

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 288
5361404

BETWEEN STEPHEN DENIS BAILEY
Applicant

AND NEIL WARNER
Respondent

Member of Authority: K J Anderson

Representatives: K McLuskie, Counsel for Applicant
N Warner, In person

Investigation: On the papers

Date of Determination: 27 August 2012

DETERMINATION OF THE AUTHORITY

The Claims

[1] The applicant, Mr Stephen Bailey, claims the sum of \$10,494.49 (gross) being due to him but unpaid, for the period 31 May 2011 to 31 September 2011. Mr Bailey seeks to be paid annual holiday pay calculated at 8% of the above sum. Mr Bailey also seeks reimbursement of the sum of \$198.00 being the amount that he paid for accommodation for two nights in Wellington during the course of his employment.

[2] Mr Neil Warner is a director (and at material times, the General Manager) of Meat Industry Training and Employment Limited. Mr Bailey was employed as the Business Development Manager for the business. Mr Warner totally accepts that Mr Bailey is owed the monies being claimed but says that payment has not been made because neither he nor the Company, has money available and that he (Mr Warner), is now facing bankruptcy.

[3] Initially, Mr Bailey filed proceedings against Meat Industry Training and Employment Limited (the Company) as his past employer but via an amended statement of problem received by the Authority on 14 June 2012, Mr Warner was cited as the second respondent to the proceedings. As an outcome of a conference call on 25 July 2012, the parties agreed that this matter should be determined “on the papers”. But the Authority has now discovered that the Company is in liquidation, effective from 23 July 2012, according to the Companies Register. The Authority notified the applicant of the affect of the Company being in liquidation; that is, the legal proceedings against the Company cannot be continued without the agreement of the liquidator.¹

[4] On 2 August 2012, the Authority received an *Amended Statement of Problem*. Meat Industry Training and Employment Limited is no longer a party to the proceedings. Mr Neil Warner is now the sole cited party.

Analysis

[5] There is no question that Mr Bailey is owed the monies identified. Mr Warner has, to his credit, totally acknowledged that this is so. Mr Warner has also informed that the Company is insolvent and it has no funds or any apparent assets that can be realised. However, a very relevant matter is that an employment agreement produced to the Authority has Mr Bailey as the employee party to the agreement with the employer party stated to be:

Neil Warner (General Manager – MITE Group).

[6] The Authority is informed that MITE Group is not and has never been a limited liability company. However, I note a reference to “MITE GROUP Limited” in a letter dated 22 July 2011 to Mr Bailey from Lorna Warner, whom I assume is Neil Warner’s wife. This letter states:

I look forward to your continuing employment with MITE GROUP LTD as we move forward together positively and catching up with you next week.

It can reasonably be assumed that MITE is an abbreviation for Meat Industry Training and Employment Limited. This appears to be verified, to some extent, by a reference to “M.I.T.E. Ltd” on the three payslips for Mr Bailey produced to the Authority, pertaining to the month of July 2011.

¹ Section 248 Companies Act 1993.

[7] At clause 15 of the agreement, it is stated that: “*I Neil Warner (General Manager), offer this employment agreement to Stephen Bailey.*” The agreement is unsigned and it is unclear if the parties accepted that this document was binding on them; or to what degree it should be accepted at face value as creating an employment relationship. But I understand that Mr Bailey says that this was the agreement that was accepted by him.

[8] But the analysis as to whether Mr Warner should be held liable for the monies owed can be assisted to some degree, whereby in a letter to the Authority dated 3 November 2011, Mr Warner writes:

The Company has not been in a financial position or me or (sic) wife to personally refund Mr Bailey the monies owed to him.

It is submitted for Mr Bailey that by this statement, Mr Warner has accepted personal liability for the monies owed to Mr Bailey. I accept that there is some merit in that proposition as the employment agreement assumes considerable prominence for Mr Warner; and it is ambiguous in regard to whom the employer party actually is. Also, there is little or no distinction between Mr Warner and the Company in that Mr Warner was the “controlling mind” of the Company and it was his decision not to pay Mr Bailey, albeit it is accepted this is because funds were not available. Mr Warner has said to the Authority that if “he” had the money he would pay Mr Bailey but he also said that he is facing bankruptcy.

[9] It also seems to me that Mr Warner was reckless (in company law terms) in that he misled Mr Bailey into continuing to work for the business on the pretence that he would be paid; the reality being that the company was, most probably, insolvent.

Determination

[10] While the Authority must be cautious in regard to imposing liability upon an individual when there is a registered limited liability company in existence, I conclude that in the circumstances of this case, because of the ambiguity of the employment agreement in regard to the identification of the employer party, and the controlling influence of Mr Warner upon the affairs of the company, along with the personal undertakings given by him for the monies owed to Mr Bailey, it is appropriate that Mr Warner should be held personally liable for the monies due.

[11] Mr Neil Warner is ordered to pay to Mr Stephen Bailey unpaid wages of the gross sum of \$10,494.49 along with annual holiday pay calculated at 8%; being the sum of \$839.56: a total of \$11,334.05. Mr Warner is also required to pay to Mr Bailey the sum of \$198.00 as reimbursement for hotel expenses incurred in the course of his employment.

[12] Mr Bailey has asked that interest be paid on the above sums until he receives payment and in most similar circumstances, the discretion of the Authority would be exercised in favour of such. But the difficulty here is that the ability on the part of Mr Warner to pay even the sums awarded is doubtful, hence an order for interest to accrue until the sums awarded are paid, could have unintended consequences in that the amount owed accumulates to an extent that the payment of any amount becomes problematic. In the circumstances, I decline to make an order for interest to be paid on the above sums beyond the date of this determination. However, Mr Warner is required to pay interest on the amounts awarded at the rate of 5% per annum from when the proceedings were commenced (28 October 2011) until the date of this determination.

Costs: Costs are reserved. The applicant has 28 days from the date of this determination to file and serve submissions with the Authority. The respondent has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority