

Note: An order at paragraph [57] prohibits publication of some information.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 564
3172154

BETWEEN	JUMEI LI Applicant
AND	BRAK BURNS LIMITED (IN LIQUIDATION) (FORMERLY BURGERED RESTAURANTS AUCKLAND LIMITED) First Respondent
AND	MATT YOUNG Second Respondent
AND	MURRAY OSMOND Third Respondent

Member of Authority:	Robin Arthur
Representatives:	May Moncur, advocate for the Applicant Matt Young, advocate for First and Third Respondents and in person as Second Respondent
Investigation:	On the papers
Submissions:	11 August and 30 August 2023 from the Respondents and 18 August 2023 from the Applicant
Date:	28 September 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

[1] This determination resolves some preliminary issues raised by the Respondents about an application by Jumei Li. It identifies issues within the Authority's jurisdiction for consideration at an investigation meeting notified for 9 and 10 November 2023.

[2] The scope of those issues has been changed by the news that the first respondent, BRAK Burns Limited (BBL), went into liquidation on 5 September 2023. By operation of s 248 of the Companies Act 1993 legal proceedings against BBL cannot continue unless the liquidator agrees or the High Court orders otherwise. Proceedings against the second respondent, Matt Young, and the third respondent, Murray Osmond, may remain on foot, if Ms Li wishes to pursue them.

[3] Ms Li's initial application was lodged in May 2022. At that time Ms Li represented herself. Her statement of problem said she worked in a café operated by the first respondent but she was "forced ... to quit" on 6 April 2022 "because the employer been keep telling I will get paid soon but never ever get wages pay sort it out (sic)". She said she wanted her employment relationship problem resolved by "legal action to force the employer to pay all of my wages ASAP". She also wrote that she wanted "unjustified compensation".

[4] BBL sought and was granted leave to lodge a statement in reply out of time. Its reply, lodged on 26 July 2022, denied its actions forced Ms Li to resign. It said a loss of franchise rights had caused difficulty for the business paying wages, particularly after government wage subsidies available during the Covid-19 pandemic emergency came to an end in November 2021. It denied failing to provide information to Ms Li about her wages. It said she "failed to show up for work and resigned without notice".

[5] An Authority investigation meeting scheduled for 24 November 2022 did not go ahead because neither party had lodged witness statements due under timetable directions issued by the Authority. Meanwhile Ms Li had arranged advocacy assistance from her current advocate, May Moncur. At a case management conference then held with the representatives, a timetable was set for lodging an amended statement of problem and any statements in reply. The parties were also directed to attend mediation by no later than February 2023, which they did without resolving the matters between them. Through her advocate Ms Li then asked the Authority to proceed with an investigation.

[6] Ms Li's amended statement of problem, lodged on 25 November 2022, expanded her claim to include Mr Young and Mr Osmond as respondents (the First ASoP). She identified Mr Young as a manager and Mr Osmond as a director. She alleged both had been in control of the business operated by BBL and had been "persons involved" in breaches of her employment agreement. She said she was unjustifiably

disadvantaged by not being paid her wages and, in those circumstances, her resignation amounted to a constructive dismissal. She sought an award of \$8,345 wage arrears and orders for Mr Young and Mr Osmond to be held personally liable for any wages or money ordered by the Authority which the company was not able to pay. She also sought remedies of distress compensation and “penalties as the Authority sees fit”.

[7] BBL’s amended statement in reply, lodged on 21 December 2022, accepted it had employed Ms Li but said her personal grievance was not raised within the required 90-day statutory period so could not be investigated by the Authority. It also alleged the Authority could not consider a claim for penalties as “only a Labour Inspector has the right to apply for penalties of the type requested by the Applicant”. It accepted Ms Li may be owed wages but disputed her calculation of the amount due.

[8] Mr Young’s statement in reply, lodged on 7 February 2023, said Ms Li had not filed an application to join him as a controlling third party under s 103B of the Act and the Authority therefore lacked jurisdiction to investigate her claims against him.

[9] Mr Osmond’s statement in reply, lodged on 22 December 2023, also referred to Ms Li not applying to join him as a controlling third party. He also said there was no valid grievance to join him to anyway because Ms Li had not lodged a personal grievance in time and had not sought an extension of time to do so under the exceptional circumstance provisions in the Act. He said her claim against him should be struck out. Mr Osmond also asked for an interim order prohibiting publication of his name pending determination of his “strike-out application”.

[10] At a case management conference held with the representatives on 26 June 2023 several preliminary issues were identified concerning the scope of what was open for investigation by the Authority. It was agreed those issues could be dealt with ‘on the papers’.

[11] The conference call was interrupted by an unexplained technical issue and was not reconvened until 31 July 2023. Meanwhile directions issued to the representatives after the disrupted 26 June call summarised the preliminary issues and, subject to determination on them, the likely substantive issues with proposed timetables for the investigation of both sets of issues. Those directions noted that it was likely Ms Li would want to lodge a second amended statement of problem to better identify the basis for some elements of her claims. This was a reference to whether her earlier amended statement of problem has adequately identified what statutory provisions were relied on

for her claims for penalties and that Mr Young and Mr Osmond were liable as persons involved in breaches in payment of her wages.

[12] Directions issued after the 31 July case management conference confirmed timetables for the preliminary and substantive investigations, including the lodging of written submissions on the preliminary issues.

[13] The Directions summarised those issues as:

- (a) Did Ms Li raise a personal grievance for unjustified disadvantage (by failure to pay wages when due) and/or a personal grievance for unjustified dismissal within the required period?
- (b) Is Ms Li, as a former employee, able to seek penalties against her former employer or anyone else?
- (c) If so, has Ms Li sought penalties in relation to failure to pay her wages and breaches of her terms of employment within the required 12-month period (s135(5) of the Act)?
- (d) If so, have penalties, as sought in the [First] Amended Statement of Problem, against Mr Young and Mr Osmond been adequately identified?
- (e) Has the [First] Amended Statement of Problem adequately identified the basis on which orders are sought for Mr Young and/or Mr Osmond to be personally liable for wages or other money payable to Ms Li?
- (f) Should Mr Osmond be struck out as a respondent (s 221 of the Act)?
- (g) Should the identity of Mr Osmond as the third respondent be subject to an order prohibiting publication of his name until his request to be removed as a party is determined?

[14] Under those timetable directions Mr Young lodged submissions for himself and BBL. Mr Osmond lodged submissions for himself. Ms Li's submissions followed, on 18 August, along with a further amended statement of problem (the Second ASoP). Mr Young then lodged reply submissions on 30 August for BBL and himself and, as noted in a covering email, for Mr Osmond. Those submissions advised Mr Osmond was unwell and asked for an extension of time to 8 September for the respondents to lodge a statement in reply to the Second ASoP. The extension was granted but the respondents did not lodge a further statement in reply.

[15] The preliminary issues have now been determined, as set out below, on the basis of the parties' submissions, the contents of the statements of problem and reply lodged by the parties and any documents lodged with them.

Ms Li raised her personal grievances within the required statutory period

[16] BBL's assertion that Ms Li had not raised her personal grievances within the required 90-day period was based on the notion that those grievances were not articulated until her advocate lodged the First ASoP. It was lodged on 30 November 2022, some 238 days after Ms Li resigned on 6 April and therefore well outside the statutory timeframe.

[17] It is correct that the First ASoP was the first time that the phrases "personal grievance for unfair dismissal" and "personal grievance for unjustifiable disadvantage" were used. However BBL's argument was based on a misconception of the form of words necessary to raise a personal grievance in a way that meets the criteria for doing so set by s 114 of the Employment Relations Act 2000 (the Act).

[18] The relevant principles for assessing whether a grievance has been raised properly have been summarised in this way:¹

[33] Section 114(1) of the Act requires an employee to raise his or her grievance with the employer within 90 days of the action alleged to amount to a personal grievance occurring or coming to the notice of the employee.

[34] Section 114(2) of the Act provides that:

... a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

...

[36] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

[37] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the

¹ *Chief Executive of Manukau Institute of Technology v Alexander Zivaljevic* [2019] NZEmpC 132 (footnotes omitted).

employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

[38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[19] It is also well-established that the Act and principles of case law allow a personal grievance to be raised by lodging a statement of problem in the Authority if such claim is served on the employer within the 90-day limitation period.²

[20] What Ms Li had written in two documents met the requirements of the Act and the relevant principles – an email message she sent her managers on 6 April 2022, submitting her resignation, and the statement of problem she lodged in the Authority on 12 May 2022.

[21] Her 6 April 2022 email said:

Unfortunately I have to inform you that I have decided to resign from Grind Café, NZFB from 6 April 2022, my last day will be 3 May 2022.

I have been working here over 8 months, but I didn't think there's any circumstances that I can further develop my skills, also I feel so much stressed this company didn't pay wages on time, nobody from management level take initiative to solve out the problems, we all been told that I have to wait day by day, month by month for wages I deserved to be paid on time, my life is all messed up caused by no wage payment.

According to my contract, my last will be on 3rd of May if I get paid for previous payment this week, if No, I would like to discuss about if I can finish my notice period earlier.

And the last, I hope there's someone who's in charge can fix my wage payment as soon as possible, otherwise I will take further action to protect my right as employee.

Thanks for your understanding.

[22] In a reply to this message a senior manager advised Ms Li she was not required to work out her notice but would be paid as if she had attended work for those weeks.

[23] Ongoing correspondence through early May did not resolve Ms Li's wage issues and she lodged her statement of problem on 12 May. She wrote this description of her problem:

² *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79 at [13].

... [A]fter I got my wages on and off, after my life goes struggling with no money for my living and rent bills come, I have to quit this job because the employer keep telling I will get paid a soon but never ever get wages pay sort it out, that forced me to quit job on 6/4/2022, last time [senior manager] told me that's all missing pay is on process, but after I leave this place and not work there anymore, everything I tried to contact with one of them, café manager, operation manager and director, they all ignored my emails and messages with not response, so I have to seek for legal solutions for the government who can help me out ...

[24] She asked for her problem to be resolved by “legal action to force the employer to pay all of my owed wages ASAP also including unjustified compensation”.

[25] Her email and statement of problem did not need to use the technical terms of “personal grievance” or “unjustified disadvantage” or “unjustified dismissal” in order to validly raise her grievances. Read together those two documents clearly advised that the nature of her complaint was about terms of her employment not being met and this resulting in her decision to resign. This plainly brought her complaint within the meaning of s 103 of the Act as being about circumstances where she considered conditions of her employment had been affected to her disadvantage by some unjustifiable action by the employer (that is a personal grievance for unjustified disadvantage), which had then caused her to resign (that is a personal grievance for unjustified dismissal, as a constructive dismissal arising from the employer breaching her terms of employment).

[26] An additional indicator that Ms Li meant to raise a personal grievance was the reference in her statement of problem to wanting “unjustified compensation”. Technically the phrase did not make sense but, obviously writing in English as a second language, Ms Li was clearly intending to use the technical language relating to personal grievances to ask for “compensation” for “unjustified” actions of her employer.

[27] Ms Li’s grievance had to be raised within 90 days of her resignation or the expiry of her notice period. Taking the earliest of those dates, this needed to be done by 6 July 2022. After liaising with a senior manager in the respondent’s business, the Authority served Ms Li’s statement of problem to him by email on 2 June 2022. On 3 June the Authority served the statement again by email to Mr Young. Mr Young had advised he was acting for BBL, through a company called Employment Associates and asked for the documents to be sent to him. Mr Osmond is sole director of that company and, through a trust company, its sole shareholder.

He was also, at that date, the sole director of BBL's ultimate holding company, Delta Private Equity Limited.

[28] For the reasons given, Ms Li's personal grievances were raised within the required period to do so and communicated to her employer with sufficient detail for it to be able to respond. The Authority had jurisdiction to investigate those grievances.

Ms Li has standing as an employee to pursue penalties

[29] BBL's statement in reply said only a Labour Inspector had the right to apply for the penalties of the type Ms Li had sought. This was incorrect. Under s 135 of the Act an action for a penalty may be brought by a person whose employment agreement has been breached or who has been subject to a breach of a provision of the Act for which a penalty can be sought for. Ms Li's allegation that BBL had breached her terms of employment by failing to pay her wages, for which a penalty may be sought under s 134 of the Act, is an example of an instance where an employee has the statutory right to pursue a penalty.

Penalty claim for employment breach sufficiently specific and made within time

[30] The statement of problem Ms Li lodged herself on 12 May 2022 did not refer to penalties but the First ASoP lodged by her advocate on 30 November 2022 did. The First ASoP did not state the specific statutory basis for the penalties being claimed. In the section of the statement of problem form which refers to the problem that the applicant wishes to have resolved, the First ASoP listed "penalties" as one of her four problems. In respect of identifying Mr Young and Mr Osmond as respondents, the First ASoP said this was done so "the applicant's wage arrears and penalty claims can be properly determined and enforced". After setting out Ms Li's claims for wages arrears and a personal grievance, the First ASoP then said Mr Young and Mr Osmond were "responsible for the failures" in paying her and "the breaches were serious and matters for which penalties should be imposed". In the section of the form setting out how Ms Li would like the problem resolved, the list of remedies sought included "penalties as the Authority sees fit".

[31] It was not until the Second ASoP was lodged, on 18 August 2023, that Ms Li's application specified the following penalties were being sought:

- (i) A penalty against BBL under s 134 of the Act for repeated breaches of Ms Li's employment agreement by failure to pay her wages. Her employment agreement included a term saying wages would be paid fortnightly by direct credit to her bank account.
- (ii) A penalty against BBL under s 27 of the Holidays Act 2003 for failure to pay Ms Li's leave entitlements on termination of her employment.
- (iii) A penalty against BBL under s 4A of the Act for breaches of good faith.
- (iv) Three penalties against Mr Young and Mr Osmond under s 134 of the Act for aiding and abetting the breaches of BBL of Ms Li's terms of employment by not paying her wages, not paying her holiday entitlements and not acting in good faith.

[32] The respondents submitted that the penalties had not been specifically identified and were not sought until well outside the 12 months allowed in s 135(5) for seeking a penalty.

[33] In this case Ms Li's resignation on 6 April 2022 was an appropriate event to take as the date on which the cause of action occurred for her penalty claim. This was because the alleged breaches were occurring and coming to her attention up to and including that day. On that basis any penalty had to be sought by no later than 7 April 2023. This meant a penalty properly claimed in the First ASoP would be within time. A new or different penalty claimed in the Second ASoP would be out of time.

[34] The Authority's role as an investigative body is to establish the facts and make determinations on the substantial merits of the case, without regard to technicalities. In doing so it must act reasonably and as it thinks fit in equity and good conscience, in a way consistent with the relevant legislation and the principles of natural justice. It concentrates on resolving the employment relationship problem "however described" and is not bound to treat a matter as being a matter of the type described by the parties.³

[35] Part of the consideration in this case is that the power to impose penalties is a punitive provision where the wrongdoer is presumed to be required to pay the amount imposed to the Authority for transfer to the Crown.⁴ It therefore requires, even in the more substantively-oriented rather than technical jurisdiction of the

³ Employment Relations Act 2000, ss 157, 160(3) and 173(1).

⁴ Section 136(1).

Authority, a stricter adherence to procedural requirements than other processes, such as how a personal grievance may be raised.

[36] For that reason, it is clear that the specific penalties not claimed till 18 August 2023 for alleged breaches of the Holidays Act and good faith must be held to have been sought out of time. They are not open for investigation and determination by the Authority.

[37] The claim for a penalty against BBL, Mr Young and Mr Osmond for breaches of the terms of Ms Li's employment agreement (by failing to pay her wages on time) did not however fall at that hurdle. It would be clear to any reasonably-well informed and objective reader that the references in the First ASoP in November 2022 to BBL and Mr Young and Mr Osmond being "jointly liable" for those breaches which "were serious and matters for which penalties should be imposed" was referring to penalties against all three for involvement in breaches of Ms Li's terms of employment. Equally clear was that this referred to the type of penalty that could be sought under s 134 of the Act against BBL for the breach and against Mr Young and Mr Osmond for allegedly aiding and abetting the breach.

[38] BBL's statement in reply lodged in December 2022 and Mr Young's statement in reply lodged in January 2023, responding to the First ASoP, did not allege the claim for penalties against them was out of time or imprecise. They argued solely, and incorrectly, that only a Labour Inspector could bring a penalty action of that type.

[39] Taking a purposive approach to the application of the object of the Act and of the specific requirements for pursuit of penalties under the Act, Ms Li's claims for a penalty against BBL for breach of her terms of employment and for penalties against Mr Young and Mr Osmond for aiding and abetting those breaches were sufficiently clear from the wording used in the First ASoP and, therefore, were made within the 12-month period allowed to do so. The Authority has jurisdiction to impose penalties on that basis under s 134 of the Act if the allegations of breach are upheld by determination after the further investigation already scheduled and the relevant matters referred to in s 133A of the Act for determining a penalty are found to have been met. Ms Li's claim in that respect can presently continue against Mr Young and Mr Osmond but not, due to its liquidation, BBL.

Mr Young and Mr Osmond properly identified as respondents.

[40] Both Mr Young and Mr Osmond objected to the jurisdiction of the Authority to consider whether they might have any liability to a penalty or being identified as a person involved in breaches of employment standards.

[41] Their objections arose from some wording used in the First ASoP and some misconceptions resulting from how they read those words.

[42] The First ASoP said Mr Young and Mr Osmond “were in control of the business and were the persons involved in the breaches of the parties’ signed employment agreement”. It then said they should be jointly liable for any wages or money awarded to Ms Li if BBL was unable to pay. It said Mr Young “was the person in charge of the operation of the business” and Mr Osmond was “the director of the company” with both “ultimately responsible” for decisions which breached Ms Li’s terms of employment and they had the power to ensure BBL “complied with its legal and contractual obligations towards its employees”.

[43] The replies from Mr Young and Mr Osmond to the First ASoP indicated that they took the reference to ‘control of the business’ as an allegation that they were each a controlling third party. They pointed to provisions in s 103B of the Act requiring a prior application to join a controlling third party to the proceedings to resolve a personal grievance.

[44] However the allegations that they were “persons involved in the breaches” and should be liable to pay arrears or other money if BBL was unable to pay were clearly intended to refer to the provisions in s 142Y of the Act. Those provisions allow for an employee to recover wages or other money from a person who was not employer but was “an officer” in the employing entity and was a “person involved” in a breach of employment standards that led to the default in paying the money. Section 142W describes the categories of who may be an involved person as including directors and any other person occupying a position of significant influence over the management or administration of the entity.

[45] The Second ASoP made clear that, as well as the penalty claimed for aiding and abetting a breach of Ms Li’s terms of employment, Mr Young and Mr Osmond were joined to the proceedings for the purpose of pursuing them under s 142Y of the Act.

An s 142Y application requires prior leave of the Authority. This is a matter appropriately considered as part of the substantive investigation of Ms Li's claims.

No grounds to strike out Mr Young and Mr Osmond as respondents

[46] Mr Young and Mr Osmond initially asked only that Mr Osmond be 'struck out' as a respondent. By the time of making their submissions in August they said they should both be removed as respondents.

[47] They said leave should have been sought to join them to the proceedings. As already noted, this submission was based on a misconception that the s 103B provisions on controlling third parties applied to this proceeding. It does not.

[48] Documents Ms Li lodged with her statement of problem showed they both had roles in the business operation for which she worked. Mr Young, for example, is the signatory with the position title of "Guru – People, Culture & Brand" to a message circulated to Ms Li and other team members about delays in pay. Mr Osmond, as another example, is identified on one of Ms Li's bank statements as the payer of \$1,000 made to her on 12 January 2022 for "wages".

[49] They are appropriately respondents to Ms Li's claim that they aided and abetted breaches to her terms of employment and should be identified as persons involved in breaches of employment standards. Whether Ms Li's claims about the extent of their responsibility can be substantiated is a matter to be tested on the basis of the evidence from her and them in the Authority's investigation meeting, not beforehand.

[50] It was not necessary for Ms Li to seek prior leave to join Mr Young and Mr Osmond as respondents for the purposes of her penalty claim or her claim that they were "persons involved". If it had been, the information available shows there were ample grounds to do so under s 221 of the Act to more effectually dispose of those matters according to the substantial merits and equities of the case.

No grounds to prohibit publication of identity of Mr Osmond and Mr Young

[51] Mr Osmond initially asked that his identity be prohibited from publication in relation to this matter given what he called "prima face evidence" that he "ought to be struck from the proceeding".

[52] By the time of making submissions on 11 August 2023 both Mr Young and Mr Osborne sought "orders for suppression ... on a temporary interim basis" until their

request for removal as respondents has been determined. That interim period has now passed with this determination of preliminary issues. No such order was made or necessary during that time.

[53] However, in their submissions of 30 August 2023, Mr Young and Mr Osborne made a further application. In the event that the Authority did not grant their request to be struck out as parties, they asked for an interim order prohibiting publication of their names so they could apply to the Employment Court “to sustain the same”.

[54] From those submissions it was not clear whether this still referred to the interim period until determination of the preliminary issues, now done, or was intended to refer to the period from now until the substantive issues are investigated and determined.

[55] Assuming they mean from now until then, Mr Young and Mr Osmond had not advanced any persuasive reasons to prohibit publication of their names in relation to this matter. They submitted they were “both professionals involved in employment matters” and “failure to protect [their names] could expose [them] to serious financial implications due to their ability to obtain work being curtailed if such matters are published”. Neither man submitted any evidence, by affidavit or otherwise, to support their submission.

[56] The principle of open justice is recognised as fundamental to public confidence in the impartial administration of justice. Where circumstances require some departure from that principle, the limits imposed must be only to the extent necessary to serve the ends of justice. A party (or other person) seeking an order for such a limit must show specific adverse consequences sufficient to justify an exception to the fundamental principle.⁵

[57] In the employment jurisdiction many hundreds of senior executives, other managers, directors, consultants, and advisors in business and government, at all levels, are routinely named as parties and witnesses in Authority proceedings every year. Merely being involved in answering claims or allegations in an Authority proceeding is not grounds, absent some other specific and proven circumstance or vulnerability, for an order of the sort that Mr Young and Mr Osmond wanted.

⁵ *Erceg v Erceg* [2016] NZSC 135 at [2], [3] and [13].

[58] In case that conclusion did give any grounds for an application by Mr Young and Mr Osmond to the court, publication of this determination through the Authority's website is suspended for 14 days from the date of this determination. The determination is to be issued to the parties but, by order made under clause 10 of Schedule 2 of the Act, is prohibited from further publication for that period and unless some further order of the Authority or the court is made meanwhile.

Timetable in place for Authority investigation of substantive issues

[59] Under timetable directions issued on 31 July 2023 the substantive issues, as further defined by this determination of preliminary issues, are to be considered in the investigation meeting notified for 9 and 10 November 2023. The issues relating to BBL cannot result in any orders against the company in liquidation (unless the liquidator's approval is sought and gained) but the issues relating to Mr Young and Mr Osmond remain open for investigation.

[60] The respondents' submissions made numerous references to the principles of natural justice and the opportunity to see detailed evidence and ask questions about it. The timetable directions made provide ample opportunity for the parties to now lodge their witness statements and provide all relevant documents in order that the investigation meeting may fully examine both the claims of Ms Li and the defences to them from Mr Young and Mr Osmond.

Costs

[61] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority