

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 6
3005312

BETWEEN PAUL HAYTON
Applicant

A N D POSSUM BOURNE MOTOR
SPORT 2015 LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Melanie Swarbrick, Advocate for Applicant
Simon Dench, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 21 November 2017 from Applicant
30 November 2017 from Respondent

Date of Determination: 10 January 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Mr Paul Hayton claims that Possum Bourne Motorsport 2015 Limited (PBMS) is liable to pay him holiday pay which he accrued while working for his former employer Possum Bourne Motorsport Limited.

[2] Mr Paul Hayton's former employer Possum Bourne Motorsport Limited was a business that was owned and operated by Paul Hayton's brother Bryan Hayton and Bryan's wife. This business provided services for performance motor vehicles in Pukekohe and it traded under the trading name "*Possum Bourne Motorsport*" up until 09 November 2015.

[3] In November 2015 Thexton Consulting NZ Limited (Thexton) purchased the workshop and assets from Possum Bourne Motorsport Limited (this entity is not the

respondent) which consisted of the business which was trading under the name *Possum Bourne Motorsport*.

[4] As part of the purchase Possum Bourne Motorsport Limited agreed to change its name to allow PBMS to use the name "*Possum Bourne Motor Sport*".

[5] After the purchase Thexton changed its name to Possum Bourne Motorsport 2015 Limited (referred to in this determination as PBMS – the respondent in this matter).

[6] Bryan Hayton's company Possum Bourne Motorsport Limited also changed its name to Supreme Motorsport Limited (SML) in order to distinguish the companies.

[7] PBMS agreed to re-employ selected SML employees, which included Paul Hayton and the owner of the previous business Bryan Hayton (Paul's brother).

[8] Because PBMS took over the leases on the premises SML had used to operate *Possum Bourne Motorsport* in Pukekohe, after the purchase *Possum Bourne Motorsport* continued to operate from the same business premises, offering the same services, to the same customers while employing some of the same employees who had previously worked for SML.

[9] At the time PBMS purchased SML's business it was clear that SML was in serious financial difficulty so wasn't in a position to be able to pay out its employee's final Holidays Act 2003 entitlements upon termination of their employment.

[10] Because of that clause 4 of the Sale and Purchase Agreement between SML and PBMS included a contractual obligation for PBMS to take on (i.e. pay) SML's holiday pay liability to its employees, which included Mr Paul Hayton.

[11] Mr Paul Hayton now claims that PBMS owes him outstanding holiday pay arrears which he acknowledges he accrued while working for SML but which Mr Paul Hayton now claims PBMS is legally responsible for paying to him.

[12] PBMS denies that claim. It says that it had a contractual obligation with SML, not with Mr Paul Hayton personally, regarding the payment of holiday pay arrears to SML's employees.

[13] PBMS says it has met its contractual obligations to SML. After SML went into liquidation on 15 December 2015 the liquidator demanded that PBMS pay to the liquidator the holiday pay obligation set out in clause 4 of the Sale and Purchase Agreement. PBMS told the Authority it made that payment as requested by the liquidator.

[14] PBMS further says that it is up to SML (and not SML's previous employees) to choose whether or not to enforce any holiday pay arrears obligations under the Sale and Purchase Agreement because it is the contracting party, not the employees individually.

[15] PBMS says it has not avoided its holiday pay obligations because it has paid that money to SML as the liquidator demanded.

[16] PBMS also says that it was not able to pay the holiday pay arrears directly to Mr Paul Hayton because the liquidator's decision was that to have done so would have constituted a voidable preference under s.292 of the Companies Act 1993.

[17] PBMS says that if it now pays Mr Paul Hayton the holiday pay arrears he is seeking (which he should have been paid by SML upon termination of his employment with SML) then PBMS would have made the same holiday pay arrears payment twice. In which case PBMS says Mr Paul Hayton would have received preferential payment which is contrary to the insolvency regime of the Act.

[18] Mr Paul Hayton's employment with SML ended on Friday 06 November 2015. His employment with PBMS started on Monday 09 November 2015.

[19] Mr Paul Hayton was suspended without pay by PBMS on 30 May 2016 and never returned to work. He gave one month notice of resignation on 16 August 2016. Mr Paul Hayton claims his resignation was a constructive dismissal so that claim is subject to current Authority proceedings.

[20] Because Mr Paul Hayton was on unpaid suspension when he gave his notice he did not attend work during his notice period. Assuming that PBMS accepted the notice of resignation, then Mr Paul Hayton's last day of employment would have been 16 September 2016.

[21] Mr Paul Hayton worked for PBMS for less than 12 months so was entitled to be paid eight percent of his total gross earnings during his employment with PBMS as holiday pay when his employment ended.

[22] However Mr Paul Hayton says that in addition to the 8% holiday pay he was entitled to during his employment with PBMS he is also entitled to be paid by PBMS for the holiday pay SML should have paid him when his employment with SML ended, but which was not paid because SML went into liquidation.

[23] Mr Paul Hayton is attempting to fix PBMS with liability to pay him for SML's unpaid holiday pay obligations to him.

[24] I do not accept Mr Paul Hayton's claim that his SML unpaid annual holiday entitlements carried over to PBMS because the employment agreement he had with PBMS does not reflect that. I consider that is a significant omission.

[25] There is no documentary record that the parties agreed that for the purposes of holiday entitlements Mr Paul Hayton's employment would be transferred from SML to PBMS with his previous employment with SML being recognised as amounting to continuous employment with PBMS for holiday pay purposes.

[26] That can be contrasted with an amendment to Mr Paul Hayton's employment agreement which suggests that the bereavement leave entitlement, for length of service purposes, was to be treated as continuous. While it would have been open to the parties to have addressed the annual holiday entitlements in the same way, they did not do so.

[27] There was no satisfactory evidence before the Authority which would meet the required evidential standard of proof to establish that the parties had ever turned their mind to and then had mutually agreed to treat Mr Paul Hayton's employment with PBMS as having been continuous. The available evidence tends to suggest the contrary.

[28] I do not accept Mr Paul Hayton's claim that there was an implied reference to continuous service because that proposition simply does not meet the evidential standard required for the Authority to imply undocumented alleged terms into the employment agreement.

[29] Nor do I accept Mr Paul Hayton's claim that the parties had agreed to continuous service for holiday entitlements but had inadvertently left that out of his PBMS employment agreement. The evidence did not support that claim.

[30] Mr Paul Hayton's employment agreement made it clear that his annual holiday entitlement was in accordance with s.16 of the Holidays Act 2003 (HA03).

[31] SML was placed into liquidation on 15 December 2015. From that point it was the liquidator's duty to take possession of, protect, to realise and distribute the assets, or the proceeds of the realisation of the assets of SML to its creditors¹.

[32] Schedule 7 of the Companies Act 1993 prevents employees who are relatives of directors of a liquidated company (in this case Mr Paul Hayton was SML's Directors brother) from claiming unpaid wages or holiday pay.

[33] The uncontested evidence is that by the time PBMS purchased SML it was in serious financial trouble to the extent that PBMS had to advance money to SML to keep it going.

[34] There was no prospect at that time of SML having the funds itself to meet its liability to pay Mr Paul Hayton his accrued holiday pay. At the time that SML was put into liquidation (shortly after PBMS purchased the business) SML owed approximately \$360,000.

[35] There are two relevant contractual documents to consider; the Sale and Purchase Agreement and Paul Hayton's employment agreement. These are obviously two separate legal contracts involving different legal parties which create discrete contractual obligations.

[36] The Sale and Purchase Agreement is a contract entered by PBMS (then Thexton) and SML (then Possum Bourne Motorsport Limited). Paul Hayton was not a party to this contract.

[37] The material employment agreement is between Paul Hayton and PBMS. SML is not a party to that because the employment relationship between SML and Paul Hayton had ended and Paul Hayton had accepted employment with a new employer – PBMS.

¹ Section 253 Companies Act.

[38] Under the Sale and Purchase Agreement, SML sold and PBMS purchased the assets of *Possum Bourne Motorsport*.

[39] Clause 4 of the Sale and Purchase Agreement involved an agreement that the amount PBMS was to pay for the business was reduced by the amount of SML's holiday pay liability, which was just under \$41,000.

[40] The effect of this arrangement was to use money due to SML for the purchase of its assets to pay off liability it had to a group of creditors, namely its employees, which included Mr Paul Hayton.

[41] The liquidation which occurred on 15 December 2015 meant that the effect of clause 4 in the Sale and Purchase Agreement was to prefer Paul Hayton and his brother Bryan Hayton as creditors over other creditors.

[42] I accept Mr Dench's submission that if PBMS breached its obligations under clause 4 by failing to pay SML's holiday pay liability then SML would have had a claim against PBMS for breach of contract with one potential remedy being specific performance of that contractual obligation.

[43] SML was the party who had the right to decide whether or not and if so then and how to enforce PBMS's obligations under the Sale and Purchase Agreement. Mr Paul Hayton had no personal rights in that regard.

[44] I agree with Mr Dench's submission that it is important not to conflate performance by PBMS of the contractual obligation it owed SML under the Sale and Purchase Agreement with an argument that it owed the same obligation independently to Mr Paul Hayton under his employment agreement - because significantly the employment agreement does not contain any such obligation.

[45] PBMS acknowledges that it had indicated to Mr Paul Hayton that it would pay him the holiday pay that SML owed him. However I find that indication did not create an enforceable contractual or separate independent legal obligation to do so.

[46] The complicating factor here was that when SML went into liquidation on 15 December 2015, it was up to the liquidator to decide whether and how to enforce SML's rights under the Sale and Purchase Agreement and in particular whether to require PBMS to perform its obligation to pay Mr Paul Hayton under clause 4.

[47] I find as a matter of fact that there is no contractual obligation directly between PBMS and Mr Paul Hayton that PBMS would pay Mr Paul Hayton the holiday pay that was due to him from his employment with SML. Such a term would be inconsistent with the expressed terms of the agreement which restrict the annual holiday entitlements to those minimum entitlements provided by HA03.

[48] It is clear the parties turn their minds to changes that needed to be made to the original proposed employment agreement which was given to Mr Paul Hayton before he accepted employment with PBMS. While some changes were negotiated and made to the proposed employment agreement, the annual holiday entitlement was not changed from providing the minimum annual leave entitlements under HA03.

[49] I consider that Mr Paul Hayton's employment agreement is clear and unambiguous on the face of it. Mr Paul Hayton's claim is effectively inviting the Authority to effectively draft new terms of his employment agreement, which the Authority is expressly prohibited from doing.

[50] In terms of PBMS's obligation to pay Mr Paul Hayton holiday pay for the time it employed him, I accept PBMS's evidence that Mr Paul Hayton took paid annual holidays that slightly exceeded his statutory annual holiday entitlement at the point when he was suspended without pay on 30 May 2016.

[51] Mr Paul Hayton would be entitled to another eight percent of his earnings from the date he was suspended until the date his employment ended with a slight reduction being made for the holidays taken in advance of his entitlement to 30 May 2016. But eight percent of "*no pay*" is nil.

[52] Mr Paul Hayton has other proceedings before the Employment Relations Authority challenging his suspension and the unpaid nature of it, so whether any obligations to pay wages or associated annual holiday entitlements during the unpaid suspension period arise is yet to be determined in respect of subsequent proceedings.

[53] However for the purposes of Mr Paul Hayton's current claim that PBMS is liable to pay him directly for the unpaid annual holiday he accrued during his employment with SML, I conclude that the claim does not succeed.

[54] I am not satisfied that there is any legal, statutory or contractual obligation on PBMS to pay Mr Paul Hayton that amount directly.

[55] I also consider that as a result of the liquidator becoming involved in this matter PBMS has met its holiday pay obligations under clause 4 of the Sale and Purchase Agreement with SML by paying those funds (at the liquidator's request) to SML.

[56] It is up to SML's liquidators as to how it disperses those funds to creditors. That is not a matter that PBMS had influence over or was involved in.

[57] PBMS as the successful party is entitled to a contribution towards its costs. However I consider that costs should be dealt with in a holistic manner once all of the substantive matters between these parties have been resolved.

[58] Accordingly, the resolution of costs in this matter is placed on hold until further notice.

Rachel Larmer
Member of the Employment Relations Authority