

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 538
3257059

BETWEEN EURICO TOMAS
Applicant

AND MATTHEW SANDERS
Respondent

Member of Authority: Peter Fuiava

Representatives: Adrian Plunket, advocate for the Applicant
Respondent in person

Investigation Meeting: 15 July 2024 in Auckland and by audio-visual link

Submissions and information received: 15 July 2024 from the Applicant
19 July 2024 from the Respondent

Determination: 6 September 2024

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Eurico Tomas was employed by The Fire Guys Ltd (the Fire Guys or the company) as a senior fire alarm technician from 18 June 2020 until he resigned on 7 March 2023. The company's main activity was active fire protection, installation and continued maintenance of fire alarm protection systems. Mr Tomas claims that he is owed wage and annual leave arrears by his employer.

[2] On 5 September 2023, the Fire Guys was placed into liquidation and is no longer solvent. Mr Tomas now brings an action against the company's sole director, Matthew Sanders, for recovery of wages under s 142Y of the Employment Relations Act 2000 (the Act). However, for Mr Tomas to succeed against Mr Sanders, leave from the Authority is required.

[3] The application for leave is opposed. While Mr Sanders accepts that wages and annual leave are owed, Mr Tomas has not been paid because of a genuine dispute with his failure to return all equipment and stock to the company including a remote display that was needed for an important job for a large customer who subsequently took its business to a rival entity managed by Mr Tomas's son.

How has the Authority investigated?

[4] For the Authority's investigation, written witness statements from Mr Tomas and his wife Marlita were received on 19 April 2024. The investigation meeting was held both in person in Auckland and by audio-visual link (AVL) with Mr Sanders and Mr Tomas's representative, Mr Plunket, attending remotely. Mr Tomas and his wife attended in person.

[5] On the morning of the investigation meeting, I received a copy of Mr Plunket's written closing submissions that he requested not be provided to Mr Sanders until the investigation meeting had commenced. However, as a matter of procedural fairness and to avoid the situation of Mr Sanders being caught off guard by new information presented during the investigation meeting, I directed that he be provided a copy of Mr Plunket's submissions prior to the meeting's commencement.

[6] After receiving the submissions, Mr Sanders emailed the Authority a copy of Mr Tomas's individual employment agreement (IEA) with the Fire Guys and a copy of a vehicle policy for a related company (also in liquidation). As anticipated, Mr Sanders requested that he be given more time to respond to Mr Plunket's closing written submissions which was granted and have been received and considered.

[7] All witnesses answered questions under oath or affirmation from me and the parties' representatives. As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What were the issues?

[8] The issues requiring investigation and determination were:

- (i) Was Mr Tomas unjustifiably disadvantaged when his work vehicle was removed?
- (ii) Was he unjustifiably dismissed or did he resign?
- (iii) Mr Tomas was employed by the Fire Guys Ltd (now in liquidation) of which Mr Sanders was a director and majority shareholder. If the company is found to have unjustifiably disadvantaged and/or dismissed Mr Tomas, to what extent (if any) can Mr Sanders be personally liable for hurt and humiliation compensation and any penalties under the Act or the Wages Protection Act 1983 (WPA) that do not relate to a breach of employment standards?
- (iv) Should leave be given by the Authority under s 142Y of the Act for Mr Sanders to be regarded as a person involved in a breach of employment standards?
- (v) If so, what remedies are available to Mr Tomas under ss 142W, 142X and 142Y of the Act?
- (vi) What property belonging to the company is still in Mr Tomas's possession (if any)?
- (vii) Should either party contribute to the costs of representation of the other party?

What are the relevant facts?

[9] By email of 7 March 2023, Mr Tomas advised Mr Sanders that he was tendering his resignation because he saw for himself that the Fire Guys was slowing down and was letting staff go. Believing that he might be next, Mr Tomas decided to resign. He now works for his son's company which Mr Sanders believes has cost him his business.

[10] Mr Tomas' individual employment agreement with the Fire Guys allowed for either party to terminate the relationship on giving one month's notice to the other party. As part of his employment, Mr Tomas was loaned a company vehicle, a Ford Ranger, which was flood damaged during the Auckland Anniversary floods in late January 2023. He was provided with a like replacement vehicle shortly thereafter.

[11] On 7 March 2023, Mr Tomas resigned by email and indicated that 10 April 2023 would be his last day of employment pursuant to the notice period provision above.

[12] On 16 March 2023, at approximately 4.30 pm, Mr Tomas noticed that his work vehicle was no longer parked on the road across his house. He immediately thought that the ute had been stolen and told his wife that it was missing.

[13] Marlita informed him that Mr Sanders had taken the vehicle. When Mr Tomas telephoned the office, he was told by the company's administration and account manager that he was not to return to work. Mr Tomas emailed Mr Sanders later that same evening to advise that he was taken aback by the sudden removal of his work vehicle without any prior communication and that the vehicle was part of his remuneration. Mr Tomas expected the Fire Guys to still pay him his notice period up to and including 10 April 2023. He had not been paid since 27 February 2023 and had an annual leave balance of 205.81 hours owing to him. At the time of his resignation, Mr Tomas was paid fortnightly at the rate of \$50 per hour and his IEA required him to work a minimum of 40 hours per week.

[14] Mr Tomas says that the way his employment ended caused him mental, emotional and financial distress for which he seeks compensation for unjustified disadvantage (the taking of the work vehicle without consulting him) and unjustified dismissal (being told by the administration and account manager that he was not to complete the remainder of his notice period).

[15] On 19 March 2023, Mr Sanders responded to Mr Tomas' email stating that prior to taking the vehicle, he tried contacting him several times without success. He visited his residence during work hours and expected Mr Tomas to be home because he had reported in sick that day. Not seeing him, Mr Sanders took the vehicle.

[16] Mr Sanders' reply email stated that Mr Tomas had previously been requested to return all property belonging to the Fire Guys as soon as possible and that any final payments due to him would be paid once all of the company's equipment had been returned. Mr Sanders' email did not expressly state what company property was outstanding and during the investigation meeting he was not able to provide a list of these items or quantify their worth.

[17] Mr Tomas stated that he had not seen Mr Sanders that day and that he had not received any calls or messages on his work phone because this was in the ute when it

was taken. He acknowledged that he still possessed some items belonging to the company such as laptop, access card, fuel card and his uniform but these were all subsequently left on Mr Sanders' work desk on 23 March 2023 at the company's office. Mr Tomas denied having any other company equipment in his possession and stated that he had left the remote display with 'Luke', a co-worker .

[18] Following the ending of the employment relationship between Mr Tomas and the Fire Guys, it took him approximately one month to find alternative employment with his son's business. Mr Sanders takes issue with the remote display's return stating that because this item was never returned, the Fire Guys lost an important client to the son's business.

Was Mr Tomas unjustifiably disadvantaged and unjustifiably dismissed?

[19] A personal grievance for unjustified disadvantage and unjustified dismissal requires the employer (the Fire Guys) to show that its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.¹ However, in addition to noting the company's liquidation some six months after Mr Tomas's dismissal, it must also be noted that the only respondent in this employment problem is Mr Sanders who was sole director at the time of the Fire Guys. He was not Mr Tomas' employer and there is no employment relationship between the pair.

[20] Be that as it may, the Act does provide an avenue for an employee to recover wages or other money payable from an individual who is not the employer. This is through the mechanism of s 142Y which states:

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.

¹ The Act, s 103A.

- (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.

[21] It must be borne in mind that redress under s 142Y is of limited compass. It does not extend to compensation for hurt and humiliation as a result of an established personal grievance. Section 142Y is limited to the recovery of any wages or other money payable to the employee. Being a creature of statute and not a court with inherent jurisdiction, the Authority must act *intra vires* of the Employment Relations Act 2000 and other employment-related legislation for its orders to be valid. This includes its ability to order penalties which I return to later in this determination.

[22] Mr Tomas's causes of action for unjustified disadvantage and unjustified dismissal must lie at the foot of the Fire Guys Ltd and no proceedings can be brought against a liquidated company without the agreement of the liquidator (which has not been obtained) or the High Court otherwise orders (no such order has been made).²

Should leave under s 142Y be granted?

[23] Under s 142Y(2)(a) and (b) of the Act, an employee seeking to recover money from a person who is not their employer can only do so with prior leave of the Authority (or court) and, to the extent the employer is unable to pay the money owing. I set out below a four-step process when applying s 142Y to an employment problem.

[24] The first step is determining whether there has been default in the payment of wages or other money due to an employee. I answer this affirmatively for Mr Tomas as it was accepted by Mr Sanders that he had not been paid from 27 February 2023 and that annual leave owing to him from the Fire Guys remains outstanding also.

[25] The second step requires me to be satisfied that the default in the payment of wages is due to a breach of employment standards. Employment standards has a specific definition at section 5 of the Act which relevantly includes minimum

² Companies Act 1993, s 248(1)(c).

entitlements and payment of these under the Holidays Act 2003 (the HA) and the provisions of the WPA.³

[26] Mr Tomas's written witness statement to the Authority includes a print out of his annual leave balance with the Fire Guys of 205.81 hours. A copy of one of his payslips (1 March 2023) records that he was paid the rate of \$50 per hour at that time. Applying that hourly rate to the number of hours of annual leave owing amounts to \$10,290.50 (gross) of outstanding annual leave (205.81 x \$50 per hour). Under s 27(2) of the HA, this amount needed to be paid to Mr Tomas in the pay relating to his final period of employment.

[27] Under s 4 of the WPA an employer is required to pay a worker their entire wages when these become payable without deduction. In addition to outstanding annual leave, Mr Tomas also seeks payment of his wages from 27 February to 7 April 2023 amounting to \$12,000 (gross). The amount outstanding includes the balance of his notice period of approximately three weeks.

[28] The above amounts are not contested by Mr Sanders. There are multiple ways to cast these arrears as a breach of employment standards under s 5(a) to (f) of the Act but any of these is sufficient. I have no difficulty concluding that the default in wages and other money payable here involve breaches of the HA and the WPA. It follows that the default is due to a breach of employment standards as required by s 142Y(1)(b).

[29] The third step requires me to be satisfied that the person whom the employee is seeking an order under s 142Y, is a person *involved in the breach* within the meaning of s 142W of the Act which relevantly states:

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) as 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.

³ The Act, s 5(c) and (e).

- (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) the person occupying the position of a director of a company if the entity is a company:
...

[30] When Mr Tomas tendered his resignation on 7 March 2023 and learnt on 16 March 2023 from the company's administration and account manager that he was not to return to work, Mr Sanders was the controlling mind of the Fire Guys being its sole company director. Being an officer of the company, Mr Sanders qualifies under s 142W(2) and (3)(a) of the Act to be treated as a person involved in a breach of employment standards.

[31] I need to then consider whether Mr Sanders 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 as set out in s 142(W)(1) above.

[32] In an email to Mr Tomas (19 March 2023), Mr Sanders acknowledged that there were "final payments" due to him but that these would only be paid once he had returned all the company property that was within his possession as soon as possible. In an email (23 June 2023) from Mr Sanders to Mr Tomas's employment advocate Mr Plunket, it was claimed that Mr Tomas was in the possession of tens of thousands of dollars of company equipment and stock.

[33] Mr Sanders was unable to provide a list of equipment he alleges was never returned to the company by Mr Tomas. The absence of such a list calls into question the veracity of the claim of tens of thousands of dollars of company equipment and stock being missing. Following the investigation meeting, Mr Sanders provided the Authority his closing written submissions attached to which was an email (26 June 2023) from his former administration and account manager stating that Mr Tomas had returned one half of a remote display with the other half being water damaged. However, the administrator observed that this was months after the floods which is a reference to the Auckland Anniversary floods in late January 2023.

[34] Mr Tomas says the remote display in question was in his previous company vehicle that had been flooded and that display had been water damaged as a result. Mr Tomas further stated that he returned the display to his colleague Luke who has subsequently emailed the Authority on 16 July 2024 to acknowledge his receipt of the remote display.

[35] Based on the information and evidence before me and the lack of a list of missing equipment from Mr Sanders, it is more likely than not that Mr Tomas has returned all company equipment and stock to his former employer. There is no valid basis for Mr Tomas's wages to have been withheld particularly given the requirements of the WPA for wages to be paid when these become payable without deduction.

[36] I find that Mr Sanders had sufficient knowledge of the essential facts that wages and annual leave was owing to Mr Tomas by his company. I further find that Mr Sanders was directly involved and knowingly concerned in the breach of employment standards under s 142W of the Act.

[37] The fourth and final step is that I must be satisfied that arrears in wages or other money payable is ordered only to the extent that the employee's employer is unable to pay (s 142(2)(b) of the Act). With the liquidation of the Fire Guys, the company is no longer in a position to pay Mr Tomas what it owes him in wages and annual leave. The full amount owing will consequently be paid by Mr Sanders.

Interest?

[38] The Authority has the power under cl 11 sch 2 of the Act to award interest if it thinks fit to do so. I acknowledge that Mr Sanders would not have expected to pay interest on a debt that originally sat with his company. However, s 142Y has been part of the employment law landscape in this country since 1 April 2016 and exists to afford an additional layer of protection for workers insofar as wage arrears and other money payable to them are concerned.

[39] This is an appropriate case for the award of interest as Mr Tomas has been deprived of the use of his wages since his employment ended. However, bearing in mind that Mr Sanders has been made liable by virtue of this determination, interest shall accrue from the date proceedings were lodged in the Authority. Mr Sanders is ordered

to pay interest on \$22,290.50 (wages \$12,000 (gross) + annual leave \$10,290.50 (gross)) from 13 October 2023 to the date payment is made in full. Interest is to be calculated using the civil debt interest calculator.⁴

Penalties?

[40] An application for a penalty against a person involved in a breach under s 142W of the Act can only be made by a Labour Inspector. In the absence of a Labour Inspector in these proceedings, I am not able to award Mr Tomas a penalty under s 142X of the Act.

[41] For different reasons, I am also not able to award Mr Tomas a penalty for an alleged breach of good faith under s 4A because the duty of good faith applies to those in an employment relationship as defined by the Act and as stated already, Mr Sanders was never Mr Tomas's employer. He was the director of the employing company only.

[42] Penalties for alleged breaches of the WPA as well as ss 64, 130 and 134 of the Act were sought against Mr Sanders but for the same reason, cannot be awarded as Mr Tomas's employer was the Fire Guys and not Mr Sanders. It may be noted that at the investigation meeting, an unsigned copy of Mr Tomas' employment agreement with the company was provided to the Authority.

Conclusion

[43] For the reasons given, Mr Sanders is a person involved in a breach of employment standards and is personally liable under ss 142Y and 142W of the Act for the payment of Mr Tomas' wage arrears and unpaid annual leave. However, Mr Sanders' liability does not extend to the payment of personal grievance remedies which lie with his company (now in liquidation).

Reasonable expenses?

[44] Given the outcome of this investigation in which Mr Tomas has been successful, it is appropriate that he be reimbursed the filing fee of \$71.55 that he paid to lodge his statement of problem with the Authority.

⁴ www.justice.govt.nz/fines/civil-debt-interest-calculator.

Summary of orders

[45] The Authority declares that Matthew Sanders is a person involved in a breach of employment standards under ss 142Y and 142W of the Act. As the employing company, The Fire Guys Ltd is in liquidation, the Authority orders Matthew Sanders to pay Eurico Tomas the following monies no later than Friday 4 October 2024:

- (i) \$12,000 (gross) in wage arrears;
- (ii) \$10,290.50 (gross) for unpaid annual leave;
- (ii) interest on \$22,290.50 from 13 October 2023 until the date payment is made in full; and
- (iii) reimbursement of the filing fee of \$71.55.

What about costs?

[46] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[47] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the applicant may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, the respondent then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[48] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁵

Peter Fuiava
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.