

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Joanne Massey, Labour Inspector, on behalf of Sione Sione, Jamie Batchelor, Martin Kay and Murray Batchelor (Applicants)

AND EJM Builders Limited (Respondent)

REPRESENTATIVES Jeremy Bioletti, Counsel for Labour Inspector
Margaret Matthew, Counsel for Eamon Murphy

MEMBER OF AUTHORITY A Dumbleton

INVESTIGATION MEETING 22 March 2002

DATE OF DETERMINATION 26 March 2002

PRELIMINARY DETERMINATION OF THE AUTHORITY

Claim to make director of employer personally liable

1. By action commenced in the Authority, a Labour Inspector seeks to invoke s.234 of the Employment Relations Act 2000. This section provides that where any payments of minimum wages and holiday pay are due under the Minimum Wage Act 1983 or the Holidays Act 1981 to any employees of a company, the directors, officers or agents of that company may be ordered to pay the amounts owing if the employer company becomes unable to do so.
2. As well as opening another channel for the recovery of underpayments of minimum entitlements due to employees of a company, the provisions of s.234 should be read as a warning and constant reminder to directors and others in any position of control over the payment of wages and holiday pay, that in certain circumstances they may be held personally responsible to meet the statutory requirements of the employer.
3. The action was commenced by the Inspector, Ms Joanne Massey, against EJM Builders Limited, a registered company. Commencement against the employer company is a preliminary step under s.234 towards obtaining the authorisation of the Authority for proceedings to be brought against Mr Eamon John Murphy personally in his capacity as a director of EJM Builders Limited.
4. Before the Authority may authorise the Inspector to bring the action against a company director (or officer, or agent) for recovery of minimum entitlements, it must be established upon a balance of probabilities that the amount claimed is unlikely to be paid in full if judgment is given against the company for that sum, because one of the following situations exists:

- (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, -*

5. At this preliminary stage s.234 does not require the claim against a company to be proved. What has to be considered by the Authority is whether the circumstances of either sub-clause above are present.
6. I am satisfied the Labour Inspector has reasonable grounds for believing that EJM Builders Limited does not have sufficient assets to pay in full the amount being claimed against that company.
7. The presence of those grounds is evidenced by a memorandum presented to the Authority on 5 March 2002 by Mr Murphy on behalf of EJM Builders Limited, stating the following:

Dear Sir

Further to our conversation yesterday, I wish to confirm that EJM Builders Limited has insufficient funds and/or assets to pay the amount owing to the Department of Labour.

Sincerely yours,

*Eamon Murphy
EJM Builders Ltd*

8. Mr Murphy gave this advice at the invitation of the Authority following an exchange of memoranda and a telephone conference held on 4 March with Mr Bioletti, who represents the Labour Inspector, and Mr Murphy.
9. I accept the accuracy of Mr Murphy's statement. There is no advantage to be gained from mis-stating his company's assets, because while under s.234 liability can be found against a director, officer or agent of a company, the corporate entity remains jointly and severally liable to pay the amounts recoverable from the action. Under the provisions there is an extension rather than a transference of liability.

Failure to comply with earlier settlement of claims

10. Mr Murphy has had plenty of time in which to make sure that EJM Builders Limited discharged any of its obligations to the above-named employees. On their behalf in 2001 the Labour Inspector made claims for holiday pay against the company. Subsequently the employees and the company, which was represented by Mr Murphy, through mediation were able to agree on terms of settlement of those claims. Commencement of a claim in the Authority was not therefore necessary. Settlement was formally recorded in respect of each employee by the mediator on 14 August 2001, pursuant to s.149 of the Employment Relations Act. Unfortunately only \$2,500 was subsequently paid in satisfaction of the total settlement sum of \$18,514.40 and the Labour Inspector was then obliged to obtain a compliance order under s.137 of the Act from the Authority. This required the company to comply with the

terms of settlement, although some extra time to pay was allowed by the Authority. That order has not been observed by the company.

11. The compliance determination of the Authority, which is under AA191/01 and dated 20 November 2001, concluded with reference to the consequences of any default by a party against whom compliance has been ordered. Upon application to the Employment Court penalties, including fines and imprisonment, may be imposed and an order may also be made to have the assets of an employer seized and sold to pay for amounts owed. The Inspector has elected not to apply to the Court but instead take a different tack towards recovery of the holiday pay by invoking s.234 of the Act, to which Mr Murphy was also referred by the compliance determination.
12. Although the resolution obtained through mediation was expressed to be “in full and final” settlement of the claims made on behalf of the above-named employees, I am satisfied that this does not stop the Authority from considering the application that has been commenced against the employer company under s.234. Clearly the settlement has been repudiated by the employer, leaving it open to the Inspector to regard herself as no longer bound by them. It may be implied from the Inspector’s actions in bringing this claim that the terms of settlement are now regarded by her as cancelled in consequence of the employer’s failure to fully perform them. In any event there is no legal bar to proceeding because the issue of liability, whether against the employer or Mr Murphy or both, has never been determined by any court or tribunal. Authority for these propositions about the defeasibility of mediated settlements may be found in *Hunt v Forklift Specialists Ltd* [2000] 1 ERNZ 553, a judgment of the Employment Court.

Authorisation

13. Mr Bioletti and Ms Matthew have been heard on this preliminary matter. I am not at all persuaded by Ms Matthew that although the statutory precondition has been met, the Authority should nevertheless exercise its discretion under s.234 to decline authorisation for the Labour Inspector to bring the action against Mr Murphy. I do not see that it is necessary to show that he acted fraudulently. There is no suggestion of that and indeed when ordering compliance I accepted that the cause of his trouble was that others who owed money to his company were not paying up when they should. The exercise of any discretion under s.234 is limited by the clear purpose and wide scope of the provisions. In relation to the payment of minimum wages and holiday pay owed to employees, the directors, officers and other agents of an employer company will not be shielded by incorporation or agency and the normal legal protections afforded by those, but will be held personally responsible in certain situations to see that the payments are made. The statutory requirements of corporate employers for payment of minimum employment entitlements have been made more rigorous for a reason. No compelling grounds against authorisation have been shown to be present here.
14. Accordingly, the Labour Inspector is now authorised to bring the action for the recovery of holiday pay against Mr Eamon John Murphy. At the same time the proceedings against EJM Builders Limited will continue and both can be consolidated for the investigation by the Authority.

Matters to be proved

15. The success or otherwise of this action against Mr Murphy will depend on two matters in particular, both of which must yet be proved. First, it must be shown to the Authority that the employer company has defaulted in the payment of holiday pay to each employee. The fact that Mr Murphy reached a settlement of the claims on behalf of the employer is not to be taken on its own as any sort of admission or confession. The same goes for the employees and their acceptance of lesser amounts than strictly they may have been entitled to; they are not now prevented from claiming their full legal entitlement. In any event, the mediation was implicitly a without prejudice situation for all parties.

Statement of problem

16. So that Mr Murphy can be fully informed of the nature of the proceedings the Authority has authorised to be taken against him, the Inspector is to lodge with the Authority a statement of problem in which Mr Eamon John Murphy is to be referred to as a respondent party. The application is to allege against Mr Murphy the second matter of proof which under s.234 must be satisfied. That is, that he “directed or authorised” the default of the employer company in payment of the minimum holiday pay. Particulars should be given as to the way in which he is alleged to have done this. I anticipate that as a minimum it will need to be alleged that Mr Murphy had knowledge of the default and that he was in a position to be able to prevent it if he had wished. The meaning to be given to the expression “directed or authorised” and whether as a fact that is what Mr Murphy did, will remain matters for evidence and argument to be heard by the Authority at an investigation meeting.
17. In lodging a statement of problem the Inspector will need to consider whether it is appropriate for the claim to be quantified according to the actual holiday pay that was originally calculated and claimed as due to each employee, rather than the sums that were settled in mediation on their behalf. Since the terms of settlement are now to be regarded as a nullity there is no reason why the statutory amounts due cannot be claimed, although it is right that the amount paid under the settlement (\$2,500) should be deducted. It is a matter for the Labour Inspector as to how much is claimed and there may be reasons why there should be a relaxation in favour of the employer in this case.
18. Once the Labour Inspector has lodged a statement of problem naming Mr Murphy personally, it will be served and he will be given the usual opportunity to respond with a statement in reply setting out any defences or matters of excuse that are to be raised before the Authority. For now I merely note in this regard that Mr Murphy has asserted that holiday pay was not owed to the employees because they were in receipt of an all-inclusive rate of wages. Mr Murphy has also drawn attention to the default of trade debtors leaving the company without funds to pay the employees. It remains a matter for the Inspector to establish that Mr Murphy directed or authorised any default on the part of the company. He may raise any matters that may be relevant to the way the finding of the Authority should be made in this regard.

Investigation meeting

19. As soon as the statement of problem and statement in reply have been lodged, the parties will be contacted about the setting of a date for an investigation meeting. I expect at that meeting the employees will be available to give evidence.

Mediation

20. In view of the history of this matter there is little point in the Authority directing mediation. However, if Mr Murphy feels that the claim may yet be resolved by some reasonable proposals he has to put forward and that may be acceptable to the Labour Inspector, he should contact her or approach the Mediation Service and ask for another meeting with Mr Packwood or any other mediator, for that purpose. Even if further mediation is not successful, it may be that Mr Murphy can give the Labour Inspector some information that may make a difference to these proceedings or the continuation of them.

A Dumbleton
Member of Employment Relations Authority