

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
OTAUTAHI ROHE**

[2023] NZERA 465  
3203519

BETWEEN                      LAURA SUSANNE FORREST-  
SMITH  
Applicant

AND                              MATTHEW KEVIN  
DOCHERTY  
Respondent

Member of Authority:      David G Beck

Representatives:            Stephen Zindel, counsel for the Applicant  
No appearance by the Respondent

Investigation Meeting:     On the papers

Submissions Received:    8 June 2023 from the Applicant  
None from the Respondent

Date of Determination:    22 August 2023

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]        Laura Susanne Forrest-Smith is seeking to make Mathew Kevin Docherty responsible for the non-payment of an award of lost wages of \$6,393.60 gross. This outstanding sum is derived from an order made pursuant to section 123(1)(c)(ii) of the Employment Relations Act 2000 (the Act) in a determination of 10 August 2022.<sup>1</sup>

[2]        The Authority also awarded Ms Forrest-Smith a sum of \$12,000 compensation pursuant to s 123(1)(c)(i) the Act) and in a costs determination of 9 September 2022, a

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<sup>1</sup> *Laura Susanne Forrest Smith v Sun Kissed Tan Limited* [2022] NZERA 380.

costs award of \$3,100 and the Authority filing fee of \$71.55.<sup>2</sup> Both determinations have Sun Kissed Tan Limited (SKT) as the sole respondent. On 1 February 2023, SKT was placed in liquidation and none of the monetary awards have been paid to Ms Forrest-Smith.

[3] Mr Docherty was the sole director of SKT and majority shareholder. I am satisfied that Mr Docherty has been made aware of these proceedings, but he has chosen not to participate and is believed to be living in Australia.

### **Issue**

[4] Utilising s 142Y of the Act, Ms Forrest-Smith is seeking to recover the Authority's award of lost wages by alleging Mr Docherty is a person involved in the breach and is personally liable for such. However, before I can consider the matter a preliminary threshold issue arises of whether the disputed amount identified falls within the ambit of s 142Y(1) of the Act. This provision allows with prior leave and to the extent the employer is unable to pay the amount owing,<sup>3</sup> a person to "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.<sup>4</sup>

[5] The key question is whether the amount claimed was due to a breach of employment standards and is therefore potentially recoverable from Mr Docherty. Ms Forrest-Smith's employment with SKT ended on 20 January 2021 in circumstances the Authority found to be unjustified. The Authority awarded Ms Forrest-Smith eight weeks lost wages up to 21 March 2021 and holiday pay on that amount.

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<sup>2</sup> *Laura Susanne Forrest Smith v Sun Kissed Tan Limited* [2022] NZERA 452.

<sup>3</sup> Section 142Y(2) Employment Relations Act 2000.

<sup>4</sup> Section 142Y(1) Employment Relations Act 2000.

[6] In a Directions Notice of 30 June 2023 I asked the parties to provide submissions on this as a preliminary matter. On 13 July 2023, counsel for Ms Forrest-Smith filed a submission but Mr Docherty has not provided one.

### **Ms Forrest-Smith's submission**

[7] In a brief submission, Mr Zindel noted that this was a novel matter and could not identify precedents of the Authority or Employment Court determining the full scope of s 142Y of the Act. Reference was made to an Authority decision that granted leave for an applicant to recover wages from the sole director of a company but Mr Zindel noted such was confined to unlawfully deducted wages and holiday pay prior to employment ending.<sup>5</sup> Mr Zindel suggested generally that “wages compensation for the applicant not being able to work may be treated in the same way as payment for actual work” and that despite the employment ending upon termination, there may be instances when the employment ‘remains on foot’ during an agreed notice period (impliedly for example where the person is placed on garden leave during their notice period).

[8] Mr Zindel argued that the term ‘employment standards’ is defined in the interpretation section of the Act (s 5) to include minimum entitlements payable under the Minimum Wage Act 1993 (MWA) and the Holidays Act 2003. Using the definition of a “worker” under s 2 MWA, Mr Zindel suggests it encompasses times when a person is not “employed at a given time” so compensation during such periods is deemed to be related to a period of work rather than general damages. Mr Zindel further suggested it would be anomalous to not consider lost wages awarded at the minimum hourly wage rate (as was here) as arising from a breach of minimum standards as the legislation “is designed as remedial and to be protective of vulnerable workers”.

### **Discussion**

[9] Setting aside whether the payment of compensatory wages as a loss of a future benefit can fall within the ambit of a minimum standard, the difficulty with extending the scope or reach of s 142Y, is the plain and ordinary meaning of the provision. The heading of the section refers to “wages or other money due” and at s 142Y(1)(a) it refers to

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<sup>5</sup> *Singh v Dhaliwal* [2021] NZERA 247 at [67].

recovery being possible for a 'default' in the payment of wages payable. The wording is plainly directed at retrospective breaches. Given I found no default in any wages due to Ms Forrest-Smith in the substantive determination, it would be too much of a stretch to accept the purpose of s 142Y is to allow recovery for an award of future lost wages as envisaged in s 123(1)(c)(ii) of the Act.

[10] I also consider that to bring Mr Docherty within the scope of s 142Y it would have to be established he was a party to a breach of minimum standards and no finding of such was made in the substantive determination. There was also no application to join Mr Docherty to the original proceedings.

### **Finding**

[11] I do not find that the scope of section 142Y of the Employment Relations Act 2000 can be extended to allow Laura Susanne Forrest-Smith to recover an outstanding award of lost wages as this compensatory award did not involve a finding that there had been a breach of a minimum standard.

### **Costs**

[12] Given the application is unsuccessful and the respondent has not participated in proceedings I determine that costs are not at issue.

David G Beck  
Member of the Employment Relations Authority