

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2020] NZEmpC 66
EMPC 389/2019**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN A LABOUR INSPECTOR
 Plaintiff

AND WANNAKAWATTAWADUGE JANAKA
 SUJEEWA FERNANDO
 First Defendant

AND ARUMADURA UDENI LAKMALI
 FERNANDO
 Second Defendant

Hearing: On the papers

Appearances: G La Hood, counsel for plaintiff
 P Shaw, counsel for the defendants

Judgment: 22 May 2020

JUDGMENT OF JUDGE K G SMITH

[1] The Labour Inspector unsuccessfully sought an order from the Employment Relations Authority that she could recover from Wannakawattawaduge Fernando and Arumadura Fernando interest on arrears of wages and holiday pay owed by La Wheat Ltd (in liquidation) to two former employees.¹

¹ *A Labour Inspector v La Wheat Ltd (in liq)* [2019] NZERA 558 (Member Doyle) (second determination).

[2] The Authority held that the interest claimed was not recoverable from Mr and Mrs Fernando, because there was no cause of action against them until the company was placed in liquidation and the interest claimed pre-dated that event.² The Inspector has challenged that conclusion.

The challenge

[3] The Inspector challenged the determination by claiming it was based on an error of law about the interpretation and application of s 142Y of the Employment Relations Act (the Act). The relief claimed was a declaration that she is able to recover the accrued interest and ongoing interest from Mr and Mrs Fernando and orders to that effect were sought.

[4] Mr and Mrs Fernando accepted they were persons directly or indirectly concerned in La Wheat's breaches. Consequently, they accepted personal liability for the arrears due to the employees under the Minimum Wage Act 1983 and Holidays Act 2003.³ However, they disputed that their liability included accrued interest on those debts.

[5] The amount of interest is modest but liability to pay it is important to the Inspector and Mr and Mrs Fernando. To contain costs the parties conducted this proceeding relying on a statement of agreed facts, an exchange of submissions, and by providing copies of the statement of problem, statement in reply and related applications in the Authority.

Two determinations

[6] The Authority issued two determinations dealing with the liability of La Wheat and Mr and Mrs Fernando. The first determination established the extent of the company's liability for unpaid wages and holiday pay and held that Mr and Mrs Fernando were persons who were directly or indirectly involved in the company's breach.⁴

² At [26].

³ As provided for by s 142W of the Act.

⁴ *A Labour Inspector v La Wheat Ltd* [2019] NZERA 50 (Member Appleton) (first determination).

[7] The Authority's second determination was concerned with the extent of Mr and Mrs Fernando's liability and the Inspector's claim for interest.

The first determination

[8] The first determination was released on 1 February 2019. The Authority found that La Wheat failed to pay wages and holiday pay to two named employees. In relation to the first employee, who was subsequently identified only as P, the orders were that the company pay him:

- (a) \$43,382.01 for arrears of wages due under the Minimum Wage Act; and
- (b) \$16,689.16 for arrears of holiday pay under the Holidays Act; and
- (c) interest accrued between 24 December 2016 and the date of the determination of \$6,337.10.

[9] The date of 24 December, used in the interest calculation, was when the employee's employment ended. The interest was calculated on the whole amount owed, over 770 days at \$8.23 per day. The Authority ordered the company to pay interest accrued to the date of the determination and that it continued to accrue at the rate of 5 per cent per annum for each day the arrears remained outstanding in full or in part.

[10] In relation to the second employee, identified as M, the orders were that the company pay:

- (a) \$15,131.81 for arrears of wages under the Minimum Wage Act; and
- (b) \$1,593.48 for arrears of holiday pay under the Holidays Act; and
- (c) interest accrued between 22 December 2016 and the date of the determination of \$1,767.88.

[11] The date of 22 December 2016 was when M's employment ended. The interest was calculated on the whole amount for 772 days at \$2.29 per day. The same order was made about interest continuing to accrue until the debt was paid. In both cases the debts were to be paid within 28 days.

[12] The Authority found that Mr and Mrs Fernando jointly ran the business and made all of its decisions about staff including what they did and what they were paid.⁵ In their capacity as directors and shareholders they were responsible for the direction and control of the company and its employees. They determined when the employees worked, approved leave, and communicated with them about daily tasks.⁶ Not surprisingly, they were held to be persons involved in the company's breaches of employment standards, within the meaning of s 142W of the Act.

[13] However, despite that conclusion, the Authority declined to make any orders under s 142Y as to the extent of Mr and Mrs Fernando's liability. The Authority considered it was not possible to ascertain, as at the date of the determination, whether the company was unable to pay. The reason given to explain that conclusion was that the company might be able to raise a loan to pay the debt if it did not otherwise have money available.⁷

[14] However, the Authority granted the Inspector leave to apply to determine the extent of the orders to be made against Mr and Mrs Fernando if the company did not pay the arrears within the stipulated time.

The second determination

[15] A second determination was needed because La Wheat did not pay the arrears, or interest. It was promptly placed into liquidation about a fortnight after the first determination was issued.⁸ In the second determination the Authority dealt with the Inspector's application for orders under s 142Y of the Act, pursuant to the leave reserved in the first determination.⁹ The full amounts owing to P and M were sought

⁵ First determination, above n 4, at [92].

⁶ At [11].

⁷ At [94].

⁸ Second determination, above n 1.

⁹ At [4], the issue of payment of penalties was not pursued in this challenge.

including interest on the outstanding debts from December 2016. A slight adjustment to the amounts claimed was needed to reflect when s 142Y came into force, but otherwise the claims against Mr and Mrs Fernando mirrored those made against the company.¹⁰

[16] The application was granted in so far as the unpaid wages and holiday pay were concerned. However, the Authority decided the Inspector could not recover the interest claimed because it did not fall due following a breach of employment standards. Instead, interest had been ordered because the Authority exercised its discretion to do so under cl 11 of sch 2 of the Act.

[17] The Authority said:

[25] Under s 142Y the cause of action against a person involved in a breach does not arise until there has been a default in the payment of wages or other money due to a breach of employment standards. ...

[18] The Authority continued that, in the first determination, it was not possible to ascertain if the company was unable to pay the arrears.¹¹ That analysis led to this conclusion:

[26] There was no cause of action against [Mr and Mrs Fernando] for payment of arrears until after the determination when within days [the company] was placed in liquidation and the liquidator's first report made it clear the total shortfall to all creditors was sizable. There was then a default within the meaning of s142Y due to a breach of employment standards.

[19] The Authority continued:

[29] Liability of a party for interest before a cause of action has arisen is a significant departure from the usual basis for an interest award. If that was the intent then a specific provision to that effect would be expected. There is no such provision. I do not find that it is available to the Labour Inspector to recover under s142Y from [Mr and Mrs Fernando] the interest awarded to [the employees] payable by [the company].

[20] That conclusion was reached because the Authority considered the cause of action only accrued on the liquidation of La Wheat and following the liquidator's

¹⁰ At [5], the parties proceeded on the basis that pt 9A of the Act applied rather than the repealed s 234 by virtue of sch 1AA cl 3(7).

¹¹ At [25], referring to the second determination, above n 1, at [94].

report. The answer to the question posed by the Inspector was no; she was not able to recover interest and none was awarded.¹²

Alleged errors

[21] The Labour Inspector pleaded the Authority made an error by holding that she could not recover interest on the arrears. Two broad errors were attributed to the Authority. The first was that, in relation to s 142Y(1) of the Act, the words “any wages or other money payable to an employee” were misinterpreted by an unduly restrictive analysis. The second was about the phrase “cause of action” in cl 11(1) of sch 2 to the Act and, in particular, whether the Authority erred in concluding when it arose.

Analysis

[22] The Labour Inspector’s challenge requires consideration of ss 142Y and 142W of the Act. Section 142Y reads:

142Y When person involved in breach liable for default in payment of wages or other money due to employee

- (1) A Labour Inspector or an employee may recover from a person who is not the employee’s employer any wages or other money payable to the employee if—
 - (a) there has been a default in the payment of wages or other money payable to the employee; and
 - (b) the default is due to a breach of employment standards; and
 - (c) the person is a person involved in the breach within the meaning of section 142W.
- (2) However, arrears in wages or other money may be recovered under subsection (1) only,—
 - (a) in the case of recovery by an employee, with the prior leave of the Authority or the court; and
 - (b) to the extent that the employee’s employer is unable to pay the arrears in wages or other money.

[23] The relevant part of s 142W, defining what it means to be involved in a breach, reads:

¹² At [30].

142W Involvement in breaches

- (1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—
- (a) has aided, abetted, counselled, or procured the breach; or
 - (b) has induced, whether by threats or promises or otherwise, the breach; or
 - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
 - (d) has conspired with others to effect the breach.

...

[24] It was common ground that the meaning of s 142Y must be ascertained from its text and in light of its purpose.¹³

[25] From the Labour Inspector’s perspective the issues turn on the meaning of the phrase “or other money payable” in s 142Y(1) and that was where her submissions were concentrated. Mr La Hood, counsel for the Inspector, submitted that interest fell within that phrase on both a textual and purposive analysis.¹⁴

[26] Mr La Hood submitted that the ordinary meaning of “payable” is broad and encompassed interest, relying on a dictionary definition of the word as an amount that may, can, or must be paid. From that submission his analysis was that s 142Y included the interest previously awarded by the Authority. The purpose of the Act, derived from s 3 and s 142A, was said to support this conclusion.

[27] Ms Shaw, counsel for Mr and Mrs Fernando, took the opposite view largely supporting the Authority’s reasoning.

[28] I do not accept Mr La Hood’s submission that the phrase “other money payable” captures the accrued interest owed by LA Wheat, for the same reasons as the

¹³ Interpretation Act 1999, s 5; and see *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36.

¹⁴ Relying on the principle that the actual words of an enactment are the most important factor in statutory interpretation as expressed by the High Court in *Tan v Auckland Council* [2015] NZHC 3299 at [27].

Authority gave. However, I disagree with the Authority’s conclusion about when the cause of action arose and, therefore, the decision that interest could not be awarded.

[29] The text of s 142Y requires the default to be in payment of wages or other money payable to the employee due to a breach of an employment standard. That is apparent from the conjunction between ss 142Y(1)(a) and (b).

[30] An employment standard is defined in s 5 of the Act as:

- (a) the requirements of any of sections 64, 69Y, 69ZD, 69ZE, and 130:
- (b) the provisions of the Equal Pay Act 1972:
- (c) the minimum entitlements and payment for those under the Holidays Act 2003:
- (d) the requirements of sections 81 and 82 of the Holidays Act 2003:
- (e) the minimum entitlements under the Minimum Wage Act 1983:
- (f) the provisions of the Wages Protection Act 1983

[31] The provisions in (a) (that is, ss 64, 69Y, 69ZD, 69ZE and 130) do not refer to payment of wages or other money. They are concerned with statutory entitlements such as for breaks in the working day. The Equal Pay Act is concerned with prohibiting discrimination in employment based on gender. Of the balance of the provisions, the Minimum Wage Act deals with minimum entitlements for payment of wages, the Wages Protection Act ensures that wages are paid in cash, and the Holidays Act provides for entitlements to paid holidays, public holidays and other leave.

[32] The text of s 142Y, therefore, indicates that what is intended by the phrase “wages or other money payable” is a debt due and owing to the employee because one or other of those standards was breached. Section 142Y does not mention interest and nor does s 5.

[33] The purpose of Part 9A does not suggest s 142Y should be interpreted differently. Part 9A was introduced on 1 April 2016.¹⁵ It begins with a specific object, in s 142A. That object is to provide additional measures to promote the more effective

¹⁵ By s 19 of the Employment Relations Amendment Act 2016.

enforcement of employment standards, especially minimum entitlement provisions.¹⁶ The balance of s 142A lists the new enforcement tools available to an Inspector; the introduction of declarations of breach, pecuniary penalties for breaches of minimum entitlements, compensation orders, banning orders, making certain insurance unlawful and extends to providing for what is meant by involvement in a breach of employment standards. There is nothing in Part 9A to support the purposive interpretation urged by Mr La Hood, that the words “other money payable” includes the interest awarded at the discretion of the Authority.

[34] However, that is not the end result. Instead of starting fresh proceedings the Inspector applied to the Authority to continue the first claim, in accordance with the leave granted to do so. The statement of problem had combined claims against the company and Mr and Mrs Fernando alleging that there had been breaches bringing into play s 142Y of the Act, s 77A of the Holidays Act and s 11AA of the Minimum Wage Act.¹⁷ Interest was sought relying on cl 11(1) of sch 2 to the Act.¹⁸

[35] When the Inspector applied for leave to complete the claim against Mr and Mrs Fernando interest continued to be sought, expressed as a lump sum and a continuing daily rate until it was paid. However, in both cases, interest was claimed under cl 11(1) of sch 2 to the Act.

[36] The way the claims were pleaded meant that, by the time of the second investigation, the Authority was being asked to fix the amount of the debt and to exercise the discretion under cl 11(1) of sch 2. The Authority did not undertake that exercise because of the conclusion it reached about when the cause of action accrued.

[37] The Authority interpreted s 142Y(2)(b) as meaning the cause of action in this case was not complete until the liquidation of La Wheat and the liquidator’s report indicated a sizeable shortfall to creditors. I disagree. A cause of action is every fact that might be necessary for the plaintiff to prove, if traversed, in order to support the

¹⁶ Employment Relations Act 2000, s 142A(1).

¹⁷ First determination, above n 4, at [4].

¹⁸ The pleading included reference to an amendment to the schedule created by the Interest on Money Claims Act 2016 that amended cl 11(1) of sch 2 to the Act with effect from 1 January 2018. The transitional provisions on the Interest on Money Claims Act provided that this proceeding would continue to be decided under the law as it previous stood.

plaintiff's right to a judgment from the Court.¹⁹ A similar expression of the same proposition is an assembly of facts which, if proved, would entitle the plaintiff to relief.²⁰

[38] The cause of action was complete, in my view, once the company defaulted in the payment of wages and holiday pay. That default preceded the liquidation of La Wheat and was probably much earlier than when P and M ceased their employment. At that point both La Wheat and Mr and Mrs Fernando had liabilities; the company had them as the employer and the directors had at least contingent liabilities in the sense that they had been involved in the breaches and were exposed to orders being made against them. It was involvement in the breaches, not the solvency of the company or the liquidator's conclusions about the anticipated payment to creditors, that allowed the Inspector to make claims against the directors.

[39] Liquidation is a convenient expression for the administrative and legal steps taken to wind up the affairs of a company.²¹ In fact, liquidation is not usually complete until the liquidator has provided a final report and steps have been taken to remove the company from the Companies Register.²² While it might be convenient to see liquidation as indicating the company was unable to pay, the passing of a resolution by the shareholders (or for that matter an order by the Court) does not, by itself, establish the final financial position of the company.

[40] In this case the situation was somewhat stark because the liquidator's prompt report indicated a shortfall to creditors. However, the company need not have been placed in liquidation when it was or, alternatively, the liquidator may not have been able to immediately conclude a shortfall would exist, or how much of one. In those situations, using the Authority's approach, all the ingredients of the cause of action may not exist for some considerable time after the breaches have occurred. Potentially that could even be after further litigation, if the extent of the employer's ability to pay

¹⁹ *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA); see also the commentary in *McGechan on Procedure* (online ed, Thomson Reuters) at HR5.17.01.

²⁰ See Matthew Casey and others *Annotated High Court Rules* (4th ed, LexisNexis, Wellington, 2018) at [HCR5.1.7] relying on *National Bank of New Zealand Ltd v Glennie* (1992) 6 PRNZ 292 (HC).

²¹ Companies Act 1993, pt 16, ss 240-316B.

²² Companies Act 1993, ss 249 and 318.

has to be established. I doubt that was intended given the object and purpose of Part 9A.

[41] The conclusion that the cause of action against Mr and Mrs Fernando arose when the default occurred is consistent with the text of the section, emphasising recoverability rather than liability.²³ Section 142W also supports the conclusion that the breach occurs at the point where the liable person has aided, abetted, counselled, or procured the breach or in some way has been directly or indirectly knowingly concerned in it, not when the extent of the employer's ability to pay is established. It is also consistent with the purpose of Part 9A of the Act being to provide additional measures to promote effective enforcement of employment standards.

[42] Since the cause of action arose when the employment standards were breached there was no impediment to the Authority exercising the discretion to award interest on the outstanding debts.

Outcome

[43] The Authority's determination is set aside. The Inspector was entitled to claim interest and was, in reality, seeking the exercise of the Authority's discretion to order it. The purpose of interest is to ensure that the party who is owed money is compensated for the delay in payment. In those circumstances it is extremely difficult to contemplate that the Authority would have declined to award interest.

[44] Having reached the conclusion that the Authority was in error, that leaves for consideration the orders that should be made. The Inspector sought an order fixing the amount of interest, but the statement of agreed facts, and the submissions, gave no indication about the amount to be ordered. If the parties are unable to agree on the amount of interest leave is reserved for them to apply for further or other orders, but that should not be necessary in this situation.

²³ In so far as recoverability is concerned the position is similar to the now repealed s 234 of the Act, where the Authority was empowered to make an order against an officer, director or agent of a company to pay the amount owed by a company if it was unlikely to be paid in full. The precursor to action under s 234 was the company being placed in receivership or liquidation, or the Authority being satisfied there were reasonable grounds for believing the company did not have sufficient assets to pay the amount in full. See also the discussion in *Brill v Labour Inspector* [2017] NZCA 169.

[45] Costs are reserved. If costs are to be pursued by either party memoranda proposing a timetable will need to be filed.

K G Smith
Judge

Judgment signed at 9.55 am on 22 May 2020