

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 182
3054674

BETWEEN	KYM BYE AND JASON BYE Applicants
AND	KELEE DEVELOPMENTS LIMITED First Respondent
AND	KEVIN PUGH Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Simon Mitchell, counsel for the applicants Kevin Pugh, director of the first respondent and in person as second respondent
Investigation:	On the papers
Submissions received:	26 March from the first respondent and 27 March 2019 from the applicants
Determination:	28 March 2019

DETERMINATION OF THE AUTHORITY

- A. By order under s 137 of the Employment Relations Act 2000 Kelee Developments Limited (KDL) must, by no later than 5 April 2019, pay Kym Bye and Jason Bye:**
- (i) the lost wages and compensation awarded by the Authority to Mrs and Mr Bye on 29 November 2018; and**
 - (ii) the sum of \$4,500 subsequently agreed to by KDL as its contribution to their costs.**

B. A further issue raised in the application of Mr and Mrs Bye is reserved for further investigation.

C. Costs in relation to the present application are reserved.

Employment Relationship Problem

[1] Kym Bye and Jason Bye applied to the Authority for orders on two matters.

[2] Firstly, they sought a compliance order requiring their former employer, Kelee Developments Limited (KDL), to pay remedies awarded by the Authority last year and a contribution to their costs which KDL had subsequently agreed to pay them.¹ The lost wages award was \$3,000 for Mr Bye and \$5,200 for Mrs Bye. Both were awarded \$6,000 as compensation for humiliation, loss of dignity and injury to feelings. The agreed costs amount was \$4,500.

[3] Secondly, they sought leave to pursue KDL's director Kevin Pugh for liability to pay arrears of wages or other money if there were a default in payment by KDL. The leave was sought under s 142Y(2) of the Employment Relations Act 2000. That provision allows for directors or other involved persons to be held personally liable if an employer's default in payments of wages and other moneys is due to a breach of employment standards.

[4] KDL did not lodge a statement in reply but Mr Pugh, in his personal capacity, lodged a statement in reply questioning the jurisdiction to grant the leave sought.

The Authority's investigation

[5] Investigation and determination of the first issue, regarding a compliance order against KDL, was made on the papers. The second issue, regarding potential liability of Mr Pugh, is reserved for further investigation.

[6] By Minute of 22 March the parties were advised of my preliminary view of the application and issues arising. They were given the opportunity to seek to be heard before any orders regarding compliance were made. Mr Pugh, in his capacity

¹ *Bye and Bye v Kelee Developments Limited* [2018] NZERA Auckland 378.

as director of KDL, took that opportunity to lodge a brief submission by email on behalf of KDL. Mr and Mrs Bye, through counsel, responded briefly by letter.

KDL's position

[7] In the earlier determination KDL was ordered to pay a penalty of \$2,000 to the Crown for breach of the Wages Protection Act 1983. It paid the penalty on 24 December 2018.

[8] Under the Authority's orders KDL was due to pay the lost wages and compensation remedies to Mr Bye and Mrs Bye by no later than 27 December 2018. KDL's submissions confirmed it had not paid the amounts due. It said KDL had no funds or assets. It said the company was used for various business activities over the years but, by the time of the dismissal of Mr and Mrs Bye, KDL operated as a property maintenance contractor. Mr and Mrs Bye were KDL's only employees, working as caretakers on a 40-hectare rural waterfront property near the Bay of Islands called Wai Raumati. The maintenance work on Wai Raumati was said to be KDL's only contract.

[9] The Authority's determination in November 2018 (it appears, incorrectly) described Wai Raumati as owned by KDL. Mr Pugh's submission said the costs of the company and its outgoings (which would have included the wages of Mr Bye and Mrs Bye) "were paid for by a matching equal payment in receipt for its services by the trust owners of the subject property". He submitted that KDL "subsequently ... does not have the funds to pay the debt at this time". He confirmed KDL had agreed to pay costs of \$4,500. He acknowledged that a compliance order was available to Mr and Mrs Bye because the company had not paid the ordered amounts by the due date. He apologised for the position KDL was in but said those were "the facts", which he summarised as "no ability to pay, no funds, no assets".

[10] The applicants' reply noted the Authority intended to issue a compliance order and did not seek to be heard any further on that issue.

Determination and orders

[11] As KDL acknowledged, a compliance order was available as a means of seeking to have payments due to Mr and Mrs Bye made. As a matter of common

sense the discretion to make such orders may not be exercised where they are completely incapable of being complied with or would serve no other useful purpose.

[12] In this case KDL has advised that the trust owning the property had previously funded operating costs, such as the wages of Mr and Mrs Bye. In the earlier Authority investigation Mr Pugh's witness statement said the property was purchased by his family trust, Lakeview Trust. His oral evidence indicated he and other family members had beneficial use of the property, including a holiday home and other accommodation on it. No additional information was provided for the present proceeding as to whether the Trust still owned the property or it had since been sold.

[13] Against that background it cannot be said with certainty that KDL, through Mr Pugh and his other interests, did not have access to further funds if the company (and he as its director) wished to pay the amounts due in remedies and costs. KDL's submissions referred to not having funds "at this time".

[14] There is also the prospect that a compliance order, if not met, would then enable the applicants to make further inquiry of the legal and financial circumstances of KDL through the enforcement procedures available either in the District Court or the Employment Court.² Failure to pay may also, potentially, be relevant to the second issue reserved for further investigation.

[15] In all those circumstances, exercise of the discretion to make a compliance order regarding remedies and costs was appropriate. It is made on the terms set out in paragraph A at the head of this determination.

Next steps

[16] As advised to the parties in the Minute issued on 22 March, the Authority will shortly arrange for a case management conference on the second identified issue regarding potential liability of Mr Pugh.

Robin Arthur
Member of the Employment Relations Authority

² Employment Relations Act 2000, s 141, s 138(6) and s 140(6).