IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2014] NZEmpC 213
CRC 2/14

IN THE MATTER OF	the referral of a question of law from the Employment Relations Authority
BETWEEN	DOUGLAS KARL HIXON (LABOUR INSPECTOR) First Plaintiff
AND	MARCIA JOY COLLINS Second Plaintiff
AND	JUSTIN CAMPBELL First Defendant
AND	DEAN EGGERS Second Defendant
AND	PAULA CAMPBELL Third Defendant

Hearing:	28 April and 11 August 2014 (Heard at Wellington)
Court:	Chief Judge GL Colgan Judge Christina Inglis Judge AD Ford
Appearances:	M Urlich and S Carr, counsel for plaintiffs No appearance for defendants M Palmer QC, counsel assisting the Court
Judgment:	17 November 2014

JUDGMENT OF THE FULL COURT

A A labour inspector is not empowered to recover in proceedings in his or her name, deductions from wages made in breach of the Wages Protection Act 1983.

B The defendants were not the employer or employers of the second plaintiff and other employees in similar circumstances pursuant to the definition of "employer" in s 2 of the Wages Protection Act 1983.

C The plaintiffs' claims are dismissed.

D There will be no orders as to costs.

REASONS

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Introduction

[1] There are now two questions for decision in this case. In logical order they are:

- whether a labour inspector is entitled in law to bring proceedings for the recovery of monies deducted from employees' remuneration in breach of the Wages Protection Act 1983; and

- whether the definition of "employer" in s 2 of the Wages Protection Act 1983 entitles a labour inspector (and/or now an employee) to bring such proceedings for recovery of deductions against persons other than the primary employer of the employee.

[2] The proceeding was removed to this Court by the Employment Relations Authority[1] in view of the uncertainty about, and importance of, the second question above. The first question arose more recently, the first plaintiff having responsibly brought to the Court's attention the doubt about his entitlement to bring proceedings for recovery of monies deducted from the remuneration of multiple employees of a company.

[3] Marcia Collins was joined as a plaintiff in the proceeding on 19 April 2014. An amended statement of claim was filed on the first morning of the hearing,[2] bringing a separate claim by Ms Collins in respect of deductions allegedly made unlawfully from her wages. Those amended proceedings have now been served on the defendants but they have taken no formal step to defend them. That accounts for the delay in finalising the hearing of the case.

[4] For the purpose of this judgment we assumed that the Labour Inspector would prove his allegations in the amended statement of claim and on the affidavit evidence filed, although this temporary assumption would not have precluded a later challenge to them by the defendants if the proceedings had survived. All references to events in the following narrative must be read accordingly.

Relevant facts

[5] AHV Contracting Limited (AHV) employed a number of casual employees to prune grapevines at Black Birch Vineyard in the Awatere Valley in the winter months of 2012. The Labour Inspector, Mr Hixon, received a number of complaints from the employees including that AHV made unlawful deductions from the employees' wages for tools and travel. In August 2012 Mr Hixon began an investigation into these complaints and in late September 2012 met with the principal supervisor at the vineyard, Morris Tiueti, who provided him with time records of the employees.

[6] In response to Mr Hixon's request the third defendant, Paula Campbell, emailed and couriered employee records of a number of AHV's employees to him.

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[1] *Hixon (Labour Inspector) v Campbell* [2014] NZERA Christchurch 4.
[2] 28 April 2014.

These included copies of job application forms, employment agreements, and tax forms. Mrs Campbell also provided Mr Hixon with a summary of wages and deductions in respect of individual employees. Whilst these records were incomplete, he was able to compile a schedule of tool allowance deductions for 29 employees of AHV. In respect of the second plaintiff, Marcia Collins, tool deductions totalling $100 were assessed by the Labour Inspector to have been made by AHV. Most of the other 28 employees had identical amounts deducted in respect of tools provided by the employer although in four instances amounts of $93.14 had been deducted.

[7] The Labour Inspector's investigations showed that the employees were advised that the deductions for tools were made during their employment but they were told that these would be refunded at termination if the tools were returned to the company. The Labour Inspector's investigations show that whether or not tools were returned, none of the employees received a refund.

[8] Mr Hixon alleged that these deductions had been made unlawfully by AHV, that is in breach of the Wages Protection Act. The Labour Inspector filed a claim against AHV in the Authority on 21 May 2013 including claims to recover those sums unlawfully deducted and for penalties for AHV's failure to comply with its statutory obligations.

[9] On 29 July 2013 AHV was placed in liquidation and, on 31 January 2014, was removed from the Companies Register. During the period of its registration from 4 May 2011 and prior to its liquidation on 29 July 2013, the company's records show that its shareholders and directors were the first and second defendants with Mr Campbell holding 52 and Mr Eggers holding 48 of the company's 100 shares.

[10] On 6 August 2013 the liquidator refused to consent to the continuation of the proceedings in the Authority and after the company was removed from the Companies Register on 31 January 2014, the Labour Inspector's proceedings against AHV were discontinued.

[11] The current proceedings were then filed by the Labour Inspector against the two directors and shareholders of the company and against its Business Manager, Mrs Campbell.

[12] The following modus operandi of AHV was ascertained by the Labour Inspector. Morris and Trish Tiueti were employed by both the owners of the vineyard and AHV to supervise employees such as Ms Collins and to provide records of their productivity and hours of work to AHV. Blair Fitzsimons (Mrs Campbell's brother) was the National Operations Manager of AHV and so managed its operations. Mrs Campbell, who is the wife of the director and shareholder, Justin Campbell, was ascertained by the Labour Inspector to be the Business Manager responsible for the payment of, and deductions from, wages. On the matter of tool deductions, Mrs Campbell communicated with the employees either directly through Mr Fitzsimons or through their immediate supervisors. Mrs Campbell compiled wage records and provided these to an entity called Luscombe Legal in Hawke's Bay to be entered electronically in a payroll system. The Labour Inspector ascertained that Mrs Campbell was aware of AHV's "tool allowance" deduction policy and actively implemented it.

[13] The Labour Inspector says that Mr Campbell was involved in day to day operations of AHV and was aware of, and enforced, the tool deduction policy. The Labour Inspector says that he did not know of Mr Eggers's involvement, if any, in the tool deduction policy and practice. The Labour Inspector's evidence also names a number of others who were the supervisors of the employees and were often the conduit for the communication of information from AHV management to them. The Labour Inspector says that in his statement in reply to the claim filed in the Authority, Mr Campbell refers to the tool deduction policy.

[14] The constitution of AHV required that the business and affairs of the company be managed by, or under the direction or supervision of, "the Board", being the majority of directors.

[15] To complete the picture, on 29 January 2013 the Authority conducted an investigation meeting into similar claims by two other employees of AHV who

represented themselves. There was no appearance for AHV at the Authority's investigation meeting. It issued its determination on 1 February 2013.[3] The Authority found that each of the applicants in that case had the sum of $100 deducted from her and his pay towards the end of their employment. AHV claimed, in its statement in reply to the Authority, that this was for tools (secateurs and a picking bucket) that the company had sold to each of the employees. The Authority found that the applicants nevertheless provided their own secateurs and declined ones offered by AHV. The Authority found that the applicants' picking buckets were lent to them and that payment for the buckets would only be required if they were not returned, as they were in fact. AHV's defence to that claim was succinct and quoted by the Authority in its determination as follows:[4]

> Tools are purchased not loaned & no refunds are given or offered it is not economically viable to do so.
>
> No agreement made for refund – why would after staff used tools AHV fully refund purchase price. This does not happen.

[16] The Authority in that case concluded that the monies were deducted and the only question for decision was AHV's justification for doing so. The Authority referred to clauses in the applicants' employment agreements under the heading "Deductions authorised" as follows:

> You hereby authorise us to deduct the weekly costs of accommodation and transportation as provided in clause 15 hereof directly from your weekly wages when such services are provided to you. You may withdraw your consent to these deductions being made directly from your wages at any time by notifying us in writing.

[17] The Authority held that secateurs and picking buckets were not contained within that authorisation. There was what the Authority described as a second and inconsistent provision in the relevant employment agreements entitled "Schedule B – Authorised Deductions". It covered accommodation and transport but also two additional items. These were "Inadequate notice" and "Employer's property". Under a heading "Employer's property", four items were listed. They were secateurs, loppers, picking buckets, and safety glasses. There then followed

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[3] *Wong v AHV Contracting Ltd* [2013] NZERA Christchurch 26.
[4] At [9].

references to "replacement cost" and a "deductions if not returned" which were, in the case of secateurs, $20, and $80 for picking buckets.

[18] The Authority concluded:

> [15] The existence of a provision that facilitates payment where an employee fails to return a tool provided by the employer belies AHV's assertion such practice does not happen. When I add the applicants' evidence they were told the tools were lent (which I accept), that they should be retained (which they were) and an inability to deduct for this purpose under the deductions clause, I conclude AHV cannot justify the deduction.

[19] The Authority directed AHV to pay to each of the applicants in that case $100 and disbursements.

[20] Returning to the present case, the company provided a statement in reply to these proceedings which was received by the Authority on 18 June 2013. It alleged that the claims were based on "Extreme Factual inaccuracies" and "obviously bias[ed] information provided / supplied to him by former AHV staff members that have had their employment terminated for serious breaches of their employment conditions, including dishonesty and Serious Gross Mis-conduct". This included the following assertions about tool deductions:

> Tools – These were purchased for new staff on their behalf because they could not afford to purchase themselves. AHV then deducted the cost of the tools from the employees and show as "Tool Deduction" on their payslips. At no time did AHV offer to refund fully the purchase costs at the end of the season and furthermore was informed on many occasions by Morris and Trish [Tiueti] that some staff were simply trying to take advantage of a situation and make some free money. Logic would suggest we would not be in business long if we purchased tools for every employee and then refunded them full retail amount after they had been used.

[21] This statement in reply was signed by Mr Campbell and dated 16 June 2013.

[22] There is also affidavit evidence from the second plaintiff, Ms Collins. She responded to AHV's newspaper advertisement for vineyard pruners at Black Birch Vineyard. Ms Collins was employed under a fixed term casual individual employment agreement with AHV and worked between 6 July and 12 September 2012. Ms Collins initially used her own tools but later changed to use tools provided by AHV. For the pay period ending 26 August 2012 $100 was deducted from her

wages for "Tools Deduction". This deduction was made during the course of Ms Collins's employment and not on its termination. She did not retain any of AHV's tools after her employment ended.

[23] Relevant clauses of Ms Collins's employment agreement included the following:

> **Deductions authorised**
> 16. You hereby authorise us to deduct the weekly costs of accommodation and transportation as provided in clause 15 hereof directly from your weekly wages when such services are provided to you. You may withdraw your consent to these deductions being made directly from your wages at any time by notifying us in writing.
> …
> **Final payment**
> 42. We shall pay out your final entitlements at the termination or expiration of this agreement, and shall be entitled to:
> a. deduct any outstanding accommodation and transport costs owing by you as calculated in Schedule B, and
> b. deduct the value of any property of ours not returned, the value as calculated in Schedule B, and
> c. fill the vacant position.

[24] Schedule B provided under the heading "Employer's property" the following:

Item	*Replacement Cost*	*Deductions if not returned*
Secateurs	*$40.00*	*$20.00*
Loppers	*$90.00*	*$50.00*
picking buckets	*$150.00*	*$80.00*
Safety glasses	*$20.00*	*$15.00*

Deductions accepted:

[25] The Authority's determination of 13 January 2014 removing this proceeding to the Court under s 178 of the Employment Relations Act, notes that Messrs Campbell and Eggers participated in the proceeding in the Authority by submitting to it that they did not accept liability for the claims made against them as directors of the company, said that the Labour Inspector's action was unjustified, and sought its dismissal. The Authority's determination records, also, that Mrs Campbell told it that she was simply an employee of AHV and was acting at all times under instructions from "senior management".

[26] Mr Campbell filed a statement in reply in the Authority on 8 November 2013 for himself and on behalf of Mr Eggers. Mr Campbell referred to the Authority's determination in the *Wong* proceedings summarised earlier in this judgment,[5] which concluded that it was the responsibility of the company's senior managers to control all staff deductions. Mrs Campbell also filed a statement in reply denying liability for the deductions on the basis that she was an employee of AHV at all times acting under instructions from "senior management".

A labour inspector's powers

[27] The first question for decision is whether the Labour Inspector was empowered in law to bring proceedings for recovery of wages deducted unlawfully by the employer as the inspector has done in this case.

[28] The relevant sections of the Wages Protection Act are 11, 12A and 13 which are as follows:

> **11 Worker may recover wages**
> (1) Subject to subsections (2) and (3), a worker may recover from that worker's employer, by action in the Employment Relations Authority, established by the Employment Relations Act 2000, in the prescribed manner,—
> (a) any deduction made (otherwise than pursuant to section 6) by that employer from wages that have been paid, or but for that deduction would have been paid, by that employer to that worker, if—
> (i) that deduction was not consented to, or requested by, that worker in writing; or
> (ii) the making of that deduction was consented to, or requested by, that worker in writing; but the consent or request concerned was obtained by threat of dismissal, or otherwise by duress:
> (b) an amount equal to any wages required by section 7 to be paid to that worker in money, if that employer paid those wages to that worker otherwise than in money.
> (2) No action under subsection (1) shall be brought after the expiration of 6 years from the date on which the cause of action concerned arose.
> (3) No such action shall be brought in respect of any cause of action that arose more than 2 years before the commencement of this Act.
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> **12A No premium to be charged for employment**

[5] *Wong v AHV Ltd*, above, n 3.

(1) No employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.

(2) Where an employer receives any amount of money in contravention of subsection (1), whether by way of deduction from wages or otherwise, then, irrespective of any penalty to which the employer thereby becomes liable, the person by whom the money was paid or, as the case may be, from whose wages it was deducted, may recover that amount from the employer as a debt due to the person; and civil proceedings for the recovery of the amount may be instituted in the Employment Relations Authority by the person or, notwithstanding any disability to which the person is subject, by a Labour Inspector designated under section 223 of the Employment Relations Act 2000 on behalf of the person.

(3) Any such proceedings instituted by any Labour Inspector may be continued or conducted by the same or any other Labour Inspector.

13 Penalties

Where—

(a) any payment is made by or on behalf of any employer in contravention of this Act; or

(b) any employer or any person on that employer's behalf contravenes or fails to comply with any of the provisions of this Act,—

that employer is liable, at the suit of the worker or of a Labour Inspector designated under section 223 of the Employment Relations Act 2000, to a penalty imposed under that Act by the Employment Relations Authority.

[29] Although the relevant legislative provisions clearly empower a labour inspector to file and prosecute claims for penalties for breaches of the Wages Protection Act, there is no express power in that Act that permits a labour inspector to claim reimbursement of monies deducted in breach of the Wages Protection Act on behalf of an employee. There is no doubt that employees themselves are entitled to do so subject to compliance with time limitations.

[30] There are a number of indicia in the sections of the Wages Protection Act which confirm Parliament's intention to authorise certain activities by labour inspectors but, by strong implication, to confine them to these expressed powers. Section 13 provides that an "employer is liable, *at the suit of the worker or of a Labour Inspector*[6] designated under section 223 of the Employment Relations Act 2000, to a penalty imposed under that Act by the Employment Relations Authority"

[6] Our added emphasis

in respect of any payment made on or on behalf of any employer in contravention of the Wages Protection Act or by any person who does so on that employer's behalf.

[31] That is to be contrasted with s 11 (the section relied on in this proceeding) for recovery by "*a worker*[7] … from that worker's employer, by action in the Employment Relations Authority, established by the Employment Relations Act 2000 …".

[32] Recovery of monies unlawfully deducted or improperly paid rests with the employee or employees concerned personally. The public (as opposed to the private) function of seeking a penalty for such breach has been left by Parliament to such employees and to Labour Inspectors. Similarly, a premium sought or received in respect of employment in breach of s 12A may be recovered by proceedings instituted in the Authority "*by the person concerned… or by a Labour Inspector on behalf of that person*".[8]

[33] It is significant that labour inspectors are empowered expressly to take proceedings on behalf of an employee to recover holiday or leave pay pursuant to s 131 of the Employment Relations Act. That specific power is given by s 77 of the Holidays Act 2003. The absence of a similar specific power in respect of the Wages Protection Act tells against the Labour Inspector's case for an implied power.

[34] We do not accept the plaintiffs' argument that the words in s 11 of the Wages Protection "by action in the Employment Relations Authority" means, in the absence of stipulation in that phrase as to who can bring the action, that this includes a labour inspector. Such an interpretation would be inconsistent with ss 12A and 13.

[35] Nor do we accept the plaintiffs' argument that the provisions of ss 223, 223A and 229 of the Employment Relations Act provide otherwise. Although s 223 lists, among the Acts in respect of which labour inspectors may be designated to act, the Wages Protection Act, that does not extend beyond empowering labour inspectors to

[7] Our added emphasis
[8] Section 12A(2), our added emphasis,

fulfil those functions under the Wages Protection Act which are expressly theirs or necessarily incident to those expressed powers.

[36] Nor does s 223A save the position for the plaintiffs. This sets out, among the functions of labour inspectors, "taking all reasonable steps to ensure that the relevant Acts are complied with".[9] Again, we conclude that the empowerment of labour inspectors to take all reasonable steps to ensure compliance is to take all such steps within the jurisdiction expressly given to them, that is in this case the Wages Protection Act. This power does not extend to creating other powers to bring proceedings which are not provided for expressly.

[37] Finally, we have given consideration to whether s 229 of the Employment Relations Act empowers labour inspectors to issue proceedings for recovery of unlawful deductions from wages. The Employment Relations Act does give very broad ancillary powers to labour inspectors under s 229 and following sections. In particular, s 229(4) empowers a labour inspector to commence proceedings for breach of the Wages Protection Act. This is, however, confined to claims for compliance orders under s 137. In this case, the first plaintiff's claim in the Authority was not for a compliance order but, rather, one for recovery of an unlawful deduction under s 11 of the Wages Protection Act. Whether the same outcome might be able to be achieved by applying for a compliance order is at least arguable, but does not need to be decided by us in this case.

[38] The question exemplifies just one of incongruences between the Wages Protection Act and other so-called minimum code employment legislation. For example, although s 229(4) of the Employment Relations Act allows labour inspectors to seek compliance orders for breaches of the Wages Protection Act, s 137 of the same Act sets out the provisions to which it relates but does not include any under the Wages Protection Act.

[39] Labour inspectors can exercise a number of intrusive and coercive powers which are provided for explicitly in the Employment Relations Act. We consider that to expand labour inspectors' powers by implication, or even recourse to a

[9] Section 223A(b).

general enforcement provision, would be inappropriate as would be the effect of extending labour inspectors' remedial powers to issuing proceedings for recovery of unlawfully paid or deducted amounts.

[40] A labour inspector is the holder of a statutory office, primarily under the Employment Relations Act but having powers under other associated legislation including the Wages Protection Act. We conclude that a labour inspector can only exercise such powers as are given expressly by legislation or may be properly inferred from any relevant part or parts of that legislation. Because a labour inspector is given some specific powers, that does not mean that he or she possesses thereby broader or different powers, even in relation to the same employment relationships.

[41] It may appear counter-intuitive to permit labour inspectors to bring some sorts of claims but not others on behalf of the same employees against the same employers. If this situation is thought to be clumsy, an undue duplication of effort or cost, or otherwise in need of rationalisation, it is for Parliament and not this Court to expand and rationalise the powers of labour inspectors in appropriate cases.

[42] It may well be practicable and lawful, as has occurred in this case, that combined proceedings for recovery of unlawful deductions brought by an affected employee or affected employees, and for a penalty brought by a labour inspector, involve the Labour Inspector both acting in his or her express statutory role and as a representative of the employee in the recovery action. As the law stands, however, what is essential is that the employee brings proceedings in his or her own name in that recovery action irrespective of whether it is the employee who also seeks a penalty (as he or she may) or a labour inspector.

[43] The addition of Ms Collins as a plaintiff means that, subject to the decision of the second issue about who is the "employer", the claims for monies deducted can be pursued. The Labour Inspector may act as her advocate or agent in that claim, but not in his capacity as a labour inspector.

Who is an "employer" under the Wages Protection Act?

[44] This is the second, and more difficult preliminary issue raised by the case. The question in this case is whether any of the three defendants was the second plaintiff's employer, and it turns primarily on the interpretation and application of an extended definition of "employer" in the Wages Protection Act. That definition of "employer" in s 2 is:

> In this Act, unless the context otherwise requires,—
> **employer** means a person employing any worker or workers; and includes any manager, foreman, clerk, agent, or other person engaged on behalf of that person in the hiring, employment, or supervision of the service or work of any worker

[45] In view of the significance of the legal question to be determined and the absence of professional (or indeed any) advocacy on behalf of the defendants, Mr Palmer QC was appointed as counsel to assist the Court (an amicus curiae) to ensure that all relevant arguments were considered. The Court is grateful to Mr Palmer for his submissions which have, along with those of Ms Urlich and Mrs Carr, assisted us in determining this question. The question is not as straight-forward as it may appear at first sight.

[46] The authors of Mazengarb's *Employment Law* summarise generally and accurately the relevant purpose and scheme of the Wages Protection Act:[10]

> The Wages Protection Act 1983 sets out a number of fundamental rules relating to the payment of wages. Perhaps the most significant is that no deductions can be made from wages except in accordance with the Act (s 4). The Act permits deductions to be made with a worker's consent (s 5). Certain overpayments relating to absence from work without permission, striking or being locked out, or being suspended may be recovered by deduction in strictly controlled circumstances (s 6). This exception derives from the inability of modern computer pay systems to deal with such irregular occurrences at the point in time in which they occur.
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> Wages are to be payable in money (s 7). Exceptions are provided in relation to the Crown or local authorities, which may pay by cheque (s 8), cases where workers agree to payment by cheque or bank credit (as will usually be the case (s 9)) and payment during a worker's absence from work (s 10). Employers may not stipulate the mode of spending wages (s 12). Finally, in a recent amendment which reflects the development of unscrupulous practice resulting from the combination of high unemployment

[10] Introduction to the Wages Protection Act 1983 (online ed). The 1983 Act at [3100.2].

> and the "permissive" bargaining regime introduced by the Employment Contracts Act 1991, no premium may be charged for employment (s 12A).
>
> Provision is made for recovery actions (s 11).

[47] The Wages Protection Act is part of the so-called minimum code of employee rights and is employee-protective legislation. Some of its provisions are antiquated, for example the requirement to pay wages in money (coins and notes) and the narrow and structured exemptions to this requirement. On the other hand, as may be seen from the introductory quotation above, Parliament has in recent times moved to extend or otherwise amend the Wages Protection Act's provisions to deal with circumstances as they change or arise. It is not legislation that is caught entirely in an early to mid-20th century time warp.

[48] The definition of "employer" in s 2 of the Wages Protection Act consists of a number of parts which can be broken down for individual consideration but the meaning of which must, ultimately, be considered as a whole and in the context of the Wages Protection Act.

[49] All words and phrases defined in s 2 are subject to the qualifying words "In this Act, unless the context otherwise requires …". That is a common qualifier of statutory definitions in many Acts. The words "In this Act" make it clear that the definitions and the catch-all qualifying phrase apply to that legislation, the Wages Protection Act. The "context" referred to is the context of the use of the defined words or phrases within that Act. So, in this case, the definition of "employer" must be considered in the context of the relevant section or sections in which it appears. In this case the focus is on s 11 in which the word "employer" is used several times. Finally in this regard, the word "requires" imposes a high threshold to be attained if the statutory extended definition of "employer" in s 2 is not to be applied. Put another way, if the statutory definition of the word can apply sensibly in the context in which it is used (here s 11), then the catch-all exemption is inapplicable and the Court must apply the s 2 definition of "employer".

[50] Burrows and Carter's Statute Law in New Zealand,[11] the leading New Zealand text on statutory interpretation, categorises the definition of "employer" in s 2 as a stipulative definition. This stipulative definition can only be displaced by the proceeding caveat ("… unless the context otherwise requires …") if the context gives strong indications to the contrary.

[51] The learned authors also point out that "the context" admits of a wide meaning. "It includes not only the text of the legislation in question, but also the purpose and policy of the legislation, its history and the consequences of a suggested interpretation."[12] This suggests that "the context" is not merely the statutory context although that is an essential part of it. Authority for this proposition is the judgment of the New Zealand Court of Appeal in *Police v Thompson,*[13] which followed the earlier Supreme (now High) Court judgment in *Auckland City Corporation v Guardian Trust and Executors Co of New Zealand* Ltd,[14] where the Court concluded that the statutory definition of the word "owner" could not be interpreted as the statute apparently required because of the injustice that this would cause in practice.

[52] The first element of the definition of "employer" is uncontroversial. It means "a person employing any worker or workers". That is not dissimilar (but not identical) to the relevant definition of "employer" in s 5 of the Employment Relation Act, being "a person employing any employee or employees" although under the 2000 Act definition this is deemed to include any person engaging or employing a home worker. There is no material difference between "employee" and "worker" for this purpose. But that is the complete definition of "employer" under the Employment Relations Act whereas the extended definition in s 2 of the Wages Protection act has no counterpart in the 2000 Act.

[53] Next, crucially, the definition of "employer" is extended to include "any manager, foreman, clerk, agent or other person …". The specific descriptions (manager, foreman, clerk, agent) contemplate other staff or employees of an

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[11] JF Burrows and RI Carter, Statute Law in New Zealand (4th ed, Lexis Nexis, Wellington 2009).
[12] At 422-423.
[13] *Police v Thompson* [1966] NZLR 813.
[14] *Auckland City Corporation v Guardian Trust and Executors Co of New Zealand Ltd* [1931] NZLR 914 (SC).

employing entity, an agent of that employing entity who may or may not be an employee of that employing entity, and, potentially, office holders of an employing company.

[54] Next, those extended categories of person must be "engaged on behalf of that person [the employer] in the hiring, employment, or supervision of the service or work of any worker". There are two different elements to this part of the definition. Those persons in that extended category may be engaged in the pre-contractual elements of the employment relationship (the hiring or employment) or in the day to day work performed under the contract (the supervision of the service or work). These phrases restrict the classes of person to those in the employment-related operations of the entity that engages an employee: someone, even a director or other officer of an employing company who does not have that operational involvement with its employment of persons, would not fall within the definition.

[55] Put another way, not all people involved with the employing entity are drawn into the definition of "employer". There is a requirement for either a supervisory or managerial role in relation to the "worker", a business administrative role (the clerk), or the person subject to the extended definition must be the agent of the employing entity in relation to those relationships (supervisory and administrative).

[56] Having analysed the elements of the definition of "employer" in s 2, we now move to other relevant sections of the Wages Protection Act for the purpose of ascertaining its broader context as regards employers.

[57] The first reference to "employer" is in s 4. This requires an employer to pay a worker's wages without deduction. Next, s 5 provides that an employer may make deductions from wages payable to workers in certain circumstances. Section 6 uses the word "employer" in relation to the recovery of overpayments of wages made to workers. Sections 8-10 deal with the method of payment of wages by employers to workers.

[58] A narrower interpretation of "employer" than appears in full in s 2 cannot be a universal interpretation of the word in the Wages Protection Act. Any narrower

interpretation would be the exception rather than the rule. Parliament has set out what is to apply in all, or at least most, cases with exceptions to that having to be determined in the context of a particular use of the word.

[59] Section 11 (under which the plaintiffs' claims are brought in this case) is as follows:

> **11 Worker may recover wages**
> (1) Subject to subsections (2) and (3), a worker may recover from that worker's employer, by action in the Employment Relations Authority, established by the Employment Relations Act 2000, in the prescribed manner,—
> (a) any deduction made (otherwise than pursuant to section 6) by that employer from wages that have been paid, or but for that deduction would have been paid, by that employer to that worker, if—
> (i) that deduction was not consented to, or requested by, that worker in writing; or
> (ii) the making of that deduction was consented to, or requested by, that worker in writing; but the consent or request concerned was obtained by threat of dismissal, or otherwise by duress:
> (b) an amount equal to any wages required by section 7 to be paid to that worker in money, if that employer paid those wages to that worker otherwise than in money.
> (2) No action under subsection (1) shall be brought after the expiration of 6 years from the date on which the cause of action concerned arose.
> (3) No such action shall be brought in respect of any cause of action that arose more than 2 years before the commencement of this Act.

[60] Section 13 of the Wages Protection Act ("Penalties") provides:

> Where—
> (a) any payment is made by or on behalf of any employer in contravention of this Act; or
> (b) any employer or any person on that employer's behalf contravenes or fails to comply with any of the provisions of this Act,—
> that employer is liable, at the suit of the worker or of a Labour Inspector designated under section 223 of the Employment Relations Act 2000, to a penalty imposed under that Act by the Employment Relations Authority.

[61] Formerly, s 14 (repealed by the Wages Protection Amendment Act 1991 (1991 No 33)) originally provided (until 7 May 1991) as follows:

> **14. Employer may have actual offender charged**
> (1) Where an employer is charged with an offence under this Act, that employer shall be entitled upon information duly laid by that

> employer to have any other person whom that employer alleges to be the actual offender brought before the District Court Judge on the same charge; and to enable both charges to be heard together, the charge against that employer may be adjourned for such time as the District Court Judge thinks reasonable.
>
> (2) If any charges are heard together under subsection (1) of this section and the offence concerned is proved, but the District Court Judge finds that-
>
> (a) That offence was committed in fact by the other person concerned, without the consent or connivance of the employer concerned; and
>
> (b) That employer had done all that could reasonably be expected of that employer to prevent the offence, that other person shall be convicted of that offence, and that employer shall not be guilty of that offence.

[62] In s 11 the relevant phrase used in relation to recovery of wages is: "… a worker may recover from that worker's employer …". The later reference in the section to "that worker" refers back to the opening description of "that worker's employer". As with the other sections in which the word "employer" appears, there is nothing immediately apparent in the context of the use of the word "employer" in relation to recoveries of unlawful deductions which would require a narrower definition of "employer" than that which is set out in full in s 2. However, because the definition of "employer" and its application to s 11 proceedings is at the heart of this case, we must and will examine further the use of the word in contexts of both s 11 and the circumstances of this case. It does not follow necessarily that the definition of "employer" in s 11 in this case will apply either to the same word used elsewhere in the Act, or to other factual circumstances of another s 11 case.

[63] To complete our analysis of the use of "employer" in the remainder of the Act, section 12 prohibits the stipulation by employers of the mode of expenditure of workers' wages and s 12A relates to the prohibition on premiums being charged for employment. Section 13 is the general penalties section.

[64] Section 14, which was repealed with effect from 15 May 1991 by s 4 of the Wages Protection Amendment Act of that year, may have provided a context within which to interpret "employer" as only the primary employing entity of a worker and to exclude those categories and persons referred to in the s 2 definition. That section referred to an "employer" being charged with an offence under the Wages Protection Act. It allowed any such "employer" to "have any other person whom that employer

alleges to be the actual offender brought before the District Court Judge on the same charge". To have permitted the "employer" to include the extended range of persons under the s 2 definition could have rendered redundant much of the intended purpose of s 14 because such other persons alleged to be actual offenders would already have been deemed to be the employer under the extended s 2 definition.

"Employer" in s 11– the argument for the plaintiffs

[65] We mean no disrespect to counsel for the plaintiffs when we describe their arguments as simple and obvious. That is because, on their face, the plain words of the definition of "employer" appear to mean what they say. That is, in addition to meaning the actual employing entity (in this case AHV Contracting Limited), "employer", for the purpose of recovering wrongly deducted or paid monies, includes others, either animate persons or even arguably corporate persons, having a specified connection to that primary employer.

[66] Before coming to the nub of the definition, it is, nevertheless, necessary to address a preliminary point of the plaintiffs' argument with which we disagree but which, if correct, would have created an even broader spectrum of persons potentially liable.

[67] Ms Urlich submitted that not only are "managers, foremen, clerks or agents" also deemed to be employers, but so too are any others engaged on behalf of the primary employing entity or on behalf of any manager, foreman, clerk, or agent if that other person is engaged in the hiring, employment, or supervision of the service or work of any worker.

[68] We interpret the words "other person engaged on behalf of that person in the hiring, employment, or supervision of the service or work of any worker" as not creating a broad class of person independently of the prior descriptions. Rather, they qualify the words "manager, foreman, clerk [and] agent". So, to use the example of whether a "manager" is an "employer" for the purposes of this Act, such a manager must be engaged on behalf of the primary employing person in the hiring, employment, or supervision of the service or work of any worker.

[69] Finally, we interpret the definition to mean that any "other person engaged on behalf of [the primary employer] in the hiring, employment, or supervision of the service or work of any worker" must be engaged in a role akin to that of a manager, foreman, clerk, or agent.

The amicus's submissions

[70] Mr Palmer assisted us by providing a detailed historical background to the current provision, tracing its development from the earliest truck legislation in the United Kingdom. Counsel faced an initial difficulty in ascribing an alternative meaning to the extended definition in s 2 if the phrases did not mean what they appear on their face to say. Rather than persuading the Court that an alternative meaning should be given to the words, Mr Palmer submitted that they should be given their plain (extended) meaning only in what would now be exceptional circumstances. Drawing on what he said was the historical justification for creating an extended meaning, Mr Palmer said that the extended meaning should only be able to be resorted to where either the identity of the primary employing entity is in doubt or where, for whatever reason, the primary employing entity is not amenable to the jurisdiction of the Court. Counsel submitted that neither circumstance exists in this case and we agree that this is so as a matter of fact.

[71] We did not understand, however, counsel's submissions about the jurisdictional amenability of the primary employing entity, to extend to the circumstances of this case. Here the primary employing entity (the company) has gone into liquidation and has ceased to exist after the proceedings were issued. In one sense, the primary employer in this case is "not amenable" to the Court's jurisdiction. These are the same distinction and rationale posited by the authors of Mazengarb's *Employment Law* in their commentary on the definition of "employer" under the Act.

[72] Mr Palmer submitted that recourse to the extended definition would be rare these days in view of the transparency of employment relationships and of the identities of the parties to such relationships, of modern record keeping by

companies and other similar employing entities, and like developments which have occurred over the last century and a half.

[73] We understood counsel to say that in the vast majority of cases (including this), the opening words only of the s 2 definition ("a person employing any worker or workers") would define who is the relevant employer. Such a definition would mean that only AHV was the employer in this case and the defendants would not, therefore, come within that status.

[74] Another associated argument put before us by the amicus was that the apparent absence of any reported case law, either in the United Kingdom or New Zealand, on the definition of "employer" advanced by the plaintiffs, tends to indicate that a literal interpretation of the definition cannot possibly be correct. We do not, however, draw such an inference from the absence of reported cases. There may be many explanations for parts of legislation not being determined by courts quite apart from the inference that the plaintiffs' interpretation must be so manifestly wrong that no one has ever advanced it in argument in a case such as this. Indeed, there is relatively little reported litigation about the Wages Protection Act and its relevant predecessors. This may indicate, for example, that it is legislation that has been substantially complied with by employers, that cases have been resolved otherwise than by judgments or any one of a number of explanations that are equally likely to be true as that advanced by the amicus.

Statutory interpretive aids

[75] Mr Palmer addressed two of these, albeit briefly. The first is s 6 of the New Zealand Bill of Rights Act 1990 (NZBORA) which requires the Court, when a rights' question is engaged, to interpret legislation in concurrence with the NZBORA where it is open to the Court to do so. Mr Palmer accepted, however, that finding a substantive right in the NZBORA was "a stretch" and the closest that he was prepared to venture was the freedom from unreasonable seizure in s 21. Mr Palmer submitted that it might be said that a wages clerk, required to refund deductions unlawfully made from the clerk's own financial resources in circumstances where the clerk was innocent personally of any breach of the Act, might be said to be an

unreasonable seizure of those monies. Mr Palmer felt obliged to concede, however, that even if this argument might prevail in the case of a statutory labour inspector exercising public statutory powers, it would be considerably more difficult to maintain in the case of a suit by an individual employee. Mr Palmer conceded that he could not advance any more persuasive Bill of Rights argument and we agree.

[76] The second interpretive consideration referred by the amicus was the International Labour Organisation's Protection of Wages Convention, 1949 (No. 95). Although New Zealand has not subscribed to this Convention expressly, its membership of the International Labour Organisation means nevertheless that the Organisation's Conventions, if relevant, should be acknowledged in interpreting relevant legislation.

[77] The Convention advocates for the protection of employees' wages including, as here, where the person primarily liable for the payment of these is not able to be recovered against. Article 11 of the Convention provides:

> 1. In the event of the bankruptcy or judicial liquidation of an undertaking, the workers employed therein shall be treated as privileged creditors either as regards wages due to them for service rendered during such a period prior to the bankruptcy or judicial liquidation as may be prescribed by national laws or regulations, or as regards wages up to a prescribed amount as may be determined by national laws or regulations.
>
> 2. Wages constituting a privileged debt shall be paid in full before ordinary creditors may establish any claim to a share of the assets.
>
> 3. The relative priority of wages constituting a privileged debt and other privileged debts shall be determined by national laws or regulations.

[78] Relevant New Zealand company and liquidation law does, of course, acknowledge such a priority, albeit with limitations. That is not the same thing, however, as providing that some other person should be liable for those wages or other employment related monies due as is the interpretation of "employer" contended for by the plaintiffs. As in the case of the NZBORA, we can only draw very limited, indeed probably no, interpretive assistance from this Convention.

The history of the Wages Protection Act and truck legislation

[79] The first New Zealand antecedent of the current Wages Protection Act was the Truck Act 1891. Following the development of that legislation in New Zealand, it was consolidated as part of the Wages Protection and Contractors Liens Act 1908 and further updated in the Wages Protection and Contractors Liens Act 1939. That legislation was split up in 1964, including into the Wages Protection Act 1964 which is the immediate predecessor to the current Act. The definition of "employer" changed little between 1891 and 1983. But the Wages Protection Act's heritage goes back further and beyond New Zealand.

[80] As the judgment of the High Court in *Davies v Dulux NZ Ltd* records,[15] there was an imperial ancestry to the Truck Act 1891 (NZ) traceable as far back as the 15th century. This was law designed to prevent the abuse of employees by employers requiring them to take their wages or parts of their wages in the employer's goods or in goods at the employer's valuation. The United Kingdom legislation was consolidated in the Truck Act 1831 (UK).[16] That legislation was amended by the Truck Amendment Act 1887 (UK). The relevant provisions of the 1831 and 1887 United Kingdom Acts are similar to the first New Zealand Truck Act of 1891.

[81] Section 25 of the 1831 (UK) Act provided a definition of "employer". As Mr Palmer noted, Burrows and Carter's statutory interpretation suggests that this was only six years after the appearance of the first United Kingdom example of an interpretation section in a statute. That definition was:

> In the meaning and for the purposes of this Act ... all masters, bailiffs, foremen, managers, clerks, and other persons, engaged in the hiring, employment, or superintendence of the labour of any such artificers, shall be and be deemed to be "employers" …

[82] As may be seen, the key stipulative limb of the definition of "employer" in the current New Zealand Act (that is after the word "includes") substantially reflects that definition in the 1891 (NZ) Act which was:

> 2. In this Act, unless inconsistent with the context,—

[15] *Davies v Dulux NZ Ltd* [1986] 2 NZLR 418 (HC) at 421-425.
[16] 1&2 Will. 4, ch 37.

> …
> "Employer" includes any master, manager, foreman, clerk, or other person engaged in the hiring, employment, or superintendence of the service, work, or labour of any workman within the meaning of this Act:

[83] There is a direct line of descent of the definition of "employer" from the 1831 (United Kingdom) Act through the 1891 (New Zealand) Act to the current 1983 (New Zealand) Act. Such minor changes as the word "labour" which disappeared in the 1908 consolidation and the transformation of "workman" to "worker", do not affect materially the position.

[84] So, too, as Mr Palmer pointed out in submissions, the substantive effects of the Acts in the same lineage have remained generally the same in nature, although not identical. The enforcement provisions of the legislation are now more generally (and less precisely) specified. So, for example, the current Act empowers an employee to recover deductions from his or her employer by action in the Authority under the Employment Relations Act[17] and makes an employer liable for a penalty imposed by the Authority under that Act.[18] By contrast, for example, the 1891 (NZ) Act provided that contracts allowing for deductions for interest or for payment other than money, were illegal and void and were recoverable from the employer "in any Court of competent jurisdiction" with no set off by the employer for any goods received by the worker.

[85] It is noteworthy in the context of this case, also, that the 1891 (NZ) and earlier (UK) Acts:

- allowed for an enforcement regime permitting service of legal proceedings to be effected on the employer by delivery to "the manager or overseer for the time being of the works";[19]

- made "the employer" guilty of an offence "if the employer of any workman, by himself or the agency of any other person or persons", contravened the Act;[20]

[17] Section 11.
[18] Section 13.
[19] Truck Act 1891, s 10.

- provided that where an offence had in fact been committed by some agent of the employer or other person: that person "shall be liable to the same penalty as if he were the employer";[21] and

- enabled an employer charged with an offence to have any other person to be charged "as the actual offender".[22]

[86] Also relevant in the decision of this case were ss 17 and 18 of the 1891 (UK) Act. Section 17 provided:

> 17. No person shall be liable to be convicted of any offence against this Act committed by his co-partner in business, and without his knowledge, privity, or consent; but it shall be lawful, when any penalty or sum for wages, or any other sum, is ordered to be paid under the authority of this Act, and the person or persons ordered to pay the same shall neglect or refuse to do so, to levy the same by distress and sale of any goods or chattels belonging to any co-partnership concern or business in the carrying-on of which such wages may have become due or such offence may have been committed.
>
> 18. In all proceedings to recover any sum due for wages, it shall he lawful in all cases of co-partnership for the Court, at the hearing of any action for the non-payment thereof, to give judgment against any one or more co-partners for the payment of the sum appearing to be due, and in such case the service of a copy of the summons or other process upon one or more of such co-partners shall be deemed to be service upon all; and any execution or other process may be had and enforced upon any such judgment in accordance with the ordinary law and practice affecting such Court.

[87] As Mr Palmer submitted, the foregoing ss 17-18 replicated directly s 13 of the 1831 (UK) Act except to the extent that the phrase "co-partner in business" was used rather than the earlier "co-partner in trade". As was discussed with counsel at the hearing, such co-partnerships are not a feature of modern commerce. That may be explicable when one considers that joint stock companies with separately legal personality (including as to liability) did not become common until after the United Kingdom Joint Stock Companies Act 1844 and the Limited Liability Act 1855 (UK). Mr Palmer submitted that the reference to "co-partner in trade" must have been to partners in partnerships.

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[20] n 19 above, s 11.
[21] n 19 above, s 12(1).
[22] n 19 above, s 12(2).

[88] The wording in ss 17-18 of the 1891 (NZ) Act was carried through ss 45 and 46 of the 1908 (NZ) Act and ss 17-18 of the 1939 (NZ) Act. It was, however, discontinued in the 1964 (NZ) Act which provided that a worker could recover an unlawful deduction (but without saying from whom) under s 7, and that the employer was deemed to have committed an offence if the employer or any person on his behalf contravened the Act.[23]

New Zealand case law

[89] Apart from *Davies v Dulux*, the only other case found by counsel's researches is a judgment of this Court although one in which the issue was dealt with probably by way of observation (obiter dicta) and was not the subject of the same detailed research and submission as this case has received.

[90] *Mehta v Elliott (Labour Inspector)*[24] addressed principally the extraterritorial application of s 12A of the Wages Protection Act affecting commissions paid for the procurement of employment. The appellant (Mr Mehta) operated businesses in New Zealand which included a restaurant company (Exotiqa Ltd) and an immigration consultancy partnership in India. An Indian national made inquiries of Mr Mehta's immigration consultancy partnership in India about immigration to New Zealand and paid a fee to that partnership. Mr Mehta arranged for that person to be employed in New Zealand by an Exotiqa restaurant. The fundamental question before the Court was whether s 12A applied to premiums paid to Mr Mehta in India. The Court determined that s 12A did not apply extraterritorially. In those circumstances, the following parts of the judgment were observations or obiter dicta, one of which was to ascertain personal liability for repayment of the premium. The Court wrote:[25]

> [78] Who would be liable to repay the premium? Mr Mehta, whether in his capacity as a director of Exotiqa Ltd or in his role as a partner in the business conducted in India known as A & NZ Consultants which acted as recruitment agent for Exotiqa Ltd, was found by the Tribunal to have been an "Employer" as defined in s 2. Exotiqa Ltd was employing workers and Mr Mehta was its manager, agent or was otherwise engaged on Exotiqa's behalf in the hiring or employment of any worker. I agree with that conclusion.

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[23] Truck Act 1964, s 10.
[24] *Mehta v Elliott (Labour Inspector)* [2003] 1 ERNZ 451.
[25] At [78]-[79].

> [79] The extended definition of "Employer" in s 2 places the legislation's obligations on individuals within organisations and, in this case, I am satisfied, upon Mr Mehta in his personal capacity. The extended definition of "Employer" including Mr Mehta would have allowed the inspector to recover the amount of any premium from Mr Mehta as a debt due by him for Mr Duhanja. If there was a premium paid for the job with Exotiqa, the equivalent of that premium would be recoverable by the labour inspector from Mr Mehta personally.

[91] *Mehta* does not really assist in deciding the issues in this case.

[92] We agree with Mr Palmer that the broad definition of "employer" both in New Zealand and the United Kingdom Acts was consistent with the general purpose of the legislation to impose obligations on those acting as employer, whether partnerships or individual agents of an employer. We agree, also, that the judgment of the Supreme Court in *McClenaghan v Bank of New Zealand*[26] cannot now assist in determining the question. That is because the effect of the judgment in *McClenaghan* was expressly negated by s 6 of the 1983 Act as is made clear by the Parliamentary debates over its passage as well as by comparing the relevant sections before and after the judgment.

[93] As Mr Palmer pointed out, the text of the enforcement regimes is not consistent with sanctions being imposed on all those persons falling within the extended definition of "employer". Section 12 of the 1891 Act was explicit in providing for liability of an agent or another person who was the "actual offender". That provision was not repealed until 1991, 100 years later, when s 14 was deleted as the current legislation was enacted. As Mr Palmer pointed out, ss 17-18 of the 1891 Act (and s 13 of the 1831 (UK) Act) were explicit in specifying that a "co-partner in business" who lacked knowledge, probity or consent, was not liable for an offence although judgment for recovery may have been enforced against such persons.

[94] These provisions are difficult to reconcile with the plaintiff's broad submission that a wider definition of "employer" was intended to mean that those persons should be made liable for an offence or subject to a recovery action.

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[26] *McClenaghan v Bank of New Zealand* [1978] 2 NZLR 528.

[95] Initially, s 17 of the 1891 (NZ) Act (s 13 of the 1831 (UK) Act) allowed a sum to be recovered "by distress and sale of any goods or chattels belong[ing] to any co-partnership, concern or business in the carrying-on of which such wages may have become due or such events may have been committed." This indicated a legislative intent that the funds of the business or employing enterprise were intended to be available to satisfy the claims of workers under the Act. We accept that the extent of joint liability was apparently intended to be confined only to a co-partner in a partnership under s 18 of the 1891 (NZ) Act (the second limb of s 13 of the 1831 (UK) Act).

[96] Mr Palmer's submission was that, given the legislative purpose when the words of the definition were enacted originally to be of limited extent, it is difficult to suggest now that essentially the same definition can sustain the weight of exposing all those who fall within that same wide definition to recovery under the current regime. Had Parliament intended this, he submitted that we could have expected some express signal to this effect in the enforcement provisions of the current Act.

[97] It appears that the modern equivalent United Kingdom statute has moved away significantly from the old Truck Acts and, more particularly, in their definition of "employer". In *Delaney v Staples*[27] the Court of Appeal (Nicholls LJ) noted that the Wages Act 1986 repealed and replaced the former Truck Acts. In a passage in the judgment unaffected by the subsequent successful appeal to the House of Lords,[28] the Court of Appeal noted that:

> 'Employer' means the person by whom the worker is employed or, where the employment has ceased, was employed, and 'worker' means an individual who has entered into or works under a contract of service or apprenticeship or other relevant contract or, where the employment has ceased, worked under such a contract.

[98] It is not insignificant that the New Zealand Parliament, at about the same time, did not clarify at least the definition of "employer" at issue in this case.

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[27] *Delaney v Staples* [1992] 1 AC 687, 1 All ER 944.
[28] *Delaney v Staples* [1991] 1 All ER 609 at 619.

[99] Addressing what he termed the "liberty of the subject" argument, Mr Palmer submitted that the interpretation advocated by the plaintiffs would necessarily mean the potential imposition of penalties or financial liabilities on a wide group of people. Counsel submitted this would be contrary to the established interpretive principle that penal statutes should be interpreted narrowly in favour of the subject, although counsel acknowledged that this presumption has weakened in the presence of modern purposive interpretation.[29]

[100] Penultimately, Mr Palmer addressed the requirement in s 15 of the Wages Protection Act that it "shall be read subject to the provisions of any other Act". Counsel submitted that this is another factor indicating that the definition of "employer" should not allow enforcement action against directors and employees of a company. Counsel submitted that the plaintiffs' broad definition runs counter to the carefully constructed framework of Part 16 of the Companies Act 1993 in respect of liquidators realising and distributing the assets of a company in liquidation in a strict order of priority. Such arrangements include payments to employees[30] and elevating the recovery from the company of deductions made from wages would be inconsistent with the scheme and purpose of Part 16 of the Companies Act.

[101] Mr Palmer also highlighted the independent legal personalities given to companies under s 15 of the 1993 Companies Act and the relevance of the liabilities of shareholders under s 97. The Companies Act draws a statutory corporate veil over a company's affairs to keep them legally separate from those of its shareholders, directors and employees. This is a longstanding doctrine of company law, although one that arose first after the definition at issue here was introduced in the 1831 Act. Counsel submitted that the definition in s 2 in the Wages Protection Act should not be added to the exceptions, limited in number and extent, to the inviolability of that corporate veil.

Is the definition of "employer" affected by other legislation?

[102] Section 15 of the Wages Protection Act provides:

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[29] See Burrows and Carter at 330-332.
[30] Companies Act 1993, sch 7, cl 1(2)-(3).

> **Act subject to other enactments**
> Subject to sections 6(2) and 16, this Act shall be read subject to the provisions of any other Act.

[103] Section 6(2), to which s 15 is subject, is not applicable to the definition of "employer" in s 2. Nor is s 16 which also relates to collective agreements.

[104] Can the definition of "employer" in s 2 be reduced in scope because the Wages Protection Act must "be read subject to the provisions of any other Act"? If there is no conflict between a provision in the Wages Protection Act and a provision of any other Act, the former will trump the latter. But there is nothing in the definition of "employer" in s 2 of the Wages Protection Act which conflicts with the definition of "employer" in any other Act so far as the Wages Protection Act is concerned. The Wages Protection Act is a standalone enactment. Although there may be different definitions of "employer" between Acts, that does not mean that there is thereby a conflict. The different definitions of "employer" can coexist because they exist for different purposes. In the case of the Wages Protection Act, those purposes are quite limited and are covered by the discrete provisions of that legislation although it may be enforced in tribunals or courts created by other legislation and using, by adoption, procedures applicable to other litigation in which "employer" is defined differently. Section 15 does not affect the s 2 definition of "employer" by requiring it to be read down.

Recent statutory amendments to the Wages Protection Act

[105] Parliament considered a related definition ("worker") in s 2 of the Wages Protection Act as recently as 2000. By s 240 of the Employment Relations Act the previous definition of "worker" in the Wages Protection Act was substituted with the following which is subject to the same qualifying words ("unless the context otherwise requires"):

> **worker** has the same meaning as that given to the term employee by section 6 of the Employment Relations Act 2000; and, in relation to any employer, means a worker employed by that employer.

[106] Parliament considered the participants in employment relationships in relation to the Wages Protection Act and although it elected to change the meaning of

one of those participant parties ("workers"), it apparently elected also to leave unchanged the previous and longstanding definition of "employer".

[107] That statutory amendment in 2000 rather derails Mr Palmer's analysis of the adoption and successive re-adoptions of an antiquated and now inappropriate definition of "employer" in s 2 by parliaments which he submitted have simply not considered the inaptness of that definition. Although a search of the relevant parliamentary materials affecting the change to the meaning of "worker" to align that with the meaning of "employee" in s 6 of the Employment Relations Act, does not throw any light on why there might not have been a similar change to the definition of "employer". However, the fact is that there was no change to the definition of "employer" made on an occasion in which this might have been expected. That is despite the changed definition of "worker" itself referring specifically to "any employer" and "that employer". The inference to be drawn is that Parliament had an opportunity to consider the definition of "employer", did consider and alter the meaning of "worker" to modernise it, but did not do so in respect of the definition of "employer". That in turn supports an argument that Parliament has, in recent times, elected to retain the extended definition of "employer" and by using the same formula of words as it has from time immemorial. This is the strongest indication of Parliamentary intention in support of the plaintiffs' case, but is not decisive of the question.

The meaning of "employer"

[108] We agree that a plain words/plain meaning interpretation of the definition of "employer" in s 2, and as contended for by the plaintiffs in the circumstances of this case, leads to a counter-intuitive result. It would allow an employee to recover an unlawfully made payment or an unlawful deduction from a person (other than the employing entity) whose role with that employing entity fell within the broad extended definition of any manager, foreman, clerk, agent, or other person engaged on behalf of that person in the hiring, employment, or supervision of service or work of that worker. So, for example, the plaintiffs' interpretation would allow recovery from a wages clerk or a work supervisor although the employing entity is both identified and exists in a legal sense for the purpose of recovery against that

employing entity. We were asked to question seriously whether Parliament would have intended such a result. The implication of this rhetorical question is that Parliament could not possibly have so intended and the definition of employer in a s11 claim must be interpreted accordingly.

[109] As Mr Palmer pointed out, potential consequences of this broad interpretation would be contrary to such modern legal principles as the inviolability of an employing company's corporate veil and independent legal personality. It would make persons liable at the suit of others for losses for which the former may not have been responsible and to which they are only tenuously related.

[110] This brings into play the interpretive principle against the presumption of absurdity. If the consequence of an interpretation is absurd and unjust, a court should not so interpret the relevant word or phrase. As it is put in Bennion on Statutory Interpretation:[31]

> The Court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial or productive of a disproportionate counter-mischief.

[111] The laws of New Zealand (Common Law Guides and Rules)[32] adopts the principle in this country. It was approved by the Court of Appeal in *Frucor Beverages Ltd v Rio Beverages Ltd*,[33] explaining the principle in *R (on the application of Edison First Power Ltd) v Central Valuation Officer*.[34] Lord Millett said that "… the more unreasonable a result, the less likely it is that Parliament intended it …".

[112] Describing "the unreasonable dilemma", *Bennion* at 873 states: "A strained construction is necessary where the literal meaning places persons who are not

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[31] Oliver Jones, *Bennion on Statutory Interpretation* (6th ed, LexisNexis, UK, 2013) s 312 at 869.
[32] *Laws of New Zealand* Common Law Guides and Rules (online ed) at [177].
[33] *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 (CA) at [28].
[34] *R (on the application of Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20, [2003] 4 All ER 209 at [116].

subject to the Act in a dilemma so unreasonable that Parliament cannot be supposed to have intended it."

[113] In these circumstances, it is appropriate to cross-check such an interpretation against the context in which the provision was enacted to determine whether this was the consequence intended by Parliament and, therefore, whether the words should be so interpreted. Section 5(1) of the Interpretation Act requires this cross-checking as part of the purposive approach to the interpretation of all statutes as confirmed both authoritatively and recently by the Supreme Court in *Commerce Commission v Fonterra Co-Operative Group Ltd.*[35] In this case an historical analysis of the definition and of the statute and its predecessors is particularly appropriate because of their longevity and largely unchanged natures.

[114] We have already noted that the overarching qualifier at the commencement of s 2 to all words and phrases defined there. In this Act, "unless the context otherwise requires …". We accept, as Mr Palmer submitted, that a statutory definition will only be displaced by a such a phrase from its apparent or obvious meaning where there are strong indications to the contrary in the context. This is particularly so with a stipulative definition.[36] As in this case, another interpretation must be "required" by the context in which the word or phrase ("employer") is used in the Wages Protection Act.

Decision

[115] The context of this claim under s 11 of the Employment Relations Act requires the Court to define "employer" as "a person employing any worker or workers". There is no dispute in this case that the second plaintiff's employer was AHV. That entity was the appropriate employer party in respect of these claims. That context requires the Court to limit any liability to that employer.

[116] The subsequent unavailability of AHV as a party because of its liquidation, the refusal of its liquidator to agree, and the absence of any court order continuing its

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[35] *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36 at [22].
[36] JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 412, 417-423.

party status, does not mean that the context now requires the Court to apply the extended definition of "employer" in s 2. To so interpret and apply the definition would create an absurdity, that is a result that is contrary to all other applicable legal principles affecting companies and corporate insolvency. Using the third defendant as an example, adopting the plaintiffs' argument would have meant that another employee of AHV would have been potentially liable for its debts. As we have already noted, the Wages Protection Act is employee-protective legislation and it would be ironic and absurd to require another employee to be liable for that employee's employer's debts to other employees.

[117] We would add only that even if the plaintiffs' case had succeeded, the first and second defendants, as directors and shareholders of AHV, would not have been liable to Ms Collins and other employees in this or similar proceedings, and any potential liability would have fallen only on the third defendant.

[118] For these reasons, the plaintiffs' claims against the defendants cannot succeed and must be and are dismissed.

Costs

[119] This has been a test case in which the defendants have played little or no part and, in these circumstances, we do not propose to make any orders for costs.

Postscript

[120] It is not difficult to understand the Labour Inspector's concern that liability for breaches of the Wages Protection Act by companies in particular may be able to be avoided by receiverships or liquidations, especially those which might be said to be contrived and/or for the purpose of avoiding such liability. In such circumstances, it is also understandable that the Labour Inspector would seek to recover compensation for such breaches against the directors or former directors of such entities. Another irony in this case is, however, that even on the Labour Inspector's best case, the directors and shareholders of AHV would not have been personally liable.

[121] It is, of course, for Parliament to determine statutory rights and obligations and not for this Court. We do, however, point out that the definition of "employer" under the Wages Protection Act is now out of step with the definition of the same word in other employment legislation including so-called 'minimum code' legislation. Consistency of important definitions of the same words or phrases in closely aligned legislation is generally desirable although there may be asymmetry for good reasons that are not apparent to us. If Parliament considers that in cases of breach of the Wages Protection Act, a broader recovery net ought to be able to be cast, there is a recent and current example of such a scheme in the Employment Relations Act. This is s 234 which provides as follows:

> **234 Circumstances in which officers, directors, or agents of company liable for minimum wages and holiday pay**
>
> (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—
>
> (a) the company is in receivership or liquidation; or
>
> (b) there are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full,—
>
> 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.
>
> (4) In this section,—
>
> **company** has the meaning given to it by section 2(1) of the Receiverships Act 1993
>
> **holiday pay** means any amount payable under the Holidays Act 2003 to an employee as pay for an annual holiday or public holiday
>
> **minimum wages** means minimum wages payable under the Minimum Wage Act 1983.
>
> (5) Nothing in this section affects any other remedies for the recovery of wages or holiday pay or other money payable by a company to any employee of that company.

[122] We point out that the current definition of "employer" under the Wages Protection Act precludes recovery of unlawful payments against any officer, director or agent of the company who has directed or authorised the breach. The present definition under the Wages Protection Act also allows the perverse result that a wages clerk following instructions may be liable to other, higher paid employees for those defaults, with the Authority or the Court having little or no discretion to ameliorate a compensatory order (as opposed to a penalty). If the Labour Inspector's concern is to allow realistic recoveries of payments made in breach of the Wages Protection Act where there may have been a tactical liquidation by the company's directors, then the s 234 model may be thought to be preferable to the current, antiquated and arguably anomalous definition of "employer" in s 2. We emphasise that the foregoing remarks about liquidation tactics are not intended to be read as applicable to the employer party in this case. There is no evidence about that and the hypothetical example is used only to illustrate our point.

GL Colgan
Chief Judge
for the full Court

Judgment signed at 9.15 am on Monday 17 November 2014