IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 66
5353106

	BETWEEN	IAN KOERSELMAN Applicant
	AND	JOINERS NS LIMITED (In Liq) First Respondent
	AND	JOHN RICHARDSON Second Respondent

Member of Authority:	K J Anderson
Representatives:	P Skelton, Counsel for Applicant J Richardson, Advocate for Respondents
Investigation:	On the papers
Submissions Received:	28 October 2011 and 4 November 2011for the Applicant Nil for the Respondents
Determination:	23 February 2012

DETERMINATION OF THE AUTHORITY

The matters before the Authority

[1] Via a *Statement of Problem* and an application for urgency, this matter was first lodged with the Authority on 11th August 2011. At that time, the applicant, Mr Koerselman, was seeking an urgent investigation meeting pertaining to the failure of the First Respondent (Joiners NS Limited) to pay the sum of $10,886.84 (gross) being wages owed and due to Mr Koerselman for work done in May and June 2011. The evidence provided with the *Statement of Problem* shows that there is no dispute that the monies in question are due to Mr Koerselman.[1] In addition to seeking an order that the above sum be paid, the applicant sought an award of interest. Also the applicant required the Authority to impose a penalty upon Joiners NS Limited for breaching the

[1] This was confirmed by Mr Richardson during a conference call with the Authority on 16th August 2011.

applicant's employment contract by failing to pay wages and holiday pay due and owing. The applicant also sought the imposition of a penalty upon the Second Respondent (Mr John Richardson)[2] for being a party to the breach of the applicant's employment agreement by the First Respondent. Costs were also sought by the applicant.

[2] The Authority convened a conference call with Mr Skelton and Mr Richardson on 16th August 2011. The outcome was that it was agreed that a consent determination would be issued by Authority.

[3] On 17th August 2011 the Authority issued a consent determination,[3] the germane content being:

> [5] Therefore, I record that the parties have agreed that, on or before 5th September 2011, Joiners NS Limited will pay to Mr Koerselman the gross sum of $10,886.84 being wage arrears and holiday pay due to him; along with a further sum of $64.90 being interest owing at the rate of 5% from the date that the wages should have been paid to 16th August 2011.
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> [6] By consent and by this determination, the terms agreed to, as set out above, become the orders of the Authority.

[4] Notwithstanding the above terms of the consent order, the applicant reserved his right to return to the Authority to pursue the remedies pertaining to the penalties and costs originally sought via the *Statement of Problem;* in the event that the First Respondent failed to pay the applicant the monies due by 5th September 2011. Mr Richardson confirmed to the Authority that he understood and agreed with the terms that were to be recorded within the consent determination.

[5] Subsequent to the issuing of the consent determination by the Authority, Mr Koerselman was paid a further $4,000; leaving an unpaid balance due of $6,886.84 plus interest. This amount remains unpaid.

[6] Via a further application (with a sworn affidavit) and submissions received by the Authority on 28th October 2011, Mr Koerselman exercised his right to return to the Authority, given that monies were still outstanding and hence the consent

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[2] Mr Richardson is the sole director of Joiners NS Limited and he owns 100% of the shares in the company.
[3] [2011] NZERA Auckland 365

determination dated 17th August 2011 had not been fully complied with. The following remedies were sought:

(a) a penalty against the First Respondent pursuant to s 134(1) of the Employment Relations Act 2000 (the Act) for breaching Mr Koerselman's employment contract and the Authority's order by failing to pay wages and holiday pay due and owing;

(b) a penalty against Mr Richardson pursuant to s 134(2) of the act for inciting, instigating, aiding or abetting a breach of Mr Koerselman's employment agreement;

(c) an order pursuant to s 136(2) of the Act for the whole or part of the penalties to be paid to Mr Koerselman;

(d) a compliance order pursuant to s 137(2) of the Act against Mr Richardson requiring him to ensure that the First Respondent meets its obligations to pay him the wages and holiday pay due and owing;

(e) an award of costs against the First and Second Respondents (jointly and severally) in his favour.

Further developments

[7] On 4th November 2011 the Authority received supplementary submissions for Mr Koerselman. These informed that Joiners NS Limited had been placed in liquidation with the notice of such being registered on 28th October 2011. Pursuant to s 248(1)(c) of the Companies Act 1993, proceedings against Joiners NS are now stayed due to the liquidation status of the company. However, Mr Koerselman wishes to continue his pursuance of remedies against Mr Richardson. He asks that the Authority now makes the following orders:

(a) an order pursuant to s 134(2) of the Employment Relations Act 2000 (the Act) that Mr Richardson is to pay a penalty of $2,000 for having incited, instigated, aided and abetted the breach of Mr Koerselman's employment agreement;

(b) an order pursuant to s 136(2) of the Act that the penalty payment be paid to Mr Koerselman;

(c) an order that Mr Richardson pay to Mr Koerselman the sum of $1,750 as a contribution to his costs.

[8] The above application and both sets of submissions have been served on the respondents with a timetable for a response. There has been no response received for either of the respondents.

Analysis and conclusions

[9] Section 134 of the Act provides for penalties for the breach of an employment agreement in that:

> (1) Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.
>
> (2) Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

[10] The remedies now sought by Mr Koerselman raise firstly, the issue of whether a secondary party (Mr John Richardson), not being a party to the employment relationship, can be held to be liable for a penalty pursuant to s 134(2) of the Act; due to the fact that there has been a breach of Mr Koerselman's employment agreement by the First Respondent; and given that it is accepted that he has not been paid the full amount of the wages and holiday pay due and owing to him. The second issue is whether Mr Richardson can be found to be a "person" who has incited, instigated, aided, or abetted a breach of Mr Koerselman's employment agreement with Joiners NS Limited.

[11] The Court of Appeal examined similar issues in *Peacock v The New Zealand Performance etc Workers Union;*[4] a matter on appeal from the Labour Court. A question arose as to whether as a receiver for a company,[5] Mr Peacock, could be held liable for a penalty for a breach of an award or agreement under s 202 of the Labour Relations Act 1987. The pertinent provision of that Act (and relevant to this matter) was subsection (2):

> Every person, being an officer or member of a committee of management of a union or employer's organisation or a person acting on behalf of an employer,

[4] (1990) ERNZ Sel Cas 761; [1990] 2 NZILR 257
[5] Rainbow's End Limited

> who incites, instigates, aids, or abets any breach of an award or agreement shall be liable to a penalty not exceeding $2000 in respect of every such breach.

Among other matters, the Court examined the principal of separate legal entities[6] and joint liability. In reference to a number of cases which indicate that the person or persons whose acts or decisions render a company criminally liable, the Court of Appeal cited *R v Isaac Sorsky* [1944] 2 All ER 333, where a company and the man who controlled it were held liable as principal and aider and abettor respectively. The Court also referred to an Australian case; *R v Goodall* (1975) 11 SASR 94, in which there is a discussion by Bray CJ of the principles and the conclusion (albeit obiter), that a director who controls or who is one of the controllers of a company can aid or abet the commission of a crime by the company by the same act or conduct which constitutes the commission of an offence by the company itself.

[12] In *Peacock* the Court of Appeal concluded that:

> We are of the opinion that a person who is the "mind" of the company in the relevant sense may be found guilty of aiding and abetting the company in the commission of an offence constituted or brought about by the act or conduct of that person.

The Court went on to uphold the decision of the Labour Court that had found that Mr Peacock, as receiver for Rainbow's End Limited, had aided and abetted the company to commit seven breaches of the relevant industrial award with penalties being awarded accordingly.

[13] It seems to me that the circumstances in *Peacock* are analogous to those pertaining to those of Mr Koerselman in that Joiners NS Limited has breached his employment agreement by refusing to pay him monies owed and due. There is a further breach pertaining to the employment relationship in that Joiners NS Limited failed to comply with the consent determination of the Authority as Mr Koerselman has not been paid the total sum (plus interest) that the company had agreed to pay but this is not being pursued.

[14] The question then is: Was Mr John Richardson "the mind" of Joiners NS Limited in the "relevant sense" that he was responsible for the aforementioned breaches? Given that Mr Richardson was (and remains) the sole director and

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[6] *Salomon v Salomon* [1897] AC 22 and *Lee v Lees Air farming Ltd* [1961] AC 12.

shareholder of the company and hence the sole person responsible for its financial liabilities, then one cannot help but conclude that he was indeed the "mind" of the company in that he made a conscious decision not to pay Mr Koerselman the monies due to him. And while this may have been for genuine reasons due to lack of cash flow within the company, nonetheless pursuant to s 134(2) of the Act, Mr Richardson can be held to have incited, instigated, aided and/or abetted the breach of Mr Koerselman's employment agreement. It follows that I must find that Mr Richardson is liable for a penalty accordingly. And pursuant to s 136(2) of the Act, I find that it is appropriate that the whole of the penalty sought ($2,000) should be paid to Mr Koerselman.

[15] Mr Koerselman also seeks an order for costs against Mr Richardson in the sum of $1,750. While the Authority is not in receipt of the details of the costs that Mr Koerselman has incurred in pursuing these proceedings, it can be reasonably assumed, given he is represented by very experienced counsel, the above sum sought is quite reasonable. Pursuant to clause 15 of Schedule 2 to the Act, I find that it is appropriate and reasonable that Mr Richardson, as a "party" to these proceedings, should pay the sum of $1,750 as a contribution to the costs incurred by Mr Koerselman.

Determination

[16] For the reasons set out above the following orders are made:

(a) Pursuant to s 134(2) of the Employment Relations Act 2000 (the Act) Mr John Richardson, as the sole director and shareholder of Joiners NS Limited, is liable for a penalty of $2,000.00. And pursuant to s 136(2) of the Act, this sum shall be paid by Mr Richardson directly to Mr Koerselman.

(b) Pursuant to clause 15 of Schedule 2 to the Act, Mr Richardson shall pay to Mr Koerselman the sum of $1,750.00 as a contribution to the costs incurred.

(c) The above sums shall be paid within 28 days of the date of this determination.

K J Anderson
Member of the Employment Relations Authority