

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 65  
3079992

BETWEEN	JUDITH SUBRITZKY Applicant
AND	SLAVERING TUSK LIMITED (IN LIQUIDATION) t/a THE ROSE AND THISTLE INN First Respondent
AND	LORRAINE HOWE Second Respondent
AND	RICHARD MAHONEY Third Respondent

Member of Authority: Rachel Larmer

Representatives: Adam Mapu, advocate for the Applicant  
No appearance for the Respondents

Investigation Meeting: 3 December 2021 at Auckland

Date of Determination: 2 March 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] From 12 December 2018 to 21 February 2019 Ms Subritzky was employed as a Chef by Slaving Tusk Ltd (in Liquidation) which was trading as the Rose and Thistle Inn (the First Respondent).

[2] Ms Subritzky claims the First Respondent unjustifiably constructively dismissed her and unjustifiably disadvantaged her in her employment. She also claims the First Respondent breached her employment agreement.

[3] Ms Subritzky seeks penalties against Lorraine Howe (the Second Respondent) and Richard Mahoney (the Third Respondent) under s 134(2) of the Employment Relations Act 2000 (the Act).

[4] The Second and Third Respondents are directors of the First Respondent and at the material time were working alongside Ms Subritzky in the First Respondent business. Ms Subritzky says she brought the First Respondent's breaches of her employment agreement to the attention of both directors on multiple occasions, but they failed to take any steps to prevent the breaches by the First Respondent from continuing.

[5] Ms Subritzky says penalties should be imposed on Ms Howe and Mr Mahoney personally for aiding and abetting the First Respondent's breaches of her employment agreement.

#### **No appearance by Respondents**

[6] None of the three respondents engaged in the Authority's investigation process. None of the respondents filed statements in reply or sought leave to file statements in reply out of time.

[7] The Authority is satisfied that:

- (a) These proceedings have been served on each of the three respondents;
- (b) The respondents have been served with copies of the Statement of Problem, the Notice of Directions and Minutes issued by the Authority, the Notices of Investigation Meetings and the applicant's witness statement, costs submissions and supporting documents;
- (c) The respondents have been given a number of opportunities to seek leave to file statements in reply out of time, but have failed to do so;
- (d) The respondents were aware of these proceedings but have elected not to participate in the Authority's investigation;
- (e) The respondents have not engaged in the Authority's process in good faith.

## Service

[8] Ms Subritzky experienced problems in serving the respondents after the Authority's usual method of service by track and trace courier was unsuccessful. The Authority's Minute dated 26 October 2021 addressed service relating to all three respondents. Affidavits filed by process servers record that the Second and Third Respondent have been actively avoiding service.

[9] The First Respondent was served with copies of all documentation at its registered office, as recorded on the Companies Office website.

[10] The Second and Third Respondents were served at the address they have recorded as directors of the First Respondent on the Companies Office website. This included service of a copy of the Authority's Minute dated 26 October 2021 and the Notice of Investigation Meeting held on 3 December 2021.

[11] The two respondent directors were served at the address they have listed with the Companies Office by a process server on 1 November 2021. The process server reported that the male occupant of that address said he would pass the documents (that were in two separate sealed envelopes, individually addressed to each director) to Ms Howe and Mr Mahoney if he had an opportunity to do so.

[12] The Second Respondent was also personally served at her (then) various home addresses by a process server on 30 November 2019, 7 April 2021, 20 June 2021 and 16 August 2021.

[13] Personal service, as directed by the Authority's Minute dated 1 February 2022, on the Second Respondent did not occur in February 2022, because she could not be located by a process server. Despite that, the Authority was satisfied that the Third Respondent has been appropriately notified of these proceedings and has been given a reasonable opportunity to participate, had she wanted to do so:

- (a) She knew about these proceedings due to the previous personal service that has occurred on her;
- (b) She has deliberately elected not to engage with the Authority;

- (c) She was served at the address she listed as a director with the Companies Office. Although she no longer resides there, it is still her responsibility as a director of the First Respondent to ensure the information provided to the Companies Office is correct and kept updated. That is particularly important in relation to addresses for service. She can therefore reasonably be expected to have made arrangements for the occupant at the address she has listed with the Companies Office to pass service documents on to her.

[14] The Third Respondent was personally served at his then home address on 20 March 2020 and on 18 June 2021 and 29 October 2021 at the school he was (at that time) working at.

[15] Service on 18 June 2021 and 29 October 2021 occurred by the process server handing a sealed envelope with the service documents to the Principal of the school that employed Mr Mahoney. The Principal confirmed she would personally pass the service documents on to Mr Mahoney, who had declined to meet with the process server to receive the documents.

[16] The Authority authorised substituted service on the school Principal if the process server could not make contact with Mr Mahoney personally.

[17] The Authority also sent the Third Respondent a copy of the Authority's Minute dated 1 February 2022 and the applicant's costs submissions dated 1 December 2021 by track and trace courier on 1 February 2022, to the school where he was working.

### **The First Respondent is in liquidation**

[18] Slavinger Tusk Limited (in liquidation) was placed into liquidation on 6 December 2021 on application of Inland Revenue. The liquidation was subject to a notice in the New Zealand Gazette dated 9 December 2021 by the liquidator Craig Sanson of PWC.

[19] The Authority discovered the First Respondent was in liquidation on 1 February 2022 after reviewing the Companies Office website. The applicant's advocate was informed that the liquidator's written consent was needed for the Authority to be able to conclude its investigation into the claims made against the First Respondent.

[20] The Authority was subsequently advised that consent had been sought from the liquidator, but that no response has been received.

[21] Without the liquidator's written consent, the Authority is currently unable to determine the applicant's claims against the First Respondent - Slaving Tusk Limited (in liquidation). If that situation changes, and the liquidator does issue consent, then the Authority will issue a separate determination regarding the claims the applicant has made against the First Respondent.

[22] Accordingly, the claims against the First Respondent are now placed on an 'administrative hold' pending a response from the liquidator.

### **Claims against the Second and Third Respondents**

[23] Although the specific claims against the First Respondent can not be formally determined without the liquidator's consent, it is nevertheless still necessary for the Authority to record in this determination its view about whether any breaches of the applicant's employment agreement had occurred, because that is a pre-requisite for it determining the penalty claims against the other respondents.

*Did the First Respondent breach the applicant's employment agreement?*

[24] The First Respondent breached the applicant's employment agreement in the following ways:

- (a) It failed to appropriately respond to her bullying complaints;
- (b) It failed to prevent another colleague from continuing to bully and harass the applicant;
- (c) It failed to provide a safe workplace, resulting in the applicant suffering physical, emotional, mental and financial harm as a direct result of the bullying she suffered;
- (d) It failed to pay the applicant for all of the hours she worked;
- (e) It failed to pay the applicant her wages on time;
- (f) It failed to provide her with work when she was ready willing and available to work, in breach of her contractual hours of work;
- (g) It failed to pay the applicant when she was available and wanted to work out her notice period but was not permitted to do so.

*Did the Second and/or Third Respondent aid and/or abet the First Respondent's breaches?*

[25] As working directors of the First Respondent, the Second and Third Respondents were the controlling mind of the First Respondent. Both directors were made aware of the breaches by the applicant but failed to do anything to address them.

[26] Those failures by the Second and Third Respondent directly caused the breaches of the applicant's employment agreement by the First Respondent to continue unchecked. Their knowledge, ability to control and deliberate lack of action all amount to tacit approval of the breaches that occurred.

[27] It was within the Second and Third Respondents' exclusive power to control the First Respondent and its employees in a way that ensured it met its legal obligations to the applicant. The failure by both of them to do that amounts to aiding and abetting the First Respondent's breaches of the applicant's employment agreement.

[28] The Authority was satisfied that these breaches would not have occurred and/or have continued had the Second and Third Respondent not aided and abetted the First Respondent's breaches of the applicant's employment agreement.

*Should a penalty be imposed on the Second and/or Third Respondents?*

[29] Penalties are used to signal disapproval by the employment institutions of conduct that breaches statutory and/or contractual obligations. Penalties are imposed to punish unlawful conduct. Penalties also act as an important deterrent to those involved in breaches as well as to those who may be minded to ignore their employment law obligations to others.

[30] It is appropriate to impose penalties on the Second and Third Respondents for aiding and abetting the First Respondent's breaches of the applicant's employment agreement, under s 134(2) of the Act, for deterrent and punishment purposes.

*What penalty should be imposed on each Respondent?*

(i) Culpability

[31] The Authority finds that the Second and Third Respondent are equally culpable for aiding and abetting the First Respondent's breaches of the applicant's employment agreement. The same level of penalty should be imposed on each of them.

(ii) Penalty factors

[32] Section 133A of the Act lists the factors the Authority must have regard to when assessing penalties. These include:

- (a) The s 3 object of the Act;
- (b) The nature and extent of the breach or involvement in the breach;
- (c) Whether the breach was intentional, inadvertent, or negligent;
- (d) The nature and extent of any loss or damage suffered by the person affected by the breach;
- (e) Steps taken to mitigate the effects of the breach;
- (f) The circumstances of the breach;
- (g) Whether previous breaches have occurred.

(iii) Assessment of penalty factors

[33] The Authority makes the following findings that relate to the Second and Third Respondents equally:

- (a) The breaches that occurred are:
  - (i) Contrary to the building of a productive employment relationship through the promotion of good faith, as per the s 3(a) object of the Act;
  - (ii) Inconsistent with the mutual obligations of trust and confidence and good faith behaviour, as set out in object s 3(a)(i) of the Act;
  - (iii) An example of the imbalance of power that is expressly recognised in object s 3(a)(ii) of the Act;
  - (iv) Contrary to the promotion and enforcement of employment standards, as per the s 3(a) (ab) object of the Act;
- (b) The breaches were serious. They went to the heart of the employment relationship and resulted in the applicant's constructive dismissal;
- (c) The breaches appeared to be intentional because the applicant raised the breaches multiple times with the respondents, but was ignored;

- (d) The loss and damage to the applicant was significant. Her health and well-being suffered, she was constructively dismissed due to the breaches, she was deprived of wages she was owed so suffered financially as well as mentally and emotionally;
- (e) The applicant has not been compensated for the First Respondent's breaches and given it is in liquidation, she may never be. None of the respondents have taken any steps to mitigate the adverse effects the breaches have had on the applicant;
- (f) The circumstances of the breaches involved the applicant repeatedly asking for help from the Second and Third Respondent to address the bullying and wage arrears/unpaid wages issues. However, they both failed to do anything to address or resolve the applicant's concerns;
- (g) The Authority is not aware of the Second or Third Respondent having previously had penalties imposed on them.

(iv) Imposition of penalties

[34] A combined penalty of \$5,000 each should be imposed on the Second and Third Respondents under s 134(2) of the Act for aiding and abetting the First Respondent's breaches of the applicant's employment agreement.

[35] Ms Howe and Mr Mahoney are to equally share the burden of the total penalty that has been imposed under s 134(2) of the Act, meaning their individual share of the penalty is \$2,500 each.

[36] To recognise the harm that Ms Subritzky has suffered as a result of the Second and Third Respondent's aiding and abetting of the First Respondent's breaches, it is appropriate to order that some of the penalties imposed be paid directly to the applicant.

[37] The first \$2,000 of the penalties imposed on each respondent must be paid directly to the applicant with the remaining \$500 to be paid to the Crown bank account.

**What costs and disbursements should be awarded?**

[38] Ms Subritzky as the successful party is entitled to a contribution towards her actual legal costs and disbursements.

*Actual costs*

[39] Ms Subritzky's actual legal costs up to the date of the investigation meeting, but not including it, were \$3,612.15. Once the investigation meeting time of \$575 (2 hours x \$250 per hour plus \$75 GST) is added, then the applicant's total actual legal costs are \$4,187.15.

[40] The applicant has also incurred actual disbursements totalling \$1,094.09 consisting of a filing fee of \$71.56 plus \$1,022.53 for service by process servers on the Second and Third Respondents.

*Starting point for assessing costs*

[41] The Authority adopts its usual notional daily tariff based approach to costs, which is currently \$4,500 for the first day of an investigation meeting. That is then adjusted to reflect the particular circumstances of this matter.

[42] This matter involved a two hour investigation meeting, so the notional starting point for assessing costs is \$1,500, being 2 hours x \$750 per hour.

*Should the notional starting tariff be adjusted?*

[43] The Second and Third Respondents' conduct unreasonably increased the applicant's actual legal costs. That needs to be reflected in the costs the applicant is awarded.

[44] The need for personal service on Mr Mahoney and Ms Howe significantly increased Ms Subritzky's legal costs. She had to pay her advocate to deal with service issues and the process server to ensure service occurred.

[45] It is therefore appropriate to increase the notional daily tariff to reflect that Ms Subritzky has been put to unnecessary and unreasonable additional costs as a direct result of the actions of the Second and Third Respondents.

[46] The notional starting tariff of \$1,500 should be multiplied by 2.5 to reflect the additional legal time and therefore expense the applicant was forced to incur as a result of the service issues that arose.

[47] The total costs to be awarded to the applicant is therefore \$3,750. That amount then needs to be apportioned fairly across the three respondents.

[48] There were no service issues with the First Respondent, so its notional share of costs (if they were to be awarded if the liquidator's consent was forthcoming) would be \$500. This represents a one third share of the notional starting tariff of \$1,500, without any adjustment having been made to it.

[49] The remaining \$3,250 costs to be awarded should be shared equally between the Second and Third Respondent. That means Ms Howe is ordered to contribute \$1,625 and Mr Mahoney is ordered to contribute \$1,625 towards the applicant's actual legal costs.

*What disbursements should be awarded?*

[50] Ms Subritzky is also entitled to be fully reimbursed for all of the disbursements she has incurred as a result of having to fund the service of proceedings on the Second and Third Respondents.

[51] Reimbursement of the \$71.56 filing fee should be divided equally between the three respondents. While no orders for costs or disbursements can be made against the First Respondent without the liquidator's consent, a notional apportionment can be done for the purposes of fixing the costs and disbursements that are to be paid by the other respondents.

[52] The process server fees should be shared equally between Ms Howe and Mr Mahoney, because the First Respondent was served at its registered office.

[53] Ms Howe is ordered to reimburse the applicant \$535.12 being \$23.85 as a one third share of the filing fee plus \$511.27 as half of the actual cost of the process server service fees that were incurred.

[54] Mr Mahoney is ordered to reimburse the applicant \$535.12 being \$23.85 as a one third share of the filing fee plus \$511.27 as half of the actual cost of the process server service fees that were incurred.

[55] Any costs and disbursements order that could be made against the First Respondent is on hold pending the liquidator's written consent.

**Outcome**

[56] The determination of the claims against the First Respondent and of any costs and disbursements has been placed on an administrative hold, pending the liquidator's written consent for the Authority to conclude its investigation against the First Respondent.

[57] Ms Howe and Mr Mahoney are both equally culpable for aiding and abetting the First Respondent's breaches Ms Subritzky's employment agreement.

[58] Penalties of \$2,500 each have been imposed on Ms Howe and Mr Mahoney under s134(2) of the Act.

[59] Within 28 days of the date of this determination, the Authority orders:

- (a) Lorraine Howe to pay the applicant \$4,160.07 consisting of:
  - (i) \$2,000 as part of the total penalty imposed under s134(2) of the Act;
  - (ii) \$1,625 contribution towards her actual legal costs;
  - (iii) \$511.27 as a half share of reimbursement of disbursements incurred;
  - (iv) \$23.85 as a third share reimbursement of the filing fee paid.
- (b) Lorraine Howe to pay the Crown bank account \$500 being the balance of the \$2,500 penalty imposed on her under s 134(2) of the Act;
- (c) Richard Mahoney to pay the applicant \$4,160.07 consisting of:
  - (i) \$2,000 as part of the total penalty imposed under s134(2) of the Act;
  - (ii) \$1,625 contribution towards her actual legal costs;
  - (iii) \$511.27 as a half share of reimbursement of disbursements incurred;
  - (iv) \$23.85 as a third share reimbursement of the filing fee paid.
- (d) Richard Mahoney to pay the Crown bank account \$500, being the balance of the \$2,500 penalty imposed on him under s 134(2) of the Act.

**Rachel Larmer**  
**Member of the Employment Relations Authority**