

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2020] NZERA 224
3064414

BETWEEN	DENISE FAY TUBBY Applicant
AND	SR NZ INVESTMENTS LIMITED First Respondent
AND	JASBIR SINGH JASWAL Second Respondent

Member of Authority: Michele Ryan

Representatives: Margaret Williams, advocate for the Applicant
No response for or on behalf of the Respondents

Investigation Meeting: On the papers

Date of Determination: 9 June 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Denise Tubby has applied to the Authority for leave to have Mr Jasbir Jaswal, the sole director of the first respondent, joined to proceedings currently before the Authority.

[2] Ms Tubby's application is made pursuant to s 142Y of the Employment Relations Act 2000 (the Act) and s 77A of the Holidays Act 2003 (the HA).

[3] In letters delivered to each of the respondents on 13 March 2020¹, Mr Jaswal was advised that if he intended to object to Ms Tubby's application, he was required to do so in writing no later than 14 days after receipt of the application.

[4] No response has been received from either respondent on the issue of joinder and the Authority has proceeded to determine the application on the material provided.

The relevant statutory provisions

[5] It is helpful to first set out the provisions under which Ms Tubby brings her application.

[6] Section 142Y of the Act provides:

142Y When person involved in breach liable for default in payment of wages or other money due to employee

- (1) A Labour Inspector or an employee may recover from a person who is not the employee's employer any wages or other money payable to the employee if—
- (a) there has been a default in the payment of wages or other money payable to the employee; and
 - (b) the default is due to a breach of employment standards; and
 - (c) the person is a person involved in the breach within the meaning of section 142W.
- (2) However, arrears in wages or other money may be recovered under subsection (1) only,—
- (a) in the case of recovery by an employee, with the prior leave of the Authority or the court; and
 - (b) to the extent that the employee's employer is unable to pay the arrears in wages or other money.

[7] The term "**employment standards**" is referred to at s 5 of the Act, and includes but is not limited to:

- minimum entitlements and payment for those under the Holidays Act 2003;
- minimum entitlements under the Minimum Wage Act 1983;
- the provisions of the Wages Protection Act 1983.

¹ Confirmed by CourierPost's 'Track&Trace' system

[8] Section 142W of the Act defines who may be a “person involved in a breach” as follows:

142W Involvement in breaches

- (1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—
 - (a) has aided, abetted, counselled, or procured the breach; or
 - (b) has induced, whether by threats or promises or otherwise, the breach; or
 - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
 - (d) has conspired with others to effect the breach.
- (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
- (3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:
 - (a) a person occupying the position of a director of a company if the entity is a company:

...

[9] Ms Tubby alleges the first respondent failed to pay her minimum wages, annual holidays, and public holidays. Each claim concerns a breach of an employment standard as defined at s 5.² It is not necessary therefore to apply both s 142 of the Act and s 77A of the HA to Ms Tubby’s circumstances where her claims all fall within the ambit of s 142Y.

Should Ms Tubby be granted leave?

[10] Ms Tubby’s application was accompanied by a sworn affidavit. She points to bank statements attached to the first respondent’s statement in reply, and observes there are a number of transactions recorded as dishonoured. She also says a representative of the first respondent advised that the employer company was “practically defunct”. This information leads Ms Tubby to conclude the first respondent may not be in a position to pay wages and holiday entitlements.

[11] Ms Tubby further states that Mr Jaswal, as the sole director of the first respondent, was the person who directly made decisions about payments she was entitled to receive.

² The employment standards material to this matter are set out at [7].

[12] The assertions contained in Ms Tubby's affidavit have not been challenged, nor has either respondent refuted the contents of the bank statements as inaccurate.

[13] On the information provided I am satisfied that there is a arguable case that:

- wage and holiday entitlements may be owed to Ms Tubby; and
- the first respondent may be unable to pay the entitlements; and
- Mr Jaswal may be a person involved in a breach.

[14] Ms Tubby's application to have Mr Jasbir Jaswal joined as a second respondent to the claims set out at file number 3064414 is granted.

[15] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority