Brawley and possibly Mrs Brawley as well, in respect of their acts and omissions as directors and owners of GCB.

[15] However, the successful exercise of this remedy against Mr and Mrs Brawley would not yield Mr Hertel the \$10,275 he is owed and which GCB has been ordered to pay to him. The remedy for the breach is a penalty to a maximum of \$5,000 in the case of an individual. At most, therefore, total penalties of \$10,000 could be recovered against Mr and Mrs Brawley, if an action brought against both of them was successful. However, even then a decision in his favour would not get money into the hands of Mr Hertel, as penalties are required by the Act usually to be paid to the Crown. The Authority is unlikely to be persuaded that it should order the payment of any penalty to a party to an employment agreement instead of to the Crown, as the purpose of the remedy is to punish for a breach of the employment agreement rather than to enable recovery of monies owed under it.

### **Remedy of Compliance Order as means of enforcement**

[16] I have considered a line of cases that culminated in the decision of the Labour Court in *Northern Clerical IUOW v. Lawrence Publishing Co of NZ Ltd and John Tony Holdings Ltd & Anor* [1991] NZILR 717. To resolve an employment dispute in that case, a company had been ordered by the Court to pay a sum of compensation to a former employee of the company. When the company failed to obey the order a further application was made to the Court for the remedy of compliance. The order was sought not just against the employer company but also a person who was both a director of that company and of its parent company. He was the major shareholder of both companies.

[17] Despite that person never having been the employer of the applicant employee, the Court made orders against him. It is clear however from the Court's judgment that he personally was not ordered to make payment "from his own pocket" but was required to use his position of control within the two companies to ensure that the liability was met by the employer company. The orders required him to bring about a transfer of funds from the holding company to its subsidiary, the employer, to ensure that the debt was paid to the employee.

### **Acorn Construction Services Ltd**

[18] Shortly after the sale and purchase agreement had been executed to transfer GCB's business to SHHB, a new company Acorn Construction Services Limited was formed. A Companies Office search shows that it was incorporated on 17 November 2006, with Mr Gary Brawley appointed as its director and with himself and Mrs Jenny Brawley as owners in equal shareholding. On 21 November Mr Brawley gave his personal guarantee to pay Mr Hertel his \$10,275 bonus payments due. Around this time the dispute between GCB and SHHB arose, leading GCB to issue a property law settlement notice against SHHB. Those companies apparently remain in dispute, leaving Mr Hertel without the payments due to him.

[19] Mrs Hertel has claimed that Mr Brawley transferred assets of GCB to his new company Acorn Construction. She also claims that Mr Brawley sold a show home that had been owned by GCB and that he used the proceeds personally instead of paying Mr Hertel the bonus due of \$10,275.

### **Determination**

[20] Mr Hertel is justly aggrieved that through the ducking and diving of Mr Brawley he is being kept out of the money he earned from GCB by way of bonus. There has never been the slightest dispute about Mr Hertel's entitlement, earned no doubt by long and hard work. In relation to SHHB, Mr Brawley has referred to that company being obliged to "honour" an agreement, yet after offering a personal guarantee to pay Mr Hertel he appears to feel that the same concept of honour does not apply to him and he has now lightly shrugged off his own word as having no value. Mr Hertel is aggrieved that while he goes without his earned lawful entitlement the Brawley's maintain an opulent and affluent lifestyle, although they claim they are merely beneficiaries of a trust rather than the owners of the house they live in and the vehicles they drive.

[21] I consider that further investigation should be carried out by the Authority into the enforcement of the Authority's 19 April 2007 against Mr Gary Brawley. The Authority will investigate the existence of grounds for making an order against him under s 137 of the Employment Relations Act, on the same or similar basis as the compliance orders were made by the Court in the *Lawrence Publishing* case (above).

[22] If grounds are found to exist the Authority will consider making the orders under s 137(2) of its own motion, without application by Mr Hertel being needed, as it may do when any matter is before the Authority.

[23] As part of its continuing investigation the Authority will formally require Mr Brawley to attend a hearing and produce to the Authority books and records, including financial statements, of his two companies GCB and Acorn Construction Services Ltd. He will be required to be examined

on that information and also in relation to a family trust in respect of which contradictory information has been given to the Authority by his solicitors about the ownership of motor vehicles used by Mr and Mrs Brawley. On 1 May 2007 it was represented in writing to the Authority that vehicles that had been detained by clamping were Mr Brawley's, whereas on 4 September 2007 it was stated that the vehicles belonged to a family trust.

[24] A formal notice of the investigation meeting to be resumed will be issued to GCB, Mr and Mrs Brawley and Mr Hertel. A summons will also be issued by the Authority to Mr Brawley, requiring him to bring specified documents, books and records to the Authority meeting.

[25] The Authority strongly recommends that Mr Brawley and Mr Hertel attend mediation before the investigation is resumed. I will consider directing them to mediation if either (or both) advise the Authority that an order to attend is sought.

A Dumbleton  
**Member of the Employment Relations Authority**