

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 412  
5343323

BETWEEN	ANTON TALJAARD, LABOUR INSPECTOR Applicant
AND	SEVANS OPERATOR HIRE LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) First Respondent
AND	STEPHEN CHRISTOPHER EVANS Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person No appearance for First Respondent No appearance for Second Respondent
Investigation Meeting:	20 September 2011
Determination:	20 September 2011

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**DETERMINATION OF THE AUTHORITY**

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- A. Stephen Evans directed or authorised the default in payment of holiday pay due to Rodney Buck, former employee of Sevans Operator Hire Limited, now in liquidation and in receivership.**
- B. Mr Evans is jointly and severally liable with the company to pay the holiday pay, along with interest ordered on that amount.**
- C. Mr Evans must also reimburse the Labour Inspector for the fee to lodge an application in the Authority.**

[1] The Labour Inspector applied under s234 of the Employment Relations Act 2000 (the Act) for an order making a company director jointly and severally liable to pay arrears of holiday pay owed to a former employee of the company.

[2] An earlier determination of the Authority,<sup>1</sup> issued on 3 March 2011, had ordered Sevans Operator Hire Limited to pay \$2727.68 in holiday pay and \$2076.81 in outstanding wages owed to its former employee Rodney Buck. The order for the holiday pay included interest on the amount due at the rate of 4.8 per cent from 28 August 2010 until the amount due was paid in full.

[3] That determination also authorised the Inspector to bring an action for recovery against the company's director, Stephen Evans, if the company defaulted in payment of the holiday pay.

[4] At the time of giving that authorisation the Authority was satisfied there were reasonable grounds for believing the company did not have sufficient assets to pay the amount of wages and holiday pay due. That fulfilled the requirements of s234(2)(b) of the Act for authorising the Inspector to bring an action for recovery against a director who directed or authorised the default in payment of the money due. Subsequently the alternative situation under which such action may be authorised, under s234(2)(a) of the Act, also occurred when the company went into receivership on 10 June 2011 and into liquidation on 1 July 2011.

[5] Under the statutory provisions for receivership and liquidation, the liability of the company for the wages and holiday pay due to Mr Buck is now subject to the requirements of the preferential scheme for creditors. However on 28 June 2011 the Inspector sought the necessary order under s234 for Mr Evans to also be personally liable for the amount due as holiday pay.

[6] With some difficulty Mr Evans was located and provided with a copy of the papers relating to the Inspector's most recent application. A case management conference by telephone was convened on 12 August 2011 in which Mr Evans participated.

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<sup>1</sup> [2011] NZERA Auckland 81.

[7] The liquidator and the receivers had been advised of the conference and John Scutter attended the call on behalf of the receivers. Mr Scutter advised that the receivers would not be represented at the investigation meeting. This was an understandable position given the cost and because the sole issue for determination was whether Mr Evans should personally become jointly and severally liable for the company's debt for holiday pay to Mr Beck.

[8] During the conference call a date was set for the Authority's investigation meeting and a timetable was set for Mr Evans and the company's accountant, Neil Mercer, to lodge written witness statements in advance of the meeting. A Notice of Investigation Meeting and a Minute of the Authority setting out the timetable directions was sent to the address for service which Mr Evans confirmed during the telephone conference. Track and trace courier records confirm delivery of those papers. Neither Mr Evans nor Mr Mercer lodged a statement in compliance with those directions.

[9] At today's investigation meeting neither Mr Evans nor Mr Mercer attended at the appointed time. I had a support officer of the Authority call the telephone number provided by Mr Mercer and from which Mr Evans had attended the case management conference. There was no answer. After waiting 15 minutes I proceeded with the investigation meeting, hearing sworn evidence from Mr Taljaard. No good cause was shown for Mr Evans' failure to attend or be represented.<sup>2</sup>

## **Issues**

[10] The primary issue for determination is whether Mr Evans directed or authorised default in the payment of the holiday pay.

[11] Mr Taljaard's evidence confirmed he and Mr Evans spoke several times during the last quarter of 2010 about money due to Mr Buck as wages and holiday pay. Mr Evans advised the money would be paid when funds were available from an overseas source. On 16 December 2010 Mr Evans told Mr Taljaard the payment would be made in the pay run for the following week. It was not. During this period

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<sup>2</sup> Clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

the company of which Mr Evans was the director and manager continued to employ other staff who got their pay when it was due. Mr Taljaard confirmed this with Mr Mercer, the company accountant.

[12] Based on that evidence and on the balance of probabilities I find Mr Evans was aware of the obligation to pay Mr Buck's holiday pay and directed or authorised the default in payment of it. For that reason I determine Mr Evans is jointly and severally liable, with the company, to pay the amount due in holiday pay to the Inspector for the benefit of Mr Buck.

[13] Mr Evans is also jointly and severally with the company liable to pay the interest ordered on the holiday pay, with the amount calculated according the terms of the order made in the earlier determination.<sup>3</sup>

[14] The authorisation given to bring an action for recovery against Mr Evans did not refer to the penalty awarded to the Crown or to the wages due to Mr Buck – presumably because the money owed included not only his entitlement to minimum wages but also the contractual amounts above that. The liability for the wages and the penalty remains with the company. The company's liability for the holiday pay will be reduced by whatever portion of it the inspector can now recover from Mr Evans, either by voluntary payment or by enforcement action (which under s141 of the Act may be through the District Court).

[15] Mr Evans must also pay the inspector \$71.56 in reimbursement of the fee for lodging the application in the Authority.

[16] A copy of this determination is to be sent to all parties, including the liquidator and the receivers of the company.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>3</sup> Clause 11 of Schedule 2 of the Act (as it was at 3 March 2011).