

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2020] NZERA 512
3064414

BETWEEN DENISE FAY TUBBY
 Applicant

AND NADEEM MOHAMMED
 Respondent

Member of Authority: Michele Ryan

Representatives: Margaret Williams, advocate for the Applicant
 No response for or on behalf of the Respondent

Investigation Meeting: On the papers

Date of Determination: 9 December 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Denise Tubby says she was employed by SR NZ Investments Ltd (“SR NZ”) from mid-to-late March 2018 until 10 July 2018. She has claims lodged with the Authority seeking recovery of unpaid wages and holiday entitlements against SR NZ.

[2] On application under s 142Y of the Employment Relations Act 2000, on 9 June 2010 Mr Jasbir Jaswal, a director of SR NZ, was joined as a respondent to the proceedings where I found there was an arguable case he was a “person involved in a breach”.¹

[3] This determination involves another application under s142Y.

¹ *Tubby v SR NZ Investments Ltd and Jaswal* [2020] NZERA 224

[4] Ms Tubby has since become aware that Ms Nadeen Mohammed was the sole director of SR NZ for a material portion of the period in which she was employed by it.² Ms Tubby now seeks to have Ms Mohammed joined to the proceedings also.

Service

[5] Ms Mohammed has not responded to Ms Tubby's application but I am satisfied she has received it and must be aware of it. This is because the application was sent via Courier Track&Trace to Ms Mohammed's personal residential address at 16f Coronation Road, Mangere Bridge, Auckland 2022.

[6] The Courier Track&Trace documentation reflects the parcel was signed by Naden H on 1 October 2020. On balance I am persuaded this individual is Nadeen Mohammed where courier drivers, in a now contactless process, are required to decipher signatures. I note the address also remains recorded in the New Zealand Companies Office Register as the registered address and address for service for SR NZ.

[7] The letter notified Ms Mohammed that if she intended to object to Ms Tubby's application, she was required to do so in writing no later than 14 days after receipt of the application. No response has been received from Ms Mohammed and the Authority has proceeded to determine the application on the material provided.

The relevant statutory provisions

[8] Section 142Y of the Act provides:

142Y When person involved in breach liable for default in payment of wages or other money due to employee

- (1) A Labour Inspector or an employee may recover from a person who is not the employee's employer any wages or other money payable to the employee if—
 - (a) there has been a default in the payment of wages or other money payable to the employee; and
 - (b) the default is due to a breach of employment standards; and
 - (c) the person is a person involved in the breach within the meaning of section 142W.
- (2) However, arrears in wages or other money may be recovered under subsection (1) only,—

² The New Zealand Companies Register records Ms Mohammed was appointed as a director of NZ SR on 3 January 2018 and remained so until 10 June 2018.

- (a) in the case of recovery by an employee, with the prior leave of the Authority or the court; and
- (b) to the extent that the employee’s employer is unable to pay the arrears in wages or other money.

[9] The term “**employment standards**” is referred to at s 5 of the Act, and includes but is not limited to:

- minimum entitlements and payment for those under the Holidays Act 2003;
- minimum entitlements under the Minimum Wage Act 1983;
- the provisions of the Wages Protection Act 1983.

[10] Section 142W of the Act defines who may be a “person involved in a breach” as follows:

142W Involvement in breaches

- (1) In this Act, a person is **involved in a breach** if the breach is a breach of employment standards and the person—
 - (a) has aided, abetted, counselled, or procured the breach; or
 - (b) has induced, whether by threats or promises or otherwise, the breach; or
 - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
 - (d) has conspired with others to effect the breach.
- (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
- (3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:
 - (a) a person occupying the position of a director of a company if the entity is a company:
 - ...

Should Ms Tubby be granted leave?

[11] Ms Tubby’s application was accompanied by a sworn affidavit. She reports she has been informed that SR NZ is “practically defunct” and points to banks statements obtained from SR NZ that reflect a number of dishonoured payments by it. Ms Tubby is concerned SR NZ may not be in a position to meet any orders for payment of wages and holiday entitlements if her claim is successful.

[12] Ms Mohammed was the sole director of SR NZ for 12 of the 16 weeks over which Ms Tubby was employed by it.

[13] On the information provided I am satisfied that there is an arguable case that:

- wage and holiday entitlements may be owed to Ms Tubby; and
- SR NZ Investments Ltd may be unable to pay the entitlements; and
- Ms Mohammed was a director of SR NZ Investments Ltd (for a material portion over the timeframe in which may wage and holiday entitlements may be owed) and may be a person “involved in a breach”.

[14] Ms Tubby’s application is granted.

[15] Ms Nadeem Mohammed is now joined as a third respondent to the claims set out at file number 3064414.

[16] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority