

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 77  
5593232

BETWEEN                    A LABOUR INSPECTOR OF  
                                  THE MINISTRY OF BUSINESS  
                                  INNOVATION                    AND  
                                  EMPLOYMENT  
                                  Applicant

A N D                        JOHANNES                    GRAHAM  
                                  DYKHOFF                                         
                                  Respondent

Member of Authority:     David Appleton

Representatives:         Geraldine Kelly, Counsel for Applicant  
                                  Respondent in person

Investigation Meeting:   Determined by consideration of the papers

Submissions Received:   27 May 2016 for Applicant

Date of Determination:   9 June 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The Labour Inspectorate seeks an order pursuant to s.234 of the Employment Relations Act 2000 (the Act) to bring an order against Mr Dykhoff for the recovery of holiday pay. Mr Dykhoff opposes the application.

[2]     Section 234 of the Act was repealed with effect from 1 April 2016, prior to the Labour Inspector's application being lodged in the Authority, by virtue of s.35 of the Employment Relations Amendment Act 2016 (the 2016 Act). However, clause 3(7) of Schedule 1AA of the Act makes clear that s.234 continues to apply, despite its repeal, to proceedings brought in relation to conduct that occurred before the commencement of the 2016 Act, whether or not the proceedings were brought before

that commencement. Therefore, the Authority has the jurisdiction to consider the Labour Inspector's claim made under s.234 of the Act.

[3] Section 234 of the Act provided as follows:

**234 Circumstances in which officers, directors, or agents of company liable for minimum wages and holiday pay**

(1) This section applies in any case where a Labour Inspector commences an action in the Authority against a company to recover any money payable by way of minimum wages or holiday pay to an employee of the company.

(2) Where, in any case to which this section applies, the Labour Inspector establishes on the balance of probabilities that the amount claimed in the action by way of minimum wages or holiday pay or both is, if judgment is given for that amount, unlikely to be paid in full, whether because—

(a) the company is in receivership or liquidation; or

(b) there are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full,—  
the Authority may authorise the Labour Inspector to bring an action for the recovery of that amount against any 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.

(3) Where, in any action authorised under subsection (2), it is proved that the officer, director, or agent of the company against whom the action is brought directed or authorised the default in payment of the minimum wages or holiday pay or both, that officer, director, or agent is with the company (and any other officer, director, or agent of the company who directed or authorised the default in payment) jointly and severally liable to pay the amounts recoverable in the action and judgment may be given accordingly.

(4) In this section,—

**company** has the meaning given to it by section 2(1) of the Receiverships Act 1993

**holiday pay** means any amount payable under the Holidays Act 2003 to an employee as pay for an annual holiday or public holiday

**minimum wages** means minimum wages payable under the Minimum Wage Act 1983.

(5) Nothing in this section affects any other remedies for the recovery of wages or holiday pay or other money payable by a company to any employee of that company.

[4] Following the majority decision of the Employment Court in *Labour Inspector Melissa Ann Macrury v Cypress Villas Ltd and Barry Edward Brill*<sup>1</sup>, the Authority must determine applications under s.234 of the Act in two stages, as two separate questions. The two questions that the Authority must decide are as follows:

- (a) The first, whether to authorise the Labour Inspector to bring an application against Mr Dykhoff for the recovery of the amounts

<sup>1</sup> [2015] NZEmpC 157

claimed by way of holiday pay, which were originally claimed against a company now in liquidation; namely, Prestige Brick & Block Limited (in liquidation);

- (b) The second, if the Authority decides to give that authorisation, whether Mr Dykhoff directed or authorised defaults in payment of the holiday pay, and if so, whether he should be ordered to pay the holiday pay personally.

[5] This determination deals only with the first question, namely whether to grant leave to the Labour Inspector to bring an action against Mr Dykhoff.

### **Background**

[6] By way of an application lodged in the Authority on 6 November 2015, the Labour Inspector (Mike Heyward) sought the following against Prestige Brick & Block Limited:

- (a) A compliance order under s.137 of the Act that Prestige Brick & Block comply with an enforceable undertaking dated 16 June 2015 (signed on 19 June 2015) requiring the payment of holiday pay and sick pay to four employees of Prestige Brick & Block;
- (b) An order for payment to those four employees (or to the Labour Inspector on their behalf) in relation to sick leave, holiday pay, public holiday pay and payment of alternative holidays; and
- (c) Penalties under s.223C of the Act for failing to comply with an enforceable undertaking.

[7] On 17 February 2016, Mr Dykhoff emailed the Authority to advise it that:

*This company no longer exists and has not for 2 weeks.*

[8] Upon inquiry, the Companies Office website showed that Prestige Brick & Block Limited went into liquidation with effect from 3 February 2016. The Labour Inspectorate then applied to the liquidator, Mr Murray Allott, for permission to

continue the proceedings against the company but, by way of a letter dated 30 March 2016, Mr Allott advised the following:

*I have discussed your email with my solicitor.*

*He sees no reason for the Company still to be included in the proceedings.*

*The matter before the ERA can continue against the Directors if the ERA grants the current applicant leave and authority to proceed against the Director.*

[9] Accordingly, the Authority received an application against Mr Dykhoff personally.

### **The legal principles**

[10] In *Labour Inspector v. Cypress Villas Ltd*, the full Employment Court examined in some detail the requirements of s.234 of the Act. The following principles can be distilled from the majority's judgment:

- (a) The Authority has a discretion whether to authorise a Labour Inspector to bring an action for recovery against a third party;<sup>2</sup>
- (b) Instances in which the Authority may exercise its discretion not to authorise the bringing of an action against a third party will be on relatively narrow grounds, such as where the third party has been declared bankrupt, that the third party has been named erroneously, that the third party only became involved after the defaults occurred or ceased any involvement with the company before the defaults began;<sup>3</sup>
- (c) In respect of the first part of the investigation, required under s.234(2), the Labour Inspector need only:
  - i. name the proposed third party:
  - ii. plead that the proposed third party was at the material time either one or more of a director, officer or agent of the relevant company; and

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<sup>2</sup> At paragraph [77].

<sup>3</sup> At paragraphs [77] and [78].

iii. allege that the proposed third party directed or authorised the default.<sup>4</sup>

- (d) The Labour Inspector must establish, on the balance of probabilities, either that the failure to recover the amount claimed to be owed is, or will be by reason of the company's receivership or liquidation, unlikely to be paid in full or that there are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full.<sup>5</sup>

### **The issues**

[11] In order to determine whether or not to grant leave to the Labour Inspector to issue proceedings against Mr Dykhoff personally, the following issues need to be determined:

- (a) If judgment is given by the Authority for the amount claimed, is it unlikely to be paid in full; and
- (b) Was Mr Dykhoff an officer, director or agent of the company?

[12] It is not necessary, as is shown by *Cypress Villas*, at this stage of the investigation for the Labour Inspector to prove that Mr Dykhoff was an officer, director or agent of the company who directed or authorised the default in payment of the holiday pay.

### **Are the monies ordered to be paid unlikely to be paid in full?**

[13] It is uncontested that Prestige Brick & Block Limited is in liquidation and that, according to the liquidator's first report dated 10 February 2016, the company's liabilities to secured and unsecured creditors exceed the value of its assets by \$63,492.

[14] Therefore, I am satisfied that, if judgment were given for the amount claimed by the Labour Inspector in respect of holiday pay, Prestige Brick & Block Limited, being in liquidation, is unlikely to be able to pay the judgment sum in full.

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<sup>4</sup> At paragraph [83]

<sup>5</sup> At paragraph [73]

**Was Mr Dykhoff an officer, director or agent of the company?**

[15] The sole director of Prestige Brick & Block Limited is shown on the Companies Office Register as one Johannes Dykhoff. However, it is understood that this individual is the respondent's father.

[16] Mr Heyward has made a statement, which has been attached to Ms Kelly's submissions, in which he recounts the circumstances under which he first met the respondent and that the respondent told Mr Heyward that the director and shareholder was his father, with whom he shared a name, but that his father was retired and that the respondent ran the business of Prestige Brick & Block Limited.

[17] This statement by Mr Heyward has not been produced as a sworn affidavit. However, I note that contemporaneous documents attached to the original statement of problem against Prestige Brick & Block Limited included a progress report written by Mr Heyward which made express reference to the respondent making employment decisions, such as offering employment agreements to employees in order to satisfy Immigration New Zealand and an agreement by the respondent that he needed to *change things*.

[18] I also note that, amongst the documentation, are copy emails between the Labour Inspectorate and the respondent (rather than the respondent's father). The email address of the Mr Dykhoff who was corresponding with the Labour Inspector is the same as that of the respondent who has been corresponding with the Authority.

[19] Therefore, although Mr Heyward's statement of evidence has not been sworn as true and accurate to the best of his knowledge and belief, independent contemporaneous documentation strongly indicates that the respondent (Mr Dykhoff Jnr) was the person who was effectively running the business of Prestige Brick & Block Limited.

[20] Furthermore, it was Mr Dykhoff Jnr who took part in a telephone conference with the Authority prior to Prestige Brick & Block Limited going into liquidation.

[21] The Employment Court in *Cypress Villas* examined the question of what is meant by the words *officers* and *agents* of companies. The Employment Court stated the following in relation to the meaning of *officer*<sup>6</sup>:

*In the context of a company (the relevant Acts not making reference to “officer” or otherwise assisting in the definition), we consider that s.234 is intended to cover persons involved at a senior level in the directorate or management of a company and, in particular, who may have an executive or managerial responsibility for the employment of staff and the payment to them of their remuneration. Whether someone is an “officer” under s.234 will not turn only or even substantially on whether that word is present or absent in his or her title. Determining whether someone is an officer will be a question of fact and degree to be determined in each case by the Authority or the Court.*

[22] Whilst the Employment Court speaks of *persons involved at a senior level, management and executive ... responsibility*, these words do not merely connote executives or managers in a white collar sense. They mean any person who acts in a way so as to manage the employment of staff and the payment to them of their pay.

[23] Therefore, being satisfied that the respondent was responsible for managing the employees of the company and payment to them, I am satisfied that Mr Dykhoff was an officer of the company in the context of s.234.

[24] Although Mr Dykhoff did not lodge any submissions within the timeframe by which he was directed to do so, if he wished to, he had previously lodged a letter which the Authority accepted as his statement in reply.

[25] The thrust of Mr Dykhoff’s defence to the Labour Inspector’s application is that the four employees who have complained to the Labour Inspector knowingly took part in the deception of Immigration New Zealand, both accepting the work visas that were issued to them as a result of sham employment agreements that were given to Immigration New Zealand, but at the same time accepting a higher rate of pay for which only contractors would have been eligible. Mr Dykhoff says that the four employees never once mentioned holiday pay but that they are now, effectively, seeking to have their cake and eat it too.

[26] Whilst this defence does raise a question as to the employment status of these individuals and their entitlement to receive holiday pay or not, that is not a question that can be determined at this stage. At this stage, the Authority is only deciding

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<sup>6</sup> At [101]

whether or not to allow the Labour Inspector to bring a claim against Mr Dykhoff personally. As the Employment Court said in *Cypress Villas*, there will be relatively narrow grounds and probably few occasions where the Authority will exercise its discretion against authorising the Labour Inspector to issue proceedings to recover from a third party<sup>7</sup>.

### **Conclusion**

[27] I conclude that the Authority should exercise its discretion to allow the Labour Inspector to bring a claim against Mr Dykhoff personally. However, this does not mean that the Authority will then necessarily go on to find that he should pay the sums claimed and a substantive investigation meeting will be required in order to establish the following:

- (a) That the four employees of the company are entitled to receive holiday pay;
- (b) That they did not receive that holiday pay;
- (c) That Mr Dykhoff directed or authorised the default in payment of the holiday pay;
- (d) Whether Mr Dykhoff is liable to pay the amounts claimed to the Labour Inspector.

[28] The Authority will arrange a case management telephone conference call with the parties to make arrangements for this substantive investigation meeting to take place.

### **Costs**

[29] Costs are reserved.

David Appleton  
Member of the Employment Relations Authority

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<sup>7</sup> At [77]