

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 96
5520935

BETWEEN

LABOUR INSPECTOR
(TASNEEM BEGUM)
Applicant

AND

CK HOSPITALITY LIMITED
TRADING AS MASALA
INDIAN RESTAURANT (IN
LIQUIDATION)
Respondent

Member of Authority: Vicki Campbell

Representatives: Rebecca Denmead for Applicant
No Appearance for Respondent

Investigation Meeting: On the Papers

Determination: 30 March 2015

DETERMINATION OF THE AUTHORITY

- A. CK Hospitality Limited (In Liq) is ordered to pay the sum of \$7,500 into the Authority within 14 days of the date of this determination.**
- B. CK Hospitality Limited (In Liq) is ordered to reimburse the Labour Inspector for the Authority's filing fee in the sum of \$71.56.**

Employment relationship problem

[1] On 1 October 2014 The Labour Inspector lodged a statement of problem claiming CK Hospitality Limited (In Liq) trading as Masala Indian Restaurant (CK Hospitality) had failed to pay holiday pay to its employee Mr Rajinder Kumar and sought payment of the outstanding holiday pay including payment for alternative days, together with penalties.

[2] By memorandum dated 18 November 2014 the Labour Inspector advised the Authority that CK Hospitality had paid the outstanding holiday pay and alternative

days and was withdrawing its claims in that regard, but still wished to pursue CK Hospitality for penalties for its failure to pay the holiday pay.

[3] No Statement in Reply was received from CK Hospitality and on 1 December 2014 I wrote to both parties proposing the process to be followed in determining this matter. The parties were invited to respond to my proposal which included that this matter be determined on the papers.

[4] The Labour Inspector confirmed its consent to the matter being heard on the papers. No response was received from CK Hospitality.

[5] I am satisfied CK Hospitality was on notice that this matter was to be determined on the papers and was aware of its opportunity to provide submissions. Until 16 January 2015 CK Hospitality was represented by an experienced employment lawyer and all correspondence concerning this matter up to that date had been sent to the representative as well as to Ms Joti Jain, the sole Director and Shareholder of CK Hospitality. The Authority was notified on 16 January 2015 that CK Hospitality's legal representative no longer had instructions to act.

[6] I have proceeded to determine the Labour Inspector's application for penalties as permitted under the Employment Relations Act 2000 (the Act).¹

Background

[7] CK Hospitality was one of a number of companies operating the Masala Indian Restaurant brand of restaurants. On 19 January 2015 CK Hospitality was put into liquidation. The liquidators have consented to this matter proceeding.

[8] Mr Kumar was employed as a Chef at the Masala Papakura restaurant. The Labour Inspector met with Ms Jain (as the Director) on 30 April 2014 and advised Ms Jain of Mr Kumar's complaint. At that time Ms Jain was issued with a notice to produce wages and time records and holiday and leave records relating to Mr Kumar together with a copy of Mr Kumar's employment agreement.

[9] The records were provided to the Labour Inspector on 7 May 2014 together with an acknowledgement that outstanding holiday pay and payment for alternative days was owed to Mr Kumar. Despite being told the money would be paid by the

¹ Clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

following week, no payment was received. On 11 September 2014 the Labour Inspector sent Ms Jain a request that the arrears be paid by 19 September 2014.

[10] When no payments were forthcoming, despite further contact from the Labour Inspector, this application was lodged in the Authority on 1 October 2014. CK Hospitality paid the outstanding arrears on 8 October 2014.

Issues

[11] The issue for the Authority is whether it should order CK Hospitality to pay penalties in respect to its failure to pay Mr Kumar his arrears of holiday pay and alternative days when they fell due pursuant to the Holidays Act 2003, sections 75(2)(a) and (c). The payments fell due on the date of termination which was 14 February 2014.

Determination

[12] It is generally accepted that a penalty should be imposed for the purpose of punishment and deterrence. In *Tan v Yang & Zhang*² the Court set out the following non-exhaustive list of factors that may usefully be considered by the Authority when dealing with applications for penalties:

- a) The seriousness of the breach;
- b) Whether the breach is one-off or repeated;
- c) The impact, if any, on the employee/prospective employee;
- d) The vulnerability of the employee/prospective employee;
- e) The need for deterrence;
- f) Remorse shown by the party in breach; and
- g) The range of penalties imposed in other comparable cases.

[13] The failure to pay holiday pay and alternative days is a serious breach of CK Hospitality's statutory obligations. I am satisfied Ms Jain was aware of her obligations. When Mr Kumar resigned from his employment in writing on 31 January 2014, he requested payment of his outstanding holiday pay and alternative days. That payment was not forthcoming until October 2014 and only after the Labour Inspector had lodged and served these proceedings.

² [2014] NZEmpC 65.

[14] The Masala group of restaurants is a large employer and as such must have the resources to ensure its employees received their statutory entitlements in a timely fashion.

[15] While this was a one-off breach, the breach continued over a period of approximately 8 months despite Ms Jain acknowledging in May 2014 that the holiday pay was owed to Mr Kumar and despite promises by her that the payment would be made.

[16] While the sum involved was not significant, Mr Kumar was deprived of those funds and had to enlist the assistance of the Labour Inspectorate to enforce his rights and recover his statutory entitlements.

[17] A significant portion of those employed by the Masala group of Restaurants are recent migrants to New Zealand. Migrant workers, such as Mr Kumar are often in a vulnerable position.

[18] I find that this case warrants the imposition of a penalty which will also serve as a deterrent message. I consider a penalty of \$7,500 for the breach of the Holidays Act 2003 to be justifiable.

[19] I order CK Hospitality Limited (In Liq) to pay the sum of \$7,500 into the Authority within 14 days of the date of this determination. Pursuant to section 136(2) of the Employment Relations Act 2000, 50% of the penalty is to be paid to Mr Kumar. The remaining 50% is to be paid to the Crown.

Filing Fee

[20] CK Hospitality Limited (In Liq) is ordered to reimburse the Labour Inspector for the Authority's filing fee in the sum of \$71.56.

Vicki Campbell
Member of the Employment Relations Authority