

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 97
5523520

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. 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 for the failure to pay minimum wages and holiday pay.**
- B. I order CK Hospitality Limited (In Liq) to pay the sum of \$10,000 into the Authority within 14 days of the date of this determination for the failure to provide records on request.**
- C. 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 14 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 minimum wages, holiday pay and payment for alternative holidays to its employee Mr Manpreet Singh. The Labour Inspector claimed payment of the outstanding wages, holiday pay including payment for alternative days and the imposition of penalties.

[2] By memorandum dated 26 November 2014 the Labour Inspector advised the Authority that CK Hospitality had paid the outstanding wages, 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 and supply records.

[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

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

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 Singh was employed as a Waiter/Kitchen Hand at the Masala Papakura restaurant for one week from 23 – 29 October 2013. The Labour Inspector met with Ms Jain (as the Director) on 30 April 2014 and advised Ms Jain that Mr Singh had lodged a formal complaint that he had not been paid for work he had performed for CK Hospitality and had not received any holiday pay when his employment ended. At that time Ms Jain was issued with a notice to produce wages and time records and holiday and leave records relating to Mr Singh together with and a copy of Mr Singh's employment agreement.

[9] At the time Ms Jain accepted Mr Singh had worked for CK Hospitality but as he had not completed a timesheet there were not records for him. Ms Jain requested the Labour Inspector to have Mr Singh complete a staff profile form so that the company could process his wages.

[10] Mr Singh completed the staff profile as requested, however, no payment was made by CK Hospitality. The Labour Inspector made a further request for payment on 5 September 2014. On that same date Ms Jain emailed the Labour Inspector disputing the hours Mr Singh says he worked.

[11] The parties eventually reached agreement on the number of hours to be paid, however, no payment was received by the Labour Inspector in the time frame promised by Ms Jain.

[12] When no payments were forthcoming, despite further contact from the Labour Inspector, this application was lodged in the Authority on 14 October 2014. CK Hospitality paid the outstanding arrears on 21 October 2014.

Issues

[13] The issue for the Authority is whether it should order CK Hospitality to pay penalties in respect to its failure to pay Mr Singh his arrears (in the form of minimum wages and holiday pay) and in respect of its failure to provide wages and time records, holiday and leave records and an employment agreement for Mr Singh.

[14] The obligations to pay minimum wages and holiday pay (including for time worked on a public holiday) are set out in the Minimum Wages Act 1983² and the Holidays Act 2003³. The obligation to keep and maintain records, including employment agreements are set out in the Employment Relations Act 2000⁴, Minimum Wages Act 1983⁵, and Holidays Act 2000⁶. The obligation to provide records on demand is also set out in the statutory framework.⁷

[15] Section 229(3) of the Employment Relations Act 2000 provides for employers who fail without reasonable cause to comply with any requirement of a Labour Inspector, to be liable to a penalty. The Holidays Act 2003 at section 75 provides for the imposition of penalties for a failure to provide holiday and leave records. In the case of a company, the maximum penalty is \$20,000 for each breach.

[16] It is generally accepted that a penalty should be imposed for the purpose of punishment and deterrence. In *Tan v Yang & Zhang*⁸ 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.

[17] The failure to pay minimum wages and holiday pay and to produce records on request is a serious breach of CK Hospitality's statutory obligations. Mr Singh made numerous approaches to CK Hospitality for payment of his wages and holiday pay

² Section 6.

³ Sections 23 & 50.

⁴ Section 130(1) for wages and time records. Section 65 sets out the requirements with respect to individual employment agreements.

⁵ Section 8A.

⁶ 229(1)(d).

⁷ See Employment Relations Act 2000 sections 229(1)(d) and 229(2) and the Holidays Act 2003 section 82.

⁸ [2014] NZEmpC 65.

and completed all the required paperwork when requested. That payment was not forthcoming until October 2014 and only after the Labour Inspector had lodged and served these proceedings.

[18] I am satisfied CK Hospitality was aware of its obligations to retain records. On 18 October 2013 CK Hospitality entered into an enforceable undertaking with the Labour Inspector. In that undertaking CK Hospitality acknowledged that none of its employees had employment agreements as required by sections 63A, 64 and 65 of the Employment Relations Act 2000. Further CK Hospitality acknowledged that it did not have adequate wages and time records or holiday and leave records for its employees in breach of section 130 of the Employment Relations Act 2000 and section 81 of the Holidays Act 2003.

[19] Despite signing that undertaking and acknowledging its statutory obligations on 18 October 2013, CK Hospitality employed Mr Singh less than a week later and failed to have an employment agreement, or any wages and time records or holiday and leave records for him.

Penalty for failure to pay minimum wages

[20] While the failure to pay minimum wages and holiday pay was a one-off breach, the breach continued over a period of approximately 12 months despite Mr Singh agreeing to a lesser amount that he believed was owed to him and Ms Jain's promises to pay.

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

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

[23] During her communications with the Labour Inspector Ms Jain accepted that Mr Singh had not been paid his entitlements. Despite the payments being due in October 2013 no money was paid to Mr Singh until this matter had been lodged in the Authority in October 2014.

[24] 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 failure to pay minimum wages and holiday pay to be justifiable.

[25] 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 Singh. The remaining 50% is to be paid to the Crown.

Penalties for failure to provide records on request

[26] As set out above CK Hospitality was aware of its legal obligations to keep, maintain and provide records on request. Despite signing undertakings to that effect on 18 October 2013, CK Hospitality employed Mr Singh less than a week later and then failed to maintain the very records it had acknowledged as being a legal obligation.

[27] I find this to be an aggravating feature of this case and consider that a total penalty of \$10,000 for the failures to produce records on request to be justifiable.

[28] I order CK Hospitality Limited (In Liq) to pay the sum of \$10,000 into the Authority within 14 days of the date of this determination. The penalty is then to be paid to the Crown.

Filing Fee

[29] 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