

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 539  
3267180

BETWEEN	TIELE APIUTA First Applicant
AND	RAHUL JAIN Second Applicant
AND	MARRI-ANNE THOMPSON Third Applicant
AND	NIKYLA THOMPSON Fourth
AND	JAMES TUCKER Respondent

Member of Authority: Rachel Larmer

Representatives: Kim Ahern, advocate for the Applicants  
No appearance by the Respondent

Investigation Meeting: 5 September 2024 in Auckland

Other information: 6 September 2024 from the Second Applicant

Date of Determination: 6 September 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Tiele Apiuta, Rahul Jain, Marri-Anne Thompson and Nikyla Thompson (the applicants) were employed by JV No. 6 Limited (JV), which was previously known as Mad Mex and which traded as “Downlow”. JV went into liquidation on 28 March 2024.<sup>1</sup> Mr James Tucker is the sole director of JV (in Liquidation).

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<sup>1</sup> The Liquidator’s first report is dated 9 April 2024.

[2] This is a wage arrears claim against Mr Tucker as the sole director of the employer company which is in liquidation. The Liquidator declined to give consent to the applicants' proceeding with their claims against their employer, which was in liquidation.

[3] The applicants' original statement of problem (SoP) lodged on 7 December 2023 only named their employer JV No.6 Limited (in Liquidation) as the respondent. The SoP made claims of unjustified dismissal, unjustifiable disadvantage, unlawful deductions from wages, breaches of good faith and breaches of employment standards.

[4] The SoP was served on JV (in Liquidation's) registered address for service, which was also Mr Tucker's home address, by track and trace courier on 14 December 2023. Receipt of the SoP was signed for by "C Clare".

[5] On 27 February 2024 the parties were directed to mediation to occur within 30 days. The applicants attended mediation but JV (in Liquidation) failed to attend. Mr Tucker did not advise the applicants or Mediation Services that JV (in Liquidation) would not be attending the scheduled mediation.

[6] On 26 March 2024 the applicants lodged an amended statement of problem (ASoP) which named four respondents. JV (in Liquidation) was the first respondent, Downlow Franchising Limited was the second respondent, Mad Group Limited was the third respondent and Mr James Tucker was the fourth respondent.

[7] The four respondents were served with the ASoP by track and trace courier at 3.13pm on 28 March 2024 that was sent to Mr Tucker's address, which was the address for service for all of the respondents. Receipt of delivery was signed by "R Tucker".

[8] Mr Tucker is the sole director of the other three respondents. At the material time, all of the respondents had the same address for service. The three respondent companies' addresses for service were Mr Tucker's address, as recorded on the Companies Register. JV (in Liquidation's) address for service changed on 9 April 2024.

[9] The applicants were not in an employment relationship with the second and third respondents and no claims were made against those entities over which the Authority had jurisdiction. Because Mr Tucker is the sole director of the applicants' employer,

the Authority had jurisdiction over the claims the applicants had made against him personally.

[10] On 21 May 2024 the Liquidator informed the Authority that it did not consent to the applicants continuing proceedings against JV (in Liquidation).

[11] On 19 August 2024 the applicants lodged a second amended statement of problem (2ASoP) with the Authority, which only named James Tucker as the respondent.

[12] The 2ASoP was served on Mr Tucker at 1.55pm on 20 August 2024 by track and trace courier at the address he has registered on the Companies Register for him as a director of JV (in Liquidation). Receipt was signed for by “R Tucker”.

[13] It is this 2ASoP which is the subject of this determination. The 2ASoP contained the same claims against Mr Tucker as the ASoP had, but it had removed the other three respondent companies that he was the sole director of as named respondents in this matter.

[14] Mr Tucker has received copies of all of the directions the Authority has issued, the evidence the applicants lodged and the Notice of Investigation Meeting.

### **Relevant background**

[15] Tiele Apiuta is 18 years old. He started work for Mad Mex/Downlow/JV (in Liquidation) on 16 April 2022, when he was 16 years old. It was his first job.

[16] Rahul Jain was employed by JV (in Liquidation) on 14 February 2022 as the Store Manager at Mad Mex St Lukes store. He said he was fully committed to the business, so did not take much leave while employed.

[17] Marri-Anne Thompson was employed by JV (in Liquidation) on 9 June 2022. She is 17 years old and this was her first job.

[18] Nikyla Thompson is 16 years old. She started working for JV (in Liquidation) on 24 November 2022, and worked for ten months before the business closed.

[19] On 8 September 2023 Mr Tucker emailed the applicants a letter which informed them the business was closing on Saturday, 9 September 2023, their employment would

end on 12 September 2023 due to financial difficulties, and that they would receive two weeks' pay in lieu of notice.

[20] The Operations Manager (not Mr Tucker) met with the applicants on 9 September 2023, and confirmed that the business was closing immediately. At their employer's request, Marri-Anne Thompson and Mr Apiuta both worked for three hours on 11 September 2023, helping to pack up the premises. They have not been paid for the work they did that day.

[21] The applicants' employment ended on 12 September 2023.

[22] The applicants were due to be paid their wages on 14 September 2023, but they were not paid. Their next usual payday would have been 21 September 2023, but they were also not paid on that date. The applicants all gave evidence of how much they, and their families, had suffered as a result of them not being paid their wages.

[23] On 22 September 2023 Mr Tucker emailed the applicants to say that JV (in Liquidation) was unable to pay them.

[24] On 24 October 2023 JV emailed the applicants informing them that liquidators were being appointed and that it would be unlikely that they would receive their outstanding wages.

### **The claims**

[25] The applicants sought leave to recover their wage arrears and other money they were owed from Mr Tucker personally, because their employer was in liquidation and could not pay them. They also sought interest on their wage arrears and an award of legal costs for these proceedings.

[26] Mr Tucker did not respond to the applicants' claims.

### **The Authority's investigation**

[27] Mr Tucker did not participate in the Authority's investigation. He did not comply with the Authority's direction to attend mediation that was served on him on 18 April 2024. Mediation could not be arranged because he failed to engage with Mediation Services.

[28] Mr Tucker did not attend the case management conference. He did not lodge a statement in reply. He did not seek leave to lodge a statement in reply out of time.

[29] Mr Tucker did not lodge any evidence in accordance with the timetable directions the Authority issued on 16 April 2024, which gave him until 29 April 2024 to seek leave to lodge a statement in reply out of time. He was also given extra time to lodge evidence, but failed to do so.

[30] The Authority held an in-person investigation meeting in Auckland on 5 September 2024. The four applicants attended, along with Jennifer Thompson who is Mr Jain's partner, Garth Thompson who is Mr Apiuta's, Marri-Anne Thompson's and Nikyla Thompson's grandfather, and Sarah Thompson who is Nikyla Thompson's mother.

[31] All of these individuals gave evidence under oath or affirmation. They expressed to the Authority the considerable hurt and hardship Mr Tucker's actions had caused the applicants and their families.

[32] Mr Tucker did not attend the investigation meeting, which was started 30 minutes later than scheduled in order to give him additional time to appear.

[33] After the investigation meeting, Mr Jain provided some updated information about his annual leave entitlements. This information was lodged in an updated statement, which was sent by email to Mr Tucker at the email address he had used to communicate with the Authority in March 2024.

### **The issues**

[34] The following issues are to be determined:

- (a) Has there been a breach of employment standards?
- (b) If so, is Mr Tucker "a person involved in a breach of employment standards"?
- (c) If so, should the applicants be granted leave to recover from Mr Tucker personally any wage arrears and other money they are owed which JV (in Liquidation) is unable to pay them?
- (d) Can the employer pay the applicants the wage arrears and other money they are owed?

- (e) If not, how much does Mr Tucker personally owe each applicant?
- (f) Should Mr Tucker be ordered to pay interest on the wage arrears the applicants are owed?
- (g) Does the Authority have jurisdiction to investigate the applicants' unjustifiably disadvantage, unjustified dismissal, breach of contract and breach of good faith claims?
- (h) What costs and disbursements should be awarded?

**Has there been a breach of employment standards?**

[35] Section 5 of the Employment Relations Act 2000 (the Act) defines employment standards. This definition includes:

- (a) A breach of s 64 of the Act, which requires an employer to retain a copy of an employee's individual employment agreement or their individual terms and conditions of employment;
- (b) A breach of s 130 of the Act which requires an employer to keep and produce wage and time records for employees;
- (c) Breaches of the minimum entitlements and payments to employees due under the Holidays Act 2003 (HA03);
- (d) A breach of the requirements in s 81 and 82 of the HA03, regarding the employer's obligation to keep and produce holiday and leave records for employees;
- (e) A breach of the minimum entitlements provided for by the Minimum Wage Act 1983 (the MWA); and
- (f) A breach of the provisions of the Wages Protection Act 1983 (WPA).

[36] JV (in Liquidation) engaged in breaches of employment standards, as defined by s 5 of the Act, because it failed to pay two of the applicants for all of the hours they worked, it failed to pay any of the applicants pay in lieu of giving them contractual notice of termination and it failed to pay them their HA03 entitlements. These were all breaches of employment standards.

**Is Mr Tucker “a person involved in breaches of employment standards”?**

[37] Section 142W of the Act sets out when a person is involved in a breach of employment standards. That occurs where the person has aided, abetted, counselled or procured the breach or has induced the breach or has in any way, directly or indirectly, knowingly concerned in or party to the breach (among other things).

[38] Section 142W(2) of the Act provides that where a company has engaged in a breach of employment standards then a person may only be treated as a person involved in a breach if they are an officer of the company. Mr Tucker as the sole director of JV (in Liquidation) was at the material time “a person involved in a breach of employment standards”.

[39] It was Mr Tucker’s responsibility as the sole director to take appropriate steps to ensure that JV (in Liquidation) did not breach its minimum code obligations to the applicants. That did not occur.

[40] Mr Tucker was therefore involved in aiding, abetting and directly causing the breaches of employment standards by JV (in Liquidation) which have occurred for each applicant.

**Should leave be granted to the applicants to pursue Mr Tucker personally for the wage arrears and money they are owed which JV (in Liquidation) is unable to pay them?**

[41] The Employment Court in *Lawton v Steel Pencil Holdings Limited (in Liq)*, the Court held that proceedings against the director as a person involved in a breach of employment standards could proceed notwithstanding that the liquidator of the employer company which was in liquidation had not consented to proceedings against that entity continuing.<sup>2</sup>

[42] In *Lawson* the Court held:<sup>3</sup>

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 would still need to be proved that there has been a default in the payment of wages or other money due to a

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<sup>2</sup> [2021] NZEmpC 199 at [34] – [37].

<sup>3</sup>Above n1.

breach of employment standards. There must be established that the person from whom payment is sought was involved in the breach.

[43] Section 142Y of the Act provides that an employee may recover from a person who is not their employer wages or other money that they are owed by the employer if the default in the payment of wages or other money to them by the employer is due to a breach of employment standards, and the person who is liable to pay is a person involved in the breach of employment standards, within the meaning of s 142W.

[44] That is the case here. There has been a breach of employment standards by the applicants' employer, which is unable to pay them, the default was due to a breach of employment standards and Mr Tucker was the person who was directly involved in those breaches of employment standards that occurred.

[45] Section 142Y of the Act permits the recovery of wage arrears and other money from an individual with the prior leave of the Authority, to the extent that the employees' employer is unable to pay the wage arrears or other money, as per s 142Y(2) of the Act.

[46] The applicants are given leave to recover the wage arrears that they are owed by JV (in Liquidation), which the Liquidator has said was unlikely to be paid to them due to the lack of funds available. The applicants are therefore given leave to recover that money from Mr Tucker personally, to the extent that JV (in Liquidation) was unable to pay them.

**Can the employer pay the applicants their wage arrears and other money they are owed?**

[47] Mr Tucker advised the applicants in September and again in October 2023 that their employer could not pay their wages. The applicants have repeatedly asked Mr Tucker and the Liquidator to pay them, without success.

[48] That position that Mr Tucker communicated to the applicants in September and October 2023 has not changed over the last 12 months. JV (in Liquidation) is still unable to pay the applicants the wage arrears and other money they are owed.

[49] Mr Stan Denisenkov of Waterstone Insolvency Limited communicated with the Authority on behalf of the Liquidator. On 16 August 2024 in an email Mr Denisenkov

advised the Authority that the liquidators had been notified of the applicants' claims against JV (in Liquidation) and that:

The liquidators have not realised any assets during the period of the liquidation. Therefore, it is currently unclear whether there will be sufficient recoveries to pay distributions to any class of creditor.

[50] The Authority was satisfied that the employer, JV (in Liquidation), cannot pay the applicants the wage arrears and other money they are owed. Mr Tucker must therefore personally pay each of the applicants the wage arrears and other money they are owed.

### **How much is each applicant owed?**

[51] The amounts each applicant said they were owed were uncontested, so have been accepted as calculated by them. The correct annual holiday calculations were done in accordance with:

- (a) Section 22 of the HA03, which sets out the calculation of annual holiday pay if holiday has been taken in advance;
- (b) Section 24 of the HA03, which sets out the calculation of annual holiday pay if the employment ends and entitlement to holidays has arisen;
- (c) Section 25 of the HA03, which sets out the calculation of annual holiday pay if the employment ends before a further entitlement has arisen.

[52] Mr Jain's unused alternative holiday entitlement was calculated in accordance with s 60 of the HA03.

[53] Marri-Anne Thompson and Mr Apiuta were paid their wage arrears for hours they worked but were not paid at their contractual rate of pay, which was \$23.50 per hour for Ms Thompson and \$25.00 per hour for Mr Apiuta.

[54] Nikyla Thompson had received advance annual holiday pay of \$604.47 and Mr Apiuta had received advance annual holiday pay of \$477.14. That advance annual holiday pay was therefore deducted from their final annual holiday pay, as per s 22 and s 23(2)(a) of the HA03.

*Rahul Jain*

[55] Rahul Jain said he was owed \$15,652.52, consisting of:

- (a) \$5,137.04 accrued annual leave as per s 21(2)(b) of the Holidays Act 2003 (the HA03);
- (b) \$3,979.16 being 8% of his total gross earnings since his last anniversary date, as per s 25 of the HA03;
- (c) \$3,967.80 for 15 unused days of alternative holiday, as per s 60(2)(b) of the HA03;
- (d) \$2,568.52 pay in lieu of two weeks' notice.

*Tiele Apiuta*

[56] Mr Apiuta said he was owed \$1,400.80, consisting of:

- (a) \$75.00 wage arrears for three hours work he did on 11 September 2023, but which he has not been paid for;
- (b) \$380.96 being 8% of his total gross earnings since his last anniversary date, as per s 25 of the HA03;
- (c) \$944.84 pay in lieu of two weeks' notice.

*Marri-Anne Thompson*

[57] Marri-Anne Thompson said she was owed \$803.38, consisting of:

- (a) \$70.50 wage arrears for three hours work she did on 11 September 2023, but which he has not been paid for;
- (b) \$261.10 being 8% of her total gross earnings since her last anniversary date, as per s 25 of the HA03;
- (c) \$471.78 pay in lieu of two weeks' notice.

*Nikyla Thompson*

[58] Nikyla Thompson said she was owed \$1,329.38 consisting of:

- (a) \$595.60 annual holiday pay being 8% of her total gross earnings since her last anniversary date, less \$604.47 annual holiday paid to her in advance, as per s 25 of the HA03
- (b) \$733.78 pay in lieu of two weeks' notice.

**Should the applicants be awarded interest on their wage arrears?**

[59] The applicants have been deprived of wages that should have been paid to them by 14 September 2023, which was their final payday. It is therefore appropriate that Mr Tucker paid them interest on their wage arrears from that date until the applicants have been paid all of the money they are owed.

[60] Interest is to be calculated in accordance with the Civil Debt Interest Calculator on the Ministry of Justice website.

[61] Based on the wage arrears calculations provided by each applicant, they are owed the following interest for the period 14 September 2023 (being their final payday) to 5 September 2024 (being the date of the investigation meeting):

- (a) Rahul Jain \$922.07;
- (b) Tiele Apiuta - \$82.52;
- (c) Marri-Anne Thompson - \$47.33;
- (d) Nikyla Thompson - \$78.31.

[62] Interest continues to run from the date of this determination until the amounts owing plus the interest that has been awarded to each applicant has been paid in full. Future interest is also to be calculated using the Civil Debt Interest Calculator on the Ministry of Justice website.

**Does the Authority have jurisdiction over the applicants' other claims?**

[63] The Authority did not have jurisdiction over the applicants' unjustified disadvantage, unjustified dismissal, breach of contract and breach of good faith claims that they had made in the 2ASoP against Mr Tucker personally.

[64] JV (in Liquidation) is not a party to these proceedings, because the 2ASoP lodged on 19 August 2024 did not name it as a respondent party, presumably because it was in liquidation and the Liquidator had not given consent to these proceedings continuing against that entity.

[65] The applicants therefore withdrew these additional claims during the investigation meeting.

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

#### *Legal costs*

[66] The applicants as the successful parties are entitled to a contribution towards their actual legal costs. Ms Ahern informed the Authority that each applicant had incurred actual legal costs in excess of \$1,500.

[67] This matter involved a half-day in-person investigation meeting, so the notional starting point for assessing costs was \$2,250, being half of the current notional daily tariff, which is \$4,500 for a one day investigation meeting. The Authority considered that the notional starting tariff did not need to be adjusted, so each applicant was awarded \$562.50 towards their actual legal costs.

[68] Accordingly, Mr Tucker is ordered to pay each applicant \$562.50 towards their actual legal costs.

#### *Filing fee*

[69] The applicants are also entitled to reimbursement of the filing fee. There was one filing fee of \$71.55 paid, so the reimbursement of that should be divided equally between each of the four applicants.

[70] Accordingly, Mr Tucker is ordered to pay each applicant \$17.89 as a reimbursement of each applicant's contribution towards the filing fee that was paid.

### **Summary of outcome**

[71] Mr Tucker is a person who was involved in breaches of employment standards, in accordance with s 142W of the Act.

[72] Pursuant to s 142Y(2) of the Act, Mr Tucker is ordered to personally pay each applicant the wage arrears and other money JV (in Liquidation) owes them, but which it is unable to pay.

[73] Accordingly, within 28 days of the date of this determination, Mr Tucker is ordered to pay:

- (a) Rahul Jain \$17,154.98 gross, consisting of
  - (i) \$15,652.52 wage arrears;
  - (ii) \$922.07 interest to the date of the investigation meeting;
  - (iii) \$562.50 contribution towards his legal costs;
  - (iv) \$17.89 partial reimbursement of filing fee;
- (b) Tiele Apiuta \$2,063.71 gross, consisting of:
  - (i) \$1400.80 wage arrears;
  - (ii) \$82.52 interest to the date of the investigation meeting;
  - (iii) \$562.50 contribution towards his legal costs;
  - (iv) \$17.89 partial reimbursement of filing fee;
- (c) Marri-Anne Thompson \$1,431.10 gross, consisting of
  - (i) \$803.38 wage arrears;
  - (ii) \$47.33 interest to the date of the investigation meeting;
  - (iii) \$562.50 contribution towards her legal costs;
  - (iv) \$17.89 partial reimbursement of filing fee; and
- (d) Nikyla Thompson \$1,988.08 gross, consisting of:
  - (i) \$1,329.38 wage arrears;
  - (ii) \$78.31 interest to the date of the investigation meeting;
  - (iii) \$562.50 contribution towards her legal costs;
  - (iv) \$17.89 partial reimbursement of filing fee.

[74] Mr Tucker is also ordered to continue paying interest to each applicant on the wage arrears and other money they are owed, to run from the date of this determination

until the applicant has been paid in full. Future interest is to be calculated using the Civil Debt Calculator on the Ministry of Justice website.

Rachel Larmer  
Member of the Employment Relations Authority