

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 92  
3125534

|         |                                                                       |
|---------|-----------------------------------------------------------------------|
| BETWEEN | REEGAN PAORA LAWTON<br>Applicant                                      |
| AND     | STEEL PENCIL HOLDINGS<br>LIMITED (IN LIQUIDATION)<br>First Respondent |
| AND     | ORMOND BRIAN STOCK<br>Second Respondent                               |

Member of Authority: Michael Loftus

Representatives: Paul McBride, Counsel for Applicant  
No appearance for both first Respondent  
Russell Buchanan, Counsel for Second Respondent

Investigation Meeting: On the papers and by telephone conference on 30  
November 2020, 9 and 10 December 2020, 12 and 22  
February 2021 and 3 March 2021

Determination: 8 March 2021

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**DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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[1] The applicant, Reegan Lawton, claims the first respondent, Steel Pencil Holdings Limited (Steel Pencil), failed to pay wages, holiday pay and expenses. The sums are considerable and he also seeks penalties and damages.

[2] Mr Lawton, fearing Steel Pencil would use various nefarious means to avoid its alleged liabilities, included Mr Stock as a respondent on the grounds he was a

*person involved*<sup>1</sup> who should be held liable should Steel Pencil fail to pay any sums found to be owing.<sup>2</sup>

[3] Steel Pencil denies it owes any money and argues Mr Lawton was employed by another company, Steel Pencil Philippines Limited, though the evidence alludes to the possibility that arrangement was a sham designed to circumvent Philippine government immigration requirements. There are also a number of convoluted issues emanating from the fact Mr Lawton was a director up until 22 April 2020 and a significant shareholder until 28 May 2020.

[4] Mr Stock, who was by the time of lodging the pre-emptive director and shareholder, also denied liability. He largely relied on the grounds cited by Steel Pencil.

[5] The application, as originally lodged, was accompanied by an application for removal to the Employment Court. One of the grounds was a desire to have the matter heard with alacrity given Mr Lawton's belief it was inevitable Steel Pencil would try to delay while moving assets and funds beyond his potential reach. Given what I have already said, it should be apparent this was also a factor in his citing of Mr Stock as a respondent and, as events transpire, Mr Lawton is now proffering evidence to support a claim that Steel Pencil is still operating via a "phoenix" company post liquidation.

[6] The removal application was withdrawn during the telephone conference of 10 December 2020 due to the Authority's ability to schedule a three day investigation meeting commencing 8 March 2021 as this was undoubtedly earlier than the Court was likely to address the claims. The same discussion also led to the parties accepting the action against Mr Stock was a live one and leave was granted for it to proceed.<sup>3</sup>

[7] An exchange of evidence then proceeded though while that was occurring there was an intimation Steel Pencil was likely to liquidate. Receipt of that advice led to a discussion between myself and the parties representatives about whether or not that might preclude the action against Mr Stock. The underlying rationale was that

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<sup>1</sup> Section 142W of the Employment Relations Act 2000

<sup>2</sup> Sections 142Y of the Employment Relations Act 2000, 77A of the Holidays Act 2003 and 11A of the Wages Protection Act 1983

<sup>3</sup> Section 142Y(2)(a) of the Employment Relations Act 2000

which had led me to previously refer a question of law to the Employment Court in 2017.<sup>4</sup>

[8] Using the words of counsel in the 2017 removal application, the argument is the Authority lacks jurisdiction to hear applications under ss142W, 142X and 142Y of the Employment Relations Act 2000 (the Act) post liquidation and in the absence of an initial finding against the employing company ... *as the claim against him, as a director of the First Respondent company, is parasitic on there being established a breach by the First Respondent, and there is none.*<sup>5</sup>

[9] Essentially the argument is a *person involved* is only liable under s142Y of the Act for payment of wages or other money owing once the employer (in this case Steel Pencil) is in default and has failed to pay. It is argued there can be no failure/default until after a finding, and order to pay, has been made against the employer. If liquidation means the claim against the employer cannot proceed it follows there can be no finding money is owed and no order for the payment thereof. This, in turn, means there can be no default for which liability can be transferred to the *person involved*.

[10] As I observed in *A Labour Inspector v Ankurs* this line of defence appears, at first glance and given the statutory provisions, to be distinctly arguable. However, if successful, it could also have the effect of seriously undermining the statute and its intent by removing the ability to enforce minimum standards in numerous instances. It was my view such an outcome raised serious issues of law and public policy (read public welfare<sup>6</sup>) which could have widespread ramifications. I concluded this was the type of issue which the Employment Court should consider in the first instance and ordered removal under both ss 178(2)(a) and 178(2)(d) of the Act.

[11] The Employment Court then accepted the 2017 removal but, unfortunately, the question was never answered as the originating action was withdrawn.

[12] While a potential liquidation and the possibility I would consider removal of the above question on my own volition was discussed with the representatives this was in the abstract until 26 February 2021. It was on that day Steel Pencil was placed

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<sup>4</sup> *A Labour Inspector v Ankur's Nice & Spice Limited & Ors* [2017] NZERA Wellington 129

<sup>5</sup> *ibid* at [9]

<sup>6</sup> *Vice-Chancellor of Lincoln University v Stewart (No 2)* [2008] ERNZ 249 at [35]

in liquidation and on 2 March the liquidator advised he was exercising his rights and requiring a stay of proceedings against the company.<sup>7</sup>

[13] This also meant my earlier concerns about whether or not the argument the Authority lacked jurisdiction to hear claims against Mr Stock, as a *person involved*, in the first instance were again live. During the teleconference of 3 March 2021 I again raised the possibility of removal at the Authority's volition with the parties.<sup>8</sup> Both advised they had no objection.

[14] Ancillary to that we discussed whether the removal should be brought to the attention of the Ministry of Business, Innovation and Employment as it might be interested in acting as an intervener given its responsibility for the legislation in question. The parties agreed this was appropriate.

[15] The final issue was whether or not removal should apply to just the question of law or Mr Lawton's action in its entirety. Mr McBride favoured complete removal, while Mr Buchanan lacked instruction.

[16] Having considered the issues I conclude complete removal to the Court is appropriate in this instance. Primarily I do so as both parties raised various issue of substance which they considered the Court should hear in order to answer the question of law. It is well established that once the Court is seized of proceedings between the same parties which involve the same, similar or related issues it is prudent for the Court to deal with all matters – indeed, it is a ground for removal.<sup>9</sup> The rationale is obvious – the removal of potential confusion and the avoidance of duplicity in effort and cost.

[17] Whilst it is arguable the Court is not seized of the substantive claims but a narrow question of law, the assertion by both parties that it will have to consider substantive issues to decide the question would suggest the above rationale is valid in this instance.

[18] Secondly I note the evidence I have seen to date, along with the comments of counsel, suggest the possibility that further ancillary issues of law might arise concerning immigration and, more importantly, issues of company structure and law.

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<sup>7</sup> Section 248(1)(i) of the Companies Act 1993

<sup>8</sup> Section 178(1) of the Employment Relations Act 2000

## **Conclusion and Orders**

[19] As a result of the issues discussed above I remove to the Employment Court, as a preliminary question of law, the question of whether or not Mr Stock can be liable for any monies that might potentially be owing to Mr Lawton in the absence of the Authority making a finding against the party he claims to have been employed by (namely, Steel Pencil).

[20] I also remove to the Employment Court, again for reasons canvassed above, consideration of Mr Lawton's substantive claims should the Court consider the answer to [19] above is *yes* and the proceedings may continue.

[21] Finally I order this determination be brought to the attention of the Ministry of Business, Innovation and Employment so that it may take any action it deems appropriate.

[22] Costs are reserved.

Michael Loftus  
Member of the Employment Relations Authority

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<sup>9</sup> Section 178(2)(c) of the Employment Relations Act 2000