

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 4
5436409

BETWEEN	DOUGLAS KARL HIXON (LABOUR INSPECTOR) Applicant
A N D	JUSTIN CAMPBELL First Respondent
A N D	DEAN EGGERS Second Respondent
A N D	PAULA CAMPBELL Third Respondent

Member of Authority:	David Appleton
Representatives:	Joseph Lill, Counsel for Applicant Respondents in person
Investigation meeting:	On the papers
Submissions Received:	14 and 22 November 2013 from Applicant 29 November 2013 from Respondents
Date of Determination:	13 January 2014

DETERMINATION OF THE AUTHORITY

**A. This matter is to be removed to be heard by the Employment Court
without the Authority investigating it.**

Employment relationship problem

[1] Mr Hixon, Labour Inspector, seeks a determination from the Employment Relations Authority to resolve whether the first, second and third respondents are personally liable for alleged unlawful deductions made to wages of former employees of a company AHV Contracting Limited (in liquidation) (AHV). Mr Campbell and

Mr Eggers were directors of AHV and Ms Campbell was, according to Mr Hixon, a manager and/or administrator for AHV, whose duties included payroll administration.

[2] The purpose of this determination, however, is to decide whether the matter should be ordered to be removed to the Employment Court to hear and determine the matter without the Authority investigating it, pursuant to s.178 of the Employment Relations Act 2000 (the 2000 Act). The parties were invited by the Authority to consider whether such removal should occur, with the applicant supporting removal whereas the respondents oppose it.

Brief background

[3] During 2012, AHV was engaged in providing viticulture services at vineyards in the Marlborough region. It employed a number of employees, usually on short term casual agreements. Its template employment agreement included provision for deductions to be made from an employee's wages for travel and accommodation.

[4] It is Mr Hixon's case that AHV unlawfully deducted sums from a number of employees' wages in relation to tools which it said had been supplied to workers and not returned. Mr Hixon also states that deductions were made from an employee's wages with no reason being provided.

[5] Mr Hixon states that the total amount claimed as unlawfully deducted amounts to \$3,914.12. This sum relates to 29 former employees of AHV.

[6] Mr Hixon had originally brought a claim against AHV by way of a statement of problem lodged with the Authority on 21 May 2013 (Authority file No 5420045). Following the appointment of liquidators of AHV from Deloitte on 29 July 2013 the liquidators wrote to the Authority on 6 August 2013 advising that, pursuant to s.248(c) of the Companies Act 1993, the liquidators did not provide their consent to Mr Hixon's action against AHV being continued. As a consequence, Mr Lill, on behalf of Mr Hixon, advised the Authority that the Ministry of Business, Innovation and Employment requested that the file No 5420045 be closed. Accordingly, that matter was closed.

[7] Upon receipt of the statement of problem against the three respondents in the current matter, the Authority inquired of Mr Lill as to the legal basis upon which he asserted that the three respondents may be personally liable for the amounts allegedly

unlawfully deducted from the wages of the 29 employees formerly employed by AHV. Mr Lill referred me to s.2 of the Wages Protection Act 1983 (the 1983 Act) which defined *Employer* as follows:

employer means a person employing any worker or workers; and includes any manager, foreman, clerk, agent, or other person engaged on behalf of that person in the hiring, employment, or supervision of the service or work of any worker.

[8] Section 11 of the 1983 Act provides that a worker may recover any deduction made from their wages from their *employer*. Mr Lill referred the Authority to the Employment Court judgment of *Mehta v Elliott (Labour Inspector)* [2003] 1 ERNZ 451 in which His Honour Judge Colgan referred to the extended definition of *employer* in the Wages Protection Act placing obligations on individuals within organisations. Mr Lill submitted that, on the facts of the case, the three respondents in the current matter meet the definition of *employer* for the purposes of the 1983 Act and that recovery can be made against them personally under provisions of that Act.

[9] It was the Authority's view that the *Mehta* case may be distinguishable from the current matter in that, in *Mehta*, Mr Sheikh was found to be employed by Mr Mehta from the outset and that, in Mr Duhanja's case, as well as being a director, Mr Mehta had held himself out in such a way that he could have been regarded as an employer in his personal capacity (paragraphs [9] and [78]).

[10] In the current matter, it is understood to be the case that each employee was employed pursuant to a fixed term casual employment agreement between the employee and AHV. As His Honour Judge Colgan pointed out in *Mehta*:

[22] The question of who was the employer must be determined as at the outset of the employment. If that changed during the course of the employment, there must be evidence of mutual agreement to that change.

[11] In the current matter, but for the liquidation, the application against AHV would have continued and been determined by the Authority. The intervening event that has caused the Labour Inspector to seek to pursue the respondents was the liquidation of the company. It is not clear, from the extended definition of *employer* in s.2 of the 1983 Act, under what circumstances a worker or labour inspector may elect to pursue any manager, foreman, clerk, agent or other person engaged on behalf

of a person employing any worker, in the hiring, employment, or supervision of the service or work of any worker, as opposed to the person employing that worker.

[12] Section 224 of the 2000 Act does not assist in this matter as it applies only when an employer is in default in payment of minimum wages or holiday pay.

Should this matter be removed to the Employment Court?

[13] Section 178 of the Employment Relations Act 2000 (the Act) provides as follows:

178 Removal to court

(1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.

(2) The Authority may order the removal of the matter, or any part of it, to the court if—

(a) an important question of law is likely to arise in the matter other than incidentally; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or

(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues;

or

(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

(3) Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such case the court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).

(4) An order for removal to the court under this section may be made subject to such conditions as the Authority or the court, as the case may be, thinks fit.

(5) Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the court, the court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.

(6) This section does not apply—

(a) to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and

(b) without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.

[14] Counsel for Mr Hixon submits that either s.178(2)(a) or (d) of the Act are relevant in this case. In respect of the important question of law, Mr Lill submits that it is the scope of the definition of *employer* within the Wages Protection Act 1983 that

is central to this matter. If the definition is extended, he submits, and carries with it a corresponding liability, then it may impact upon a wide range of individuals in New Zealand who may not now be aware of their obligations under the 1983 Act. Counsel for Mr Hixon submits that, whether or not the company is in liquidation is not central to this issue but that the 1983 Act places obligations on individuals and those obligations may result in liability where they are breached.

[15] Mr Lill submits that he is not aware of any authority beyond *Mehta* directly on point and that removing the matter to the Employment Court would allow the Court to provide guidance and authority on the scope of liability and the definition of *employer* under the Wages Protection Act 1983.

[16] Mr Lill submits that the question of law that he would like to be referred to the Court is as follows:

Whether the definition of “employer” under the Wages Protection Act 1983 entitles the worker and/or the Labour Inspector to pursue the directors and managers of the employee’s employer company personally.

[17] Mr Lill submits that there are a large number of employees who are potentially affected by the question and that the proceedings could result in personal liability for the respondents.

[18] Finally, Mr Lill confirms that the Labour Inspector is not seeking to rely on equitable principles to pierce the corporate veil.

[19] Mr Campbell and Mr Eggers submit to the Authority that they do not accept liability for the claim against the directors of the company and that they feel the action is unjustified, requesting that the action be dismissed in all regards. Specifically, on the question of whether the matter should be removed to the Employment Court, they oppose that *as it is simply a waste of tax payers money.*

[20] Ms Campbell says simply that she was an employee of AHV and was at all times acting under instructions from senior management.

[21] The Authority must determine this question by reference to the four tests set out in s.178(2) of the Act. Having considered the submissions of Mr Lill and the respondents, I am satisfied that an important question of law is likely to arise in the matter other than incidentally.

[22] I refer to the Employment Court case of *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 in which Chief Judge Goddard stated (at p.7):

I conclude without difficulty that questions of law are likely to arise in this case otherwise than incidentally, and I turn my attention to the real issue which is whether the questions of law are important questions of law. It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of s 94 [s.178]. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally. Most questions of law that could be described as important will be far less momentous. I ask myself what Parliament intended by this epithet. Obviously it did not intend that there should be a power to remove cases from the Tribunal to the Court merely because a question of law was likely to arise in the course of the case. It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.

[23] I am mindful in particular of the final sentence of His Honour the Chief Judge's words in the passage above. With respect to Mr Lill, I do not agree that the question he suggests is the correct one in this particular matter. It is my view that any inquiry into the obligations of a manager of an employer company under the 1983 Act needs to focus on the circumstances when liability would shift from the employer company to those individual directors and managers.

[24] What will be of crucial importance in deciding the current matter in my view is whether the intervening liquidation of AHV entitles the Labour Inspector to proceed against the individuals who were directors of AHV, and its payroll administrator, at the time when the alleged unlawful deductions contrary to the 1983 Act took place.

[25] In the absence of authority on this specific point, and given the potential effect upon other directors and employees of companies that go into liquidation, I am satisfied that this is a question that is an important question of law that is likely to arise in this matter other than incidentally. I do not agree that removal of this matter

to the Court would be a waste of taxpayers' money as asserted by Messrs Campbell and Eggers.

[26] For completeness, I do not consider that the test in s.178(2)(b) or (c) are relevant in this matter. I am, however, of the view that, in all the circumstances, the Employment Court should determine this matter in view of the potentially large number of employees in New Zealand who might be affected by the decision.

Determination

[27] For the reasons set out above, I find that, pursuant to s.178(2)(a) of the 2000 Act, matters relevant to file No 5436409 should be removed to the Employment Court on the basis that an important question of law is likely to arise other than incidentally.

[28] Accordingly, I order removal of this matter to the Employment Court.

Costs

[29] Costs are reserved.

David Appleton
Member of the Employment Relations Authority