

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 163
5158394

BETWEEN	TASNEEM BEGUM (LABOUR INSPECTOR) Applicant
AND	EFFECTIVE FENCING NZ LIMITED First Respondent
AND	EFFECTIVE FENCING LIMITED Second Respondent
AND	MICHAEL O'CONNOR Third Respondent

Member of Authority: Vicki Campbell

Representatives: Aaron Brown for Applicant
Michael O'Connor in Person

Investigation Meeting: On the Papers

Determination: 26 April 2011

DETERMINATION OF THE AUTHORITY

- A The application pursuant to section 234 of the Employment Relations Act 2000 is granted. Mr Michael O'Conner will, with Effective Fencing Limited, be jointly and severally liable to pay any amounts recoverable against Effective Fencing Limited, in these proceedings.**
- B Costs are reserved.**

[1] This determination deals with an application lodged in the Authority on 30 March 2011 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.

Background

[2] The Labour Inspector has commenced an action in the Authority on behalf of Mr Chris Sucich, against Effective Fencing NZ Limited (first respondent) and Effective Fencing Limited (the second respondent) to recover money payable by way of holiday pay to Mr Sucich who was an employee of the company.

[3] Mr Sucich commenced employment with Effective Fencing Limited (EFL) in 2005 and continued in its employ until November 2008 when Effective Fencing NZ Limited (EFNZL) took over his employment.

[4] Mr Michael O'Connor (the third respondent) was a Director and Shareholder of EFL. At the time EFNZL took over EFL, Mr O'Connor became an employee of EFNZL.

[5] Mr Sucich resigned from his employment with EFNZL with his last day being 13 February 2009. On that day he received his final pay slip which showed that he was owed \$5,646.33 gross, in holiday pay. On 18 February 2009 Mr Sucich received a payment of \$740.00 but did not receive any further payments.

[6] On 8 April 2009 the Labour Inspector lodged a statement of problem in the Employment Relations Authority on behalf of Mr Sucich claiming the unpaid holiday pay against EFNZL. In its statement in reply, EFNZL did not deny that the money was owed.

[7] On 3 March 2010, following the non attendance by EFNZL at the Authority's investigation meeting, the Authority released its determination finding that the holiday pay was owed and that there was no dispute from EFNZL about its liability to pay the outstanding entitlement.¹

¹ *Tasneem Begum (Labour Inspector) v Effective Fencing NZ Limited*, unreported, 3 March 2010, Employment Relations Authority Auckland, Member Dumbleton, AA 94/10.

[8] Subsequently EFNZL filed an application with the Employment Court claiming that EFL was liable for the greater share of the holiday pay. The application was supported by Mr O'Connor on behalf of EFL.

[9] On 17 February 2011 an application for re-opening the Authority's investigation meeting was granted and EFL was added to the proceedings and directed to lodge a statement in reply.² In its statement in reply EFL states that the company is still in existence although it is not trading and has no assets.

Analysis and conclusions

[10] The relevant provision of the Act is s 234 which states:

(1) This section applies 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.

(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 the 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 the 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.

[11] Pursuant to s 234(2) the Labour Inspector is required to establish, on the balance of probabilities, 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.

[12] In a statement of evidence produced to the Authority Mr O'Connor states that EFL is still in existence but is not trading and is asset less. He says the assets were

² *Tasneem Begum (Labour Inspector) v Effective Fencing NZ Limited (first respondent) and Effective Fencing Limited (second respondent)* [2011] NZERA Auckland 61.

sold to clear creditors of EFL. It was at this time that EFNZL took out a lease on the buildings and began trading as EFNZL.

[13] The Authority accepts that should the Labour Inspector be successful in showing that EFL is in default in regard to the payment of the holiday pay in question, then EFL would not have sufficient assets to pay the amount in full.

[14] It is because EFL would not be able to pay any sum that may be found to be due, that the Labour Inspector now asks the Authority to authorise an action for recovery against Mr O'Connor, who is a Director of EFL.

[15] 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 O'Connor in his role as a Director of EFL, it must first be proved that Mr O'Connor directed or authorised the default in the payment of holiday pay.

[16] The Authority notes that at this stage of the proceedings, it has not yet been proven that a default in the payment of holiday pay against EFL exists. However, that is not required at this preliminary stage.

[17] The evidence relied on by the Labour Inspector in her application is that Mr O'Connor stated in a previous witness statement that he was aware that there was an amount of holiday pay outstanding when Mr Sucich's employment was taken over by EFNZL.

[18] Further, that in 2010 when he was contacted by the Labour Inspector about the outstanding holiday pay, Mr O'Connor told the Labour Inspector he was not prepared to pay the unpaid holiday pay.

[19] I find Mr O'Connor authorised a default in the payment of holiday pay owed to Mr Sucich by EFL when he advised the Labour Inspector in 2010 that he was aware of the outstanding holiday pay but was not prepared to pay it.

[20] For the reasons given above Mr O'Connor will be jointly and severally liable with EFL to pay any amounts recoverable in these proceedings.

Costs

[21] Costs are reserved.

Vicki Campbell
Member of Employment Relations Authority