

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 27
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 First Defendant
AND	BARRY EDWARD BRILL Second Defendant

Hearing:	12-14 August 2019 (Heard at Auckland) Further written submissions filed on 28 August and 2 September 2019
Appearances:	S Blick and S Carr, counsel for plaintiff No appearance for the first defendant B E Brill, as counsel on his own behalf
Judgment:	11 March 2020

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] These proceedings involve an issue as to whether the second defendant, Barry Edward Brill, can be held jointly and severally liable with his former company Cypress Villas Limited (Cypress), the first defendant, for breaches of minimum standards of employment. The proceedings have been commenced by the Labour Inspector acting on behalf of Ms Nina Northcroft, formerly employed by Cypress as a motel supervisor.

The affairs of Cypress have been wound up and it has now been removed from the Companies Register.

[2] The statutory provision relied upon by the Labour Inspector is the now repealed s 234 of the Employment Relations Act 2000 (the Act). This section, which was in force at the time of commencement of proceedings, reads 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.

History of the proceedings

[3] The proceedings already have a substantial history. Proceedings were commenced in the Employment Relations Authority (the Authority) against Cypress.¹ The Authority found that the claims by Ms Northcroft under the Holidays Act 2003 and the Minimum Wage Act 1983 were proved and Cypress was ordered to pay a sum of \$38,146.89. In addition, Cypress was ordered to pay interest on that sum at the rate of 5 per cent per annum from 2 April 2013 until the date that payment was made. Interest continues to run.

[4] Mr Brill was named as a proposed second respondent in the Authority proceedings in view of the fact that the Authority was being asked to decide whether he should be joined as a party pursuant to s 234 of the Act. The Authority decided that there were no grounds to join Mr Brill, and the Authority therefore declined to authorise the Labour Inspector to bring an action pursuant to s 234.

[5] The Labour Inspector filed a challenge on a de novo basis against the entire determination of the Authority. While the findings of the Authority against Cypress in favour of the Labour Inspector were not disputed, those findings were included in the challenge. The primary objective of the challenge, however, was to review the Authority's decision not to authorise proceedings being commenced against Mr Brill.

[6] The full Court of the Employment Court considered the matter on a preliminary basis in order to give its interpretation of the section. The full Court considered what proof requirements were placed upon the Labour Inspector to first be given authority to commence proceedings against Mr Brill and then how the claim against him needed to be proved.² The Court made a majority decision on these issues and Mr Brill then sought leave to appeal the Court's decision to the Court of Appeal. Leave was granted, and the questions considered by the Court of Appeal and its answers are set out as follows:³

A We answer the two questions of law submitted for determination by this Court:

¹ *Labour Inspector (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] ERNZ 236.

- (i) “What threshold must the Labour Inspector meet in order to obtain authorisation under s 234(2) of the Employment Relations Act 2000?”

The Labour Inspector must satisfy the Employment Relations Authority that there is a tenable cause of action.

- (ii) “What does the Labour Inspector have to prove to establish that any officer or director or agent of the company has “directed or authorised the default in payment” within the meaning of s234(3)?”

The Labour Inspector must prove the officer, director or agent knew the payment was in default of the company’s obligations under the Minimum Wage Act 1983 or the Holidays Act 200[3]. The relevant knowledge may be proved by direct evidence or by inference.

[7] The standard of proof is on the balance of probabilities.

[8] As a result of the Court of Appeal’s decision, the Labour Inspector’s challenge to the Authority’s determination proceeded to a hearing with the Court having the assistance of the Court of Appeal’s decision.

[9] Following the completion of evidence on behalf of the Labour Inspector in support of the challenge, Mr Brill made a submission that on the balance of probabilities the Labour Inspector should not be given authority to commence proceedings against him. In an oral judgment given under urgency at the hearing, dated 13 August 2019, I held that there was sufficient evidence for me to find that the threshold set by the Court of Appeal at that stage in the proceeding was met.⁴ I found that there was a tenable cause of action, that the Labour Inspector was authorised to commence proceedings against Mr Brill and that the matter would proceed to the next stage.

[10] Mr Brill then elected to give evidence in support of his defence to the proceedings, and I then heard submissions both on behalf of the Labour Inspector and from Mr Brill. There is no need to retrace in this judgment the findings which I made as to the proved preliminary requirements so that the Court could authorise the Labour Inspector to bring the action. Nor is there a need to retrace the findings I made against Cypress itself. The claims against Cypress had been accepted as being

⁴ *Labour Inspector (MacRury) v Cypress Villas Ltd* [2019] NZEmpC 97.

established in the earlier determination of the Authority and confirmed in the decision of the Court. Cypress has been ordered to pay the amounts found to be owing to Ms Northcroft. Judgment may be sought against Cypress in order to advance a matter discussed later in this judgment. However, for a formal judgment to be given, Cypress would need to have its status regained in the Companies Register.

The pleadings

[11] The statement of claim filed by the Labour Inspector is a little problematic. It elects to challenge the whole of the Authority's determination on a de novo basis. This means that it includes the positive findings in favour of the Labour Inspector, which granted Ms Northcroft's entitlement to arrears of minimum wages and holiday pay, in addition to challenging the refusal of the Authority to award penalties against both Cypress and Mr Brill or to authorise the issue of proceedings against him.

[12] This problem, however, appears to be resolved by the fact that the only relief sought is the authorisation under s 234 of the Act and, as a consequence, consideration of Mr Brill's liability. Out of an abundance of caution, in addition to dealing with that issue, I have reiterated in this judgment the findings in the determination as to the liability of Cypress. As those findings appear to have been put in issue on a de novo basis in the challenge, the Court should confirm the Authority's findings as its own decision pursuant to s 183(2) of the Act.

[13] So far as the challenge against the refusal to grant penalties is concerned, this claim was not raised either in evidence or submissions on behalf of the Labour Inspector, and I have had to assume that it has been abandoned. Under s 234 of the Act, penalties would not be claimable against Mr Brill in any event.

[14] Material to the issue which now needs to be decided in this case are the following pleadings contained in the statement of claim:

- 28 The proposed second defendant directed or authorised the default of the first defendant in payment of holiday pay and minimum wages to Ms Northcroft.
- 29 If judgment is given for the amount claimed by the plaintiff for holiday pay and minimum wages, it is unlikely to be paid in full by

the first defendant because there are reasonable grounds for believing the company does not have sufficient assets to pay the amount in full.

- 30 The direction or authorisation of the proposed second defendant was given by him in or through his role as a director of the first defendant entering into an employment relationship with Ms Northcroft. In particular;
- a) The proposed second defendant assumed personal responsibility for all employment related decisions made by or on behalf of the first defendant.
 - b) The terms of the agreement, which were negotiated and signed by the proposed second defendant on behalf of the first defendant, did not provide or allow for the relevant provisions of the Holidays Act 2003 and Minimum Wage Act 1983 to be complied with, having regard to the days and hours worked by Ms Northcroft under the agreement.
 - c) The proposed second defendant knew the motel was open every day from 8am to 8pm, as a sign at the motel entrance stated those hours. Ms Northcroft was required to be available between those times.

Factual outline

[15] Ms Northcroft was employed by Cypress as a supervisor of its motel in Taupo. Mr Brill, who was sole director of Cypress, resided in Paihia. Prior to Ms Northcroft's employment, Cypress had employed a manager of the motel for a number of years. When she resigned from the position, she recommended Ms Northcroft to take over. Ms Northcroft had previously periodically carried out housekeeping duties at the motel and relieved the manager when she was on breaks or taking leave. Mr Brill had ultimate oversight of the previous manager but gave her substantial autonomy in running the motel. She gave evidence as to the way that she managed her time so that she was able to take breaks, days off and leave as required and others were employed to assist her. She was of course on a salary for a greater amount than that agreed to be paid to Ms Northcroft. Mr Brill, to use his own words, was "hands off" in his oversight of the motel.

[16] Mr Brill decided that the motel would wind down its operation and the units would be sold off on separate titles. This was the completion of Mr Brill's original development plan for the site he acquired and built the motel units upon. The eventual financial outcome was probably not what he had originally envisaged or hoped for.

With the indication that the motel business would be wound down, the previous manager decided to move on, and Ms Northcroft was employed as motel supervisor during the final wind down period. She was to be on a fixed-term employment agreement for this reason.

[17] I am of a view, having heard the evidence, that Mr Brill expected that the employment arrangement with Ms Northcroft would be on a similar basis as the previous manager, albeit at a lower level of salary. This is confirmed to a degree by the terms and conditions in the employment agreement which provided for days off each week and provided that leave would be dealt with in accordance with the provisions of the Holidays Act. It needs to be remembered that the agreement was for a fixed-term, although it later came to be extended. The agreement itself does not by its terms result in breach of minimum wage and holiday pay requirements. It is the total hours worked by Ms Northcroft and her failure to take her Holidays Act entitlements which procured the breaches. For this reason, the pleading in paragraph 30(b) of the statement of claim is not strictly correct.

[18] With the previous manager, Mr Brill had maintained a level of supervision but at a distance. Certainly, the previous manager had a great deal of autonomy in the way that she ran the motel and ensured the integrity of and compliance with her terms and conditions of employment. This included Holidays Act entitlements. Once Mr Brill decided to gradually dispose of the motel units, he delegated responsibility for management and oversight to his niece's husband, Darren Edge, who was a restaurateur in Taupo. He was given oversight of employment matters insofar as Ms Northcroft was concerned, and payroll functions were contracted to a local firm of accountants. It was Mr Edge who negotiated the terms and conditions of the employment agreement with Ms Northcroft, and it was he who signed the agreement on behalf of Cypress. Ms Northcroft conceded in evidence that this was so. Accordingly, the pleadings against Mr Brill in this respect are incorrect. The Labour Inspector relied upon the allegation that Mr Brill negotiated and signed the employment agreement as an important part of the claim against him.

Discussion

[19] There is no doubt that Cypress breached its obligations towards Ms Northcroft. I note from email correspondence on the file that there were occasions when she was given assistance, but generally there was a negligent disregard by Cypress of the pressures facing her in supervising the motel operation and later tenancies. These, however, were deficiencies on the part of Mr Edge, acting on behalf of Cypress as the Manager of the motel. It would be fair to say, however, that the oversight by Mr Edge may have been partially caused by Ms Northcroft's reluctance to raise with him matters which concerned her about her employment position. She gave evidence that she feared losing her employment if she complained. That did not excuse Cypress from its obligation to pro-actively care for Ms Northcroft's wellbeing and provide assistance to her to ensure that the individual employment agreement was strictly observed. This was particularly so if the motel was to be open for twelve hours a day as a sign near the reception apparently stated. If Mr Edge had done that, it would likely have resulted in payment for her actual hours of work being in compliance with the Minimum Wage Act.

[20] The issue in this case is whether the Labour Inspector has discharged the onus of proof of the matters established by the Court of Appeal to be proved for Mr Brill to be held jointly and severally liable for the defaults. Mr Brill only met Ms Northcroft once. This was before Ms Northcroft commenced employment as supervisor and when he was at the motel with Mr Edge dealing with other matters.

[21] As already indicated, at the hearing, it was proved to be incorrect that Mr Brill negotiated and signed the individual employment agreement as Ms Northcroft had originally alleged in her evidence and as was pleaded in the statement of claim. As a significant point relied upon by the Labour Inspector in the claim it came to be undermined. In addition, Mr Brill had no day-to-day hands on management of the motel. He resided in Paihia. He left management to Mr Edge and the accountants who managed payroll. The position of the previous manager and the way that she managed the motel is important because it shows that she was more proactive in ensuring that she was able to take breaks and leave with Cypress agreeing to provide other employees to relieve her. It is possible that Mr Brill was lulled into a belief that

Ms Northcroft would also operate in the same way. As Mr Brill stated in his evidence, he left it to Mr Edge to negotiate the terms of Ms Northcroft's employment and to carry out management. Mr Brill's only concern was compliance with requirements for fixed-term agreements in view of the fact that Ms Northcroft's employment would depend upon the period it took to carry out the sale of the units. However, that concern of Mr Brill's was only at the outset of the employment. Payroll was in the hands of a local accounting firm which liaised with Mr Edge.

[22] As indicated in the Court of Appeal's answer to the second question of law, the Labour Inspector must prove that Mr Brill knew the payments made to Ms Northcroft were in default of Cypress' obligations under the Minimum Wage Act 1983 or the Holidays Act 2003 before he could be found to have directed or authorised the breaches. That relevant knowledge may be proved by direct evidence or by inference. Having heard the evidence, I am not satisfied that there is sufficient evidence to prove that Mr Brill knew that the payments made to Ms Northcroft were in default of the company's obligations. Nor am I satisfied that there are any proven facts or circumstances from which such an inference could be made. Mr Brill had mistaken assumptions about Ms Northcroft being in a salaried position, but this just adds to the culpability of the company and not Mr Brill personally. Breaches by the company arose through failure of adequate management by Mr Edge and his lack of care for Ms Northcroft's position. I accept Mr Brill's evidence that he was not aware of the breaches until the Labour Inspector advised him.

Conclusion and disposition

[23] Based on the evidence that has been presented in this case, I find that there is insufficient evidence to hold Mr Brill jointly and severally liable with Cypress to pay the amounts which have been held to be recoverable against Cypress. Accordingly, the action by the Labour Inspector against him is dismissed.

[24] This may not be the end of the matter however, so far as Mr Brill is concerned. There was evidence that a secured creditor of Cypress had liability to it satisfied by the winding up of Cypress. It may well be that Ms Northcroft, up to a certain extent of wages and holiday pay owing to her, was a preferential creditor under the provisions

of the Companies Act 1993. A lot may depend upon timing of payments, but certainly, if she did indeed have preference, then she was entitled to be paid up to the limit provided under the Companies Act. Mr Brill will have responsibility for attending to this as sole director of Cypress. If the matter is to be pursued in this way and is not resolved, then steps will need to be taken to have Cypress restored to the Companies Register. The pursuit of any such claim, however, would only be within the jurisdiction of the High Court. It may well be that this matter is capable of resolution without the need for further proceedings.

Costs

[25] Mr Brill is a practising barrister and solicitor. Costs should follow the event and, in view of the fact that Mr Brill has been successful in defending the Labour Inspector's claim, he is entitled to costs. Hopefully, this is also a matter which may be resolved between the parties. If no resolution on costs is reached, then Mr Brill will have 14 days from the date of this judgment in which to file a memorandum containing his submissions in support of any application for costs he wishes to make. The Labour Inspector will have 14 days thereafter to file any submissions in answer, and Mr Brill will have a further 7 days in which to file any submissions in reply. The issue of costs will then be dealt with on the papers.

M E Perkins
Judge

Judgment signed at 12.15 pm on 11 March 2020