IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 532
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:	7 June 2019 from the applicants and 21 June 2019 from the second respondent.
Determination:	13 September 2019

FURTHER DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination concerns further attempts by Kym Bye and Jason Bye to get their former employer Kelee Developments Limited (KDL) to pay remedies they were awarded on 29 November 2018 for unjustified dismissal.[1] The Authority ordered KDL to pay lost wages of $3,000 to Mr Bye and $5,200 to Mrs Bye and $6,000 each as compensation for humiliation, loss of dignity and injury to feelings.

[2] KDL was also ordered to pay a penalty of $2,000 for a breach of s 4 of the Wages Protection Act 1983 (the WPA). It had not paid holiday pay due to Mr Bye

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

after the termination of his employment, instead offsetting it for money Mrs Bye owed KDL in rent arrears. KDL had promptly paid that penalty to the Authority for transfer to the Crown Account.

[3] However KDL did not pay the remedies due to Mr and Mrs Bye within the required period. They then sought further orders for payment of the remedies along with $4,500 KDL had meanwhile agreed to pay as its contribution to their costs. On 28 March 2019 the Authority issued a compliance order requiring the remedies and costs to be paid by 5 April 2019.[2] The total amount due to be paid to the Byes was $24,700.

[4] Their application for a compliance order had also sought leave under s 142Yof the Employment Relations Act 2000 (the Act) to pursue KDL director Kevin Pugh if KDL defaulted in payment of wages or other money. This provision of the Act allows directors or other involved persons to be held personally liable if an employer's default in payment of wages and other money is due to a breach of certain defined employment standards. The Authority's 28 March determination reserved that leave application for further investigation.

[5] KDL did not comply with the order made on 28 March. The Authority proceeded with arrangements for a case management conference to schedule investigation of the reserved issue regarding leave to pursue Mr Pugh personally under s 142Y of the Act.

[6] In earlier evidence and correspondence Mr Pugh had referred to the prospect that KDL did not have funds or assets to pay the remedies. In the week before the planned conference call counsel for the Byes lodged a memorandum referring the Authority and Mr Pugh to *Allen Chambers Limited & Chambers v Pelabon*, a recent Employment Court decision said to be relevant to the circumstances of the Byes and KDL.[3] In the *Chambers* case the judge found the Authority had jurisdiction to order Mr Chambers, as director of a holding company, to arrange funds so an employing company of which he was sole director and shareholder could pay remedies ordered

[2] *Bye and Bye v Kelee Developments Limited* [2019] NZERA 182.
[3] [2019] NZEmpC 45. See also *Allen Chambers Limited & Chambers v Pelabon* [2018] NZEmpC 114 and *Pelabon v Zumo Retail Nelson Limited* [2018] NZERA Wellington 44 and [2017] NZERA Wellington 101.

by the Authority. Counsel for the Byes said this allowed for similar orders to be made in their case.

[7] Mr Pugh is the sole registered director of KDL. KDL is owned by two holding companies: KP Trust Holdings Limited (KPTHL) and LV Trust Holdings Limited (LVTHL). Mr Pugh is the sole shareholder in KPTHL and LVTHL. Those two companies each have the same two directors: Mr Pugh and Tony Thomas. Mr Thomas is the principal of the chartered accounting firm that is also the registered office and address for service of KDL, KPTHL and LVTHL.

[8] Shortly before the conference call Mr Pugh wrote to the Authority opposing the proposition that what happened in the *Chambers* case was similar to the factual circumstances for him, KDL and the Byes in the present matter.

The Authority's investigation

[9] At the case management conference the parties agreed the issue of whether compliance orders could be made against KDL and Mr Pugh should be determined 'on the papers', after the parties had the opportunity to lodge written submissions under an agreed timetable. Those papers comprised the evidence available from the earlier investigations and determinations, the parties' communication with the Authority and their written submissions.

[10] From discussion in that conference call I understood counsel for the Byes to have limited the scope of their application to whether orders could be made applying the principles considered in the *Chambers* decision, and not continuing to seek leave to pursue Mr Pugh under s 142Y of the Act. However the later written submissions made for the Byes addressed both avenues for potential orders. In an amended statement of problem, lodged with those submissions, the Byes asked for "a compliance order against both respondents, to ensure the employer makes the payments" as well as being granted their earlier request for leave to pursue Mr Pugh under s 142Y of the Act.

[11] In reply submissions Mr Pugh objected to the Byes amending their claim, first lodged on 21 February 2019, to include an order of the type confirmed by the Court in the *Chambers* case. He submitted it would be a breach of natural justice to allow an 'eleventh hour' change. Instead, Mr Pugh argued the Authority should limit itself to

considering solely the question of leave under s 142Y as that was the issue that had been reserved in its 28 March 2019 determination. And that claim, he suggested, should be dismissed because the Authority had not awarded any payments of the type that could be pursued under such a grant of leave.

Issues

[12] The issues for resolution in this determination were:

(i) Could the Authority justly consider the Byes application for a compliance order requiring KDL and Mr Pugh to take the steps necessary to put KDL in the funds necessary to pay the remedies?

(ii) Should such an order be made?

(iii) Should leave be granted under s 142Y to pursue Mr Pugh personally if KDL did not pay the remedies and costs due to the Byes?

Adequate opportunity to be heard

[13] Mr Pugh objected in his written submission to the Byes advancing a claim for orders against him of the type made in the *Chambers* case. He said that was a substantial change and it was contrary to the principles of natural justice to allow them to make such a significant change at a late stage.

[14] The reference to natural justice in this instance concerns the opportunity for a party to be heard after a fair amount of time to prepare relevant information and arguments.

[15] This has occurred in the present matter. Counsel for the Byes gave fair notice, by way of memorandum, regarding their view of the relevance and potential application of the *Chambers* case. This was done a week before the case management conference. Mr Pugh provided a written response, lodged by email, shortly before that conference call. His response set out information and argument about whether his position and KDL's circumstances were similar to those of the parties in the *Chambers* case. He argued that the Byes had other avenues to collect their debt against KDL.

[16] Mr Pugh also wrote that he was "happy for this matter to be decided on the papers before the Authority". This procedure was confirmed during the conference call where the timetable for written submissions was set – a week later for the Byes

and, in reply, three weeks later for Mr Pugh. He subsequently lodged submissions which have been considered in preparing this determination. Accordingly, Mr Pugh has had adequate notice of the nature of the claim and the opportunity to respond to it through the 'on the papers' procedure to which he had agreed.

A compliance order may be made against KDL and Mr Pugh to arrange funds

[17] The Byes submitted that there was "sufficient closeness" in the relationship between KDL and Mr Pugh to make a compliance order of the type issued by the Authority and confirmed by the Court in the *Chambers* case.

[18] Four topics needed to be addressed in relation to that submission: (i) the circumstances of the Byes' employment and how KDL got the funds to pay them; (ii) the facts and legal principles in the *Chambers* case; (iii) an assessment of similarity and applicability to the situation of Mr Pugh and KDL; and (iv) what order, if any, should be made.

(i) The employment and how KDL got its funds

[19] Mr and Mrs Bye were employed by KDL as caretakers of a 40-hectare rural property called Wai Raumati in the Bay of Islands, located about 30 minutes' drive from Kerikeri. Mr Pugh used a large house on the property as a holiday home for himself and his family. The Authority's original determination wrongly described Wai Raumati as being owned by KDL.[4] Mr Pugh subsequently corrected that description. In the case management conference on 30 May he explained that Wai Raumati was owned by what he called the Lake View trust, referring to LVTHL.

[20] The property is of considerable value. On one occasion, when it was on the market for sale, it was advertised as being "a great legacy family estate" that could also be run as an accommodation business. It was described as comprising three separate titles, with two white sandy beaches, two separate houses, a boat shed, six powered camp sites, five registered deep water moorings and two boat ramps.

[21] An email Mr Pugh sent the Authority on 26 March 2019 said KDL had no funds to pay the remedies. His email included an important explanation of the formal accounting arrangements between KDL and LVTHL to pay maintenance services for the property, including paying the wages and associated costs of employing staff:

[4] *Bye*, above n 1, at [1].

> The reason KDL has not already paid the amounts deemed owing to Mr & Mrs Bye is that KDL has no funds or assets. The company over the years has been used for various business activities. It has been registered since April 2006 and always operated correctly meeting its requirements/ obligations. At the time of the incident that has created this outcome and resultant debt it operated as a property maintenance contractor. The Byes were its only employees. The contract at Wai Raumati to maintain the property it's [*sic*] only contract.
>
> The costs of the company and its outgoings were paid for **by a matching equal payment in receipt for its services by the trust owners of the subject property**. Subsequently it does not have the funds to pay the debt at this time.
>
> … No ability to pay. No funds. No assets.
>
> As Director of KDL I acknowledge that a Compliance Order is available to the applicants due to KDL's non-payment by the required date.
>
> I apologise for the position the company is in but those are the facts.

[22] The key point for present purposes was that the trust company provided the funds KDL needed to pay its employees. Mr Pugh was a director of both entities. KDL was owned by the two trust companies in which he was the sole shareholder and a director.

(ii) The Chambers *case: facts and principles*

[23] Mr Chambers owned 100 per cent of the shares in Allen Chambers Limited (ACL). ACL was the ultimate holding company of Zumo Retail Nelson Limited (ZRNL). Mr Chambers was sole director ACL and ZRNL.

[24] The Authority ordered ZRNL to pay Mr Pelabon remedies of lost wages, holiday pay and distress compensation after finding his dismissal was unjustified. When those remedies were not paid the Authority considered a request from Mr Pelabon for a compliance order requiring ACL and Mr Chambers to ensure ZRNL complied with the Authority's earlier orders to pay remedies to him.

[25] In deciding to grant the requested compliance order, the Authority relied on a 1990 judgment of the Labour Court. In *Northern Clerical Workers Union v Lawrence Publishers Co of New Zealand Limited and John Tony Holdings Limited* the Court confirmed a compliance order was available to enforce orders for monetary remedies of lost wages and distress compensation.[5] Reviewing earlier case law the Court also

[5] (1990) ERNZ Sel Cas 667, [1990] 1 NZILR 717.

found there were some circumstances where an order could be made requiring compliance by persons not party to the original order for remedies. Here, 'persons' means both human individuals and legal entities such as registered companies.

[26] The Court accepted that, in general, a managing director or a holding company would not be required to pay compensation that was clearly the liability of a separate employing entity. Neither would payment by compelled by "some other person who has no powers in the matter to bring about payment by a separate employing entity of the money for which it is liable".[6]

[27] And, in the facts of the case in *Lawrence Publishing*, the Court saw no need to go so far as 'lifting the corporate veil' to look at issues of control by directors and shareholders in different legal entities. Rather, it looked at who was responsible to carry out the acts necessary for the employing entity to pay the remedies it had been ordered to pay. The Court referred to a number of similar cases and said:[7]

> In each of those cases third persons were bound by compliance orders, not to make payment of a respondent's debt from their own pockets, but to take the steps which were in their power to ensure that the liability was met by the person upon whom the liability fell.

[28] Applying that principle the Court found that the director and the holding company had sufficient control over the employer company to put that entity in a position where it could and would pay the remedies owed to the worker.[8] The Court concluded it had jurisdiction to make orders requiring all three respondents in that case to ensure the employer company made the payment. This included requiring the holding company to advance whatever funds were necessary to the employer company.

[29] In *Chambers* the Employment Court confirmed the principles from *Lawrence Publishing*, decided 29 years earlier, remain relevant for use of the compliance provisions under the current Act.[9] It found the Authority had properly applied those principles to similar facts involving Mr Chambers, ACL and ZRNL. It described Mr Chambers as being the same person wearing respective hats in two entities. It found no evidence that neither he nor ACL were unable to place ZRNL in funds, if either of

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[6] At 672, 721.
[7] At 672, 722.
[8] At 674, 723.
[9] *Chambers*, above n 3, at [37].

those parties decided to do so, or if they were ordered to do so. Those facts indicated there were "sufficient connections between the relevant parties" to give rise to an irresistible inference that they had the necessary power and control to make those arrangements.[10]

(iii) similarity and applicability to the situation of Mr Pugh and KDL

[30] The situation and circumstances of Mr Pugh and KDL was clearly on all fours with the facts of both *Lawrence Publishing* and *Chambers.* Mr Pugh was a director of all relevant entities. He was the sole shareholder of the owner of the property. As its sole director he was also responsible for the arrangements whereby KDL was operated as the provider of services, through employees, to the trust company that owned the property and then, as its sole shareholder and a director, for the trust company to pay for those services by an annual transfer of necessary funds. There is no evidence Mr Pugh is not able to have KDL placed in funds sufficient to pay the ordered remedies. He clearly had the sufficient connections and necessary power to arrange for the trust company to secure and provide those funds to KDL.

(iv) Order for compliance by Mr Pugh and KDL

[31] Mr Pugh has suggested that the Byes simply attempt to enforce KDL's debt to them by the normal civil collection process. In an email to the Authority on 30 May 2019 he wrote:

> The applicant[s] have their compliance order against Kelee Developments Ltd. They have avenues available to them to progress the collection of the debt. That is what they should do.

[32] One such avenue is provided under s 141 of the Act allowing an Authority determination to be filed in the District Court and enforced in the same manner as an order of the District Court. However, as is clear from the accounting arrangements he has described, Mr Pugh no doubt knows pursuing that route would find the Byes, or the court's bailiffs, knocking on the door of a cupboard that is bare. It was a means by which supposedly clever use of the separate legal personalities of KDL and the trust company, which paid KDL's bills, could be used to avoid paying the remedies awarded to the Byes for their unjustified dismissal.

[10] At [49]-[50] and [58].

[33] In those circumstances it was in the interests of justice for the Authority to exercise its discretion under s 137 of the Act by ordering KDL and Mr Pugh to take all steps necessary to ensure KDL is put in funds to make the necessary payments to the Byes. How Mr Pugh makes those arrangements in respect of the resources of KPTHL, LVTHL, KDL or other sources is up to him. By order under s 137(1)(b) and (3) of the Act, Mr Pugh must make those arrangements and KDL must then make full payment of the remedies and costs due to Mr and Mrs Bye with 28 days of the date of this determination.

No leave granted under s 142Y of the Act

[34] Section 142Y allows an employee to seek leave to recover "wages and other money payable to the employee" from people who were involved in certain capacities in breaches of employment standards that then resulted in a default in the payment of that money. If leave is granted, the employee can pursue such a person for payment if the employee's employer is unable to pay the arrears in wages or other money.

[35] One defined category of "involved" person is a director of a company. There was no doubt that Mr Pugh fell within the scope of that provision but that was not the point at issue.

[36] By Minute of 22 March 2019 I had advised the parties that the reference to "any wages or other money payable" in s 142Y did not apply to remedies for a personal grievance awarded under s 123 of the Act. The Byes did not agree with that view. Their submissions on that topic required consideration of the scope of the reference to employment standards in s 142Y. This is because the default in payment must be "due to a breach of employment standards".

[37] Employment standards are defined as meaning certain provisions of the Act and other statutory minimum entitlements.[11] These standards include all the provisions of the WPA but do not refer to the s 123 remedies provided in the Employment Relations Act.

[38] The argument on this technical point was partly complicated because the Authority's earlier determination had, as permitted under s 157(1) of the Act, taken what was described as a "simpler, less technical approach" to resolving part of Mr

[11] Employment Relations Act 2000, s 2 definition of "employment standards".

Bye's claim. His original application to the Authority included a claim that KDL breached the WPA by not paying his holiday pay.

[39] Throughout their employment, and by arrangement with them, KDL had paid the separate wages of the Byes into a joint bank account. After their dismissals KDL had withheld Mr Bye's holiday pay to offset part of a rent debt owed to it by Mrs Bye. Mrs Bye accepted the debt was owed so if an order was made for KDL to pay Mr Bye his holiday pay, KDL could have then sought an order requiring Mrs Bye to pay the equivalent amount back to the company to cover her rent debt. Although the deduction from Mr Bye's holiday pay was unauthorised, no orders were made for payments to fix that shortcoming because it was better to let Mr and Mrs Bye sought the balance out between them rather than require practically pointless payments to be made from and to KDL.

[40] The withholding of the holiday pay was, however, a breach of an employment standard. That wrongdoing was addressed by imposing a penalty of $2,000 on KDL, which it has paid.

[41] I was not persuaded these circumstances favoured exercise of the discretion to grant leave to pursue Mr Pugh under s 142Y(2). There was a breach of employment standards but no order for payment of wages or other money was made as a result. Other sums now due to Mr Bye and Mrs Bye were remedies due under s 123 of the Act, not the provisions within the scope of the Act's definition of employment standards. It was only wages and other money due under those standards provisions that could be pursued under s 142Y leave, not personal grievance remedies.

No order for costs

Neither the Applicants statement of problem lodged on 21 February 2019 nor their amended statement of problem lodged on 7 June 2019 sought any orders for costs in relation to their applications for a compliance order, leave under s 142Y or the subsequent compliance orders against KDL and Mr Pugh. No order for costs is made in relation to those applications.

Robin Arthur
Member of the Employment Relations Authority