

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 471  
3134016

BETWEEN RUI DE SOUSA,  
CHANTAL DE SOUSA,  
SARA CAVANAGH,  
CAMERON KEATS,  
NICHOLAS KEAN,  
GUILHERME ARAUJO,  
SONTHI BANPHET  
AND CHARLOTTE  
MORISON  
Applicants

AND BAYSIDE FINE FOOD  
LIMITED (IN LIQ)  
First Respondent

DEANNA DEHLSSEN  
Second Respondent

JAMES DEHLSSEN  
Third Respondent

Member of Authority: Marija Urlich

Representatives: Simon Mitchell and Jeremy Lynch, counsel for  
the Applicants  
Samuel Houliston, counsel for second and third  
Respondents

Investigation Meeting: 23 August 2021 (by zoom)

Submissions received: At the investigation meeting

Determination: 26 October 2021

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**DETERMINATION OF THE AUTHORITY**

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## **Employment Relationship Problem**

[1] In a determination dated 22 January 2021 the Authority found Rui de Sousa, Chantal de Sousa, Sara Cavanagh, Cameron Keats, Nicholas Kean, Guilherme Araujo, Sonthi Banphet and Charlotte Morison (the applicants) had been unjustifiably dismissed by Bayside Fine Food Limited (in liq) and made awards of lost wages, wage arrears and compensatory damages.<sup>1</sup> By determination dated 11 February 2021 the Authority awarded costs in favour of the applicants.<sup>2</sup> The sums awarded, or any part thereof, have not been paid.

[2] By application lodged on 9 March 2021 the applicants now seek the following:

- (i) compliance orders against Bayside Fine Foods Limited to comply with the substantive and costs determinations; and
- (ii) compliance orders against Ms Dehlsen and Mr Dehlsen to take the necessary steps to enable Bayside Fine Foods Limited to comply.<sup>3</sup>

[3] They also seek a contribution to costs incurred in lodging this application.

[4] BFFL (in liq) has not filed a statement in reply. I am satisfied service was effected on Bayside Fine Foods Limited on 11 March 2021. On 12 April 2021 Bayside Fine Foods Limited entered voluntary liquidation. The creditors listed in the liquidator's first report are the applicants and an incorporated company of which Ms Dehlsen and Mr Dehlsen are the sole directors and shareholders. The applicants say Ms Dehlsen and Mr Dehlsen are properly joined to these proceedings because they are directly responsible for the losses they have suffered. Through counsel the applicants advise the liquidator's consent to pursue these proceedings has been sought and declined and they are reluctant to seek leave of the High Court due to the time and expense involved.

[5] Ms Dehlsen and Mr Dehlsen have filed statements in reply. They say because they were not parties to the Authority's substantive determination or the costs determination and because the applicants have not claimed they jointly employed them

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<sup>1</sup> *De Sousa and 7 Ors v Bayside Fine Food Limited* [2021] NZERA 27.

<sup>2</sup> *De Sousa and 7 Ors v Bayside Fine Food Limited* [2021] NZERA 47.

<sup>3</sup> Employment Relations Act 2000, s 137(6).

or have assumed personal liability for Bayside Fine Foods Limited actions the Authority has no power to order compliance against them under s 137(2) of the Act. They say they cannot be joined in their capacity as directors for the purposes of compliance and enforcement because the Authority does not have that jurisdiction under s 137.<sup>4</sup> They also say the liquidation of Bayside Fine Foods Limited makes joining them to the proceedings ineffective.<sup>5</sup>

[6] To this end Ms Dehlsen and Mr Dehlsen raise two preliminary issues for determination:

(i) can they be joined as respondent parties to this application, if so, should they; and

(ii) if they are, can the Authority make the compliance orders sought.

### **The Authority's investigation**

[7] By consent the above issues are to first be considered and determined. Counsel attended an investigation meeting by zoom during which they spoke to written submissions.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Relevant law**

[9] Under s 137 of the Act the Authority has a broad discretion to order compliance with a range of matters including determinations issued by the Authority. A compliance order may be made against a person who is not an original party to the proceedings for the purpose of ensuring earlier decisions are complied with.

[10] In *Auckland Regional Services Trust v Lark* the Court of Appeal set out the general test to be applied to joinder:

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<sup>4</sup> *Baker v Hauraki Rail Trail Limited* [2019] NZEmpC 147 at [22].

<sup>5</sup> *Christiansen v Sevans Group Ltd* [2013] NZEmpC 11.

The general test is whether the proposed party will be directly affected by any order which may be made in the proceedings and the general rule is that it is for the plaintiff to decide who he or she will sue and for any person named as defendant to take striking-out proceedings if it is considered by them that there is no arguable cause of action.<sup>6</sup>

[11] Under s 221(a) the Authority may join parties to the proceedings in order to make compliance orders against them.<sup>7</sup> The terms of any such compliance orders would usually be to ensure that the original party complies with the orders being enforced, not that the joined parties should themselves comply by, for example, personally paying sums of money ordered. In cases where an incorporated employer has failed to pay a sum of compensation to an employee, the Authority may order a director to use his or her position of control to ensure that the liability is met by the employer company.<sup>8</sup> There may be cases where joining should be declined because it would serve no useful purpose.

## **Discussion**

[12] The applicants submit the Authority has broad powers under s137 of the Act to order compliance with any order of the Authority including any determination. Further, the applicants submit s 137(4) empowers the Authority to require any person to do any specified thing for the purposes of preventing further non-compliance with a determination of the Authority. Relying on the principles articulated in *Lawrence Publishing* (as confirmed in *Pelabon*) the applicants submit the Authority has jurisdiction to make a particular type of compliance order – one against a director and/or a shareholder of a liable company to “take the steps which were in their power to ensure that the liability was met by the person upon whom the liability fell”.<sup>9</sup> They say until the Authority has before it all the relevant information the issue of whether the compliance orders sought can be granted cannot be considered and determined.

[13] It is accepted the compliance orders sought by the applicants could be made by the Authority if it is established Ms Dehlsen and Mr Dehlsen could *take the steps* necessary to ensure the liability was met. The intervening event of the liquidation is a

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<sup>6</sup> *Auckland Regional Services Trust v Lark* [1994] 2 ERNZ 135 at 138.

<sup>7</sup> *New Zealand Performance and Entertainment Workers Union v Infrast Holdings Ltd* (LC) Auckland ALC85/90, 26 July 1990.

<sup>8</sup> *Northern Clerical IUOW v Lawrence Publishing Co of NZ Ltd* (1990) ERNZ Sel Cas 667 (LC); *Allen Chambers Ltd v Pelabon* [2019] NZEmpC 45 at [43]–[58].

<sup>9</sup> *Lawrence Publishing* above n 8 at 722.

relevant and significant factor which may deprive the applicants the possibility of the orders they seek because Ms and Mr Dehlsen are prevented from doing so by s 248 of the Companies Act 1993. However, on the limited information before the Authority that appears to be one of a number of factors which will need to be weighed once the relevant evidence is filed and considered.<sup>10</sup>

[14] Accordingly, I am not satisfied, that the liquidation is such an absolute barrier to the Authority considering the exercise of the discretion sought by the applicants and that Ms Dehlsen and Mr Dehlsen are properly joined.

[15] The situation before the court in *Hauraki Rail Trail* is not that currently before the Authority. The applicants do not seek to join Ms Dehlsen and Mr Dehlsen in their capacity as directors against whom compliance orders (and enforcement) are personally sought rather, it is understood, as agents who can compel the company to meet its obligations.

### **Outcome**

[16] Deanna Dehlsen and James Dehlsen are properly joined to the proceedings and the Authority has jurisdiction to consider the compliance orders sought.

[17] The Authority will be in contact regarding the next steps in this proceeding.

### **Costs**

[18] Costs are reserved.

Marija Urlich  
Member of the Employment Relations Authority

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<sup>10</sup> *McLennan v Internet Productions Ltd (in liquidation)*, unreported, AC 19/03.