

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 150  
3154922

BETWEEN	ANDIE O'LEARY Applicant
AND	UMBRELLA MULTIMEDIA LIMITED First Respondent
AND	KEVIN LAULU Second Respondent

Member of Authority: Michael Loftus

Representatives: Bede Laracy, advocate for the Applicant  
No appearance for the Respondents

Investigation Meeting: 20 April 2022 at Wellington

Submissions Received: At the Investigation Meeting

Date of Determination: 20 April 2022

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] This is an application for compliance, along with other orders. They are that I join Kevin Laulu (also known as Vika To'Oala) as a second respondent and that I:

- a. Order he takes all necessary steps to ensure Umbrella Multimedia Limited (Umbrella) complies with any compliance order I might make including that he make the necessary payments; and
- b. More particularly, grant leave under section 142Y of the Employment Relations Act 2000 (the Act) and order he make good unpaid wages

that were found to be due to Ms O’Leary should Umbrella continue to fail to pay.

[2] Costs are also sought.

[3] The respondents, in a statement in reply furnished by counsel who was then instructed, concedes the amounts have not been paid. It is stated that Umbrella “... is not currently in a position to comply (as) its financial position is parlous but it hopes to recover and make a modest profit ... by March 2022.”<sup>1</sup>

[4] The respondents assert it would be inappropriate to join Mr Lauu as he is not in a position to compel Umbrella to do anything given the company’s financial position and suggests, but does not give any detail, that there may be grounds to argue he was not a person involved and cannot, therefore, be held personally liable.

### **Background**

[5] Ms O’Leary was, until 21 October 2020, employed by Umbrella. At the time Mr Lauu was, and according to the evidence before me remains, Umbrella’s sole Director.

[6] On 8 October 2021 I issued a determination in which I concluded Ms O’Leary had a personal grievance in that she was unjustifiably dismissed by Umbrella.<sup>2</sup> For that she was awarded both lost wages and compensation pursuant to s 123(1)(c)(i) of the Act. I also concluded she was due unpaid wages and holiday pay.

[7] Ms O’Leary asserts that none of the amounts ordered have been paid and, as already said, Umbrella concedes that is so.

### **Discussion**

[8] Before possibly considering the substantive applications the respondent’s failure to attend today means I must consider whether I can even proceed. The absence was unannounced and unexplained.

[9] The answer is yes.

---

<sup>1</sup> Statement in Reply dated 3 December 2021 at 1(a) and 2(a)

<sup>2</sup> *O’Leary v Umbrella Multimedia Limited* [2021] NZERA 442

[10] Umbrella is a company and companies must, according to the Companies Act 1993, have an address for service.<sup>3</sup> Umbrella's address for service is 33 Argyle Street, Levin which is also Mr Lauulu's address as a Director as is required by the Companies Act.<sup>4</sup>

[11] That the application was received by Umbrella and Mr Lauulu is clear as counsel was then instructed. While counsel has since withdrawn as a result of the respondents failing to give ongoing instructions he was, at one time, authorised to accept service. That time extended beyond the preparation and serving of the notice of investigation meeting which was sent to counsel as then instructed. In other words the notice of investigation meeting was properly served.

[12] Notwithstanding that I note the documents were also sent to 33 Argyle Street though someone there chose to return them. That, however, does not exonerate a party and nor does it mean the documents were not served (not that it was required at that address in any event). Not only that, but in addition, copies have also been emailed to an electronic address provided by Mr Lauulu as that for service when he was, himself, representing Umbrella in the original application.<sup>5</sup>

[13] Given the above I am satisfied both Umbrella and Mr Lauulu are, or at least should be, aware of the investigation. They should also be aware of the consequences of non-attendance as the notice of investigation meeting includes advice that should a respondent fail to attend the Authority may proceed and issue a determination in favour of the applicant.<sup>6</sup>

## **Discussion**

[14] As already said Ms O'Leary seeks an order Umbrella comply with those made in my earlier determination and make the payments required therein.

[15] Umbrella has conceded the payments have not been made and its failure to attend means there is no defence or evidence to support the indication its means preclude immediate payment or warrant some form of instalment arrangement.<sup>7</sup>

---

<sup>3</sup> Section 192(1) of the Companies Act 1983

<sup>4</sup> Above n 3 at s 387A(1)(b)

<sup>5</sup> above n 2 at [4]

<sup>6</sup> Note 2 to Form 8 of the Employment Relations Authority Regulations 2000

<sup>7</sup> Section 138(4A) of the Employment Relations Act 2000

Therefore there appears to be no reason why compliance should not be ordered and it shall be.

[16] Turning now to the application Mr Lauulu be joined as a respondent. That is, in my view, unnecessary. That is because this compliance application is separate from the original dismissal and arrears claim and Ms O’Leary has pre-empted the issue by citing Mr Lauulu as a respondent in this application. There is precedent that she may do so in circumstances such as this<sup>8</sup> but in any event he responded and while he denies he should be joined that is not on the grounds the application is improperly made. Instead, it is argued Mr Lauulu should not be held accountable for something he cannot control.

[17] The real issue is whether I can make the other orders Ms O’Leary seeks against Mr Lauulu of which there are three. They are that:

- a. Mr Lauulu be held personally responsible for ensuring Umbrella comply with any orders I might make; and
- b. That order potentially extend to making him personally liable for the payment of wages and compensation ordered as a result of Ms O’Leary’s successful grievance claim should Umbrella not pay; and
- c. That he be personally liable for wages earned but not paid pursuant to s 142Y of the Act.

[18] Having concluded Umbrella remain liable for the orders made in the substantive determination the question arises as to whether or not Mr Lauulu should be ordered to ensure compliance occurs.

[19] Here I am cognisant of precedent which leads to me to conclude it is unnecessary to look behind the corporate veil to resolve the matter. The judgement of the Labour Court in *Northern Clerical Workers Union v Lawrence Publishers Co of New Zealand Ltd*<sup>9</sup> provides precedent as regards Mr Lauulu’s obligations. In *Lawrence* the applicant, following an award of remedies associated with a personal grievance, sought payment through compliance orders against the employing company, its

---

<sup>8</sup> *Pelabon v Zumo Retail Nelson Limited and Ors* [2018] NZERA Wellington 44 upheld by the Court in *Allen Chambers Limited and George Allen Chambers* [2019] NZEmpC 45

<sup>9</sup> *Northern Clerical Workers Union v Lawrence Publishers Co of New Zealand Ltd* [1990] 1 NZILR 717

holding company, and the managing director who also held a majority shareholding in the parent company. The Labour Court concluded the dispute could be decided without disrupting the corporate veil. It said the focus should be on “*who is responsible to carry out the act [the employer] had been ordered to perform*” but had not done so. It referred to a number of similar cases and said:

*In each of those cases third persons were bound by compliance orders, not to make payment of a respondent’s debt from their own pockets, but to take the steps which were in their power to ensure the liability was met by the person upon whom the liability fell<sup>10</sup>.*

[20] The Court found the director and the holding company in that matter had complete control over the employer company. It held it was well within the power of each of them to put the employer in a position where it could pay the monies owed. To this end the Court concluded it had jurisdiction to make orders to have all three respondents ensure the employer made the payment, including that the holding company advance whatever funds necessary to the parent company “*whether from its own resources or not will be a matter ... for the three respondents.*”

[21] That this approach remains valid has been confirmed in *Pelabon*<sup>11</sup> and the evidence satisfies me a similar situation exists here. Mr Lauulu is the sole director and the evidence proffered during the substantive investigation confirms that notwithstanding the suggestion a Mr Samasoni primarily ran Umbrella,<sup>12</sup> Mr Lauulu was active in Umbrella’s management. Even if he wasn’t he should have been as to fail to do so would be in abrogation of his responsibilities as a director especially as he could not legally cede control to Mr Samasoni. That is because Mr Samasoni was a bankrupt who had no permission to run Umbrella the company<sup>13</sup> and Mr Lauulu was aware of the bankruptcy.

[22] Similarly, and while not the majority shareholder, Mr Lauulu remains a significant player being the sole director and shareholder of a company that owns 48.72% of Umbrella. No other shareholder comes remotely close to that level of ownership and the evidence is no other shareholder plays any part in Umbrella’s management. It is Mr Lauulu who, as the sole director, controls (or should control)

---

<sup>10</sup> Above n 9 at 722

<sup>11</sup> Above n 8

<sup>12</sup> Above n 2 at [29]

<sup>13</sup> Section 149(1) of the Insolvency Act 2006

Umbrella. In the absence of any evidence supporting the insinuation Umbrella is incapable of complying he must therefore be in a position to ensure it occurs.

[23] It follows it is appropriate to order both respondents in this matter ensure Umbrella makes the payments ordered.

[24] The request Mr Lauulu be held personally liable for the wages and compensation which was ordered a result of the grievance application cannot succeed.

[25] That is because the Authority is a creature of statute and can only exercise powers bestowed by the Act. Mr Lauulu is not, and never was, the employer personally and that has not been suggested. As a result no order was made against him with respect to these remedies. In the absence of an order there can be no question of non-compliance and there is nothing in the Act which otherwise allows liability to be passed to Mr Lauulu by the Authority (though the same may not apply in the Court).

[26] The same does not apply, however, with respect to the unpaid wages and Mr Lauulu was put on notice that he might be held personally liable in the original determination.<sup>14</sup> That is because, unlike the situation with respect to the dismissal remedies, s 142Y expressly states liability for a default in the payment of wages may be passed to an individual provided the default is a breach of employment standards and the person to whom the debt passes is a “person involved”.

[27] The requirement to pay wages is an employment standard, being a provision of the Wages Protection Act 1983.<sup>15</sup> That Mr Lauulu is a person involved also goes without saying given he was at all relevant times the sole director and a significant owner of Umbrella though it should be noted the statement in reply intimates he intended arguing he was not. The argument would probably be based on my comments about Mr Samasoni’s part in managing Umbrella.

[28] While Umbrella’s non-attendance means that argument has not been aired or supported it would have failed for two reasons. The first is the evidence in the substantive hearing showed Mr Lauulu was active in Umbrella’s management. The second is that as the sole director of Umbrella at all relevant times he was the only person legally able to have authorised the Company’s defaults. For reasons already

---

<sup>14</sup> Above n 2 at [34]

discussed he could not have relied on Mr Samasoni. If he did Mr Lauulu should not have given evidence he was aware of the bankruptcy and such a failure would, at the very least, mean Mr Lauulu aided or abetted the breach.

[29] Finally I note Mr Lauulu is no longer listed as a director having been replaced by a Vika To'Oala though the requisite addresses remain unaltered. The change occurred after these proceedings were initiated and the respondent's made aware of them. This I discount if only because the evidence before me is that Messrs Lauulu and To'Oala are one and the same person and that is also confirmed by contemporaneous documentary evidence furnished at the substantive investigation. If Mr Lauulu / To'Oala thinks he can avoid possible liability by simply changing his name on the companies register he is mistaken.

[30] Returning to Mr Lauulu's possible personal liability for the arrears component of the original order. Given the points in [28] above leave to pursue Mr Lauulu personally is granted.

[31] Furthermore, and given he was earlier put on notice of this possibility along with his failure to participate meaningfully in these proceedings, I see little point in further delay and will order that Mr Lauulu be held personally liable to the extent that Umbrella fails, or is unable to pay the wage arrears previously ordered. I say should Umbrella fail or be unable to make the payment as despite its admission it was unable to do so, it also aired the possibility that situation might have changed by now but again the lack of evidence from the company leaves me unaware as to whether this is actually so.

### **Costs**

[32] Ms O'Leary also seeks reimbursement of costs and seeks \$3,500. In doing so she asks that I recognise a half day investigation and then increase the tariff to recognise additional work was required as a result of the matter being complicated by Umbrella's uncooperative behaviour.<sup>16</sup> While the investigation only took an hour that was only because it was truncated as a result of the respondent's absence. It still had to be prepared for on the basis Umbrella and/or Mr Lauulu might attend and I am satisfied additional costs were generated as a result of their behaviour. Having

---

<sup>15</sup> Section 5 of the Employment Relations Act

discussed the claim with Mr Laracy I consider it appropriate I award the amount sought.

### **Conclusion and Orders**

[33] For the above reasons I make the following orders:

- a. Umbrella Multimedia Limited is ordered to comply with the requirements of determination [2021] NZERA 442 and pay Ms O’Leary a total of \$45,407.84 (forty five thousand, four hundred and seven dollars and eighty four cents). Payment is to be made no later than Tuesday 3 May 2022 and appropriate tax may be deducted and forwarded to the Inland Revenue;
- b. That Mr Lauulu is required to takes all necessary steps to ensure Umbrella Multimedia Limited (Umbrella) complies; and
- c. Should Umbrella be unable to pay after Mr Lauulu has taken all reasonable steps then Mr Lauulu is ordered to personally pay \$8,448.91 (eight thousand, four hundred and forty eight dollars and ninety one cents) being unpaid wages and holiday pay. Should this situation arise payment is to be made no later than Tuesday 17 May 2022 and, again, PAYE may be deducted and forwarded to the Inland Revenue Department; and
- d. The parties, Umbrella Multimedia Limited and Kevin Lauulu shall be jointly and severally liable to pay Ms O’Leary a further \$3,500 (three thousand five hundred dollars) being a contribution toward the cost she incurred in pursuing this application.

Michael Loftus  
Member of the Employment Relations Authority

---

<sup>16</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135