

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

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

**[2020] NZEmpC 98  
EMPC 156/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WARREN TOLSON Plaintiff
AND	TODD ROBERT POTTER Defendant

Hearing:	25 May 2020 (Heard at Hamilton)
Appearances:	W Tolson, plaintiff P Cornegé, counsel for defendant
Judgment:	10 July 2020

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**JUDGMENT OF JUDGE J C HOLDEN**

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[1] Mr Tolson challenges a determination of the Employment Relations Authority (the Authority) that found he was employed by Potter Contracting Waikato Trust, and not by the defendant, Mr Todd Potter. The Authority dismissed Mr Tolson's claim against Mr Potter.<sup>1</sup>

[2] In the Court, Mr Tolson accepts he was not employed by Mr Potter but says that Mr Potter promised him that he would assume personal responsibility for any underpayments by Mr Tolson's employer and/or that Mr Potter was involved in a breach of employment standards for which he should be personally liable.

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<sup>1</sup> *Tolson v Potter Contracting Waikato Trust* [2019] NZERA 259 (Member Fitzgibbon).

[3] Mr Tolson seeks \$22,824 for what he says were underpayments for public holidays and sick pay. He also seeks interest on the amounts of the underpayments. Finally, he submits that Mr Potter ought to be ordered to pay a penalty. In his statement of claim, Mr Tolson refers to s 134 of the Employment Relations Act 2000 (the Act), which provides that every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty; s 142X provides for penalties for persons involved in a breach of employment standards, if the Act provides a penalty for the breach.

[4] For the reasons explained in this judgment, Mr Tolson's claim against Mr Potter fails.

### **Mr Potter now accepts there were underpayments**

[5] Mr Tolson was employed by a series of companies of which Mr Potter was the sole director as well as a shareholder. Each company ended up in liquidation and Mr Tolson's employment effectively transferred from one company to the next. The last of these companies was Potter Civil Engineering Contractors Ltd (the company), which went into liquidation on 6 November 2017 and, on 7 November 2017, into receivership.

[6] In late 2016, Mr Tolson became aware that companies using the same accounting system used by the company had made payroll errors. Mr Tolson brought the matter to the attention of the company's account manager in late January 2017 and she raised the matter with Mr Potter. There is no evidence that either Mr Potter or the accounts manager were aware of possible errors until Mr Tolson brought the issue to their attention.

[7] Mr Potter and Mr Tolson agree that there was a discussion in April 2017 between them about Mr Tolson's alleged underpayment. Mr Tolson claims that Mr Potter agreed that Mr Tolson was owed the money and promised that he personally would pay Mr Tolson the shortfall in two weeks. There were a number of conversations between Mr Tolson and Mr Potter between that first meeting and October 2017, which Mr Tolson says were along the same lines. Mr Potter says that,

as a director of the company, he simply agreed to investigate Mr Tolson's claim. He says he did not agree to pay Mr Tolson's claim. He notes at that stage he did not know whether the pay calculations were incorrect and that if there were underpayments to Mr Tolson, there would be other employees similarly affected. This would require the company to work out a way to deal with the issue more broadly. In any event, he says he was always acting in his capacity as a director of the company.

[8] It was also in April 2017 that Mr Potter says he became aware that the company had liquidity issues. As noted, the company went into liquidation in November 2017.

[9] Mr Potter now accepts that there was an error in how the company calculated Mr Tolson's holiday pay. The evidence provided by the company's previous bookkeeper was that, over the period between 2 June 2013 and the date of liquidation, Mr Tolson was underpaid by \$4,095.26.

[10] Mr Tolson says that he has communicated with the liquidators of the company and that, although he did not make a claim in the liquidation, his understanding of the advice he received was that there was no money available.

### **Was there a promise to pay?**

[11] In evidence, Mr Potter expressed sympathy for Mr Tolson's position. It is understandable why Mr Tolson is upset about the shortfall in payment, and indeed why he feels Mr Potter should bear some responsibility. However, I am not satisfied that Mr Potter assumed personal responsibility for payment of the shortfall in Mr Tolson's remuneration. Rather, as the director and shareholder of the company, he agreed he would look into Mr Tolson's claim. Accordingly, the claim based on a promise cannot succeed on the facts.

[12] In any event, the Court does not have jurisdiction to adjudicate on the claimed promise as it would not be founded on the employment relationship, which was between Mr Tolson and the company.

**Mr Potter is not a person involved in a breach of Mr Tolson’s employment agreement, as defined by the Act**

[13] From 1 April 2016, the Employment Relations Act 2000 provides for certain persons involved in a breach of employment standards to be liable for payment of arrears in wages or other money.<sup>2</sup> These persons can include an officer of a body corporate who has aided, abetted, counselled, or procured the breach by the body corporate, or has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach, or has conspired with others to effect the breach.<sup>3</sup>

[14] If those criteria are met, an employee, with the prior leave of the Authority or the Court, may recover the arrears in wages or other money to the extent that the employee’s employer is unable to pay the arrears.<sup>4</sup>

[15] For a person to be found to have been involved in a breach of standards, proof of intentional purposeful actions is required.<sup>5</sup> Mr Potter was not involved in preparing the wage payments for Mr Tolson; those were undertaken by the company’s accounts manager. There also is no suggestion that the company, the accounts manager or Mr Potter had any intention of short paying Mr Tolson. Rather, the evidence was that an error occurred because of the default settings of the accounting system being used, which were not overridden by the accounts manager. Further, even if Mr Tolson could establish that Mr Potter was a person involved in a breach of a minimum entitlement, it is apparent that he reasonably relied on the company’s accounts manager and its contracted bookkeepers, which provides him with a defence to an action to recover wages or other money.<sup>6</sup>

[16] In these circumstances, Mr Tolson is unable to recover against Mr Potter.

[17] It follows that no penalty is payable under s 134(2) or under s 142X of the Act.<sup>7</sup>

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<sup>2</sup> Employment Relations Act 2000, s 142Y.

<sup>3</sup> Employment Relations Act 2000, s 142W(1).

<sup>4</sup> Employment Relations Act 2000, s 142Y(2).

<sup>5</sup> *Southern Taxis Ltd v A Labour Inspector* [2020] NZEmpC 63 at [187].

<sup>6</sup> Employment Relations Act 2000, ss 142ZB(a), 142ZD.

<sup>7</sup> Noting that a claim for a penalty under s 134 must be commenced in the Authority, and only a Labour Inspector can apply for a penalty to be ordered against a person under s 142X.

[18] Mr Tolson's claim accordingly fails.

[19] For completeness I note that s 142W and s 142Y apply only to breaches since 1 April 2016. Only a very small part of Mr Tolson's claim is in respect of that period.

**Mr Potter entitled to costs**

[20] Mr Potter is entitled to costs. The parties are encouraged to try and agree those, but if they cannot be agreed then Mr Potter is to file and serve his application for costs within 28 days of this judgment. Mr Tolson then must file and serve his submissions in response within a further 21 days. Any submissions in reply are to be filed and served within a further seven days. Thereafter, the application for costs will be dealt with on the papers.

J C Holden  
Judge

Judgment signed at 9.30 am on 10 July 2020