

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 124  
3128914

BETWEEN                      TREVOR THOMSON  
   Applicant  
  
AND                              HISPEC HOMES NZ LIMITED  
   First Respondent  
  
AND                              BEAU MURPHY  
   Second Respondent

Member of Authority:        Helen Doyle  
  
Representatives:              Paul Mathews, advocate for the Applicant  
   John Fernando, advocate for the Respondents  
  
Investigation Meeting:        29 March 2021 at Christchurch  
  
Submissions Received:        11 March 2021 from the Applicant  
   18 March 2021 from the Respondent  
  
Date of Determination:        30 March 2021

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**DETERMINATION OF THE AUTHORITY**

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- A        Compensation and costs in the Record of Settlement dated 21 October 2021 between Trevor Thomson and Hispec Home NZ Limited are not excluded debts as defined in clause 4 of schedule 13 of the Companies Act 1993.**
- B        Holiday pay in the Record of Settlement is an excluded debt as defined in clause 4 of the Companies Act 1993.**
- C        No awards have been made for penalty, interest, compliance or costs in the circumstances.**

## **Employment Relationship Problem**

[1] Trevor Thomson applies for an order that Hispec Homes NZ Limited (Hispec Homes) comply with a record of settlement under s 149 of the Employment Relations Act 2000 (the Act). He also seeks a penalty, interest and costs. The sole director of Hispec Homes, Beau Murphy was joined to the proceedings. An order is sought under s 137(2) of the Act that he do everything possible to make the company pay the outstanding amount.

[2] In a case management conference held on 10 March 2021 the sole shareholder for the company, John Fernando, advised the Authority that Hispec Homes are now in COVID-19 business debt hibernation and have a one month protection that ends on 31 March 2021.

[3] The Authority asked for the submissions on whether or not the amounts owing under the record of settlement are excluded from debts under the scheme. Proceedings may not be continued against the entity except with its consent or the permission of the High Court unless the debt is an excluded debt.<sup>1</sup>

[4] The Authority held an investigation meeting on 29 March 2021.

### **The issues**

[5] The Authority needs to determine the following issues in this case:

- (a) Is the debt owed to Mr Thomson an “excluded debt” as defined in clause 4 of Schedule 13 of the Companies Act 1993?
- (b) If the debt is an excluded debt does the Authority have jurisdiction to make award orders for compliance, penalties, interest and costs and if so should it make orders.

### **Is the debt owed to Mr Thomson in part or in whole an “excluded debt” as defined in clause 4 of Schedule 13 of the Companies Act 1993**

#### *The record of settlement*

[6] On 21 October 2020 Mr Thomson and Hispec Homes entered into a record of settlement. The record of settlement was certified by a mediator employed by the Chief Executive of the Ministry of Business Innovation and Employment on the same day.

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<sup>1</sup> Clause 40 of Schedule 13 of the Companies Act 1993

[7] Mr Thomson's employment is recorded in the Record of Settlement as having ended on 8 January 2020. It records that he has been paid all wages until that date.

[8] There was agreement by Hispec Homes to pay a compensatory payment on "an ex gratia and denial of liability basis" to Mr Thomson and agreement to pay a contribution towards Mr Mathews legal fees plus GST. There was also agreement to pay \$697.78 (less PAYE) for holiday pay.

*The business debt hibernation scheme*

[9] The business debt hibernation scheme is governed by the provisions in Schedule 13 of the Companies Act 1993 and regulations.

[10] The purposes of the scheme are set out in clause 1 subclauses (1) and (2).

[11] Subclause 1 provides one purpose is to provide a business that is facing significant liquidity problems or one that may face those in the future because of the outbreak of COVID-19 to operate in a way that maximises the chances of the business continuing in existence. If that is not possible then another purpose is that it results in a better return for the entity's creditors and members than would be the case with immediate liquidation of the entity.

[12] Subclause 2 provides another purpose is to give an entity some temporary protections relating to its debts in order to give it an opportunity to develop with creditors a longer term approach to its liquidity problems.

*Proceedings must not be continued*

[13] Clause 40 of schedule 13 protects entities from proceedings in the High Court or any other court, a tribunal or an arbitral tribunal.

[14] It provides as follows:

**40 Proceedings must not be begun or continued**

- (1) During the protection period for an entity in BDH, a proceeding against the entity in connection with a debt or in relation to any of its property must not be begun or continued, except—
- (a) with the entity's written consent; or
  - (b) with the permission of the High Court and in accordance with the terms that the High Court imposes; or
  - (c) in accordance with the terms of an arrangement that has been approved under clause 23.

- (2) This clause does not apply to a proceeding against the entity in connection with—
  - (a) a debt that is owed by the entity to a general security holder; or
  - (b) an excluded debt.
- (3) In this clause, proceeding means a proceeding in the High Court or any other court, a tribunal, or an arbitral tribunal.

[15] Mr Mathews says in his submissions that the debt Mr Thomson is owed arising from the non-compliance with the Record of Settlement is an excluded debt.

[16] That is not the position of Hispec Homes. It submits that excluded debts relate to payments such as wages or holiday pay.

[17] An excluded debt is defined in clause 4 of Schedule 13 for current purposes as below:

- (a) means
  - (i) a debt that was incurred after the entity enters into BDH; or
  - (ii) any salary, wages, or other amounts owed by the entity to an employee in connection with the employment relationship; or
  - ...
- (b) does not include—
  - (i) interest or penalties (regardless of when they fall due for payment) if the interest or penalties relate to a debt that was incurred before the entity enters into BDH; or
  - (ii) any other amount that falls due for payment after the entity enters to BDH if the obligation to pay the amount is imposed under a contract or deed that was entered into by the entity before the entity entered to BDH.

[18] The meaning of an enactment must be ascertained from its text and in the light of its purpose.<sup>2</sup>

[19] Mr Mathews submits that the phrase “or other amounts owed by the entity to an employee in connection with the employment relationship” is very broad and not confined to payments such as wages or holiday pay that are contractual or statutory entitlements. He

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<sup>2</sup> Section 5(j) of the Acts Interpretation Act 1999.

submits more precise words would have been used if that was the intention. He compares the language with that in the Employment Relations Act 2000 and the use of words such as “minimum entitlements” or “employment standards” which is specific.

[20] In respect of the submission by Mr Mathews about the language in the Employment Relations Act 2000 the Authority notes that schedule 13 is part of the Companies Act 1993. It is an Act concerned with companies rather than employment relationships.

[21] I have considered the text in clause 4. There are specific words used to refer to wages and salary. Those words are followed by the much broader words “or other amounts owed.”

[22] There is a rule in interpreting text within the context of other words known as ejusdem generis or limited class rule. This is where specific words are followed by a more general statement. The rule is that if the specific words are of the same class then the general words following are limited to that class. That is the thrust of the submission made on behalf of Hispec Homes.

[23] Wages and salary fall into the class of payments to employees that arise from the employment agreement or from statutory entitlements such as under the Minimum Wage Act 1983 or the Holidays Act 2003.

[24] Application of the limited class rule would result in the words “or other amounts owed by the entity to an employee in connection with the employment relationship” being confined to the specific nature of this class of payment. This would include contractual and statutory entitlements in addition to wages and salary such as allowances and holiday pay.

[25] It is necessary to consider whether the application of that rule would be consistent with the clear purposes as set out earlier in schedule 13.

[26] Schedule 13 provides an entity facing difficulties because of COVID-19 an opportunity to maximise its chance of continuing in existence or result in a better return for creditors rather than an immediate liquidation. It was also designed to provide some temporary protections from its debts to develop with the creditors a longer-term approach to its liquidity problem.

[27] The purposes of schedule 13 sit less easily with excluded employee debt in clause 4 extending to payments of compensation and a payment of a contribution toward advocates

costs under a Record of Settlement. Mr Thomson would not for example if the company went into liquidation receive preferential payments for compensatory payments under s 123(1)(c).<sup>3</sup> The application of the limited class rule is not inconsistent with the purposes of schedule 13 of the Companies Act 1993.

[28] In context, and in light of its purpose clause 4 does not include the compensatory amount under s 123(1)(c) and the advocate's costs in the Record of Settlement as excluded debts. These two debts total \$13,000 with an additional GST component on the \$4000 costs.

[29] The holiday pay in clause 2(c) in the Record of Settlement is an excluded debt in the sum of \$697.78.

### **Penalty and interest**

[30] An excluded debt specifically does not include interest and/or penalties. It is very unfortunate that Mr Thomson has been left in this position and I accept that there have been financial consequences for him as a result. The Authority's focus must be on the current circumstances that Hispec Homes has given notice to the Registrar that it is entering into business debt hibernation. For completeness even if I thought it was permissible to do so I would not have exercised my discretion to award a penalty in the circumstances.

### **Compliance order**

[31] The ability to enforce a debt for the hibernation period is quite limited. At the current time there is an adjourned application in the High Court for liquidation awaiting a view from the creditors on the debt hibernation scheme as at 31 March 2021. The timeframe is very tight. The amount owing to other creditors is sizable however Mr Fernando when he gave his evidence is hopeful that creditors will be paid in full over time if the creditors give approval to extend the business debt hibernation scheme by a further six months.

[32] The excluded debt that I have found is for holiday pay in the sum of \$697.78 gross.

[33] An order for compliance is discretionary. I am not prepared in the current circumstances to make an order for compliance. Any compliance is dependent on other matters and other steps. The Authority is not prepared to make an order which may not be

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<sup>3</sup> Schedule 7 (2)(d) of the Companies Act 1993.

able to be complied with and could present other difficulties. This extends to any order with respect to Mr Murphy.

### **Costs**

[34] I do not make an award of costs in the circumstances. The ability to award costs is unclear and there has only been limited success. I also weigh that Hispec Homes may have agreed that holiday pay in the Record of Settlement was an excluded debt.

**Helen Doyle**  
**Member of the Employment Relations Authority**