Employment Court of New Zealand

Labour Inspector v Cypress Villas Limited [2019] NZEmpC 97 (13 August 2019)

Last Updated: 21 August 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2019] NZEmpC 97
ARC 31/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	LABOUR INSPECTOR (MELISSA ANN MACRURY) Plaintiff
AND	CYPRESS VILLAS LIMITED Defendant
AND	BARRY EDWARD BRILL Proposed Second Defendant

Hearing:	13 August 2019 (Heard at Auckland)
Appearances:	S Blick and S Carr, counsel for plaintiff No appearance for defendant B E Brill, as counsel on his own behalf
Judgment:	13 August 2019

ORAL JUDGMENT OF JUDGE M E PERKINS

[1] This is an application under the now repealed s 234 of the Employment Relations Act 2000. That section deals with circumstances where a Labour Inspector commences an action in the Employment Relations Authority (the Authority) against a company to recover money payable by way of minimum wages or holiday pay to an employee of the company. It provides a process where, if the company is in receivership or liquidation, or there are other reasonable grounds for believing that the company does not have sufficient assets to pay the amount in full, the Court can authorise the Labour Inspector to bring an action against an officer, director, or agent

of the company, who has directed or authorised the default in payment of the minimum wages or holiday pay or both.

[2] The statutory provision is a very difficult section, and this particular action has already been the subject of a decision by the Authority,1 a decision by a full Court of the Employment Court,2 and a decision by the Court of Appeal3 on appeal from the full Court's decision.

[3] There is effectively a four-stage process under the section. The first is the default has to be proved, that is, that the money is owing. Secondly, it needs to be shown that the employer company is effectively unable to pay the debt. Thirdly, the Court has to decide whether the Labour Inspector should be authorised to commence an action against a director or officer. Finally, the Labour Inspector has to prove that, indeed, the director or officer directed or authorised the default and therefore becomes jointly and severally liable with the employer.

[4] At the moment, having heard evidence from the Labour Inspector and having heard submissions from both Mr Brill, who is the proposed second defendant, and Ms Blick, counsel on behalf of the Labour Inspector, the Court is at the third stage. It now has to be decided whether the Labour Inspector should be authorised to bring the action for recovery of the amount against Mr Brill on the basis that he directed or authorised the default in payment.

[5] Having heard the evidence, I am satisfied that the default on the part of the company has been proved. That was already a finding in any event by the Authority. It is unfortunate that in the challenge, which is brought as a de novo challenge, rather than a non-de novo challenge, the Labour Inspector as plaintiff has put in issue in the challenge the findings in favour of the Labour Inspector in the Authority. Those findings have now had to have been entirely reheard by way of the evidence that has been presented so far.

1 *MacRury v Cypress Villas Ltd* [2014] NZERA Auckland 124.

2 *Labour Inspector v Cypress Villas Ltd* [2015] NZEmpC 157, [2015] ERNZ 1091.

3 *Brill v Labour Inspector* [2017] NZCA 169, (2017) 14 NZELR 460.

[6] Mr Brill, who was the sole director of the employer company, and has appeared as counsel on his own behalf, has made no concessions on behalf of the defendant, Cypress Villas Ltd. Having heard the evidence, however, I would have no difficulty in finding that the employer is in default in this case, both in respect of the Minimum Wage Act 1983 and the Holidays Act 2003.

[7] Nor can there be any dispute as to the second stage. The company was in liquidation, but it has now been removed from the Companies Register. It is no longer a legal entity. That, in itself, provides reasonable grounds for believing that the company does not have sufficient assets to pay the amount of the default in full. I have, therefore, no difficulty in finding that that particular part of the threshold is met.

[8] The issue now to be decided is whether there is a tenable cause of action. In the Court of Appeal's decision in the appeal against the decision of the full Court of the Employment Court, the Court of Appeal was asked to answer as one of the two questions: What threshold must the Labour Inspector meet in order to obtain authorisation under s 234(2) of the Employment Relations Act 2000? The answer given by the Court of Appeal was:4

The application for authorisation is in substance an application for joinder of another defendant to an extant proceeding, namely the proceeding against the company. The principles relating to joinder and strike-out are different and accordingly we do not agree with the approach favoured by the majority of the Employment Court which equates the two. It follows in our view that once the Labour Inspector has established on the balance of probabilities that the company will be unable to pay the full amount of the monies owing, all that need be shown is that there is "a tenable cause of action" against the officer, director or agent.

[9] I agree with Ms Blick, counsel for the plaintiff, in her submissions that that is a low threshold. The procedure under s 234 is somewhat analogous to a summary trial of a criminal matter in the District Court where, having heard evidence, often a submission is made that there is no case to answer. I agree that the threshold requirements are totally different, but the procedures are somewhat similar. Now following the evidence, Mr Brill has made submissions; firstly, in relation to the pleadings; and then secondly, in relation to the evidence, that there is no tenable cause.

4 *Brill v Labour Inspector*, above n 3, at [17] (footnotes omitted).

[10] I do not intend to go into these issues at length, because, as I say, the threshold is low. While I agree, as Mr Brill has submitted, that paragraph 30(e) of the statement of claim is somewhat difficult because it seems to depart from the test which is really required to be met under s 234, there are sufficient other pleadings for me to be satisfied that there is a tenable cause of action set out in the pleadings.

[11] Ms Blick in her submissions in answer said that paragraph 30 of the statement of claim needs to be read in its entirety, and I agree. But paragraph 30 also needs to be read in context with paragraphs 28 and 29. Those three paragraphs, that is 28, 29 and 30, are sufficient to establish a tenable cause of action pleaded against Mr Brill.

[12] Insofar as the evidence is concerned, a lot in this case is going to depend upon the findings that will be made relating to the initial step taken in Ms Nina Northcroft's employment. She is the employee in this case who is being represented by the Labour Inspector.

[13] At a meeting prior to her commencing employment, she was given a written individual employment agreement. It has been pleaded that Mr Brill negotiated and signed that agreement, but Ms Northcroft in her evidence conceded that that was not the case. In fact, the agreement was prepared and signed by Mr Darren Edge, who, in effect, was Cypress Villa Ltd's manager in Taupo. There are circumstances surrounding all of that which would need to be investigated.

[14] Mr Brill was present at that meeting when the agreement was given to Ms Northcroft. On the face of it at the moment, without hearing further evidence, the agreement itself, because of the rate of pay that was provided and because of the

clear hours of work that were going to need to be fulfilled by Ms Northcroft, meant that the requirements of the Minimum Wage Act were never going to be met.

[15] Now as I say, that is the evidence as it stands at the moment, on a prima facie basis, if I can put it that way. There is also sufficient other evidence that has been led from the witnesses, including Ms Northcroft's predecessor Ms Julie O'Connor, and the documents in the bundle of documents, for me to be able to say that, at this stage

on the pleadings and evidence, there is a tenable cause of action shown against Mr Brill.

[16] I have had to give this decision on a somewhat urgent basis because this hearing needs to continue. From what I have just stated, I find that the threshold has been met to enable me to authorise the Labour Inspector to bring an action against Mr Brill for the recovery of the money, which is clearly owing to Ms Northcroft by the company, on the basis that Mr Brill directed or authorised the default in payment.

[17] That is not to say that the finding at the end of the evidence will be that he did direct or authorise the default. However, the threshold that needs to be met for this stage in the proceedings has been reached. Now Mr Brill must be given the opportunity to give evidence if that is what he elects to do. He does not have to give further evidence, of course, and the Court will then be left to decide the matter on the evidence that has been led so far, but I would have thought that the outcome of that might be somewhat inevitable.

[18] In any event, I find that the threshold set by the Court of Appeal is met at this stage in the proceedings. I repeat that the Labour Inspector is authorised to bring the action against Mr Brill.

M E Perkins Judge

Oral judgment delivered at 4.06 pm on 13 August 2019
