

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 192
5324950

BETWEEN GINNAYA TURNER
 Applicant

AND THE STONNE TRUST
 First Respondent

AND COLUMBARD LIMITED
 Second Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Peter Hill for the Respondents

Investigation Meeting: 18 April 2011 and 9 May 2011

Determination: 10 May 2011

DETERMINATION OF THE AUTHORITY

- A. The Stonne Trust was the employer of Ginnaya Turner. It must pay Ms Turner the following sums:**
- (i) \$107,575 as unpaid salary (the overdue sum); and**
 - (ii) \$22,421 as interest on the overdue sum to 6 April 2008;
 and**
 - (iii) Interest at the rate of 8.4 per cent on the overdue sum
 from 2 November 2010 to the date of payment; and**
 - (iv) \$70 in reimbursement of her lodgement fee.**
- B. Columbard Limited did not employ Ms Turner and is not liable to pay the amounts due to her.**

Employment Relationship Problem

[1] Ginnaya Turner worked as a research and development manager in a property development enterprise between 2003 and 2007. The enterprise was referred to in the evidence as the Columbard Group.

[2] The principal figure in that enterprise was Peter Chevin. He was adjudged bankrupt on 18 November 2008. Insolvency Office records show he has also had previous periods in bankruptcy in 1989-1992 and 1995-1998. Companies Office records show he was disqualified from holding the office of director in a registered company for the period from 8 February 2008 to 8 February 2012.

[3] Ms Turner was made redundant in March 2007. Her wage arrears claim to the Authority identified the respondents as the Stonne Trust and Columbard Limited. In a statement in reply Columbard Limited denied any employment relationship with Ms Turner, stating she was employed at all times by the Stonne Trust although she had "*worked at other entities of the Group*".

[4] Stonne Limited (now in liquidation) was previously the corporate trustee of the Stonne Trust. Stonne Limited was placed in liquidation under a court order on 29 November 2007.

[5] The present corporate trustee of the Stonne Trust is Blake Street Trustee Limited (BSTL). Stonne Limited retired as trustee and BSTL was appointed as trustee under a deed dated 23 November 2007.

[6] Until he was disqualified as a director in February 2008, Mr Chevin was a director of BSTL, Stonne Limited and Columbard Limited as well as a number of other registered companies associated with the property development business operated under the name of the Columbard Group. He was the sole shareholder in BSTL and Columbard Limited at that time and the shares in both companies were later transferred to Peter Hill. The change in share ownership for BSTL and Columbard Limited was registered on 13 November 2008. Mr Hill had become the sole director of BSTL and Columbard Limited in February 2008.

[7] The main question for determination by the Authority was which entity or entities were liable for salary due but not paid to Ms Turner. A subsidiary question was whether the past or present corporate trustees of the Stonne Trust were liable to meet any such debt to her.

Investigation

[8] The Authority's investigation comprised two meetings and review of documents provided by the parties. Witness statements were provided by Ms Turner, Peter Hill, Peter Chevin and a former human resources manager employed by Columbard Management Limited, Jacqueline Fyers.

[9] Mr Chevin attended the second investigation meeting. He was required to attend by witness summons and to bring any relevant documents with him. He provided no additional documents.

[10] Each witness, under affirmation, answered questions from the Authority.

[11] As provided for under s174 of the Employment Relations Act 2000 (the Act), this determination does not set out all evidence and submissions received but records only relevant findings of fact and law and expresses conclusions on the issues for determination.

The employment relationship

[12] I am satisfied from Ms Turner's own evidence that her employment relationship was with the Stonne Trust and no other entity.

[13] She worked on a part-time basis from February 2003 until Mr Chevin offered her a full-time role in July 2003. He told her she was employed by the Stonne Trust. Ms Turner recalls the Columbard companies did not exist at that time because she helped with the documentation to set them up.

[14] There was no written employment agreement. She was given a draft agreement in May 2006 but, along with others working in the management team, was

asked not to sign the agreement until the business had sufficient income to honour a commitment to paying weekly wages.

[15] Throughout her employment Ms Turner was told to provide a regular invoice for her wages. Mr Chevin had told her not to address all her invoices to the Stonne Trust. Instead some of the invoices were addressed to other entities in the business. Although the work she did may have benefited other entities in the Group, addressing invoices to them did not create an employment relationship.

[16] I have considered whether she was really an independent contractor but I am satisfied that the real nature of the relationship was one of employment. She did not work for anyone else in this period and all her work was controlled and directed by either by Mr Chevin or other senior managers on behalf of the Stonne Trust. Her invoices were really only a form of time sheet rather than a real indication that she was in business on her own account. While no income tax was deducted from wages paid to her, and Ms Turner made her own tax arrangements, I find this was not her own choice but something she was told to do. She took annual leave and sick leave which she understood was paid. She was, I find, employed throughout by the Stonne Trust.

Liability for wage and other payments due

[17] Ms Turner was paid part but not all her agreed salary during her employment. After being made redundant in March 2007 she made repeated efforts to get paid the outstanding amount. In April 2008 Mr Chevin provided her with a letter which did two important things.

[18] Firstly, it confirmed the amount owed to her. The letter referred to an attached document as “*the latest reconciliation for the amounts owing to you*”. That was a four-page balance sheet for invoices from and payments to Ms Turner in the period from 2 January 2005 to 16 March 2007. It also referred to an interest rate of 10 per cent and I find the Stonne Trust had agreed to pay interest on the unpaid salary. The balance sheet gave the total due as \$129,997.53. That amount comprised two elements - \$107,575.77 in unpaid salary and \$22,421.76 in accumulated interest.

[19] Secondly, the letter provided a personal guarantee from Mr Chevin for what he referred to as “*the full principal amount*”. I find that amount was (as at 16 March 2009) \$107,575. Mr Chevin’s letter confirmed it was an “*outstanding amount*” – there was no clearly no dispute at that time about the amounts referred to as due on the balance sheet. However the letter expressly excluded interest from his personal guarantee. It stated the guarantee could not be called upon for 18 months from the date of the letter (4 April 2008).

[20] Mr Chevin was adjudged bankrupt in November 2008. While that extinguished his personal obligation to Ms Turner, his personal bankruptcy did not extinguish the liability of the Stonne Trust to her for the amount of unpaid salary (\$107,575) and the interest accumulated to that point (\$22,421).

No liability of corporate trustee

[21] Mr Chevin submitted the change of corporate trustees in November 2007, prior to the liquidation of Stonne Limited, meant debts incurred by the Stonne Trust before then no longer applied to the Trust. It was a proposition he said was based on legal advice but had no written opinion in support of it and could provide no authority for it.

[22] I do not accept his submission on this point for reasons which relate to the second issue for determination – whether the trustees had any liability for the debt of Stonne Trust to Ms Turner.

[23] On the evidence available to me, neither Stonne Limited (in liquidation) nor BSTL incurred a direct liability to pay outstanding wages to Ms Turner as a result of either company’s role as corporate trustee. Rather Ms Turner was employed by the Trust and it remains liable to her for the unpaid salary, not the trustee. That liability logically endures a change in whoever serves in the role of trustee – corporate or otherwise. It also appears consistent, on my reading, with the Stonne Trust deed, made in November 2001, and the deed of retirement and appointment made in respect of Stonne Limited and BSTL in November 2007.

[24] If Mr Chevin's proposition were correct, a trust could avoid its obligations to employees simply by changing trustees. My own research has not identified anything to suggest that is the correct principle at law.

Ability to meet orders

[25] Mr Chevin's evidence was that the Stonne Trust had no assets or resources with which to meet any liability to Ms Turner. Mr Hill's evidence was that Mr Chevin had mortgaged a house owned by Mr Chevin's family trust in order to raise funds to put into the business but the house had since been sold in a mortgagee sale after the failure of the business.

[26] Ms Turner was concerned that there were assets or resources of the Trust which had been moved to other entities in an exercise she described as "*smoke and mirrors*". From her knowledge of working with Mr Chevin, she believed this was likely. I have not been able to establish, to the necessary evidential standard, any such transfer of resources.

[27] Mr Hill told me the Trust's only income comprised fees paid to it by a business for which Mr Chevin now provided consultancy services on a part-time basis. He also said the Trust had been involved in a goat farming business which was now in liquidation. However Mr Chevin said the services he and Mr Hill provided as employees of the Stonne Trust to a property development business had not generated any fees. The *National Business Review* reported on 28 January 2011 that Mr Chevin was involved in a development project by Auckland investment company Hunter Capital.

[28] For the present the Authority has confirmed the liability of the Stonne Trust to Ms Turner for her unpaid salary and an earlier agreed sum of interest on that amount.

Orders

[29] The Stonne Trust is ordered to pay Ms Turner without further delay \$107,575 in unpaid salary and \$22,421 it had agreed to pay as interest to April 2008.

[30] Further I think it fit to order the Stonne Trust to pay Ms Turner interest on the unpaid salary for the period from 2 November 2010, being the date on which she lodged her claim in the Authority, until the date that amount is paid in full: clause 11(1) of Schedule 2 of the Act. The applicable rate of interest is 8.4 per cent.

[31] No interest is awarded on the sum of \$22,421 already due as interest. That would be interest on interest, which the Authority is not authorised to award: clause 11(3) of Schedule 2 of the Act.

[32] The Stonne Trust must also reimburse Ms Turner for the Authority's \$70 lodgement fee. Ms Turner was not legally represented and there is no order for costs.

[33] A certificate of determination is to be issued with this determination in the event that it is necessary for Ms Turner to pursue enforcement of these orders through the procedures available in the District Court: s141 of the Act.

Robin Arthur
Member of the Employment Relations Authority