

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 310
3158281

BETWEEN

NAVDEEP SINGH
Applicant

AND

MAXIS DAIRY NZ LIMITED
(In liquidation)
First Respondent

RUNJI JIANG
Second Respondent

SHAOQUN LIU
Third Respondent

NATALIE KUNG
Fourth Respondent

Member of Authority: Marija Urlich

Representatives: John Wood and Sunny Sehgal, advocates for the
Applicant
Erin Burke, counsel for the Respondent

Investigation Meeting: On the papers

Further information and submissions received: 17 May 2022 from the Applicant
6 May 2022 from the Second – Fourth Respondents

Determination: 11 July 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

[1] The second, third and fourth respondents apply for all the respondent parties to be struck out and/or the application dismissed as vexatious or frivolous.¹ Mr Singh opposes the application.

¹ S 221(a) and clause 12 of Schedule 2 of the Employment Relations Act 2000.

The Authority's investigation

[2] By consent this matter is determined on the papers. The parties have complied with the Authority timetable for filing information in respect of this preliminary matter. The parties have filed submissions and reply on information filed with the statement of problem, statement in reply and subsequently filed application and response. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

[3] Mr Singh was employed by Maxis Dairy NZ Limited from August 2019 as a store manager. His terms of employment were set out in a written individual employment agreement dated 17 August 2019. The terms of employment included a four week notice period, that the employer may pay the employee instead of requiring them to work out their notice and that during a notice period the parties will discuss the duties the employee is to perform which may include a change in duties or being paid not to work. A subsequent employment agreement was entered with the parties on 16 November. For the purposes of this determination there were no relevant changes to the terms of employment.

[4] On 3 November 2021 Mr Singh resigned his employment giving the required four weeks' notice. In the absence of agreement between the parties, or other event, under the terms of the employment agreement his last day of employment could have been expected to have been 1 December 2021.

[5] Events during the last weeks of Mr Singh's employment are disputed. In his amended statement of problem, Mr Singh says the directors of the employing entity, the second and third respondents, "pressured" him to leave his employment in two rather than four weeks, he did not agree to this because he could not afford to and on 23 November was trespassed from the work premises. He says he is owed wage arrears for the last two weeks of his employment and his termination holiday pay is outstanding.

[6] In their statement in reply dated 17 December 2020 the second and third respondents say the employment relationship became strained during Mr Singh's notice period and that on 22 November the third respondent, Ms Kung, who is their daughter and manages the business, told Mr Singh she would pay out his notice and then trespassed him from the work premises.

[7] On 24 November Maxis Dairy went into liquidation.

[8] On 3 December 2021 Mr Singh lodged an application in the Authority seeking a finding that Maxis Dairy NZ Limited (in liq) failed to pay his final wages and holiday pay. He seeks findings that Runji Jiang, the second respondent and Shaoqun Liu, the third respondent, are persons involved in a breach of employment standards and personally liable for any default entitlements. In respect of Natalie Kung, the fourth respondent, Mr Singh seeks a finding that she has incited, instigated, aided or abetted a breach of an employment agreement for which an award of a penalty is warranted under s 134(2) of the Act and that she is a person involved in a breach under s 142W(3)(e) of the Act. He also seeks an award of costs in his favour.

[10] The first, second and third respondents seek all respondent parties be struck out or, in the alternative that the claims against them dismissed as frivolous or vexatious.

Should the respondent parties be struck out or the claims against them dismissed?

[11] The power to strike out parties to a proceeding is in s 221(a) of the Act.

[12] Clause 12A of Schedule 2 of the Act gives the Authority power to dismiss frivolous or vexatious proceedings. The Employment Court in *Lumsden v Sky City Management Limited* recognised that the Authority's power to dismiss proceedings on the grounds that they are frivolous or vexatious is limited and the threshold for establishing that is high.² Dismissing a claim is a serious step, not one to be taken lightly.

² *Lumsden v Sky City Management Limited* [2015] NZEmpC 225.

[13] The second, third and fourth respondents apply for all the respondents to be removed from the proceedings on the following grounds:

- the first respondent is in liquidation and without the consent of the liquidator proceedings against it cannot continue;
- the second and third respondents played no part in Mr Singh's employment or the alleged breaches; and
- the fourth respondent was a co-employee of Mr Singh's and not in control of the first respondent when the alleged breaches occurred.

[14] Mr Singh says all the respondent parties are properly named by application of s 142Y of the Act.

(i) *should the first respondent be struck out or dismissed?*

[15] No. It is common ground the proceedings cannot proceed against the first respondent because it is in liquidation and the liquidator does not consent. Section 142Y of the Act was considered by the Court in *Lawton v Steel Pencil Holdings Ltd (in liq)* [2021] NZEmpC 199. There Judge Holden found that it would be contrary to the objectives of part 9A of the Act for an individual to be able to avoid liability under s 142Y by reason of the company having gone into liquidation.³ Her Honour set out the applicable approach under s 142Y as follows:

... it is clear that for liability to arise under s 142Y there must be a breach of employment standards by the employer; there cannot be accessory liability without there being an underlying infraction. However, it is not a precondition that proceedings be brought against the primary violator; the potential liability of a person involved in a breach is separate from any liability that the employer may face. It is, therefore, possible to proceed against only the secondary party, although it still would need to be proved that there has been a default in the payment of wages or other money due to a breach of employment standards. It then must be established that the person from whom payment is sought was involved in the breach.

The liquidation of the employer company may give rise to evidential difficulties but if, on the evidence available, the Authority or Court can be satisfied that there has been a default in the payment of money by the employer company due to a breach of employment standards, it may consider the potential liability of individuals pursuant to s 142Y.

³ *Lawton v Steel Pencil Holdings Ltd (in liq)* [2021] NZEmpC 199 at [34].

[16] In a s 142Y setting, as is the case here, the first determination the Authority must make is whether there has been a breach of employment standards by the employer. When such a breach may have occurred – before or after the liquidation - appears, on the information before the Authority to be disputed. The resolution of that dispute will be important. It is appropriate that the first respondent remain as a party - it is the entity through which the other respondents are claimed to be involved.

(ii) *should the second and third respondents be struck out or dismissed?*

[17] No. The factual basis of the claim against the second and third respondents is disputed and yet to be investigated and determined.

(iii) *should the fourth respondent be struck out or dismissed?*

[18] No. As with the second and third respondents, the factual basis of the claim against the fourth respondent is yet to be investigated and determined.

Outcome

[19] The claims for strike out and dismissal are unsuccessful.

[20] A timetable for the substantive application is now to be set. A case management conference is to be convened for that purpose.

Costs

[21] Costs are reserved.