

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2020] NZERA 496
3070212
3070232
3070213

BETWEEN	KILEY MILLER Applicant
AND	BEN DINGLE Applicant
AND	KATISHA MILLER Applicant
AND	DALANA ENTERPRISES LIMITED First Respondent
AND	LUTON GLEESON Second Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Steve Emslie, advocate for the Applicants
No appearance for the Respondents

Investigation Meeting: 8 September 2020 at Whanganui

Submissions [and further Information] Received: 8 September 2020 from the Applicants

Date of Determination: 1 December 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Kiley Miller (Kiley), Ben Dingle (Ben), and Katisha Miller (Katisha) each claim they were unjustifiably dismissed and are owed wages and holiday pay by Dalana Enterprises

Limited (DAL). They also seek reimbursement of the filing fee incurred in filing their statements of problem in the Employment Relations Authority.

[2] The respondents' position is unknown. DAL and their representative took part in an initial telephone conference with the Authority many months ago. There has been no further contact since. Luton Gleeson, DAL's sole director, has not responded to any attempts by the Authority to contact him and there has been no response to further correspondence. The lack of participation does, however, raise a question of whether or not I should proceed.

[3] DAL is a company. Companies are required to have an address for service.¹ A notice for investigation meeting was served on the company's office. Details were also emailed to Mr Luton and I am satisfied that service has been properly effected. This is on the basis that DAL is required to retain an effective address for service. As with a company, a director is also required to maintain an address at which documents can be served. As I am satisfied all relevant documents have been served at that address, I am therefore satisfied that DAL and Mr Gleeson have been properly served. As Mr Gleeson is also the personification of the company, and given the telephone conversations referred to above, I conclude that both DAL and Mr Gleeson are aware of the consequences of nonparticipation.

[4] DAL's and Mr Gleeson's failure to participate, means I know of no reason why the three applicants should not have their claims heard and determined.

Background

[5] Kiley's, Ben's and Katisha's claims arise out of a purported redundancy. DAL traded as Vault Bar and Eatery in Whanganui. On 15 May 2019, Kiley, Ben and Katisha attended a staff meeting where each was told that the business had been sold effective immediately but that their jobs were all safe. However, on that day the business closed and never reopened. None of the three received their final wages or accrued holiday payments. It was Mr Gleeson who called the three to the meeting and I am told that the day to day management and running of the restaurant was by Mr Gleeson. It was he who normally would have attended to the payment of wages and other money to the three applicants. Accordingly, Mr Gleeson was directly or indirectly knowingly concerned in or party to any breaches in respect of minimum entitlements.

¹ Section 192 (1) of the Companies Act 1993

Dismissal

[6] Once the fact of dismissal is established, the onus moves in this case to DAL to justify the dismissal. The fact of dismissal is simple to ascertain. As stated above, the evidence before the Authority was that on 16 May, after a promise to Kiley, Ben and Katisha that the business had been sold but all jobs were safe, the business closed and never reopened. They were dismissed. No process was followed. There was no consultation with Kiley, Ben and Katisha. The onus of justification for the dismissals moved to DAL. As neither DAL nor Mr Gleeson engaged with these proceedings, no justification for the dismissals and the non-payment of minimum entitlements due has been forthcoming.

Unpaid wages Kiley

[7] Kiley claims wages to the end of 12 May 2019 (\$1,459.69), \$129.50 for the 15th May, holiday pay of 40.55 hours (\$750.18), one month's notice calculated at 130 hours at \$18.50 per hour (\$2,405.00). Totals: \$4,744.37.

Unpaid wages Katisha

[8] Katisha claims wages to the end of 12 May 2019 (\$1,328.00); an under payment of \$163.75, six hours worked on 14 May \$120.00; worked rostered hours on 15 May (6 hours) \$120.00; accrued holidays (77.9 hours) \$1,551.80; wages in lieu of notice (30 hours at \$20 an hour) equals \$2,600; total \$5,913.60.

Unpaid wages Ben

[9] Ben claims wages to the end 12 May 2019 (\$1,088.96); five hours wages for time worked on 14 May \$88.75; five hours wages for being rostered on 15 May \$88.75; accrued holidays (31.38 hours) \$557.00; wages in lieu of notice \$2,307.50; total \$4,130.96.

[10] Neither Kiley, Katisha nor Ben have access to the employer's calculations of any payment due. However under the circumstances, s 132 of the Act allows me to accept the claims as quantified by each of the applicants and I will order payment accordingly.

[11] The ability to transfer liability to a person under s 142Y of the Employment Relations Act 2000 (the Act), is limited to minimum entitlements, namely wages and holiday pay in this circumstance. That Mr Gleeson is a person involved is clear. He was sole director of DAL

and is therefore an officer to whom responsibility can be transferred to under s 142W(2) of the Act.

[12] With respect to the issue of transferring the liability for unpaid wages to a director, I note that there is a precondition, namely that the company has either failed or is unable to pay. Here I note ample evidence has been given suggesting the company is impecunious and is on the verge of being removed from the Companies Register. While the evidence therefore suggests non-payment is a distinct liability, it is yet to occur. That said, my conclusion is that Mr Gleeson is a person involved which means I accept the application, and responsibility for minimum entitlements transfers to Mr Gleeson should DAL fail to pay by the date ordered.

[13] In respect of hurt and humiliation I accept each of the applicants suffered significant distress. They felt betrayed and misled by DAL and by Mr Gleeson.

Conclusion and orders

[14] For the above reasons I conclude Kiley, Katisha and Ben were, as claimed, unjustifiably dismissed. I accept each is also due unpaid wages as set out above. I make the following orders:

- (a) Dalana Enterprises Limited is to pay each applicant the sum of \$15,000 as compensation for humiliation, loss of dignity and injury to feeling pursuant to s 123(1)(c)(i) of the Act.
- (b) Kiley Miller is to be paid by Dalana Enterprises Limited a further sum of \$4,744.37 being outstanding wages and holiday pay.
- (c) Katisha Miller is to be paid by Dalana Enterprises Limited a further sum of \$5,913.60 being outstanding wages and holiday pay.
- (d) Ben Dingle is to be paid by Dalana Enterprises Limited a further sum of \$4,130.96 being outstanding wages and holiday pay.
- (e) Kiley, Ben and Katisha are each to be paid a further \$71.56 being the filing fee for filing their statement of problem in the Employment Relations Authority.
- (f) The above payments are to be made by 11 December 2020.
- (g) Should DAL fail to make the payments in terms of (b), (c) and (d) above by 10 December 2020, Mr Gleeson shall become personally liable pursuant to

ss 142W and 142Y of the Act, in which case payment is to be made by 18 December 2020.

- (h) Costs of \$1,000 are awarded against DAL and Mr Gleeson jointly and severally and are to be paid to the Whanganui Community Law Centre by 18 December 2020.

[15] In closing, I caution the respondents that failure to comply with the above orders may result in further consequences. Should such a failure be pursued in the Employment Court they potentially include the imposition of fines, the sequestration of property and/or imprisonment in Mr Gleeson's case.² Conversely, a certificate of determination may be obtained and the matter pursued in the District Court.

Geoff O'Sullivan
Member of the Employment Relations Authority

² Sections 139 and 140 Employment Relations Act 2000