IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 143
5365418

	BETWEEN	NIGEL DAVID McALISTER Applicant
	A N D	HADLEY FRANCIS LIMITED First Respondent
	A N D	WALTER FRANCIS BISHOP Second Respondent
	A N D	JANICE ROSALIE BISHOP Third Respondent

Member of Authority:	James Crichton
Representatives:	Applicant in Person Walter Bishop, for Respondents
Investigation meeting:	4 July 2012 at Christchurch with Applicant 10 July 2012 at Auckland with Respondents
Date of Determination:	13 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr McAlister) was employed by the first respondent (Hadley Francis) as a salesman. He was paid a salary. The role involved travelling selling the company's wares over a territory covering all of the South Island and the bottom of the North Island. Mr McAlister ceased employment with Hadley Francis in March 2010 and the present claim before the Authority relates to Mr McAlister's contention that he is still owed money or has entitlements pursuant to the former employment relationship.

[2] Hadley Francis ceased trading in April 2011 and according to its directors, the second respondent (Mr Bishop) and the third respondent (Mrs Bishop) has no funds and no assets. Mr and Mrs Bishop told the Authority on oath that they were now indebted to their son for a payment he made on behalf of Hadley Francis (about which more later) and that they were living on the Guaranteed Retirement Income (GRI) exclusively.

[3] Mr McAlister sought to pursue his claim against the directors of Hadley Francis, Mr and Mrs Bishop, as well and the outcome of that aspect, which is contested by Hadley Francis, is referred to later in this determination.

[4] The first aspect of Mr McAlister's claim against his former employer relates to a debt incurred by Hadley Francis with Diners Club. Hadley Francis provided Mr McAlister with a Diners Club credit card on which he was to charge company expenditure incurred in his travels as a salesperson for the company.

[5] Mr McAlister told the Authority that when he was engaged by Hadley Francis, he was forwarded by mail a collection of documents to sign, one of which was an application to Diners Club for a credit card which he was to use in the manner just described. Mr McAlister's evidence on oath to the Authority was that at no time was it drawn to his attention that in executing the documents that were supplied to him by Hadley Francis, he was also undertaking to, in effect, personally guarantee the debt on the card at all times. When the Authority met with Mr and Mrs Bishop, Mr Bishop's recollection of the events was that those documents were signed when he was present with Mr McAlister and that the documents very clearly spelt out that by executing them, Mr McAlister was incurring personal liability.

[6] Mr Bishop maintained that Mr McAlister would have been well aware of the personal liability aspect in signing the documents, but that is certainly not what Mr McAlister told the Authority and for the avoidance of doubt, the Authority prefers Mr McAlister's evidence on this point. If Mr Bishop is correct in his recollection that the parties were physically together when the documents were signed, then Mr Bishop as the representative of the employer had an absolute obligation to ensure that Mr McAlister knew that he was undertaking personal liability when he signed the Diners Club documentation.

[7] The Authority is absolutely satisfied that Mr McAlister had no idea that he was undertaking personal liability in signing the documentation from Diners Club. Whatever the documentation itself says (and the Authority accepts Mr Bishop's statement that there was a warning on the documentation that personal liability would be incurred), a good and fair employer, informed by the good faith principle required by law, would have been absolutely explicit with an incoming employee about the risk that the latter was undertaking in signing such documentation. The position in the Authority's judgment is analogous to the position where a personal guarantee is executed by a third party to support the commitments made by a principal party to a commercial transaction. In those circumstances, it is a commonplace that the third party would be independently advised about the nature and extent of the obligation they were undertaking. A good and fair employer seeking to have an employee effectively undertake to personally guarantee payments of a credit card bill ought, in the Authority's view, to have done the same thing. It is plain on the evidence that there was no such independent advice and, as the Authority has already noted, it accepts Mr McAlister's evidence that he had no idea that he was binding himself to effectively guarantee the debt.

[8] When the employment relationship came to an end, it is common ground that Mr McAlister cut up the Diners Club card that he held and forwarded that to Hadley Francis. But unbeknown to Mr McAlister, Hadley Francis did not pay the bill. The first that Mr McAlister knew about the fact that the Diners Club account was not cleared by Hadley Francis was when he was served with a demand notice by Diners Club's solicitors demanding payment from him personally.

[9] By virtue of having signed the Diners Club International business card employee application form, Mr McAlister became jointly and severally liable with Hadley Francis and its directors, Mr and Mrs Bishop, for charges incurred against the card. The usual business terms of Diners Club required payment of the amounts incurred against the card on a monthly basis.

[10] Mr McAlister was not made aware by Hadley Francis after the employment ceased that the Diners Club invoice was not being serviced in accordance with the requirements of the agreement. Nor was Diners Club advised by Hadley Francis that Mr McAlister was no longer an employee of Hadley Francis and that the card was no longer in use.

[11] On 13 September 2010, Mr McAlister received a letter from Diners Club's solicitors dated 6 September 2010 setting out the debt and requiring payment of the debt within five days of the date of receipt. The Authority is satisfied that that is the first occasion that Mr McAlister had any idea that payments had not been met by Hadley Francis. Later that same month, proceedings were filed against Mr McAlister for the repayment of the debt.

[12] Mr Bishop told the Authority that he had engaged with Diners Club's solicitors and told them that Hadley Francis was in financial difficulty and that the debt would be paid but that it would take time. He says that he found Diners Club's solicitors understanding and he did not understand why Mr McAlister did not take a similar stance. But of course that evidence rather begs the question of why Mr McAlister should be required to take any stance at all given the debt was not his, he had received no information at all from his former employer to suggest that there was anything amiss and he is suddenly confronted with a threat of legal action which he is forced to deal with.

[13] What Mr McAlister chose to do, not surprisingly, was to defend Diners Club's proceedings, and seek to join the three respondents by way of a third party notice. It is the costs of that proceeding undertaken by Mr McAlister to protect himself that he seeks to recover from the three respondents.

[14] The evidence before the Authority is plain that Mr McAlister was first notified of Diners Club's claim against him on 13 September 2010. Hadley Francis eventually paid the Diners Club debt in full (save for Mr McAlister's legal costs) on 6 April 2011 fully seven months after Mr McAlister was confronted with the demand from Diners Club. Mr and Mrs Bishop told the Authority that there were no funds in Hadley Francis to satisfy the Diners Club debt and that they borrowed the money from their son and are now in the process of paying that back from their GRI benefit.

[15] But that still leaves Mr McAlister out of pocket. He incurred legal costs in the sum of $1,922.46. Mr Bishop told the Authority that he had been confronted by an irate Mr McAlister on the telephone in relation to this issue and that he had told Mr McAlister that the debt was Hadley Francis' and that it would be paid. Mr Bishop subsequently confirmed to Diners Club's solicitors that the debt was a company debt and that Hadley Francis would pay it. But that correspondence was many months before the debt was paid and while the Authority is unable to make a finding of fact as

to why Diners Club persevered with its claim against Mr McAlister, given those acknowledgments by Mr Bishop, one would have to imagine that the normal commercial realities would apply and the evidence before Diners Club that one debtor was impecunious would simply encourage it to concentrate on the other possibility.

[16] There is also dispute between the parties about when Mr Bishop told Mr McAlister that the debt would be paid by Hadley Francis. Mr McAlister is clear, and the Authority accepts, that he was served with the Diners Club claim in September 2010. Mr Bishop told the Authority that he imagined that Mr McAlister had contacted him by telephone immediately that he got that advice from Diners Club. Certainly that seems likely. However, in the statement in reply filed by Hadley Francis, Mr Bishop records that he did not advise Mr McAlister until December 2010 that Hadley Francis would pay the Diners Club debt.

[17] In all the circumstances, the Authority thinks it more likely than not that Mr Bishop is mistaken about the date (he acknowledged as much in giving his evidence to the Authority) and that that telephone discussion in fact took place in September 2010, contemporaneously with Mr McAlister receiving the Diners Club claim. If that conclusion is correct, then, as the Authority has already noted, the delay between that point and Hadley Francis honouring its obligations was fully seven months. It is, in the Authority's opinion, quite unreasonable of Hadley Francis to expect Mr McAlister to simply take no steps over that period of time. Had Mr McAlister not sought to defend his position (and incurred costs in the process), a judgment might well have been entered against him for the amount of the debt which would have made matters even more complicated.

[18] In all the circumstances, a good and fair employer would have ensured that, notwithstanding the pressure it was under, payment of such a debt would be made as an absolute priority to avoid embarrassment and cost to an innocent third party, namely a former employee. The Authority has no hesitation in concluding that an employer in the situation that Hadley Francis was in has a duty to protect an employee and later a former employee against attack from third parties and it is clear on the facts that Hadley Francis failed absolutely to do that in any reasonable timeframe. In the circumstances, the Authority is satisfied that Hadley Francis ought to meet Mr McAlister's legal costs in full.

[19] The second part of Mr McAlister's claim is an allegation that Hadley Francis failed to make payment to the Inland Revenue Department for the employer contributions in respect of Mr McAlister's KiwiSaver account. The factual position is clear. Hadley Francis, through its accountants and in its own name, confirmed that payment ought to have been made, identified the quantum of the payment due and owing, but did not pay because, again, there were no funds available.

[20] Hadley Francis' accounting firm emailed Mr McAlister on 24 August 2010 identifying the quantum of the payment and undertaking to make payment to the IRD. Because of the financial pressures on Hadley Francis, that payment was never made. Notwithstanding that, Mr McAlister confirmed to the Authority in his evidence that the calculations made by Hadley Francis' chartered accounting firm were accepted by him as accurate, and it is that sum which he seeks to recover in the present proceedings.

[21] The Authority is absolutely satisfied that Mr McAlister is entitled to the payment of the sum claimed in regard to the employer's contribution to Mr McAlister's KiwiSaver account. The failure to pay was, of course, a function of Hadley Francis' deteriorating financial position.

[22] Mr McAlister sought to make claim against Mr Bishop and Mrs Bishop personally for both aspects of his claim. The Authority is satisfied there is no basis on which Mr McAlister can claim against Mr and Mrs Bishop personally in respect of his claim for reimbursement of the legal costs associated with contesting the Diners Club claim. The obligation to meet that claim was vested in Mr McAlister's employer and while he may have been able to pursue a claim against Mr and/or Mrs Bishop in the District Court because Mr and Mrs Bishop were themselves personally liable for the Diners Club debt, it is clear to the Authority that it has no jurisdiction to join third parties in respect of a claim such as the Diners Club legal costs claim. Mr McAlister's only right in the Authority is to seek recovery of that amount from his employer; that is the extent of the Authority's remit.

[23] However, in relation to the KiwiSaver issue, while the Authority itself has no power to join Mr and Mrs Bishop in any finding in respect of the KiwiSaver matter, and the Authority also has no power to make an order in relation to the KiwiSaver matter at all, the KiwiSaver Act 2006 and the Tax Administration Act 1994 both contemplate the personal liability of directors and officers where obligations under the

tax statutes fail to be met. It is in that context that Mr McAlister has his only redress in relation to the KiwiSaver matter.

Determination

[24] In respect of Mr McAlister's claim that he has incurred legal costs in defending a claim brought by a creditor of his employer for a debt owed by the employer, the Authority is satisfied on the evidence that this claim falls within the jurisdiction of the Authority pursuant to s.161 of the Employment Relations Act 2000 (the Act) because the claim raised by Mr McAlister in relation to the Diners Club bill is a claim about or emanating from an employment relationship and by virtue of Hadley Francis' default, it became an employment relationship problem. While it may be drawing a long bow, the Authority considers that in the present case, it may be possible to characterise the costs incurred by Mr McAlister in defending himself from the Diners Club claim as a *"default in payment to an employee of ... money payable by an employer to an employee under an employment agreement"*: s.131(1)(a) of the Act. In the present case, there was no written employment agreement but the Authority is satisfied that an implied term of an employment agreement between employer and employee must be a term that protects the employee from having to meet costs of the employer in the prosecution of its business.

[25] If that conclusion is thought to take matters too far, then the Authority would rely for jurisdiction on s.161(1)(r) where the Authority is given power to deal with any action arising from or related to an employment relationship other than a tortious action.

[26] That being the Authority's conclusion, the Authority directs that Hadley Francis Limited is to pay to Mr McAlister the sum of $1,922.46 being the costs incurred by Mr McAlister to resist the claim by Diners Club.

[27] The position is otherwise with the claim in respect of the employer's contribution to Mr McAlister's KiwiSaver account which was not accounted for to the Inland Revenue Department in accordance with law. It is plain that the Authority has no jurisdiction whatever to deal with this aspect. That is a matter for the tax authorities to take up if they see fit. Further, the Commissioner has power to prosecute offences in respect of the KiwiSaver legislation and the Tax Administration Act 1994 and those prosecutions can include prosecutions against officers of a

company which has failed to fulfil its obligations. For that purpose then, the Authority directs that a copy of this determination is to be made available to the Commissioner of Inland Revenue in case he feels able to take any steps in the matter. The Authority can only remark that, on the evidence it heard, there can be little doubt that Mr McAlister lost a benefit during his employment with Hadley Francis to which he was entitled by law and that in failing to honour its obligations as a good employer, Hadley Francis breached its good faith obligations to Mr McAlister as well as failed to fulfil its duties as a taxpayer.

[28] In reaching the conclusions it does, the Authority acknowledges that Mr McAlister's success in the instant case may be Pyrrhic. Hadley Francis has no funds or assets the Authority was told, but although Mr Bishop told the Authority Hadley Francis was no longer registered, that was not the position when this decision was prepared.

[29] A certificate of determination is to issue with this determination and the Authority also directs that a copy of this determination is to be made available to the Commissioner of Inland Revenue.

Costs

[30] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority