

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 709  
3050272

BETWEEN            ALEXANDER CLARK  
                                 Applicant  
  
AND                    WOOFINGTONS LIMITED  
                                 Respondent  
  
AND                    BRIAN WILLMAN  
                                 Second Respondent

Member of Authority:    Trish MacKinnon  
  
Representatives:        Tracy Campbell, advocate for the Applicant  
                                 Kevin Smith, counsel for the Respondents  
  
Investigation Meeting:    On the papers  
  
Submissions Received:    13 August 2019 from the Applicant and Second  
                                 Respondent  
  
Last information received: 5 September 2019  
  
Date of Determination:    16 December 2019

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Alexander Clark claims his employer unjustifiably disadvantaged him during his employment; unjustifiably dismissed him; breached the terms of his individual employment agreement (IEA); and breached its duty of good faith towards him.

[2]     The Authority will hear those claims in due course.    A preliminary matter has arisen over Mr Clark's citing, in an amended statement of problem, the sole director and shareholder of Woofingtons Limited as Second Respondent in this matter.    Counsel for the Respondents

raised the issue of whether or not personal liability could be properly and legally imputed to the Second Respondent as a director of the First Respondent and sought a hearing on that matter.

[3] In the course of a telephone conference with the parties it was agreed the Authority would determine this as a preliminary issue after receiving the parties' submissions on the matter.

[4] This determination has been issued outside the timeframe set out in s 174D(2) of the Employment Relations Act 2000 (the Act) in circumstances the Chief of the Authority has decided, as he is permitted by s 174D(3) to do, are exceptional.

### **Background**

[5] Mr Clark commenced work on 31 July 2017 on the terms of an IEA, an unsigned copy of which was provided to the Authority. The employer party to the IEA was named as "Woofington's Luxury Dog Stay".

[6] Brian Willman is the sole director and shareholder of Woofingtons Limited (Woofingtons), a duly registered company that operates Woofington's Luxury Dog Stay in Brooklyn, Wellington. Mr Clark's statement of problem claims Mr Willman was "at all times in direct and personal control of the First Respondent..." and that he "induced the First Respondent to breach the Applicant's IEA..." and was personally liable for penalties.<sup>1</sup> One of the orders Mr Clark asks the Authority to make is that Mr Willman ensures the First Respondent has "sufficient funds to meet any awards and/or penalties ordered in favour of the Applicant."

### **Submissions of the parties**

[7] At paragraph 5 of her submissions for Mr Clark, Ms Campbell gave the following reason for joining Mr Willman as Second Respondent:

The Applicant has joined the Second Respondent personally to the action [file reference deleted] for the reason that Applicant has concerns that the Second Respondent may wind up the First Respondent to defeat any claim the Applicant has against the First Respondent.<sup>2</sup>

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<sup>1</sup> Applicant's amended statement of problem lodged 17 May 2019 at paragraph 3.6.

<sup>2</sup> The file reference cited erroneously has been deleted as it is unrelated to the current proceedings.

[8] Ms Campbell also submitted that Mr Willman was at all times the decision maker and was responsible for Woofington's actions in relation to this matter.

[9] In other submissions, Ms Campbell referred to the belated provision of wage and time records for Mr Clark and the failure to provide additional remuneration or benefit to him to compensate for requiring him to work through rest and meal breaks. She linked the latter failure to a breach of employment standards in which Mr Willman was directly and knowingly involved.

[10] Mr Clark has made no claim or problem for resolution by the Authority in relation to this assertion: he has referred to it as part of the facts giving rise to his claims for unjustifiable disadvantage, unjustifiable dismissal, and breaches of his IEA and the duty of good faith. Ms Campbell cited s142W of the Act and submits Mr Willman, as sole director of the First Respondent, and someone who was directly and knowingly involved in the breaches, fell well within the ambit of the Act.

[11] For the Second Respondent Mr Smith submitted Woofingtons remains in existence and is continuing to trade. He says Woofingtons is not contemplating liquidation but he acknowledges it was "trading at a return less than desirable". This, he said, was the reason for attempting to "restructure" Mr Clark's IEA.<sup>3</sup>

[12] Mr Smith further submitted the First Respondent had not breached employment standards and there was no entitlement for Mr Clark to join Mr Willman to the proceedings personally. The statement in reply accepts that the First Respondent directed Mr Clark to remain on the premises during rest and meal breaks for health and safety reasons but denies refusing to allow those breaks.

[13] In Mr Smith's submission Mr Clark had failed to identify a breach of employment standards in the original statement of problem that was lodged. He noted that Mr Clark complained of "unfair dismissal" only as the cause of his grievance in that document.

[14] Mr Smith also submitted that the Applicant's concerns over the possibility that Mr Willman may wind up Woofingtons to defeat any claims he may have was not a proper ground for joining an "authorised person" in that person's personal capacity.

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<sup>3</sup> That attempt is the basis of the Applicant's claim to have been unjustifiably disadvantaged in his employment.

[15] I accept that submission. There is no compelling evidence of an intention to liquidate Woofingtons. The New Zealand Companies Register records that it last filed an annual return in September 2019 and there are no alerts on the register that would support a concern as to its imminent deregistration.

[16] The employer was cited as Woofingtons Luxury Dog Stay on Mr Clark's IEA. Although that name is different from that of the registered company, it is sufficiently close for the association to be made. There is nothing in Mr Clark's IEA to indicate a direct employment relationship with Mr Willman.

[17] Mr Clark's position description provided that he was responsible to the Manager of Woofingtons. It is clear from correspondence attached to the Statement of Problem that the Manager was not Mr Willman. The incumbent of the Manager's position may have communicated closely with the Director of the business over the direction Woofington's took, but that is neither unusual nor unexpected in a small business with a sole director. It does not indicate a relationship of employment directly between Mr Clark and Mr Willman.

[18] I am not satisfied the reason given by Ms Campbell for joining Mr Willman personally to these proceedings is valid. There is little indication that the company is about to liquidate, wind up or be deregistered from the New Zealand Companies Register.

[19] Nor am I am satisfied that it is appropriate for Mr Willman to be joined to the proceedings on the basis of Mr Clark's claim that Mr Willman induced a breach by the First Respondent of his IEA. The only breaches specified in the amended statement of problem are statutory breaches, not breaches of the IEA.

[20] Woofingtons accepts it proposed changes to Mr Clark's IEA when it presented him with a revised agreement. However, it is clear from the statements of both parties that Mr Clark rejected the proposed amendments. There is no disagreement between them that Mr Clark remained on the terms and conditions of his original IEA. An unsuccessful proposal to replace an existing IEA cannot be described as a breach of an employment agreement.

[21] Ms Campbell's submission that Mr Willman induced a breach of Mr Clark's statutory entitlement to rest breaks and meal breaks does not relate to a problem or matter the Applicant has brought to the Authority for resolution. It is asserted as part of the "facts that

have given rise to” those problems he asks the Authority to resolve but is not pleaded as a cause of action.

[22] Mr Clark seeks no penalty in relation to his assertion regarding rest and meal breaks and indeed cannot do so as that is the sole preserve of the Labour Inspectorate.<sup>4</sup>

### **Conclusion**

[23] There are no grounds to join Mr Willman to the proceedings.

### **Costs**

[24] The issue of costs is reserved and will be considered following determination of the substantive matters.

**Trish MacKinnon**  
**Member of the Employment Relations Authority**

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<sup>4</sup> Section 142X of the Act.