

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 148
3224179

BETWEEN	STEFAN VUJCICH Applicant
AND	APRICITY NZ MANAGEMENT LIMITED (IN LIQUIDATION) First Respondent
AND	ANDREW MEAKIN Second Respondent
AND	LINDEN TOLL Third Respondent

Member of Authority: Sarah Blick

Representatives: Julia Leenoh, counsel for the applicant
Alexandria Till, counsel for the second respondent
No appearance for first and third respondent

Investigation meeting: On the papers

Submissions and information received: 24 and 30 October 2023, 15 December 2023 from the applicant
20 and 27 September 2023, 14 November 2023 from the second respondent

Determination: 15 March 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Stefan Vujcich has lodged an application pursuing personal grievances and remedies including compensation, lost wages, unpaid wages, damages and penalties against his former employer Apricity NZ Management Limited (Apricity NZ) and the second and third respondents. The second respondent, director of Apricity NZ Andrew

Meakin has applied to be struck out as a party. Mr Vujcich opposes the application, which is the subject of this preliminary determination.

The Authority's process

[2] By consent this matter is determined on the papers. Mr Vujcich, Mr Meakin and two former Australian-based managers within the Apricity Group, Tony Harmey and Simon Walker, have provided affidavits for the purposes of the strike out application. Counsel have also provided submissions. The Authority has also considered these along with the amended statement of problem and Mr Meakin's statement in reply.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings and expressed conclusions on issues necessary to dispose of the matter. It has not recorded all evidence and submissions received.

The issue

[4] The issue for preliminary investigation and determination is whether Mr Meakin should be struck out as a party.

Background

[5] Mr Vujcich began working for Apricity NZ in January 2023. He says in a video call in late March 2023 Mr Meakin advised him and others present that the Australian company Apricity Finance Group Pty Limited (Apricity Australia) was to be liquidated. A few days later on 6 April 2023 Apricity Australia was put into voluntary administration.

[6] Mr Vujcich says he understood his employment with Apricity NZ would be terminated but that no formal termination letter was provided. On 12 April 2023 Mr Vujcich sent an email to Mr Meakin advising he had not received notice of termination and requested outstanding wages and holiday pay, along with a redundancy and "reparation" payment.

[7] In April 2023 Mr Vujcich also lodged a statement of problem against Apricity NZ as the sole respondent saying Apricity NZ was still running and that he was not being paid.

[8] Mr Vujcich lodged an amended statement of problem in May 2023 also naming Mr Meakin and Mr Toll as second and third respondents. Upon application from Mr Vujcich, the Authority granted leave for the amended statement of problem to be served on Mr Meakin and Mr Toll in Australia, and issued the relevant notice accompanying service outside New Zealand.¹ An affidavit of service stating service had been made on Mr Toll and Mr Meakin was later received by the Authority.

[9] Mr Vujcich says his employment was finally terminated by Apricity NZ's liquidator in June 2023, shortly after the liquidator's appointment.

[10] Although Mr Vujcich says the liquidator has confirmed his consent to these proceedings continuing, the liquidator's position appears somewhat more nuanced. On 19 June 2023, the liquidator advised counsel for Mr Vujcich the following:

...I advise that I can neither consent nor oppose the continuation of the proceedings. You are correct that I am not in a position to cause the Company to be represented in this matter but will otherwise abide such orders as the Court may make against the Company.

[11] In around September 2023 Mr Meakin engaged counsel to act, who applied for leave to respond to the application, which has been granted.

[12] Mr Toll has not responded to these proceedings to date.

Relevant law

Power to join or strike out a party

[13] Under s 221 of the Act the Authority may, to more effectively dispose of any matter according to its substantial merits and equities, amongst other matters, direct parties to be joined or struck out. The purpose of joinder rules has been said to be:²

...to secure the determination of all disputes relating to the same subject-matter without the delay and expense of separate proceedings. The general test is whether the proposed party will be directly affected by any order which may be made in the proceedings and the general rule is that it is for the plaintiff to decide who they will sue and for any person named as defendant to take striking-out proceedings if it is considered by them that there is no arguable cause of action.

¹ Employment Relations Act 2000, clause 4A, Schedule 2; Employment Relations Authority Regulations 2000.

² *Auckland Regional Services Trust v Lark* [1994] 2 ERNZ 135 (CA) at 138.

Part 9A of the Act

[14] Although the amended statement of problem broadly seeks remedies from all three respondents in relation to Mr Vujcich's personal grievances and a breach or breaches of Mr Vujcich's employment agreement, Mr Vujcich and Mr Meakin's evidence and submissions in relation to the strike out application have focused on Part 9A provisions relating to the liability of persons involved in breaches of employment standards. The Authority's focus is accordingly on the claims as they relate to Part 9A for the purpose of assessing this application.

[15] The Authority's jurisdiction to grant leave to recover wages or other money from a person involved under s 142Y of Part 9A of the Act exists only in the following circumstances:³

- (a) there has been a default in the payment of wages or other money payable to an employee;
- (b) the default is due to a *breach of employment standards*;
- (c) the person is a person involved in the breach within the meaning of s 142W.

[16] Section 5 of the Act relevantly defines *employment standards* as the following:

- (a) the requirements of any of sections 64, 69Y, 69ZD, 69ZE, and 130 of the Act;
- (b) the minimum entitlements and payment for those under the Holidays Act 2003;
- (c) the requirements of sections 81 and 82 of the Holidays Act 2003;
- (d) the minimum entitlements under the Minimum Wage Act 1983;
- (e) the provisions of the Wages Protection Act 1983.

[17] Recovery of monies, where leave is granted in relation to a person involved, is therefore limited to money payable due to breaches of the relevant provisions of the above legislation.

[18] The Employment Court has considered accessory liability under Part 9A in a liquidation context and commented:⁴

³ Emphasis added.

⁴ *Lawton v Steel Pencil Holdings Ltd (in liq)* [2021] ERNZ 1164 at [36]-[37].

... 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.

[37] 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.

[19] In relation to s 142W and s 142Y of the Act, the Court of Appeal observed in *Labour Inspector v Southern Taxis Ltd*:⁵

...The effect of these provisions is to impose the risk of non-performance of those obligations by the company on a director who knows all the primary facts relevant to the company's breach, unless the director reasonably relied on information (for example, legal advice) provided by a third party, or has taken all reasonable and proper steps to ensure the company complied with the relevant provisions. A director cannot escape liability on the basis that they did not turn their mind to the legal consequences of what they knew. Nor can they escape liability on the basis that they genuinely but erroneously believed that the obligations in question did not apply, unless that incorrect understanding of the position was the result of reasonable reliance on information supplied by another person.

[20] The Authority has taken into account the above legislative provisions and guidance from the Courts in assessing this application.

Discussion

Mr Meakin's position

[21] Mr Meakin's position is that he has been "unjustly" or "improperly" joined to the proceedings and there is no arguable cause of action.

[22] It was suggested that Mr Vujcich could only seek to join Mr Meakin if an order by the Court has been made that there have been breaches of minimum entitlements. That is not the case. Mr Vujcich was entitled to name Mr Meakin as a respondent as he did.

⁵ *Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705, [2021] ERNZ 1345 at [50].

[23] Mr Meakin submits that there have been no breaches of employment standards, and in the alternative if there was a breach or breaches, this was due to him being prevented from carrying out further acts by Mr Toll and by virtue of the company structure. Mr Meakin says Mr Vujcich reported to Mr Toll who was the Chief Executive Officer (CEO) and Executive Director of Apricity Group, and majority shareholder of Apricity NZ. Mr Meakin says he did not have control over any bank accounts for Apricity and did not hold an executive operational role in the Apricity Group. Mr Meakin submits the burden regarding any alleged breaches rests with Mr Toll.

[24] Mr Meakin says during the video call in March 2023, he told all Apricity employees that due to Apricity Australia being placed into voluntary administration and the company being in negative cashflow there “was no money” for Apricity, “they no longer had a job” and “they were all unemployed”. He says Mr Vujcich’s employment was terminated at this time. He says Mr Vujcich however carried out limited functions for three weeks post termination until 17 April 2023, which Mr Meakin says were self-serving.

[25] Mr Meakin points to the email he received from Mr Vujcich on 12 April 2023 where Mr Vujcich requested wages and holiday pay in the amount of \$7,236.62. Mr Meakin’s evidence is that he beseeched the administrator of Apricity Australia to pay the claimed sum, and that this was subsequently paid to Mr Vujcich around 29 May 2023.

[26] Mr Meakin says at no point could he do more than he did. He submits he has a defence under s142ZD of the Act in that he took all reasonable and proper steps to ensure Apricity NZ complied with its obligations towards Mr Vujcich, in light of his non-executive director governance position, as opposed to Mr Toll’s operational executive director CEO position.

Mr Vujcich’s position

[27] Mr Vujcich says he has an arguable cause of action against Apricity NZ, which includes a claim there has been a default in payment of wages of holiday pay. His evidence includes that he continued to perform work in the weeks after the video call in March 2023. In response to Mr Meakin’s affidavit in support of the strike out application, Mr Vujcich says he understood Apricity Australia employees’ employment

was terminated during the March 2023 video call, but the situation was different for Apricity NZ which was not put into liquidation until June 2023. Mr Vujcich's evidence is that he continued to be employed until June 2023 when he received formal confirmation from the liquidator of termination.

[28] Mr Vujcich says at all relevant times Mr Meakin was a director of Apricity NZ and is now the only sole director. He says Mr Meakin was the "controller" of Apricity NZ and is most likely a person involved under s 142W of the Act. He disagrees that Mr Meakin was a non-executive director, and understood Mr Meakin to be the decision-maker for Apricity NZ.

[29] Mr Vujcich says because Apricity NZ is in liquidation it is unlikely to be able to pay any arrears of wages or other money owed to him should his claims be successful in the Authority.

Finding

[30] The factual basis of Mr Vujcich's claims against the respondents is yet to be investigated and determined. Important matters are in dispute, including how and when Mr Vujcich's employment ended, which is relevant to quantum of arrears of wages or other monies which may or may not be owing due to breaches of employment standards. Also in dispute is the nature and extent of influence Mr Meakin had or did not have over the management or administration of Apricity NZ. On the basis of the untested evidence of the witnesses, the Authority is satisfied Mr Vujcich has an arguable cause of action for accessory liability in relation to the elements of s 142Y. In the circumstances it is not appropriate to remove Mr Meakin as a party. The application for strike out is unsuccessful.

[31] Having made that finding, going forward Mr Vujcich needs to be clear about the parameters of s 142Y of the Act, in that they only relate to defaults in payment of wages or other monies due to breaches of employment standards in the relevant legislation. Mr Vujcich is pursuing personal grievances. Remedies in relation to personal grievances under Part 9 of the Act are awarded against an employer (or controlling third party where they are found to have caused or contributed to the situation that gave rise to a grievance). There is no basis on the current application to hold Mr Meakin personally liable to reimburse wages or other monies to Mr Vujcich pursuant to s 123(1)(b), or to compensate him pursuant to 123(1)(c) of the Act.

[32] For completeness, counsel for Mr Vujcich has suggested in submissions that the Authority has already granted leave to recover arrears of wages or other monies from Mr Meakin and Mr Toll. To date, Mr Vujcich has simply named them as respondents. The Authority confirms leave has not been granted, and will not be granted (or declined) until the Authority has had the opportunity to investigate.

Outcome

[33] The application to strike out Mr Meakin as a respondent is unsuccessful.

[34] The Authority will now continue its investigation into Mr Vujcich's claims. A telephone conference will be convened shortly to timetable any further documentation required for an investigation meeting in respect of the substantive matter.

[35] Finally, I note the liquidator's consent Mr Vujcich relies on to continue the proceedings against Apricity NZ is currently somewhat unclear. The terms of any consent will need to be clarified.

Costs

[36] Costs are reserved.

Sarah Blick
Member of the Employment Relations Authority