IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 124
5415429

	BETWEEN	LABOUR INSPECTOR (MELISSA ANN MacRURY) Applicant
	A N D	CYPRESS VILLAS LIMITED First Respondent
	A N D	BARRY EDWARD BRILL Proposed Second Respondent

Member of Authority:	K J Anderson
Representatives:	S Carr, Counsel for Applicant No appearance for Respondent
Investigation Meeting:	20 November 2013 at Hamilton
Submissions Received:	4 and 19 December 2013 from Applicant 9 December 2013 from Respondent
Date of Determination:	3 April 2014

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant Labour Inspector alleges that the respondent, Cypress Villas Limited (CVL) breached the Holidays Act 2003 because there was a failure to pay an employee, Ms Nina Northcroft, her correct entitlements in regard to annual holiday pay and public holiday entitlements upon the termination of her employment with CVL, on or about 21 March 2012.

[2] It is also claimed by the Labour Inspector that CVL breached the Minimum Wage Act 1983. It is alleged, that while Ms Northcroft was paid an annual salary, due to the hours that she was required to work, a situation developed whereby the wages

that Ms Northcroft received were less than what she was entitled to under the minimum wage orders that prevailed at the material times.

[3] Related to the claims for payments under the Holidays Act is the status of Ms Northcroft's employment at the relevant times. That is, whether she was employed for a fixed term initially, or whether her employment was of a permanent nature at all times. The determination of this issue may have some bearing on the calculation of the appropriate payments being claimed on behalf of Ms Northcroft.

[4] In regard to the payments being claimed under the Minimum Wage Act (MW Act), the Labour Inspector says that the total gross sum of $30,018 is due and an order is sought accordingly.

[5] CVL rebuts the claims of the Labour Inspector and denies that there was any breach of the Holidays Act or the MW Act. CVL says that Ms Northcroft was paid her full entitlements and she never raised any questions about these whilst employed by the company.

[6] There is also an application pursuant to s.234 of the Employment Relations Act 2000, for the Authority to authorise the Labour Inspector to bring an action against Mr Barry Edward Brill, the sole director of CVL, for the recovery of any amount of minimum pay and/or holiday pay that the Authority may award.

[7] Finally, the Labour Inspector asks that the Authority award penalties in the total sum of $60,000 in regard to the alleged breaches of the Holidays Act and MW Act.

Background

[8] At the material times relevant to the employment of Ms Northcroft, CVL operated an accommodation business at Taupo.

[9] Ms Northcroft was initially employed as a cleaner some time in 2009. Upon the departure of the incumbent manager of the business in 2010, Ms Northcroft was appointed to the position of *"*Motel Supervisor*"*, as evidenced by an individual employment agreement signed by her on 18 July 2010.

[10] The employment agreement comprises two sections: individual terms and standard terms. The first section provides that Ms Northcroft was to be paid a salary

of $2,600 per month, paid fortnightly. Under the standard terms section of the agreement, the following provisions are particularly relevant to the matters before the Authority:

> 1. **Employment contract**
> This contract shall be for a fixed term of seven months. The motel has operated at a significant loss for some time, and it is not clear the business is capable of operating successfully, with only six motel units and minimal staff costs. The owner has decided upon a trial period for 7 months from 31 July 2010. Following 31 January 2011, the operating accounts for the prior six month period will be examined and any reasons for budget departures will be assessed. The owner will then take a decision as to whether the motel business will be closed down. If it is to be continued, this employment contract shall be renegotiated as necessary and extended.
>
> 2. You will report to DARREN EDGE who has been appointed by the owner to be the motel manager ("the Manager").
>
> 3. **Hours and Days of Work and Rosters**
> (a) This position is for 7 days a week, 52 weeks of the year. (Rights to time off are set out below.)
>
> (b) You consent to work 7 days per week.
>
> 4. **Meal and Rest Breaks**
> (a) You are entitled to take reasonable breaks at suitable times convenient to yourself.
>
> 5. **Remuneration**
> (a) You acknowledge that the remuneration and other entitlements shall fully compensate you for the time worked and duties performed under this agreement.
>
> (b) You give us written consent under s.5 of the Wages Protection Act 1983 to deduct from your remuneration (including final pay and holiday pay) any amount of money which you may owe to us for any reason, including time lost through unauthorised absence, non-return of Company property, holidays taken in advance, unworked notice, or for overpayment of salary.

[11] At clause 9 of this section of the agreement, there is a provision for "Time Off":

> You are entitled to take Wednesdays off each week, when the premises will be left in the care of an assistant supervisor on hours and terms approved by the Manager. Another day may be substituted for Wednesday with the approval of the Manager.

[12] Then at clause 11 of this section of the agreement, reference is made to the Holidays Act 2003 and it is provided that Ms Northcroft was required to work on

public holidays. Then particularly relevant to the claims before the Authority relating to holiday pay, there is the following:

> (c) **Annual leave**
>
> i. Your holiday entitlement is calculated at 8% of gross earnings.

[13] The evidence of Mr Brill, the sole shareholder and director of CVL, is that he met with Ms Northcroft in July 2010 and the *"*fixed monthly*"* salary ($2,600) was agreed to. Mr Brill says that holiday pay was included in the monthly salary payments at the rate of 8%; meaning that the monthly salary of $2,600 includes holiday pay.

[14] As recorded within the employment agreement (para.2 of the standard terms), Mr Darren Edge acted in the role of Manager. As the Authority understands it, Mr Edge lives in Taupo; he has a family connection with Mr Brill. And as the latter lives in Pahia (Bay of Islands), a substantial distance from Taupo, Mr Edge fulfilled the role of manager, albeit it appears that he was not paid for this; and he had his own business in Taupo. For all intents and purposes, Ms Northcroft was directly responsible to Mr Edge, albeit it seems that she had considerable autonomy on a day-to-day basis. The evidence of Ms Northcroft is that Mr Edge was responsible for the banking of monies coming into the business and organising and paying for relevant supplies.

[15] In regard to the payment arrangements pertaining to Ms Northcroft's salary, this was contracted to a Taupo firm of accountants which processed the salary payments without any apparent input from Ms Northcroft, or anyone else.

Fixed term of employment

[16] As set out above, the initial period of employment from July 2010 was for a fixed term of seven months. I find that this was for genuine reasons based on reasonable grounds pursuant to s.66(2) of the Act; as set out at clause 1 of the standard terms section of the employment agreement.

[17] The evidence of Mr Brill is that the trial operation of the business for the period of seven months was not successful, as evidenced by the company's annual accounts for 2010/2011. Mr Brill says that although CVL was *"*clearly insolvent*"*, it was able to continue in business as a result of assurances from the lessor company,

Tuscany Properties Limited[1] (TPL), that rent recovery would be deferred. As the Authority understands it, the property in the accommodation was owned by TPL and CVL leased it from TPL.

[18] The evidence of Mr Brill is that CVL decided to close the motel business at the end of April 2011, following the Easter holidays. The six cottages, which Mr Brill says comprised the major part of the business, were let on a permanent basis with one being sold in March 2011. Mr Brill says that as there were some forward bookings for four of the villas, Mr Edge asked Ms Northcroft to stay in her employment until the deferred closure was to take effect on 30 June 2011. Therefore, while the initial fixed term of the employment agreement was envisaged to expire on 31 January 2011, due to the uncertain circumstances, it appears that a decision was made to close the accommodation business down and from that point, the termination of Ms Northcroft's employment became inevitable, albeit the actual date of this event remained uncertain. And while the overall evidence is somewhat unclear, it is established to the satisfaction of the Authority that Ms Northcroft was employed on a further fixed term basis with her employment ending on the occurrence of a specified event[2]; that is, the closure of the business. I also conclude that Ms Northcroft was fully aware of the circumstances pertaining to the finite tenure of her employment.

[19] However, the matter of whether the provisions of s.28(1) of the Holidays Act were complied with is a matter that requires further scrutiny in due course.

The claims presented by the Labour Inspector

(a) ***Annual holiday pay entitlements***

[20] CVL says that the salary payments made to Ms Northcroft included an 8% annual holiday pay component. Reference is made to clause 11(c)(i) of the standard terms of employment: "Your holiday entitlement is calculated at 8% of gross earnings".

[21] The Authority is also referred to s.28 of the Holidays Act and CVL says that an agreement was reached with Ms Northcroft to include her holiday pay in her salary payments; as permitted by the relevant provisions of s.28.

[1] Mr Brill is the sole director of this company
[2] Employment Relations Act 2000 s.66(1)(b) and (2)

[22] Section 28 of the Holidays Act, read with s.27, provides for circumstances when annual holiday pay may be paid with (included in) an employee's pay thus:

> (1) Despite section 27, an employer may regularly pay annual holiday pay with the employee's pay if –
>
> (a) the employee –
>
> (i) is employed in accordance with section 66 of the Employment Relations Act 2000 on a fixed term agreement to work for less than 12 months; or
>
> (ii) works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with [4 weeks] annual holidays under s.16; and
>
> (b) the employee agrees in his or her employment agreement; and
>
> (c) the annual holiday pay is paid as an identifiable component of the employee's pay; and
>
> (d) the annual holiday pay is paid at a rate not less than [8%] of the employee's gross earnings.
>
> (2) If an employee to whom subsection (1)(a)(i) applies is employed by the same employer beyond 12 months on a series of fixed term agreements of less than 12 months each, the employer and employee may agree that the employee is to be paid in accordance with subsection (1) regardless of the number of agreements.
>
> (3) If the fixed term agreement of an employee to whom subsection (1)(a)(i) applies is followed by permanent employment with the same employer, the employee –
>
> (a) becomes entitled to paid annual holidays at the end of 12 months continuous employment (including the period of that fixed term agreement) under s.16; but
>
> (b) the amount of the holiday paid that the employee is entitled to be paid for the holidays is reduced by the amount that the employee has already received under subsection (1).
>
> (4) If an employer has incorrectly paid annual holiday pay with an employee's pay in circumstances where subsection (1) does not apply and the employee's employment has continued for 12 months or more, then, despite those payments, the employee becomes entitled to annual holidays in accordance with section 16 and paid in accordance with this sub-part.

[23] The first issue that arises relates to the words that are used in the employment agreement pertaining to Ms Northcroft's annual leave entitlement: *"*Your holiday entitlement is calculated at 8% of gross earnings*"*. This wording is obscure and deficient in that it only states the basic entitlement under s.23 of the Holidays Act, in the event that the employment of an employee comes to an end within 12 months of the date of commencement of their employment.

[24] While CVL has told the Authority that the intention was that Ms Northcroft's salary would have an 8% annual holiday pay component, that is not what the agreement says. It simply does not make any reference at all to Ms Northcroft's salary having an annual holiday pay component. And if one turns to the reference in the agreement to *"*remuneration*"*, it only states that Ms Northcroft was to be paid a salary of $2,600 per month, paid fortnightly. There is no mention of an annual holiday pay component. And it is the evidence of Ms Northcroft that she never agreed to annual holiday pay being included in her salary, albeit it seems that she never raised the matter during her employment.

[25] The only other relevant evidence available to the Authority is a pay advice slip for the period ended 21 March 2012. This shows that Ms Northcroft was paid for 80 hours ordinary time at $15 per hour: $1,200 gross. Under *"*Holiday Pay – Plus Taxable Allowances", there is an entry of $96; by a process of deduction, this equates to 8% of $1,200 but there is no explanation as to how Ms Northcroft would have known this given that there is no reference to "8%" at all. The gross fortnightly earnings are a total of $1,296. On a monthly basis the salary would be $2,592, which is $8 short of the $2,600 that the agreement provides for at clause 1. However, the latter point is not at issue. What is relevant is that there is a total lack of any information showing that the annual holiday pay was *"*an identifiable component*"* of Ms Northcroft's pay, as required by s.28(1)(c) of the Holidays Act.

[26] While the Labour Inspector has raised various arguments relating to fixed term employment pursuant to s.66 of the Act, it seems to me that s.28 of the Holidays Act is where the primary focus of the Authority should be. I conclude that CVL did not meet the requirements of s.28 of the Holidays Act for two reasons. First, I find that it is more probable than not that Ms Northcroft did not agree to have her annual holiday pay included as a component of her salary. And the annual holiday pay was not clearly identified as a component of Ms Northcroft's salary. It follows that I find that

CVL was in breach of s.28 of the Holidays Act. The consequece is that pursuant to s.28(4), Ms Northcroft was entitled to annual holidays and now is entitled to be paid annual holiday pay for the total period of her employment with CVL.

(b) **Payment for working on public holidays**

[27] The Labour Inspector presents two claims pursuant to ss.50 and 56 of the Holidays Act. Section 50 of the Act provides:

> ***Employer must pay employee at least time and a half for working on public holiday***
>
> (1) If an employee works (in accordance with his or her employment agreement) on any part of a public holiday, the employer must pay the employee the greater of –
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> (a) the portion of the employee's relevant daily pay [or average daily pay] (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or
>
> (b) the portion of the employee's relevant daily pay that relates to the time actually worked on the day.
>
> (2) In subsection (1)(a), **penal rates** –
> (a) means an identifiable additional amount that is payable to compensate the employee for working on a particular day of the week or a public holiday; but
>
> (b) does not include, for example, any additional payment for a sixth or seventh day of work.
>
> (3) This section is subject to section 51.

[28] The two claims presented by the Labour Inspector relate to the evidence of Ms Northcroft. She says that she was required to work, or be available, for every day that there was a public holiday, for the total time that she was employed by CVL. The evidence of Ms Northcroft is corroborated, to some extent, by that of her mother, Mrs Lynda Stewart. Mrs Stewart particularly referred to Mr Stewart and her spending Christmas Day of 2010 and 2011 at Cypress Villas because Ms Northcroft was required to be onsite in the event that guests at the villas required assistance.

[29] The evidence of Ms Northcroft regarding the requirement for her to be available on public holidays has not been disputed by CVL except for Mr Brill suggesting that Ms Northcroft was not required to be continuously on the premises. However, similar to the situation regarding the annual holiday entitlements for Ms Northcroft, CVL failed to comply with s.81 of the Holidays Act. It requires that an

employer *"must"* keep a holiday and leave record that complies with this section of the Act. Relevant to the claim for payments for working on public holidays, as set out at subsection (2), is:

> (i) The dates of, and payments for, any public holiday on which the employee worked:
> (j) The number of hours that the employee worked on any public holiday:
> (ja) The day or part of any public holiday specified in section 44(1) agreed to be transferred under section 44(a) or 44(b) and the calendar day or period of 24 hours to which it has been transferred (if applicable):
> (k) The date on which the employee became entitled to any alternative holiday:
> (l) The details of the dates of and payments for, any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to holiday pay.

[30] At subsection (3), it is provided that the holiday and leave record must be kept in a written form, or in a form or in a manner that allows the information in the record to be easily accessed and converted into a written form. There is no evidence of any holiday and leave record being kept for Ms Northcroft during her employment with CVL.

[31] I found the evidence of Ms Northcroft relating to the requirement that she worked, or was required to be available, on all of the days that were public holidays during her employment with CVL, to be credible. And in the absence of any evidence for CVL to the contrary, I accept that Ms Northcroft is entitled to be paid for working on public holidays pursuant to the provisions of ss.50 and 56 of the Holidays Act. An order will follow.

(c) ***The minimum wages claim***

[32] The Labour Inspector claims on behalf of Ms Northcroft the sum of $30,018. The basis of this claim is that Ms Northcroft says that the accommodation was open for business from 8am to 8pm, for seven days each week, including public holidays. While Ms Northcroft acknowledges that there were some *"slow periods"*, she says that she was required to be available at all times during the above hours. It is accepted by the Labour Inspector that Ms Northcroft had meal and tea breaks and hence the sum claimed is calculated on the basis of an 11 hour day rather than the 12 hours of opening time for the accommodation.

[33] It is established that Ms Northcroft's employment agreement provided for a salary of $2,600 per month; paid fortnightly[3]. Based on a 40 hour week (2,080 hours per annum), Ms Northcroft would have received $15 per hour, which incidentally is the hourly rate shown on the sole payslip available to the Authority. However, the Labour Inspector says that she is satisfied that Ms Northcroft worked 11 hours each day or 77 hours each week (4,004 hours per annum) and as a result, her effective hourly rate was (approximately) $7.79.

[34] The Labour Inspector has recorded in her calculations regarding the entitlements due to Ms Northcroft, that for the period 22 July 2010 until 31 March 2011, the minimum wage, under the relevant minimum wage order, was $12.75 per hour. From 1 April 2011 to 21 March 2012, the minimum wage was $13 per hour.

[35] CVL rebuts the minimum wage claim. The company says that the MW Act does not apply in regard to employees in receipt of a salary. While this perception of the applicability of the MW Act has, until relatively recently, been common, it is now established that the MW Act does apply to salaried employees where appropriate circumstances exist. This was found to be so by the Full Employment Court in *Idea Services Ltd v. Dickson*[4] and upheld on appeal to the Court of Appeal[5]. A more recent analysis (17 February 2014) is provided by Chief Judge Colgan in *Law v. Board of Trustees of Woodford House*[6]. In a commentary pertaining to the existence of the MW Act, the Chief Judge explains that:

> [54] The MW Act exists to provide minimum essential terms and conditions of employment and to avoid the exploitation of employees with little or no bargaining power. It should be interpreted accordingly and not so artificially that it could easily be rendered impotent. The MW Act can hardly be said to create a bonanza of riches for employees covered by it. Those who should justifiably expect its protection should not be turned away from it by the technicality of an employer's choice of an annual salary as the method of remuneration payment.
>
> [55] Courts must also interpret legislation as applying to circumstances as they arise or have developed since the legislation was enacted even where the legislation is antiquated. As the Full Court noted in its judgment in *Idea Services Ltd v. Dickson* although the MW Act was enacted in 1983, this largely replicated its 1945 predecessor.

[3] $31,200 per annum
[4] [2009] ERNZ 116
[5] *Idea Services Ltd v. Dickson* [2011] 2 NZLR 522
[6] [2014] NZEmpC 25

> Remuneration practices have changed significantly, especially since 1945 but also since 1983. Fewer employees have their remuneration determined by collective instruments than in those earlier times and, therefore, fewer employees are paid on an hourly or daily basis. A greater proportion of the workforce is now remunerated by annual salaries even although these are actually paid on a monthly, fortnightly or sometimes weekly basis in equal amounts. The legislation should apply to such changes if its provisions will bear such changes.

[36] In *Law*, the Chief Judge went on to find that:

> The words "wages" and "salary" are different descriptions of essentially the same thing, that is remuneration paid to employees for work performed. That a "salary" can also describe the remuneration of others who are not employees (for example office holders) does not mean that an employee's remuneration must be categorised exclusively as wages alone, or specifically as either wages or salary.

[37] Further, the Chief Judge found that:

> [71] I conclude that an employee in receipt of a salary (or of remuneration so expressed) is not thereby excluded from coverage and falls under the category of "in all other cases" in the rates specified in the statutory Minimum Wage Orders as discussed at [48] earlier in this judgment. That is because such employees cannot be described as being "paid by the hour" or by piecework or "paid by the day". Salaried employees are not excluded from coverage by the MW Act because of the description of their remuneration as being on an annual basis.

[38] There appears to be no good reason why the reasoning set out in *Law* should not apply to the circumstances pertaining to Ms Northcroft's salary arrangements and hence the argument advanced for CVL, that the MW Act does not apply to her circumstances, is not sustainable in law.

Quantification of the minimum wages claim

[39] The evidence of Ms Northcroft regarding the hours that she worked is set out earlier in this determination. While CVL challenged her evidence, the company has not been able to show that Ms Northcroft's evidence is lacking in credibility.

[40] Furthermore, the employment agreement is silent in regard to the hours that Ms Northcroft was expected to work. The only stipulation in the agreement is that:

> This position is for 7 days a week, 52 weeks of the year (rights to time off are set out below).

[41] But as we have seen, no arrangements were put in place for Ms Northcroft to take time off.

[42] Section 65 of the Act sets out mandatory requirements regarding the content of an individual employment agreement, including: *"*an indication of the arrangements relating to the times the employee is to work*"*. It seems that while Ms Northcroft's pay was calculated on the basis of 40 hours per week or 80 hours per fortnight; based on her evidence, she was required to be available on a more or less continuous basis; a total of 77 hours per week. While it may be possible that Ms Northcroft may have had some *"*down time*"*, CVL has not been able to produce any evidence that rebuts Ms Northcroft's evidence to the Authority. Because I found her evidence to be credible, it is accepted, as are the Labour Inspector's calculations that the gross sum of $30,018 in minimum wage arrears is owed by CVL for the use of Ms Northcroft. An order follows.

Orders of the Authority

[43] For the reasons set out above, the monetary claims advanced by the Labour Inspector are accepted. Cypress Villas Limited is ordered to pay to the Labour Inspector, for the use of Ms Northcroft:

(a) Annual holiday pay pursuant to ss.24, 25 and 28(4) of the Holidays Act 2003; being the gross sum of $4,491.98;

(b) Accrued time and a half payments for working on public holidays pursuant to s.50 of the Holidays Act 2003; being the gross sum of $1,205.91;

(c) Payments for alternative holidays accrued for working on public holidays pursuant to s.56 of the Holidays Act 2003; being the gross sum of $2,431; and

(d) Outstanding minimum pay entitlements pursuant to s.11 of the Minimum Wages Act 1983 being the gross sum of $30,018.

Interest

[44] The Labour Inspector seeks that the Authority award interest on the above monies from 28 March 2012 to the date of determination. As I understand it, this date

was when Ms Northcroft's employment with CVL terminated. However, it appears that she did not make an inquiry to a Labour Inspector until 19 April 2012. I conclude that given the arguable circumstances regarding the facts of this matter, it is not appropriate to consider that interest should be awarded before 2 April 2013, the date the statement of problem was received by the Authority.

[45] Therefore, pursuant to clause 11 of Schedule 2 of the Employment Relations Act, CVL is ordered to pay interest at the rate of 5% per annum from 2 April 2013 until the date that payment of the above sums ordered is made.

Penalties

[46] The Labour Inspector seeks that penalties, totalling $60,000 should be awarded against CVL because of the failure of the company to comply with the provisions of the Holidays Act and the Minimum Wage Act regarding the arrears set out above.

[47] Given the overall circumstances pertaining to the financial position of CVL, the penalties sought reveal a rather zealous approach by the Labour Inspector as it is obvious, given the parlous financial state of the company, the award of any penalties would be an exercise in futility. While the matter of whether Mr Brill should be held to be jointly and severally liable for the amounts payable by CVL under the above orders, pursuant to s.234 of the Employment Relations Act, remains to be determined, the Authority concludes that in any event, s.234 does not encompass joint and several responsibility for the payment of any penalties that may be awarded. Hence, given all of these circumstances, it is not appropriate for any penalties to be awarded.

The application under s.234 of the Employment Relations Act (ERA)

[48] An application is made under s.234 of the ERA for the Authority to authorise the Labour Inspector to bring an action for the recovery of the moneys ordered under the Holidays Act and the Minimum Wage Act, against Mr Brill as the sole director of CVL.

[49] Section 234 of the ERA provides for circumstances in which officers, directors, or agents of a company may be liable for minimum wages and holiday pay; thus:

> (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 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.

[50] However, the Labour Inspector's submissions at the investigation meeting were quite contrary to the reasons for the application under s.234. In response to an argument advanced by CVL that the company is unable to meet any award because the business is no longer trading and has no tangible assets, the submissions for the Labour Inspector were that:

> [10] The financial records provided by the respondent do not support this claim. Those records show the company has assets exceeding $50,000 and the most significant liability ($213,029) is owed to a related company (Tuscany Properties Limited). The terms of that loan are repayment and interest as and when demanded (refer statement of financial position 31 March 2011).
>
> [11] If Tuscany Property forgives that debt or prioritises any award then the financial records show the company holds sufficient assets.

[51] The submissions then refer the Authority to CVL as the respondent company and then make reference to other companies of which Mr Brill is the sole director and shareholder.

[52] Somewhat contrary to the intent behind the application under s.234, the submission for the Labour Inspector, at first instance, posits that CVL could meet the awards made by the Authority if appropriate steps were taken in regard to its financial arrangements with another company (Tuscany Properties Limited), of which Mr Brill is the sole director.

[53] However, after having assessed the financial information provided by Mr Brill and the weight of his submissions, I conclude that on the balance of probabilities, CVL does not have sufficient assets to pay any of the amounts awarded in full[7].

[54] Given the above finding, s.234(2)(b) then provides that the Authority *"*may*"* authorise the Labour Inspector to bring an action for the recovery of the amounts ordered against any director of the company who has directed or authorised the default in payment of the holiday pay and the minimum wage entitlements.

[55] And then in exercising its discretion pertaining to whether the Labour Inspector should be authorised to bring an action for recovery of the monies in question against Mr Brill, as the sole director of CVL, the Authority must be persuaded that Mr Brill *"*directed or authorised*"* the default in payment of the amounts involved. It is submitted by the Labour Inspector that Mr Brill, as the sole director (and majority shareholder) of CVL, must have been aware of the company's obligations to pay minimum wages and holiday pay entitlements to Ms Northcroft. Undoubtedly this is correct and the Authority understands that Mr Brill does not dispute the obligation of CVL to comply with statutory requirements. However, Mr Brill says that it was always his understanding that CVL had met its obligations to Ms Northcroft and it was not until she left the employment of CVL, and subsequently lodged a complaint with the Labour Inspector, that he became aware that there was any dispute regarding her employment entitlements.

[56] The evidence of Ms Northcroft substantially confirms this is so, apart from when she apparently raised with Mr Edge the matter of having days off consistent with the term of her employment agreement that she was entitled to have Wednesdays off each week.

[57] The Labour Inspector submits that Mr Brill directed or authorised the default in statutory payments because:

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[7] Section 234(2)(b) applies.

(a) He negotiated the employment agreement with Ms Northcroft;

(b) The agreement did not comply with minimum wage and holiday pay given the hours Ms Northcroft was required to work and therefore, in itself, constitutes the default;

(c) Mr Brill authorised those terms and conditions that constituted the default when he entered into the employment agreement on behalf of the company;

(d) The default continued throughout the employment relationship; and

(e) While Mr Edge and the company's accountant were involved in operational matters, Mr Brill, both during the employment and in all subsequent dealings with the Labour Inspector, constantly directed all inquiries back to him and he assumed personal responsibility for all decisions made by the company.

[58] The Labour Inspector also submits that there is no evidence that Mr Brill directed or authorised that Ms Northcroft's wages and holiday pay should comply with statutory minima.

[59] Mr Brill submits that because it runs counter to the doctrine of limited liability that is so important to the New Zealand commercial environment, s.234 is tempered in several important respects. It is submitted that the Authority must be satisfied that there has been a wilful default by the company, not merely an error or genuine dispute.

[60] Mr Brill also refers to three Authority determinations that the Labour Inspector has relied upon: *Begum (Labour Inspector) v. Effective Fencing NZ Ltd* [8], *Begum (Labour Inspector) v. Effective Fencing NZ Ltd & Ors* [9] and *Taljaard (Labour Inspector) v. Sevans & Anor* [10]. But as Mr Brill has correctly pointed out, the circumstances in those matters are quite different from those pertaining to this case.

[61] For instance, in *Begum* there was no dispute that the outstanding holiday pay entitlement was due to the employee involved and there was evidence that the director

[8] AA94/10, 31 March 2010
[9] [2011] NZERA Auckland 163
[10] [2011] NZERA Auckland 412

(Mr O'Connor) was aware of the entitlement to holiday pay; and it also appears that the amount due had been calculated by the company. Therefore, the Authority accepted that Mr O'Connor was directly responsible for authorising a refusal to pay (the default).

[62] In *Taljaard*, the Authority found that the director (Mr Evans) had advised the Labour Inspector that the holiday pay involved would be paid. The Authority concluded that Mr Evans subsequently directed or authorised the default in payment and hence he was held liable to make payment given that the company was in liquidation.

[63] In both of the above scenarios, a director deliberately or wilfully directed or authorised the default in payment of the holiday pay entitlements that the respective companies had acknowledged as being due for payment. In this case, the payment of annual holiday pay, in particular, was arguable; as was the minimum pay entitlement. Indeed, it has required the Authority to determine that the entitlements are due. It is not appropriate for the Labour Inspector to simply assert a right to the payments in question when they were in dispute and when an investigation by the Authority was necessary in order to determine that right. And even then, CVL is entitled to challenge the determination of the Authority should the company wish to exercise that option under the Employment Relations Act.

[64] In assessing the applicability of s.234 to this matter, I obtained some research into the intention behind the introduction of s.234 and the underlying policy behind it. The *Report of the Employment and Accident Insurance Legislation Committee* is interesting. The Select Committee explained the intent behind s.234 thus:

> One of the key reasons for including this provision in the Bill is to address the re-emergence of "sweatshops" in New Zealand. An example of this is the recent case in Auckland of a woman who brought in seamstresses to work in a factory. The Employment Tribunal determined that over $300,000 of unpaid wages was owing to the workers. A common theme with sweatshop situations is that workers both live and work, in poor conditions, on the premises. Work hours are excessively long, and the employer often holds the workers' passports and can prevent any outside contact. Another common feature has been the mixture of limited liability companies, entirely owned by the individuals who are the employers.
>
> The Department [of Labour] has reported to us on a case where the owner-employer declared bankruptcy just prior to the hearing. No assets were therefore available for distribution to employees. We believe that without a degree of personal liability the ability to

> effectively enforce the employment laws on such employers is severely compromised. The Bill is not intended to penalise an honest employer whose business is failing, but to deal effectively with any deliberate attempt to avoid responsibility.
>
> Our intention is … that [s.234] will apply only where other avenues for recovering the amounts directly from the company have failed, because of insufficient assets, and that it applies only to limited liability companies (not, for example, to charitable trusts or incorporated societies).

[65] In commenting on the underlying policy behind the introduction of s.234, *Mazengarb's Employment Law (NZ)* concludes that the intention of s.234 is that this provision should only apply as a last resort, where the company is unable to pay, and an officer, director, or agent of the company has personally and deliberately directed or authorised the failure to pay, as found in *Begum* and *Taljaard*.

[66] I conclude that in regard to the Holidays Act matters, Mr Brill sought and obtained professional advice from the company's accountant and applied that advice in apparent good faith. While with hindsight it is now obvious that the advice given was deficient, nonetheless there is nothing to suggest that Mr Brill was aware of this at the time that CVL entered into the employment agreement with Ms Northcroft. Furthermore, there is no tangible evidence that Mr Brill deliberately embarked on a course of action that was designed to deprive Ms Northcroft of her legal entitlements under the Holidays Act or the Minimum Wage Act.

[67] I find that it is not proven that Mr Brill deliberately, or even by implication, directed or authorised any action that resulted in a default in any payments due to Ms Northcroft. Hence it is not appropriate to authorise the Labour Inspector to bring an action against Mr Brill for the recovery of the proven default in the payment of Holiday Act and Minimum Wage Act entitlements due to Ms Northcroft.

Determination

[68] For the reasons set out earlier in this determination, the Authority accepts that the claims made by the Labour Inspector, on behalf of Ms Northcroft, pertaining to entitlements under the Holidays Act 2003 and the Minimum Wage Act 1983, are valid. The orders of the Authority regarding the entitlements due are set out at paras.[43] and [45] of this determination.

[69] For the reasons set out above, the Authority declines to authorise the Labour Inspector to bring an action for recovery of the moneys ordered against Mr Barry Edward Brill pursuant to s.234(2) of the Employment Relations Act 2000.

Costs

[70] Taking into account the overall outcome for the parties and that the Labour Inspector has utilised legal services from the Ministry of Business, Innovation and Employment, I am inclined to the view that costs should lie where they fall. But in the event that either party may wish to make submissions on the matter of costs, they should do so within 28 days of the date of this determination.

K J Anderson
Member of the Employment Relations Authority