

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 124
5593232

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF BUSINESS
 INNOVATION AND
 EMPLOYMENT
 Applicant

A N D JOHANNES GRAHAM
 DYKHOFF
 Respondent

Member of Authority: David Appleton

Representatives: Claire English, Counsel for Applicant
 Respondent in person

Date of Determination: 13 July 2017

DETERMINATION OF THE AUTHORITY (No 2)

**The Labour Inspector's application against the respondent is dismissed without
any order as to costs.**

Background facts

[1] By way of a statement of problem lodged with the Authority on 6 November 2015, the Labour Inspector sought compliance orders and the imposition of penalties against a company called Prestige Brick & Block Limited. That company went into liquidation on 3 February 2016 before an investigation meeting could be held.

[2] The Labour Inspector then sought permission from the liquidator to proceed against the company but that permission was withheld. The Labour Inspectorate then sought an order pursuant to s.234 of the Employment Relations Act 2000 (the Act) to bring an application against Mr Johannes Dykhoff, an officer of the company.

[3] Section 234 of the Act had been repealed with effect from 1 April 2016, prior to the Labour Inspector's application against Mr Dykhoff being lodged in the Authority, by virtue of s.35 of the Employment Relations Amendment Act 2016 (the 2016 Act). However, clause 3(7) of Schedule 1AA of the Act makes clear that s.234 continues to apply, despite its repeal, to proceedings brought in relation to conduct that occurred before the commencement of the 2016 Act, whether or not the proceedings were brought before that commencement. Therefore, the Authority had the jurisdiction to consider the Labour Inspector's claim against Mr Dykhoff made under s.234 of the Act.

[4] By way of its determination dated 9 June 2016¹ the Authority determined on the papers that the Labour Inspector could bring a claim against Mr Dykhoff personally for the recovery of holiday pay allegedly owed to four employees of Prestige Brick & Block Limited (in liquidation), pursuant to s.234 of the Employment Relations Act 2000 (the Act). The next step was then for the Authority to determine whether Mr Dykhoff was actually personally liable. This would have entailed a substantive investigation meeting being convened.

[5] However, subsequent to that determination, but before the next step could be commenced, the Authority learned that the decision of the Employment Court in *Labour Inspector Melissa Ann Macrury v Cypress Villas Ltd and Barry Edward Brill*² had been appealed to the Court of Appeal. As this case was central to the way that the Authority would have to approach the second step of the enquiry, I stayed the proceedings pending the Court of Appeal's judgement. That judgement was issued in *Barry Edward Brill v Labour Inspector (Melissa Ann Macrury)*³ on 9 May 2017.

[6] The Labour Inspector then indicated that it still wished to proceed against Mr Dykhoff personally and the Authority tried to set up a telephone conference call to arrange an investigation into the Labour Inspector's application. However, on 24 May, Mr Dykhoff advised the Authority that he had been declared bankrupt on 26 January 2017.

[7] The Authority then asked the Labour Inspector on 25 May 2017 whether it intended to seek the consent of the court to proceed against Mr Dykhoff, which was a

¹ [2016] NZERA Christchurch 77

² [2015] NZEmpC 157

³ [2017] NZCA 169.

necessary step given that the proceedings involved a monetary claim. On 12 July 2017 Ms English replied on behalf of the Labour Inspector to say that it did not so intend.

Order

[8] In light of Mr Dykhoff's bankruptcy, and the fact that the Labour Inspector's application against him cannot proceed without the leave of the court, I dismiss the Labour Inspector's application. I make no order as to costs.

David Appleton
Member of the Employment Relations Authority