IN THE COURT OF APPEAL OF NEW ZEALAND

CA701/2015
[2017] NZCA 169

	BETWEEN	BARRY EDWARD BRILL Appellant
	AND	LABOUR INSPECTOR (MELISSA ANN MACRURY) Respondent

Hearing:	16 February 2017
Court:	Randerson, French and Cooper JJ
Counsel:	Appellant in person S V McKechnie and R D Garden for Respondent
Judgment:	9 May 2017 at 12.00 pm

JUDGMENT OF THE COURT

A **We answer the two questions of law submitted for determination by this Court:**

(i) **"What threshold must the Labour Inspector meet in order to obtain authorisation under s 234(2) of the Employment Relations Act 2000?"**

The Labour Inspector must satisfy the Employment Relations Authority that there is a tenable cause of action.

(ii) **"What does the Labour Inspector have to prove to establish that any officer or director or agent of the company has "directed or authorised the default in payment" within the meaning of s 234(3)?"**

The Labour Inspector must prove the officer, director or agent knew the payment was in default of the company's obligations under the Minimum Wage Act 1983 or the Holidays Act 2001. The relevant knowledge may be proved by direct evidence or by inference.

B The appeal is allowed.

C The respondent is ordered to pay the appellant costs for a standard appeal on a band A basis together with usual disbursements.

D Costs in the Employment Court are to be determined by that Court in accordance with this judgment.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] Mr Brill is the sole director of a company.[1] The Labour Inspector wants to make him personally liable pursuant to s 234 of the Employment Relations Act 2000 (the Act) for the company's underpayment of an employee's minimum wage and holiday pay entitlements.

[2] The key issue for determination is whether the Labour Inspector must prove Mr Brill knew the company was under-paying the employee or whether it is sufficient he authorised the payments in question.

Background

The proceedings in the Employment Relations Authority

[3] The company of which Mr Brill is the sole director failed to pay its employee correctly in accordance with its obligations under the Minimum Wages Act 1983 and

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[1] The sole shareholder is another company in which Mr Brill is a majority shareholder and the sole director.

the Holidays Act 2003. That resulted in the Labour Inspector issuing proceedings against the company for recovery of the arrears in the Employment Relations Authority (the Authority).[2] The Labour Inspector also applied to the Authority for authorisation to bring an action for recovery against Mr Brill in his personal capacity under s 234 of the Act.

[4] Section 234 provides that in certain specified circumstances an officer, director or an agent of a company may be held personally liable for minimum wages and holiday pay owing by the company to its employee. The section relevantly states:

> **234 Circumstances in which officers, directors, or agents of company liable for minimum wages and holiday pay**
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> (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—
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> (a) the company is in receivership or liquidation; or
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> (b) there are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full, —
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> 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.
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> …

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2 *Labour Inspector v Cypress Villas Ltd* [2014] NZERA Auckland 124 [*Authority Decision*].

[5] As will be apparent, the application of s 234 involves a two stage process. First the Labour Inspector must obtain authorisation from the Authority to bring the proceeding against the officer, director or agent. Secondly, having obtained authorisation, the Labour Inspector must prove the officer, director or agent "directed or authorised the default in payment".

[6] In this case, the Authority ordered the company to pay the arrears totalling $38,146.89 excluding interest.[3] However it declined to authorise an action against Mr Brill on the ground there was no evidence the underpayment was the result of a wilful default. That is to say, there was no evidence Mr Brill ever intended to embark on a course of action designed to deprive the employee of her legal entitlements.[4] Mr Brill claimed to have relied on the company's accountants to pay the employee correctly.

The Employment Court decision

[7] The Labour Inspector then appealed the ruling regarding Mr Brill to a full court of the Employment Court. Although the appeal was de novo, the Court decided to deal first with preliminary questions of law before hearing any evidence. The preliminary questions focused on the sequencing of s 234's application and what is required to be proved by the Labour Inspector at each of the two stages.[5]

[8] As regards the first stage, all the Judges agreed that in order to obtain the necessary authorisation, the Labour Inspector must establish on the balance of probabilities that the company is unlikely to be able to pay the full amount because either it is in receivership or liquidation, or there are reasonable grounds to believe it does not have sufficient assets.[6]

[9] However, the Judges disagreed on what standard the Inspector was required to meet in satisfying the Authority the proposed respondent was an officer, director or agent who directed or authorised the default in payment. The majority (Chief Judge Colgan and Judge Perkins) held the application should be of a standard

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3 The company has not challenged the judgment that the Authority entered against it.
4 *Authority Decision*, above n 2, at [66]–[69].
5 *Labour Inspector (MacRury) v Cypress Villas Ltd* [2015] NZEmpC 157, (2015) 13 NZELR 261.
6 At [73] and [118].

that would survive a strike-out application.[7] The minority (Judge Inglis) held the Labour Inspector must satisfy the Authority there is an "arguable case" against the named individual.[8]

[10] At the second stage, all Judges agreed that a positive action to direct or authorise the payment must be taken before a person could be held liable under s 234(3).[9] Mere passivity was not enough. However, the Judges were divided on the issue of whether liability under s 234 depends on knowledge of non-compliance. Is the officer, director or agent only liable if they direct or authorise the company to make payments knowing those payments are a breach of the company's legal obligations? Or is it sufficient that the individual directed or authorised the payment found to be non-compliant?

[11] The minority held that actual knowledge the payment was in default was required.[10] The majority held it was not necessary to prove knowledge and accordingly ruled in favour of the Labour Inspector.[11]

Questions for determination by this Court

[12] Dissatisfied with that outcome, Mr Brill sought and obtained leave to appeal to this Court. Leave was given on the following question:[12]

> In terms of s 234(2) of the Employment Relations Act 2000, what must the Labour Inspector prove to establish that any officer, director, or agent of the company has directed or authorised the default in payment of the minimum wages or holiday pay or both?

[13] It was common ground that the question as framed required amendment because it did not clearly distinguish between the two sufficiency of proof issues arising from the Employment Court decision.

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7 At [79].
8 At [133].
9 At [96] and [118].
10 At [136].
11 At [94].
12 *Brill v Labour Inspector* [2016] NZCA 262.

[14] We have therefore amended the questions for determination by us as follows:

(i) What threshold must the Labour Inspector meet in order to obtain authorisation under s 234(2) of the Employment Relations Act 2000?

(ii) What does the Labour Inspector have to prove to establish that any officer, director or agent of the company has "directed or authorised the default in payment" within the meaning of s 234(3) of the Employment Relations Act 2000?

[15] Finally for completeness in this introductory section we record that s 234 was repealed by the Employment Relations Amendment Act 2016 which came into force on 1 April 2016. The transitional provisions, however, mean that s 234 continues to apply to this case as well as other proceedings concerning conduct that occurred prior to 1 April 2016.[13]

[16] There are major differences between s 234 and the more wide ranging regime created by the 2016 amendment.[14] The differences include the creation of a new defence which arguably would not be necessary if knowledge of default were a prerequisite of liability. Our task is, however, to interpret s 234 and it is well established that later enactments should generally not be used to interpret earlier legislation.[15] The parties to this appeal did not seek to attribute any significant weight to the changes.

Question 1

What threshold must the Labour Inspector meet in order to obtain authorisation under s 234(2) of the Employment Relations Act 2000?

[17] The application for authorisation is in substance an application for joinder of another defendant to an extant proceeding, namely the proceeding against the company. The principles relating to joinder and strike-out are different and accordingly we do not agree with the approach favoured by the majority of the

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13 Employment Relations Act 2000, sch 1AA cl 3(7).
14 Sections 142W–142ZD.
15 *Waikanae Christian Holiday Park Inc v New Zealand Historic Places Trust Maori Heritage Council* [2015] NZCA 23, [2015] NZAR 302 at [75].

Employment Court which equates the two.[16] It follows in our view that once the Labour Inspector has established on the balance of probabilities that the company will be unable to pay the full amount of the monies owing, all that need be shown is that there is "a tenable cause of action" against the officer, director or agent.[17]

Question 2

What must the Labour Inspector prove in order to establish that any officer, director or agent of the company has "directed or authorised the default in payment" within the meaning of s 234(3) of the Employment Relations Act 2000?

[18] The question requires us to determine whether it must be proved the officer, director or agent knew the company was paying below the statutory entitlements.

[19] In support of the view taken by the majority of the Employment Court, the Labour Inspector submitted that in its natural and ordinary meaning, the phrase "authorise or direct" does not require knowledge of the default itself. Counsel emphasised the absence of the word "knowingly" and the general principle that ignorance of the law is no excuse.

[20] We do not accept those submissions. We prefer the reasoning of Judge Inglis. Section 234 expressly identifies what it is that must be authorised or directed. It is the default itself. It would be an unusual and strained use of language to find that someone could positively direct or authorise a default (failure to fulfil an obligation) without knowing they were doing so.

[21] We are also fortified in that conclusion by reference to the underlying purpose and policy of s 234. As Judge Inglis pointed out, it is clear from the Parliamentary materials that s 234 was intended to apply only as a last resort where there was evidence of personal and deliberate avoidance of a company's obligations. Significantly, the report of the relevant Select Committee expressly states that the provision was "not designed to penalise an honest employer but to effectively deal with any deliberate attempt to avoid responsibility".[18]

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16 See above at [9].
17 See *Bridgeway Projects Ltd v Webb* HC Auckland CIV-2003-404-1965, 7 July 2003 at [10].
18 Employment Relations Bill and Related Petitions 2000 (8-2) (select committee report) at 42.

[22] A further consideration is that if Parliament had intended to impose a form of strict liability, it is most unlikely it would have defined the potential class of defendants in such broad terms as "any officer, director or agent". Those words encompass a wide range of actors involved in the making of payments to employees including payroll staff, human resources managers and accounting firms. As Mr Brill submitted, the practical implications would be far reaching if persons fitting that description could all be personally liable under s 234 despite having no knowledge of any breach of statute.

[23] We accept that the phrase "direct or authorise" requires the taking of some positive action and that mere passivity is not enough. However, in our view, that does not restrict the scope of those potentially liable in any meaningful or significant way. Every payment made by a company will have been directed or authorised by some human agent. The point made by Mr Brill still has force.

[24] Faced with all these difficulties, counsel for the Labour Inspector submitted as a fall-back position that if knowledge of default was required, it should embrace constructive knowledge as well as actual knowledge. It was submitted that otherwise the section would be robbed of any meaningful effect. The Labour Inspector would hardly ever be able to bring a case under s 234 because it would only be in rare cases that an individual would admit to deliberate underpayment.

[25] We disagree. In our view, there is no justification for importing a concept of constructive knowledge. We consider it an unnecessary refinement and at odds with the positive action contemplated by the words "authorise and direct".

[26] The concerns also overlook that actual knowledge can be and usually is proved by inference from conduct.[19] Thus it would still be open in the present case for example for the Labour Inspector to contend that the terms of the employment contract relating to hours of work and rates of pay were such that Mr Brill must have known the employee would be under-paid. Whether that inference can be drawn on the facts is for another day.

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[19] See *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678 at [66]; and *R v Curtis* [2009] NZCA 521 at [30].

Outcome

Answers to questions

[27] We answer the questions submitted to this Court for determination as follows:

(i) "What threshold must the Labour Inspector meet in order to obtain authorisation under s 234(2) of the Employment Relations Act 2000?"

The Labour Inspector must satisfy the Employment Relations Authority that there is a tenable cause of action.

(ii) "What does the Labour Inspector have to prove to establish that any officer or director or agent of the company has "directed or authorised the default in payment" within the meaning of s 234(3)?"

The Labour Inspector must prove the officer, director or agent knew the payment was in default of the company's obligations under the Minimum Wages Act 1983 or the Holidays Act 2003. The relevant knowledge may be proved by direct evidence or by inference.

[28] The appeal is allowed.

Costs

[29] Mr Brill is a barrister and solicitor. Accordingly although he is representing himself, he is entitled to costs as the successful party. There is no reason why costs should not follow the event and accordingly we order the respondent to pay the appellant costs for a standard appeal on a band A basis together with usual disbursements.

[30] As regards costs in the Employment Court, we were told that no costs award has yet been made. We accordingly direct that costs in the Employment Court are to be determined by that Court in accordance with this judgment.

Solicitors:
Crown Law Office, Wellington for Respondent