

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:
WA 56/08
File Number:5073550

BETWEEN EDWARD OSCAR HERTEL
 Applicant

AND GCB CONSTRUCTION
 LIMITED
 First Respondent

AND GARY BRAWLEY
 Second Respondent

Member of Authority: G J Wood

Representatives: Sharon Hertel for Applicant
 Gary Brawley for Respondents

Investigation Meeting: 19 December 2007

Further information: 28 April 2008

Determination: 5 May 2008

DETERMINATION No 3 OF THE AUTHORITY

[1] This matter has had an extremely troubled history. On 19 April 2007, I ordered the first respondent (GCB) to pay Mr Hertel \$10,275, being the amount of the payment he was claiming for an unpaid bonus, plus interest and costs. I reserved the issue of Mr Brawley's personal liability for the purposes of enforcement action if necessary. GCB still did not pay the sum, which it never disputed Mr Hertel was owed as a bonus for his hard work in completing construction jobs for GCB. On 18 September 2007, my colleague, Mr Alastair Dumbleton, in my absence, considered the issue of personal liability by Mr Brawley. The effect of his determination was that the only possibility that lay open to Mr Hertel was for a compliance order pursuant to the Labour Court's findings in *Northern Clerical IUOW v. Lawrence Publishing Co of NZ Ltd and John Tony Holdings Ltd & Anor* [1990] 1 NZILR 717. The investigation was to consider transactions between GCB,

Acorn Construction Services Limited (another company owned by Mr Brawley), Mr Brawley and his family trust in order to determine whether a compliance order of the type sort ought to be issued.

[2] At the investigation meeting, Mr Brawley gave evidence that he established Acorn after the assets and liabilities of GCB were sold and that like GCB, it had failed and was no longer trading. He gave evidence again that he personally did not have any money with which to pay Mr Hertel the sums he justly deserved and that the family trust held the family's main asset, namely the family home. A copy of GCB's accounts was provided for later analysis, together with GCB's bank statements. An analysis of these accounts and statements shows no *fleeing* of GCB's funds by Mr Brawley or Acorn. Rather they appear to demonstrate a failing company and the difficulties faced, such as the paying of some of the company's obligations and not others. It is possible, however, that Mr Brawley and his wife continued taking drawings from GCB after it may have been prudent to do so.

[3] Mr Brawley indicated that Mr Hertel could be paid if GCB was successful in a claim against Signature Homes Hawkes Bay Limited (who purchased its assets and liabilities). That company has also in turn sued GCB. Mr Brawley informed the Authority that a settlement conference of litigation by and against Signature Homes Hawkes Bay was to be held in early 2008.

[4] Attempts to contact Mr Brawley since that time have been unsuccessful. It has recently come to the Authority's attention, however, that the two cases are to be heard in the District Court later this year, but that GCB will not be pursuing its claim nor defending the one against it. In these circumstances, it appears clear that Mr Hertel will never be paid by GCB, which has no assets or income.

The Law

[5] *Lawrence Publishing* provides for third persons to be bound by compliance orders not to make payment of a debt owing by a company from their own pockets, but to take the steps which are in their power to ensure that the liability is met by the company upon which the liability falls. In that case, it was held at 721:

I think it is sound law to say in general that the Court will not require a managing director or a holding company to pay compensation which is clearly the liability of a separate employing entity. It is also good law in my view to say that the Court cannot compel some other person who has no powers in the matter to bring about payment by a separate employing entity of the money for which it is liable.

[6] In that case it was held:

It is rather a matter of seeing who is responsible to carry out the act which Lawrence Publishing has been ordered to perform and has not so far performed.

[7] In *Lawrence Publishing* the major shareholder of the company that owned Lawrence Publishing (and who was a director of both Lawrence Publishing and the other company involved) was not impecunious and neither was the other company.

[8] The issues were dealt with again in *McLennan v. Internet Productions Ltd (in liquidation)* [2003] 1 ERNZ 282. There it was held at 291 that:

It is an important element of the legislation that it is for wrongdoers to compensate for their wrongdoing. The orders were directed to the wrongdoer. An order requiring a third party to pay the sum might see the recipient paid but not by the wrongdoer. The objective of an order for compliance under subs(1) is compliance by the wrongdoer. An order for compliance under subs(2) must be of that kind also. An order that a third party simply pay the compensation out of its own resources is not an order of the sort able to be made under subs(1).

[9] In *Service Workers' Union v. Leisure Resorts (Australasia) Ltd and Walsh* (unreported, Palmer J, 17 August 1993, CEC42/93), the Court was dealing with an impecunious company and its director. Upon hearing from the main shareholder/ director that he had personal debts and had invested his own money unsuccessfully in the company that was responsible to pay the applicant, the Court declined to make orders in the nature of those sought in *Lawrence Publishing*.

Determination

[10] As has previously been mentioned, Mr Hertel is justly aggrieved that he has not been paid the moneys he is entitled to and there has been an amount of ducking and diving by GCB and Mr Brawley over its payment. The law, however, must be interpreted and applied in relation to what is just to ensure that GCB pays Mr Hertel, as GCB, not Mr Brawley, was Mr Hertel's employer.

[11] GCB has no assets and is likely to have further debt as a result of the District Court action being brought by Signature Homes Hawkes Bay. There are no linkages between GCB and Acorn for Acorn to be required to pay the sum to GCB so that Mr Hertel could be paid.

[12] Because of the family home being in a trust I am prepared to accept Mr Brawley's assurance that he does not have the resources to pay the money owing to Mr Hertel into GCB. Even if I were to accept that Mr Brawley has the resources to pay the sums owing into GCB so that Mr Hertel can be paid, I would not order him to do so. While Mr Brawley did not run GCB successfully, the

evidence is not such that he should be required to pay the money himself into GCB to ensure Mr Hertel is paid. There is insufficient evidence to displace the normal commercial view that the limited liability of a company means just that, with GCB having no funds and Mr Brawley not being legally responsible to personally pay GCB's debts.

[13] I have delayed issuing this determination (although Mr Hertel was advised of the likely outcome last December) for two reasons. First, it took a long period of time for the tools to open GCB's MYOB accounts to be provided to me. Second, in the interim, during which time GCB or Mr Brawley may have come into funds, I had held on to what has turned out to be the vain hope that Mr Brawley would do the morally right thing by Mr Hertel, either directly or through GCB, and pay him the moneys that he is owed. It is now abundantly clear that this will not occur under current circumstances. It is of great regret to the Authority that it can not require someone to actually pay the sums Mr Hertel is owed ,but that is no doubt of cold comfort to him.

Costs

[14] Costs are reserved.

G J Wood
Member of the Employment Relations Authority