

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Labour Inspector, Fiona Mary McQueen (First Applicant)
AND Labour Inspector, Fiona Mary McQueen (Second Initiating party)

AND Horlicks No.2 Limited (First Respondent)
AND Horlicks No.2 Limited (Second Responding party)
AND William John Funnell (Third Responding party)

REPRESENTATIVES Emma Cotton, Counsel for Applicant
Hamish Kynaston, Counsel for Respondent

MEMBER OF AUTHORITY Ken Anderson

INVESTIGATION MEETING 29 April 2005

FURTHER EVIDENCE 25 May 2005
11 November 2005
17 November 2005
22 November 2005

DATE OF DETERMINATION 24 March 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] The matter was filed with the Authority on 2 December 2003. It is an application pursuant to section 234 of the Employment Relations Act 2000 ("the Act"). These provisions of the Act apply in any case where a Labour Inspector commences an action in the Authority against a company, to recover any money payable, by way of minimum wages or holiday pay, to an employee of the company and it is established that the company is unable to pay due to certain criteria being present.
- [2] It has to be said that the proceedings pertaining to this matter have been unduly protracted. This has been for several reasons. Firstly, there were difficulties experienced by the Labour Inspector in being able to communicate with some of the four employees originally involved in order to ensure their availability at various times for mediation to take place. Then, the parties attempted to negotiate a settlement of the initial holiday pay claims and once again there was some difficulty in communicating with some of the employees. There then followed a period of time when representatives of the company were unavailable on the dates offered for an investigation meeting or were seeking further legal advice. Furthermore, investigation meetings that had been set down had to be adjourned for various reasons. Also, it subsequently transpired that the Labour Inspector sought only to pursue holiday pay claims for only two of the employees; Mr Brandon and Mr McKee. I also must apologise to the parties for the delay

in issuing this determination, having received final evidence on 22 November 2005, but the festive break and other personal and work commitments have intervened.

Background

- [3] The background to this matter relates to unpaid holiday pay claims made by the Labour Inspector, Fiona Mary McQueen,¹ on behalf of Mr Gary Brandon (\$10,025.69), Mr Malcolm McKee (\$10,363.56), Mr Jason Marriott \$3,328.57), and Mr Robert Kirk (\$2,733.54) – all former employees of Horlicks No.2 Limited (previously Taupo Tandem (1998) Limited). The total gross sum alleged to be owed by Horlicks No.2 Limited (“the Company”) was \$26,451.36. With the withdrawal of Mr Marriott and Mr Kirk from the proceedings, the total sum claimed is now \$20,389.25.
- [4] While that sum is alleged to be jointly owed to Mr Brandon and Mr McKee, it has not been proven that the Company is in default in regard to the payment of appropriate holiday pay entitlements pursuant to the Holidays Act 1981.
- [5] Via a letter dated 28 July 2003, the Labour Inspector confirmed that she was seeking payment for Mr Brandon, Mr Marriott and Mr Kirk.² The Company’s Solicitor, Mr Hugh Barclay responded and conveyed to the Labour Inspector that he was not in a position to confirm that her calculations are correct but acknowledged that she had calculated the amounts claimed on the basis of the information provided by the employees. Mr Barclay also wrote:
- “In respect of the claim, I would advise the Company ceased trading in November 2002 (and all its limited remaining assets, liquidated at the time), due to the accumulation of significant trading losses over the prior 20 month period.
- As a result the Company is a shell carrying no assets, and the fact that the Company wound up all commercial activity many months ago in November 2002, the Company has no resources or no capacity to meet this obligation.
- If you wish to obtain further information regarding the Company, you can contact either the writer or the Company Accountant, Mr David Wickham, C/- Stretton & Co, Chartered Accountants, Taupo, Ph: 378 7105.”
- [6] The Labour Inspector duly contacted Mr Wickham. Her evidence is that she was informed by Mr Wickham that: [“the Company had traded at a loss for the last couple of years. That it had substantial debts to the parent company, but had no external debts and no assets.”
- [7] Given that information, the Labour Inspector filed the current application on the basis that as the Company has no assets, pursuant to s.234 of the Act, authorisation is sought from the Authority to bring an action against Mr William John Funnell as a Director of the Company.
- [8] It appears to be accepted by the parties to this matter that the investigation into the validity of the claims would not be a simple matter as the pay arrangements were complex and varied. Furthermore, even if the claims were found to be valid, the Company has no resources, hence the parties would be put to considerable trouble and expense with no tangible outcome.
- [9] Faced with that prospect, the current application has now been brought by the Labour

¹ Ms McQueen has since left the employment of the Department of Labour and Mr Mark Horn, a Labour Inspector from the same office is now responsible for this matter.

² The claim for Mr Brandon followed later - on 15 August 2003.

Inspector to the Authority, pursuant to s.234 of the Act. The most relevant provisions of s.234 are:

“(2) Where, in any case to which this section applies, the Labour Inspector establishes on the balance of probabilities that the amount claimed in the action by way of minimum wages or holiday pay or both is, if judgment is given for that amount, unlikely to be paid in full, whether because –

- (a) the company is in receivership or liquidation; or
- (b) there are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full,-

the Authority may authorise the Labour Inspector to bring an action for recovery of that amount against any officer, director, or agent of the company who has directed or authorised the default in payment of the minimum wages or holiday pay or both.

(3) Where, in any action authorised under subsection (2), it is proved that the officer, director, or agent of the company against whom the action is brought directed or authorised the default in payment of the minimum wages or holiday pay or both, that officer, director, or agent is with the company (and any other officer, director, or agent of the company who directed or authorised the default in payment) jointly and severally liable to pay the amounts recoverable in the action and judgment may be given accordingly.”

What must be proven by the Labour Inspector?

- [10] Pursuant to s.234(2) of the Act, in regard to the particular circumstances of this case, the Labour Inspector is required to establish, on the balance of probabilities, that the amount claimed as unpaid holiday pay, if judgment is given for that amount, is unlikely to be paid in full because there are reasonable grounds for believing that the Company does not have sufficient assets to pay that amount in full.
- [11] While there is no evidence of the fiscal position of Horlicks No.2 Limited or its asset base, before the Authority, the parties accept, as does the Authority, that should the Labour Inspector be successful in showing that the Company is in default in regard to the payment of the holiday pay in question, then it would not have sufficient assets to pay that amount in full.
- [12] Because the Company is not able to pay any sum that may be found to be due, the Labour Inspector now seeks that the Authority authorise an action for recovery against Mr William John Funnell, a Director of the Company and effectively the owner/operator of Taupo Tandem (1998) Limited, as it was at the time that Mr Brandon and Mr McKee were employed.
- [13] However, before the Authority can authorise the Labour Inspector to bring an action for recovery of any sum that may be determined to be in default, against Mr Funnell in his role as a Director of Horlicks No.2 Limited, it must first be proved that he directed or authorised the default in the payment of holiday pay.

The position of the parties

- [14] Essentially, the argument advanced by the Labour Inspector is that Mr Funnell was the “hands and mind” of the Company and that he was aware of the wage arrangements and the calculations involved regarding the payments made to Mr Brandon and Mr McKee. Furthermore, the Labour Inspector says that all dealings pertaining to all wages and holiday pay issues were the responsibility of Mr Funnell and that he personally authorised and was responsible for the alleged default in the payments in question. In fact, Counsel for the Labour Inspector goes much further and submits that Mr Funnell set up various company structures; [“to minimise liability and circumvent responsibility which has

effectively denied employees of their statutory entitlements.”

- [15] Conversely, the argument advanced for Mr Funnell is that he did not direct or authorise any default in regard to the payment of holiday pay and that he acted in good faith in the belief that he was acting in accordance with the law at all times and that his belief was a reasonable one. Mr Funnell says that the holiday pay arrangements were entered into by agreement and he acted upon professional advice and relied on his managers for the day to day operation of the business.

Analysis and Conclusions

- [16] Firstly, it should be confirmed that at this stage of the proceedings, it has not yet been proven that a default in the payment of holiday pay exists. While there have been few applications made under s. 234 of the Act, it appears to be generally accepted that s.234 does not require a claim against a company to be proved, and at this preliminary stage, what has to be considered is whether one of the circumstances, contained within subsection (2) (a) or (b), are present. It is confirmed that in this case, there are reasonable grounds for believing that in the event that judgment is given for the amount claimed by the Labour Inspector, the Company does not have sufficient assets to pay that amount in full.
- [17] Furthermore, as Mr Kynaston has submitted: “At a practical level, the work involved in proving or disproving a default is substantial and will turn on a number of factors, including the nature of the employment relationship (casual verses permanent), the various agreements between the parties and a detailed analysis of the hours worked and the payments made.”
- [18] While much has been made in the arguments of the Labour Inspector of the “hands on” role of Mr Funnell in the operations of the Company that employed Mr Brandon and Mr McKee, I conclude that in regard to the requirements of the Holidays Act 1981, Mr Funnell sought appropriate professional advice and applied that advice in good faith. There is no tangible evidence whatsoever that Mr Funnell deliberately embarked on a course that was designed to deprive any employee of their legal entitlements under the Holidays Act.
- [19] Given the overall evidence, even if it was to be subsequently proven that a default exists in regard to the manner in which the payments in question were made to Mr Brandon and Mr McKee, there is nothing in that evidence that points to Mr Funnell directing or authorising such default. At most, given the complexity of the variety of payments made to employees at various times for fulfilling a variety of duties associated with their employment, the calculation of holiday components may have been incorrectly made, but even that is most arguable.
- [20] While I perceive that Mr Funnell is well versed in the aviation industry, given the complexity of the payment structures at the time in question, he needed to rely upon appropriate advice from the professionals that he engaged. He then enacted that advice accordingly. While the Labour Inspector claims that the manner in which the Company paid Mr Brandon and Mr McKee was in breach of the Holidays Act, it is far from proven that this is so.
- [21] It is equally far from proven that Mr Funnell deliberately directed or authorised any action that resulted in a default in any payments due to Mr Brandon and Mr McKee.

Determination

[22] For the reasons given above, I decline to authorise the Labour Inspector to bring an action against William John Funnell for the recovery of any proven default in the payment of holiday pay that is alleged to be due to Mr Brandon and Mr McKee.

Costs

[23] Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 21 days of the date of this determination.

Ken Anderson
Member
Employment Relations Authority