

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 224
EMPC 4/2024**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER OF an application to set aside appearance under
protest to jurisdiction

BETWEEN RUNGWANWILAI (ONE) KONGBANG
Plaintiff

AND LOTUS TOUCH LIMITED
First Defendant

AND CRAIG JOHNSON
Second Defendant

Hearing: 26 August 2024
(Heard at Auckland)

Appearances: D Fleming, counsel for plaintiff
No appearance for first defendant
MC Donovan, counsel for second defendant

Judgment: 22 November 2024

**INTERLOCUTORY JUDGMENT OF JUDGE KATHRYN BECK
(Application to set aside appearance under protest to jurisdiction)**

[1] The plaintiff, Rungwanwilai (One) Kongbang, has filed a challenge to a determination of the Employment Relations Authority.¹

[2] The Authority found that the first defendant, Lotus Touch Ltd (Lotus Touch), breached various minimum employment standards and was liable to pay Ms

¹ *Kongbang v Lotus Touch Ltd* [2023] NZERA 727 (Member Gane).

Kongbang various sums.² However, it determined that the second defendant, Craig Johnson, was not involved in Lotus Touch's breaches and that, as a result, Ms Kongbang was not permitted to recover sums from him.³

[3] In her statement of claim, Ms Kongbang seeks an order, pursuant to s 142W of the Employment Relations Act 2000 (the Act), that Mr Johnson was involved in breaches of employment standards. She also seeks an order, pursuant to s 142Y of the Act, permitting her to recover any outstanding sums, or at least a proportion of those sums, from Mr Johnson in the event that Lotus Touch is unable to comply with its obligations.

[4] Mr Johnson has not filed a statement of defence. Instead, he has filed an appearance under protest to jurisdiction, claiming that the Employment Court has no jurisdiction to determine the orders sought against him.

[5] Ms Kongbang now applies for orders setting aside the appearance and directing Mr Johnson to file a statement of defence. This judgment resolves that application.

Legal principles

[6] No form of procedure has been provided for such an application in the Act or the Employment Court Regulations 2000, so the Court is required to dispose of the case in accordance with the provisions of the High Court Rules 2016.⁴

[7] Rule 5.49 of the High Court Rules concerns appearances and objections to jurisdiction. Where a defendant has filed an appearance objecting to the Court's jurisdiction, a plaintiff may apply to the Court by interlocutory application to set aside that appearance.⁵ In hearing an application to set aside the appearance, the Court must dismiss the proceeding if it has no jurisdiction to hear and determine it. If the Court does not dismiss the proceeding, it must set aside the appearance.⁶ If the Court sets aside the appearance, it may extend the time within which the defendant may file and

² At [66].

³ At [56]–[59].

⁴ Employment Court Regulations 2000, reg 6(2)(a)(ii).

⁵ High Court Rules 2016, r 5.49(5).

⁶ Rule 5.49(6).

serve a statement of defence and may give any other directions that appear necessary regarding any further steps in the proceeding.⁷

Issues

[8] The parties have agreed that the issues for resolution are:

- (a) what is required for an employee, acting on their own account, to seek and be granted leave to bring an application to recover wages or other money from a person who is not the employee's employer under s 142Y of the Act;
- (b) whether the Court has jurisdiction to hear and determine the plaintiff's claim for recovery of wages or other money against the second defendant under s 142Y and, if not, whether:
 - (i) the claims against the second defendant should be dismissed; or
 - (ii) the plaintiff should be required to file amended pleadings; and
- (c) a determination of costs of the interlocutory application, or the costs that would have been awarded against the plaintiff were she not legally aided.

Submissions

[9] The second defendant's position can be summarised as follows:

- (a) An employee acting on their own account (as opposed to a Labour Inspector acting on their behalf) cannot bring an application to recover wages or other money from a person who is not the employee's employer under s 142Y without prior leave of the Authority or the Court.

⁷ Rule 5.49(8).

- (b) An application for orders under s 142Y cannot be the statutory mechanism by which an employee obtains leave because leave must be granted prior to the employee bringing an application for recovery under s 142Y and because s 142Y draws a distinction between when a Labour Inspector can make an application versus when an employee can make an application.
- (c) The plaintiff has not obtained prior leave to commence an action against the second defendant under s 142Y from the Authority or the Court.
- (d) Accordingly, the Court does not have jurisdiction to hear and determine the plaintiff's claims for recovery of wages or other money against the second defendant under s 142Y.

[10] Ms Kongbang's position can be summarised as follows:

- (a) An employee does not need prior leave of the Authority or the Court to seek an order pursuant to s 142Y.
- (b) Rather, an employee needs to obtain an order granting leave pursuant to s 142Y before that employee can recover monies owed by the employer from an individual who was not the actual employer.
- (c) An application for orders under s 142Y is the statutory mechanism by which an employee obtains such leave.

The effect of s 142Y

[11] The parties have asked what is required for an employee to recover money from a person involved in the breach.

[12] The meaning of s 142Y must be ascertained from its text and in light of its purpose and its context.⁸

[13] Section 142Y was introduced when pt 9A was inserted into the Act on 1 April 2016. The section 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,—
 - (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.

[14] It sits within a suite of provisions within pt 9A relating to the enforcement of employment standards. Section 142Y comes under a heading "Liability of persons involved in breach, bodies corporate, and principals".

[15] The sections under the heading define:

- (a) when a person is involved in a breach – s 142W;
- (b) when a person involved in a breach is liable to a penalty – s 142X;
- (c) when a person involved in a breach is liable for default in payment of wages or other money due to an employee – s 142Y;
- (d) how a state of mind of a body corporate is established – s 142Z; and

⁸ Legislation Act 2019, s 10(1).

- (e) where conduct engaged in on behalf of a body corporate can be attributed to that body corporate – s 142ZA.

[16] Sections 142W and 142Y are relevant to these proceedings.

[17] The purpose of s 142Y is stated in its heading. It identifies when a person involved in a breach is *liable* for default in payment of wages or other money due to an employee.⁹ Employees usually only have a right to recover wages from their employer – they do not normally have rights against the company’s directors or shareholders or against other staff employed by the company. Section 142Y changes that and permits money to be recovered from a broader category of persons.¹⁰

[18] When s 142Y permits a Labour Inspector or an employee to recover sums, it is not focused on permitting them to file an action for recovery, as was proposed by Mr Donovan, counsel for Mr Johnson. Unlike s 131(1), s 142Y does not refer to recovery by “action”.

[19] The provision is also not focused on permitting enforcement proceedings in the District Court of some prior order made by the Court. Unlike s 142H, s 142Y does not state that the relevant money may be recovered in the District Court as a debt.

[20] Rather, the section is focused on identifying when a person other than an employer is legally liable for an employer’s default to pay wages or other money. Once that liability has been established, appropriate steps may be taken to recover the money – the Act is not specific about how that recovery can take place.

[21] Accordingly, once the three criteria in s 142Y(1) are met, a Labour Inspector is provided with a legal basis to recover money from persons involved in the breach directly. In ideal circumstances, neither an application for an order from the Court nor enforcement proceedings would be necessary as the Labour Inspector could simply demand payment.

⁹ *Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705, [2021] ERNZ 1345 at [17].

¹⁰ At [50].

[22] Of course, if the person in question refuses to make payment, it may be necessary for a Labour Inspector to seek an order from the Court to provide a basis on which to initiate enforcement proceedings, but s 142Y does not primarily deal with such applications as its emphasis is on considering when such a person is liable to make payment.

[23] The situation is slightly more complicated for employees seeking to recover money themselves under s 142Y because s 142Y(2) states that an employee may only recover money with prior leave from the Authority or the Court. That means that even when the three criteria in s 142Y(1) are met, the employee still does not have the right to pursue recovery, and any demand issued by the employee to a person involved in the breach could legitimately be refused on the grounds that there is no legal basis for the employee to recover the sum from them.¹¹

[24] Ultimately, an involved person can be liable to a Labour Inspector as a result of circumstances, but liability to an employee under s 142Y can only arise as a result of an order from the Authority or the Court.

[25] Both parties cited various determinations of the Authority which they submitted reflected the correct approach to applying s 142Y. However, it was not suggested that any of those determinations considered the specific issues addressed in this case, so they are of limited use.

[26] Additionally, Mr Donovan relied on a Cabinet paper which indicated that leave of the Authority would be required to take a case against an involved person to the Authority.¹² However, the language of the Cabinet paper does not reflect the language of the provision. The provision states that prior leave is required before an employee

¹¹ Where the Court grants leave to recover sums from a person, it is making a finding on liability. Therefore, there is likely no reason why the Court could not, while granting leave, also make orders that the person pay the sums in question in the event of default by the employer. To suggest that the Court cannot determine all matters in one proceeding would be inconsistent with the object of the Act to reduce judicial intervention. The Court has taken a similarly pragmatic approach to s 142Y in *Shah Enterprise NZ Ltd v Labour Inspector* [2022] NZEmpC 177, [2022] ERNZ 873 at [45] where it made conditional orders without first seeking confirmation of the employer's inability to pay. However, no such orders are sought in the pleadings, so it is not necessary to specifically determine the point.

¹² Michael Woodhouse "Strengthening enforcement of employment standards" (Ministry for Workplace Relations and Safety, 2015) at [47] and [119](15).

can recover money rather than before they can take a case to the Authority. Further, the Court of Appeal has, in the context of this specific Cabinet paper, expressed significant reservations about relying on such documents.¹³ Therefore, the paper is also of limited use.

Does the Court have jurisdiction to hear the claims against Mr Johnson?

[27] Ms Kongbang's statement of claim seeks various relief in respect of her employer, Lotus Touch, including orders for payment of wages, public holiday pay and annual holiday pay. She also seeks a finding that failure to pay those amounts is a breach of minimum standards.

[28] In respect of Mr Johnson she seeks:

- (a) an order, pursuant to s 142W of the Act, that Mr Johnson was a person involved in the breaches; and
- (b) an order, pursuant to s 142Y of the Act:
 - (i) that minimum wages, public holidays entitlements, and annual holiday pay owing to Ms Kongbang can be recovered from Mr Johnson, if Lotus Touch is unable to make payment; or
 - (ii) that, if the Court finds that Ms Kongbang was herself partially responsible for Lotus Touch's breaches of minimum entitlements, a proportion of the money be recoverable from Mr Johnson, reflecting the degree of his involvement.

[29] Mr Donovan submitted that Ms Kongbang has filed an action for recovery without having first obtained leave to do so. Therefore, he submitted that the Court does not have jurisdiction to hear the claims against Mr Johnson. I do not agree.

¹³ *Labour Inspector v Southern Taxis Ltd*, above n 9, at [51].

[30] She has sought orders against Lotus Touch and asked for findings that it has breached minimum standards. She has asked for an order declaring that Mr Johnson is a person involved in the breaches. She has also asked for an order that, if Lotus Touch does not pay, she be able to recover the funds from Mr Johnson.

[31] Although the application for an order pursuant to s 142Y does not explicitly use the word “leave”, it is clear that Ms Kongbang is seeking leave to recover money from Mr Johnson if Lotus Touch is unable to make payment. She is not simply relying on him being a person involved; she has taken the next step of seeking an order that he be liable to pay any shortfall.

[32] Therefore, there is no issue with the pleadings. The Court has jurisdiction to make the orders sought.

[33] Further, I consider that even if I had found that the Court does not have jurisdiction to make the orders sought, I would have accepted the submission of Mr Fleming, counsel for Ms Kongbang, that the pleadings could have been amended to expressly seek leave to recover money under s 142Y, which would have resolved any issues.

[34] In addition, I note that notwithstanding any possible issues in relation to s 142Y, there is an order being sought against Mr Johnson for which there is clearly jurisdiction. The Authority found that Mr Johnson was not a person involved in the breaches within the meaning of s 142W. However, that finding is challenged, and an order is being sought on that point.

[35] Mr Donovan argued that there is no realistic reason for the Court to make an order under s 142W if no order is sought under s 142Y. I do not accept that submission. There may be reasons why an employee would seek a finding that an individual was involved in breaches against them without any related application under s 142Y. However, even if the two applications were inseparable, in light of my findings above in respect of the leave application, I consider that the Court has jurisdiction to make orders under s 142W also.

[36] Finally, I observe that it is accepted by both parties that, even if the Court finds that Mr Johnson is a person involved in breaches, it would be open to the Court to decline Ms Kongbang's application for leave to recover funds from him. There is no need to go into any factors that might form the basis for such a refusal at this stage, but it would likely involve the application of the Court's equity and good conscience jurisdiction.

Outcome

[37] Ms Kongbang's application for the protest to jurisdiction to be set aside is successful.

[38] If Mr Johnson wishes to defend these proceedings, he must file a statement of defence within 14 days of the date of this judgment.

[39] Costs are reserved. In the event the parties are unable to agree on costs, Ms Kongbang will have 14 days from the date of this judgment within which to file and serve any memorandum and supporting material, with Mr Johnson having a further 14 days within which to respond. Any reply should be filed within a further seven days.

Kathryn Beck
Judge

Judgment signed at 3.30 pm on 22 November 2024