

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 253
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: 4 and 17 March 2022 (by audio visual link)

Submissions received: At the investigation meeting from the parties

Determination: 17 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority has found in a previous determination that the applicants were unjustifiably dismissed by Bayside Fine Foods Limited (BFFL) and awarded remedies and costs in their favour.¹ BFFL has not paid those awards and is now in liquidation.²

[2] The applicants seek to enforce those awards. To that end they seek compliance orders from the Authority requiring Mr and Mrs Dehlsen to put monies into BFFL (in liq) for the purpose of meeting some or all of the awards.

[3] The Authority has found there is jurisdiction to do so.³ The claim for compliance orders is now for determination.

The Authority's investigation

[4] By consent the investigation of this employment relationship problem was conducted by audio visual link. Evidence was received from the applicants, Mr Dehlsen and Stephen Lawrence, who is one of the liquidators appointed to BFFL. Submissions have been presented. For completeness the parties attended mediation in an effort to find a resolution of this employment relationship problem themselves.

[5] 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.

Issue

[6] The issue for investigation and determination is whether the Authority should exercise its discretion under section 137 of the Act and order Mr and Mrs Dehlsen to take the necessary steps to enable BFFL (in liq) to comply with determinations of the Authority making awards in favour of the applicants.

¹ *De Sousa and 7 Ors v Bayside Fine Food Limited* [2021] NZERA 27 and *De Sousa and 7 Ors v Bayside Fine Food Limited* [2021] NZERA 47.

² BFFL was placed in liquidation on 21 April 2021.

³ *De Sousa and 7 Ors v Bayside Fine Food Limited (In liq) & 2 Ors* [2021] NZERA 471.

Relevant law

[7] Under s 137 the Authority has a broad discretion to order compliance with a range of matters including determinations issued by the Authority:

137 Power of Authority to order compliance

(1) This section applies where any person has not observed or complied with—

...

(b) any order, determination, direction, or requirement made or given under this Act by the Authority or a member or officer of the Authority.

(2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.

(3) The Authority must specify a time within which the order is to be obeyed.

(4) The following persons may take action against another person by applying to the Authority for an order of the kind described in subsection (2):

(a) any person (being an employee, employer, union, or employer organisation) who alleges that that person has been affected by non-observance or non-compliance of the kind described in subsection (1).

...

[8] A compliance order may be made against a person who is not an original party to the proceedings for the purpose of ensuring compliance with earlier decisions.

[9] 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.⁴ In *Allen Chambers Ltd v Pelabon* the court stated the Authority's proper consideration of such applications is:⁵

⁴ *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].

⁵ *Allen Chambers Ltd v Pelabon* [2019] NZEmpC 45 at [43]–[58].

“...more likely...to focus on the structures within which those activities occur, and the control exercised by third parties over a liable party.”

Background

[10] In January 2019 Mr and Mrs Dehlsen incorporated BFFL. They are the sole directors and shareholders. During 2019 and into 2020 BFFL operated the café at which the applicants worked from commercial premises owned by another company (the other company) of which Mr and Mrs Dehlsen are the directors and shareholders. BFFL leased the premises and café assets including tables, chairs and display cabinets from the other company. BFFL employed the applicants along with managers to manage the day to day running of the café. Mr and Mrs Dehlsen had some limited involvement in the café day to day but there is no suggestion in the evidence that they employed the applicants personally.

[11] The detailed background to the applicants’ personal grievances is set out in the determination dated 22 January 2021. For the purposes of this determination, it is sufficient to record the applicants were asked on 18 March 2020 by text message to attend a meeting the following day with the managers where they were advised they were dismissed with immediate effect. The dismissal letters they were handed invoke a type of frustration clause in their employment agreements to justify their dismissals purportedly in reliance on the uncertainty created by the then developing Covid 19 situation. The café was then closed. The applicants acted quickly and almost immediately sought resolution of their employment relationship problems including that BFFL attend mediation and take steps to ensure they could access the Government Covid wage subsidy. BFFL refused these requests. The impact on the applicants of being deprived access to the wage subsidy was, I am satisfied, devastating – having found themselves dismissed and without income on the eve a national lockdown they were then excluded from access to the wage subsidy. This situation was not one of their making and no fault can be apportioned to the applicants for the circumstances leading up to and subsequent to their dismissals.

[12] There is a suggestion in Mr Dehlsen's evidence that the true reason the decision was made to close the café and consequently dismiss the applicants was because the café was failing financially. While, as can be seen later, that was the case, at the date the café was closed and the applicants were dismissed, those were not the grounds represented.

[13] On dismissal the applicants were paid wages for the balance of the last week of their employment, two weeks-notice and their holiday pay entitlements. Mr and Mrs Dehlsen advanced funds to BFFL to meet those employment obligations. The information before the Authority shows prior to the appointment of the liquidator Mr and Mrs Dehlsen put funds into BFFL to settle all trade creditors including utility companies.

[14] The applicants' personal grievances for unjustified dismissal were subsequently heard and determined by the Authority and also their claim for costs. BFFL did not participate in the investigations of the hearing of those claims other than to advise it would not participate.

[15] In his evidence to the Authority Mr Lawrence said BFFL's shareholders appointed him and his colleague as liquidators and that the shareholders agreed to provide initial funding for the liquidation costs because BFFL had no assets to meet the costs of the liquidation. The liquidators' investigation of the affairs of BFFL confirmed the café business ceased trading on or around 19 March 2020 and that the business was insolvent at that time. Mr Lawrence said on his investigation of the available information the directors had not breached any obligation owed to BFFL and the company had not entered any transaction that should be clawed back. The liquidators first report dated 19 April 2021 and the second dated 10 November 2021 have been provided to the Authority. Those reports record the applicants and Mr and Mrs Dehlsen are the only parties who have filed claims to recover funds owed from BFFL (in liq). The Authority has also been provided with BFFL's financial statements to year ending 31 March 2020 and a profit and loss statement for financial year 2021. These documents show BFFL had a deficit in excess of \$250,000 and no realisable assets.

[16] In his evidence to the Authority Mr Dehlsen said he and Mrs Dehlsen had put substantial personal and financial resources into the café business and that its failure in

2020 was a significant disappointment. He said a café now successfully operates out of the same premises from which BFFL operated under a similar commercial arrangement with the other company and that he and Mrs Dehlsen have no involvement with the new operator's company.

Discussion

[17] The following passage from the determination as to jurisdiction records how this claim has developed and the point at which it is now:

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 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 1993.⁶ 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.⁷

[18] The filing, testing and consideration of the relevant evidence has now occurred. I am satisfied the evidence establishes:

- as directors and shareholders Mr and Mrs Dehlsen have exercised significant control over BFFL including deciding to close the café, voluntarily meeting creditor obligations BFFL could not meet, putting BFFL into liquidation and advancing funds to pay for the liquidation;
- it is within Mr and Mrs Dehlsen's personal capacity to put the debtor company into funds sufficient to meet the applicant creditors' claims and there is no evidence to suggest they do not personally have access to funds sufficient to do so;
- it is within Mr and Mrs Dehlsen's control to waive their creditor status in relation to BFFL(in liq); and
- the liquidator likely has the statutory power to use the 'put in' funds to meet the applicant creditors' claims.

⁶ *McLennan v Internet Productions Ltd (in liquidation)*, unreported, AC 19/03.

⁷ Above ftnt 3 at [13].

[19] It is also clear on the evidence before the Authority that BFFL has never had the financial means to meet some or all of the applicants' awards and this remains the case subsequent to its liquidation. It is also clear Mr and Mrs Dehlsen are not hiding behind the company entity to purposely avoid the applicant's claims and it is unlikely they will be able to recover the significant sums they have personally advanced BFFL as a result of its failure.

[20] This is not a situation where Mr and Mrs Dehlsen have moved assets of BFFL in the face of the applicants' personal grievances or subsequent awards for their own benefit or to deprive the applicants of those awards. Nor is it a situation where they could have taken steps due to BFFL's then financial situation or BFFL (in liq)'s current financial position to ensure it met those awards. What is, in effect, being sought is an order that Mr and Mrs Dehlsen pay from their own funds an amount sufficient to allow BFFL (in liq) to meet the awards made in the applicants' favour.

[21] The applicants say such an exercise of discretion in their favour is justified because there is no question Mr and Mrs Dehlsen are able to take the steps necessary to ensure BFFL (in liq) meets the awards and the way they have structured their affairs, including how they responded to the applicants' personal grievances, means the order sought is just and reasonable.

[22] The difficulty with the applicants' submission is that there is insufficient information before the Authority to suggest the compliance order they seek could be met - the effect of any such order would be to require Mr and Mrs Dehlsen to meet the payments from their own pocket and such an order is not within the scope of s 137.

Summary of orders

[23] The application for compliance order is declined.

Costs

[24] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed any party seeking costs may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination

in this matter. From the date of service of that memorandum the other party would then have 14 days to lodge any reply memorandum.

Marija Urlich
Member of the Employment Relations Authority