

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 198
3007851

BETWEEN NATHAN GILLETTE
Applicant

AND ROOFPOWER
INSTALLATIONS LIMITED
(previously named SUNPOWER
LIMITED)
First Respondent

AND THOMAS PATRICK GREEN
Second Respondent

Member of Authority: Andrew Dallas

Representatives: Lee Stevens, Counsel for the Applicant
Thomas Patrick Green, Director of the First Respondent

Investigation Meeting: 4 October 2017 at Nelson

Submissions On the day with further information received up to, and
including, 14 November 2017

Determination: 15 November 2017

DETERMINATION OF THE AUTHORITY No.2

- A. Nathan Gillette’s application for leave under s 142Y of the Employment Relations Act 2000 is granted.**
- B. Thomas Patrick Green as director of Roofpower Installations Limited (previously named Sunpower Limited) aided and abetted breaches of employment standards in respect of Mr Gillette’s employment.**

- C. Mr Green as director of the company was directly and knowingly concerned in breaches of employment standards in respect of Mr Gillette’s employment.**
- D. Within 14 days of the date of this determination, Mr Green must personally pay Mr Gillette the following amounts:**
- (i) \$19,740.52 as unpaid wages for the period 1 April 2016 to 28 July 2016; and**
 - (ii) \$929.67 as unpaid holiday pay for the period 1 April 2016 to 28 July 2016.**
- E. Costs are reserved.**

Employment relationship problem

[1] Nathan Gillette seeks leave under s 142Y of the Employment Relations Act 2000 to recover wages and holiday pay from the director of Roofpower Installations Limited (previously named Sunpower Limited), Thomas Patrick Green.

Background

[2] A primary determination of the Authority, *Gillette v Sunpower Limited*, made various findings and orders.¹ Shortly thereafter, Sunpower’s director, Thomas Patrick Green changed the name of the company to “Roofpower Installations Limited” (the company). This proceeding has continued under the new name of the company.²

[3] The company was required to pay Mr Gillette the following amounts:

- (i) \$26,043.96 gross in unpaid wages;
- (ii) Interest on the sum of \$26,043.96 at 5% per annum payable from 28 July 2016 until the sum is paid in full;
- (iii) \$929.67 gross in unpaid holiday pay;
- (iv) \$740.06 as expenses reimbursement;
- (v) \$1200 gross as a bonus payment;
- (vi) \$15,000 as compensation for lost wages;
- (vii) \$7000 as compensation for hurt, humiliation and injury to feelings.

¹ [2017] NZERA Christchurch 1 (4 January 2017).

² Companies Act 2003, s 23(4)(b).

[4] In addition, the Authority imposed a penalty of \$10,000 on the company. This was to be paid to the Authority for subsequent payment into a Crown Bank Account.

[5] The company did not challenge the Authority's primary determination to the Employment Court. Initially, Mr Gillette did not seek to enforce the Authority's determination.

[6] Mr Gillette subsequently sought leave under s142Y of the Act to enforce parts of the primary determination against Mr Green personally. The company opposed the granting of leave on grounds there was no breach of employment standards and no jurisdiction existed.

[7] Mr Gillette subsequently amended his claim so as to seek a limited compliance order for enforcement of parts of the orders of the primary determination as they related to the period prior to s142Y of the Act coming into force (that is, before 1 April 2016).

[8] At an investigation meeting convened on 4 October 2017 to consider Mr Gillette's claim, I heard evidence from Mr Gillette and Mr Green. Mr Gillette's partner also provided an affidavit.

[9] During the meeting, Mr Gillette, through Counsel, sought leave to amend his application for a compliance order such that it was directed at the whole of the determination. As such leave was not opposed by the company, I granted the application.³

[10] After considering the respective positions of the parties, I decided it was appropriate to make a compliance order in the circumstance of this case. It is clear from the evidence the company has not complied with the Authority's determination of 4 January 2017 nor taken any reasonable or positive steps to comply. The compliance order was issued on 6 October 2017 and the company was required to comply with it on or before 7 November 2017.⁴

³ *Gillette v Sunpower Limited* [2017] NZERA Christchurch 171 (6 October 2017).

⁴ See *Gillette*, above n 1 at [12] – [14].

[11] Mr Gillette's application for leave under s142Y of Act was adjourned pending the company's compliance with the Authority's primary determination. However, as recorded in my determination of 6 October 2017, I was satisfied the jurisdiction existed and the legislative pre-requisites were most likely met for leave to be given to Mr Gillette to recover his unpaid wages, including minimum wages, and holiday pay from Mr Green personally.⁵

[12] The company did not comply with the compliance order. Mr Gillette has now applied to the Authority to re-enliven his application under s 142Y of the Act. He is seeking to recover wages and holiday pay from Mr Green for the period 1 April 2016 until 28 July 2016, being the last day of his employment with the company. Mr Gillette calculated his unpaid wages as \$19,740.52 and unpaid holiday pay as \$929.67.

Issues

[13] The issues for investigation and determination are:

- (i) Should Mr Gillette be granted leave under s 142Y of the Act to recover wages and other moneys from Mr Green personally;
- (ii) Did Mr Green have the required states of mind about the company's default in payment of wages and holiday pay to Mr Gillette;
- (iii) If (ii) is answered in the affirmative, what is Mr Green's personal liability to Mr Gillette in respect of wages and holiday pay;
- (iv) Should either party contribute to the costs of representation of the other party?

Should Mr Gillette be granted leave under s 142Y to the Act?

[14] The Act provides that a Labour Inspector or employee may recover wages and other money from the employee's employer provided certain legislative pre-requisites are met.

[15] In this case, Mr Gillette brings the action in this own right as an employee of the company. There was no dispute that Mr Gillette was an employee of the company.

⁵ At [16].

[16] The relevant provisions of the Act are set out below.

[17] Section 142Y of the Act relevantly provides:

142Y When person involved in breach liable for default in payment of wages or other money due to employee

- (1) A Labour Inspector or an employee may recover from a person who is not the employee's employer any wages or other money payable to the employee if—
- (a) there has been a default in the payment of wages or other money payable to the employee; and
 - (b) the default is due to a breach of employment standards; and
 - (c) the person is a person involved in the breach within the meaning of section 142W.
- (2) However, arrears in wages or other money may be recovered under subsection (1) only,—
- (a) in the case of recovery by an employee, with the prior leave of the Authority or the court; and
 - (b) to the extent that the employee's employer is unable to pay the arrears in wages or other money.

[18] "Employment standards" are defined in section 5 of the Act as:

Employment standards means any of the following:

- (a) the requirements of any of sections 64, 69Y, 69ZD, 69ZE, and 130;
- (b) the provisions of the Equal Pay Act 1972;
- (c) the minimum entitlements and payment for those under the Holidays Act 2003;
- (d) the requirements of sections 81 and 82 of the Holidays Act 2003;
- (e) the minimum entitlements under the Minimum Wage Act 1983;
- (f) the provisions of the Wages Protection Act 1983.

[19] Section 142W of the Act defines involvement in breaches as:

142W Involvement in breaches

- (1) In this Act, a person is involved in a breach if the breach is a breach of employment standards and the person—
- (a) has aided, abetted, counselled, or procured the breach; or
 - (b) has induced, whether by threats or promises or otherwise, the breach; or
 - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
 - (d) has conspired with others to effect the breach.
- (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
- (3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:
- (a) a person occupying the position of a director of a company if the entity is a company:
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[20] Neither s 142Y nor its counterpart provisions of the Act have been subject to significant judicial scrutiny. However, in *Brill v Labour Inspector* the Court of Appeal endorsed an approach to the granting of leave, or “authorisation” as it was then termed, under s 234 of the Act, the now repealed predecessor provision to s 142Y.⁶

[21] The Court of Appeal observed in *Brill* the practical effect of granting leave was to join another party to existing proceedings. The Court of Appeal went on to find that once a Labour Inspector, as the original applicant was in that case, had established on the balance of probabilities the company was unable to pay the full amount of monies owing, all that then needed to be shown was a “tenable cause of action” against a director (or other person defined by the Act) to obtain authorisation to join them to proceedings.

[22] It seems sensible to adopt this approach when considering Mr Gillette’s application for leave under s 142Y.

[23] Mr Gillette claimed Mr Green aided and abetted breaches,⁷ and/or was directly or indirectly knowingly concerned in breaches, of employment standards in respect of his employment.⁸ Mr Gillette said the employment standards in question were the payment of minimum wages under Minimum Wage Act 1983, the payment of his total outstanding wages under the Wages Protection Act 1983 and the payment of minimum holiday pay entitlements under the Holidays Act 2003.

[24] Mr Green resisted Mr Gillette’s application. He submitted the Authority lacked jurisdiction to grant Mr Gillette leave under s 142Y of the Act. Mr Green said even if the jurisdiction existed, the legislative pre-requisites for granting leave could not be met.

[25] I reject both of Mr Green’s submissions. The Authority clearly has jurisdiction to grant leave to Mr Gillette under s 142Y of the Act. Mr Green’s second submission is clearly unsustainable in the face of the facts as found in the Authority’s primary determination and this determination.

⁶ [2017] NZCA 169

⁷ Employment Relations Act, s 142(1)(a)

⁸ Employment Relations Act, s 142(1)(c)

Company unable to pay wages and holiday pay

[26] Based on Mr Green's evidence about the state of the company finances during the 4 October 2017 investigation meeting, the financial information about the company prepared by the company's accountants which he provided to the Authority on 7 November 2017 and the failure by the company to comply with the compliance order on or before 7 November 2017, I find, on the balance of probabilities, the company is unable to pay any of the arrears of wages and holiday pay found by the Authority in its primary determination to be owed to Mr Gillette.

Tenable cause of action against Mr Green

[27] I also find based on the evidence of Mr Gillette and Mr Green during the investigation and the Authority's findings set out in paragraphs [59], [91] and [98] of its primary determination, Mr Gillette has, at least, a tenable cause of action against Mr Green as director of the company within the ambit of s 142W(3)(a) of the Act.

Leave granted under s 142Y

[28] Based on these findings, the Authority grants Mr Gillette leave under s 142Y of the Act.

Did Mr Green have the required state of mind about the company's default in wages and holiday pay to Mr Green?

[29] The issue of the required state of mind in relation to actionable conduct is dealt with in s 142Z of the Act. The section relevantly provides:

142Z State of mind of directors, employees, or agents attributed to body corporate or other principal

(1) If, in a proceeding under this Act in respect of any conduct engaged in by a body corporate, being conduct in relation to which any provision of this Act applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show that a director, an employee, or an agent of the body corporate, acting within the scope of his or her actual or apparent authority, had that state of mind.

(2) If, in a proceeding (other than a proceeding for an offence) under this Act in respect of any conduct engaged in by a person other than a body corporate, being conduct in relation to which any provision of this Act applies, it is necessary to establish the state of mind of the person, it is sufficient to show that an employee or agent of the person, acting within the scope of his or her actual or apparent authority, had that state of mind.

(3) In this Act, state of mind, in relation to a person, includes the knowledge, intention, opinion, belief, or purpose of the person and the person's reasons for that intention, opinion, belief, or purpose.

[30] A review of s 142Z(3) of Act, in particular, discloses the definition of state of mind has been given a liberal and broad meaning by the legislature.

[31] I find based on the Authority's findings set out in paragraphs [71], [72], [75], [76], [87], [91], [98] and [98] of its primary determination and the evidence I heard during the 4 October 2017 investigation meeting, Mr Green had the required state of mind to have aided and abetted breaches of employment standards by the company.

[32] I further find based on the Authority's findings set out in paragraphs [71], [72], [75], [76], [87], [91], [98] and [98] of its primary determination and the evidence I heard during the investigation meeting, Mr Green had the required state of mind so as to be directly and knowingly concerned in breaches of employment standards by the company

[33] Even though not raised by Mr Green, in fairness to him, and for completeness, I am satisfied that none of the defences set in s 142ZD of the Act which may otherwise be available to him, apply in the circumstances of this case.

[34] The cumulative effect of leave under s 142Y and the Authority's findings in paragraphs [31] and [32] above, means Mr Green is jointly and severally liable with the company for Mr Gillette's unpaid wages and holiday pay.

What is Mr Green's personal liability to Mr Gillette in respect of unpaid wages and holiday pay?

[35] Mr Gillette said he was owed \$19,740.52 as unpaid wages for the period 1 April 2016 to 28 July 2016 and \$929.67 as unpaid holiday pay for the same period. I am satisfied that Mr Gillette's wage and holiday pay calculations for the period 1 April 2016 to 28 July 2016 accord with the primary determination's findings.

[36] Mr Gillette calculated his wages for the period 1 April 2016 to 28 July 2016 with reference to the total wages he should have received under his employment agreement, including minimum wages.⁹ This is permissible because the definition of employment standards in s 5 of the Act includes “the provisions of the Wages Protection Act 1983”. A review of the Minimum Wage Act discloses s 4 provides: “an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction”. Consequently, it is clear Mr Gillette can recover his total outstanding wages. The primary determination found the company did not pay Mr Gillette any wages, including minimum wages.

[37] It is clear from the evidence before the Authority the company is unable to pay any of the wages and holiday pay owed to Mr Gillette. Consequently, I find Mr Green is personally liable to pay these monies in full.¹⁰

[38] Within 14 days of the date of this determination, Mr Green must personally pay Mr Gillette the following amounts:

- (a) \$19,740.52 as unpaid wages for the period 1 April 2016 to 28 July 2016;
- and
- (b) \$929.67 as unpaid holiday pay for the period 1 April 2016 to 28 July 2016.

Costs

[39] Costs are reserved. The parties are encouraged to resolve the issue of costs between themselves. If unable to do so, either or both parties may apply to the Authority for a timetable for exchange of memoranda on costs. If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of a daily tariff of \$4500 for one day investigation meeting adjusted upwards or downwards for relevant factors.¹¹



Andrew Dallas
Member of the Employment Relations Authority

⁹ Minimum Wage Act 1983, s 6

¹⁰ Employment Relations Act, s 142(Y)(2)(b)

¹¹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].