

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 533  
3055558

	BETWEEN	JESSE WILLIAM PAUL Applicant
	AND	B J RAKENA BUILDERS LIMITED First Respondent
	AND	BARRY JON RAKENA Proposed Second Respondent
Member of Authority:	Helen Doyle	
Representatives:	Applicant in person No response from first or proposed second respondent	
Application to seek leave to recover against proposed second respondent received:	31 July 2019	
Date of Determination:	13 September 2019	

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**THIRD DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This determination resolves the issue as to whether the applicant is granted leave to recover, from the proposed second respondent, holiday pay payable to him under s 142Y of the Employment Relations Act 2000 (the Act).

[2] The proposed second respondent was not the applicant's employer.

## **First and second determinations of the Authority**

[3] In a determination dated 17 July 2019 the Authority ordered that the first respondent comply with the first and third orders made in a determination of the Authority dated 17 April 2019 and pay to the applicant holiday pay in the sum of \$16,484.15 within 14 days of the 17 July 2019.<sup>1</sup>

[4] Although the proposed second respondent was joined to the proceeding in the 17 April 2019 determination the Authority was not prepared to order compliance by the second respondent for reasons it set out in the determination of 17 July 2019.<sup>2</sup> Instead it set out that the appropriate approach would be to reserve leave for the applicant to return to the Authority under s 142Y of the Employment Relations Act 2000 (the Act), if the first respondent defaults and does not comply with the order for payment of the holiday pay.

[5] The applicant returned to the Authority on 31 July 2019 and advised that he has not been paid by the first respondent as ordered by the Authority. He confirmed that he wants to seek leave under s 142Y for an order that payment be made personally by the proposed second respondent.

[6] The Authority advised the proposed second respondent of this in a notice of direction dated 8 August 2019 and gave him 14 days to respond in writing to the application for leave to recover holiday pay from him. I am satisfied that the notice of direction was served on the proposed second respondent and that he has failed to take any steps to respond as directed to do.

[7] Under s 142Y(2)(a) and (b) of the Act, an employee who seeks to recover money from a person who is not the employee's employer can only do so with prior leave of the Authority or the Court; and to the extent that the employee's employer is unable to pay the money owing.

[8] This means that leave needs to be obtained before the Authority can make an order for payment. It is a two stage process.

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<sup>1</sup> *Jesse William Paul v B J Rakena Builders Limited and Barry Jon Rakena* [2019] NZERA 422 and [2019] NZERA 233.

<sup>2</sup> [2019] NZERA 422 at [9]

[9] The Authority needs to be satisfied of several matters under s 142Y of the Act before leave can be granted and I will consider these now.

**Was there a default in the payment of the holiday pay?**

[10] Yes I am satisfied that there was.

**Was the default due to a breach of employment standards?**

[11] Yes it was a breach of the applicant's entitlement to payment under the Holidays Act 2003.

**Is the proposed second respondent a person involved in the breach under s 142W by failing to pay holiday pay?**

[12] Mr Rakena is a sole director of the first respondent. He was directly or indirectly knowingly concerned in, or party to, the breach of the failure to pay the applicant his holiday pay. I am satisfied that he is a person involved in the breach of the employment standards under s 142W of the Act,

**Is the first respondent unable to pay the holiday pay owed?**

[13] The proposed second respondent lodged on behalf of the first respondent a statement in reply to the claim and participated in a telephone conference with the Authority on 9 April 2019. After the first determination he did not engage again with the Authority.

[14] The first determination provides at paragraph 9 from the telephone conference as follows:

Mr Rakena was apologetic to Mr Paul and stated that the First Respondent also owes the IRD PAYE and is close to ceasing trading. Mr Rakena has always agreed with Mr Paul that he is owed money but said the company was in a poor financial situation and neither it nor Mr Rakena have been able to pay Mr Paul his leave entitlements.

[15] There was reference to a van that the first respondent may have owned and was proposing to sell. The first determination provided at paragraph 10 that both parties acknowledged that the van was unlikely to sell for the full amount owed.

[16] The first respondent is still on the Companies Register. The proposed second respondent has made it clear that the first respondent is in a poor financial situation and that its assets are unlikely to satisfy the amount owed. There is also the failure by the first respondent to make any payment of holiday pay from the time of the applicant's last day on 7 September 2018 to the date of this determination. I am satisfied that there are reasonable grounds for concluding that the first respondent does not have sufficient assets to pay the holiday pay owing.

**Should leave be granted?**

[17] The proposed second respondent has not provided a reason as to why leave should not be granted. I am satisfied that the grounds for granting leave to the applicant are made out.

[18] The applicant is granted leave to bring a claim to recover his holiday pay against the second respondent under s 142Y of the Act.

**Next step**

[19] The Senior Authority Officer will contact the parties to confirm an investigation meeting date and any other timetabling directions that may be considered necessary. The Authority will, at that point in time, decide whether to order the second respondent to make payment to the applicant of the holiday pay.

Helen Doyle  
Member of the Employment Relations Authority