

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 436  
3099992

BETWEEN	GEORGINA RONDEL Applicant
AND	BECKY VERCOE First Respondent
AND	MRS VERCOES DINER LIMITED Second Respondent

Member of Authority:	Michele Ryan
Representatives:	Applicant in person No appearance by the respondent
Investigation Meeting:	On the papers
Submissions [and further Information]	7 July 2020 for the Applicant Respondents submissions and information scheduled to be lodged on 21 July 2020 but nothing received
Date of Determination:	21 October 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The first respondent, Becky Vercoe, is the sole director and shareholder of the second respondent, Mrs Vercoes Diner Ltd. The company trades under the name Mrs Vercoes Diner. For ease of reference I refer to the company as “the Diner”.

[2] Georgina Rondel worked as a “*Kitchen Assistant/Baker*” at the Diner for just over a year. In mid-2019 she resigned from her position. On her departure Ms Rondel was owed \$3,246.20 (gross) in holiday pay.

[3] Several informal arrangements were subsequently entered into which allowed the Diner to pay the monies owed to Ms Rondel by way of instalment payments.

[4] Unfortunately arrears remains owing, and Ms Rondel now seeks an order for \$546.20 to be paid and costs.

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

[5] The respondents provided a very brief response to the statement of problem. However they have otherwise not communicated with the Authority despite notice of a scheduled case management call on 25 June 2020 and where subsequent notice of a timetable for the provision of information.

[6] This matter has been determined on the papers. No good cause has been furnished as to why the respondents have failed to attend and the Authority has proceeded as if the respondents had engaged on the matter.<sup>1</sup>

### **The issues**

[7] The Authority needs to determine:

- (a) whether holiday pay arrears are owed;
- (b) if monies are owed, which of the respondents is liable for payment;
- (c) should costs be awarded and if so, what is the appropriate quantum of an award.

### ***Is holiday pay owed?***

[8] In an email sent to the Authority the first respondent, Becky Vercoe, does not dispute Ms Rondel's claim and I am satisfied the sum she has claimed is valid. The respondent entity that employed Ms Rondel is liable for payment of the remaining wages.

### ***Who is liable for payment?***

[9] There is some ambiguity as to which of the respondents employed Ms Rondel. A signed employment agreement records the first respondent, Becky Varcoe, as Ms Rondel's employer,

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<sup>1</sup> Pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2020.

however under an “*Acknowledgment*” provision, the employment agreement records it is the Diner that offered the employment agreement to Ms Rondel.

[10] To resolve the ambiguity I have considered how Ms Rondel’s employment operated in practice. I note firstly that Ms Rondel’s wages, holiday pay, and the employers KiwiSaver contributions were paid by the Diner. Payment of wages by an entity may not always be determinative of an employment relationship, but in the circumstances of this case I find these matters are persuasive. Further, Ms Rondel worked at the premises controlled by the Diner and her role descriptor supports the view that her activities primarily benefitted the Diner’s core business.

[11] On balance I am satisfied the Diner controlled and directed Ms Rondel’s employment and was her employer. It follows that the Diner is liable for the payment of the remaining wages owed.

[12] Turning to the claim against Ms Versoe personally, her position as a director of the Diner means she may be defined as a “person involved in a breach”<sup>2</sup> where the breach is a breach of an employment standard to pay minimum entitlements under the Holidays Act 2003.<sup>3</sup>

[13] Section 142Y of the Employment Relations Act 2000 (the Act) allows liability for unpaid wages to be transferred to a director as a “person involved in a breach” if the employer is unable to pay the monies owed. The NZ Companies Office records the Diner will shortly be removed from its register. Vercoe advised the Authority that the Diner is no longer trading. Should the Diner fail to pay the sum owed, Ms Rondel may return to the Authority pursuant to s 142Y of the Act and seek to have liability for her established claim transferred to Ms Vercoe.

### *Costs*

[14] Ms Rondel seeks \$740.60 in costs. To support this aspect of her claim she provided an invoice sent by a law firm from which she sought advice which reflects that amount.

[15] I am unwilling to make an order that reimburses Ms Rondel the entire amount she seeks. This is because an order for costs is regarded as a contribution to, rather than a full indemnity of, costs incurred. The exception to this approach is rare and only considered where it can be shown the respondents’ conduct to how it addressed the claim amounted to “*flagrant*

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<sup>2</sup> Section 142W of the Employment Relations Act 2000

<sup>3</sup> Employment Standards are defined at s 5 of the Employment Relations Act 2000

*misconduct*".<sup>4</sup> There is some evidence of scheduled payments not being met by the Diner's failure in this regard falls short of the kind of conduct that would warrant indemnity costs, noting also that the Diner paid a large portion of the sum owed before the claim was lodged with the Authority.

[16] Finally, Ms Vercoe did not take challenge her inclusion as a respondent in this matter. As a result I hold both respondents jointly and severally liable to contribute to Ms Rondel's costs.

### **Orders**

[17] The Authority makes the following orders:

- (a) Mrs Vercoes Diner Ltd, is ordered to pay Georgina Rondel the sum of \$546.20 (gross).
- (b) Becky Vercoe and Mrs Versoes Diner Ltd are jointly and severally liable for costs of \$400.00, together with the cost of filing fee of \$71.56 paid by Ms Rondel to progress her claim.

Michele Ryan  
Member of the Employment Relations Authority

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<sup>4</sup> *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400