

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 102  
5448996

BETWEEN MOHAMMED IRFAN ALI  
Applicant

A N D ABHISEK QUALITY FOODS  
LIMITED t/a BOMBAY  
PALACE INDIAN  
RESTAURANT WANAKA  
First Respondent

A N D RAMESH ANAND  
RAJAGOPAL  
Second Respondent

A N D MASANIAMMAN LIMITED  
Third Respondent

Member of Authority: David Appleton

Representatives: Robert Thompson, Advocate for Applicant  
Paul McBride, Counsel for Second and Third  
Respondent  
First Respondent not represented.

Investigation Meeting: On the papers

Submissions Received: 14 June 2016 for Applicant  
20 June 2016 for Respondent

Date of Determination: 4 July 2016

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**DETERMINATION OF THE AUTHORITY ON AN INTERLOCUTORY  
MATTER**

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**Employment relationship problem**

[1] Mr Ali seeks to join the second and third respondents to the proceedings and then seeks compliance orders against them pursuant to s.137 of the Employment

Relations Act 2000 (the Act). Mr Ali also seeks a compliance order against the first respondent. These compliance orders sought by Mr Ali relate to remedies ordered to be paid by the first respondent to Mr Ali by way of the Authority's determination dated 15 June 2015<sup>1</sup>

[2] The second and third respondents resist the joinder application and object to the making of compliance orders against them.

[3] The first respondent has not taken any part in the current matter before the Authority, although the financial statements of the first respondent have been produced by order of the Authority (the financial statements). In addition, an affidavit was lodged by Mr Siva Krishnadass, who deposed that he provided accounting services to the first respondent until it ceased trading with effect on 31 March 2015. In that affidavit, dated 18 January 2016, Mr Krishnadass deposed that the financial position of the first respondent was that it was operating at a loss, had accrued losses, had extremely limited assets at 31 March 2015 and that it had, at the time of the affirming of the affidavit, no assets and could be best described as a shell with substantial debts.

[4] Having perused the financial statements, questions arose relating to whether the first respondent was in a position to be compelled to comply with the orders made by the Authority in determination [2015] NZERA Christchurch 80. It was agreed during a case management conference call on 7 June 2016 between Mr Thompson, Mr McBride and the Authority that the questions could be put to Mr Krishnadass to enable him to swear a further affidavit, thereby avoiding the costs of parties and representatives travelling to Wanaka to examine him and the second respondent personally.

[5] It was agreed during the case management conference call that the Authority would make known its questions in advance and that Mr Thompson would then have the opportunity to raise his own questions to which Mr McBride could object if he wished.

[6] This determination deals with Mr Thompson's questions and Mr McBride's objections to them.

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<sup>1</sup> [2015] NZERA Christchurch 80.

**The questions asked by Mr Thompson**

[7] Mr Thompson has indicated 15 questions that he wishes to ask Mr Krishnadass. Mr McBride objects to all of them. I deal with each question in turn.

[8] First, I will note the following. In submissions lodged earlier on behalf of the applicant, the applicant asserted that he did not wish to lift the corporate veil of either the first or third respondents. However, whilst not seeking to lift the corporate veil, many of the questions asked by Mr Thompson, as framed, appear to be seeking to elicit whether the transfer of the business from the first respondent to the third was at an under value. That is not something which the Authority can inquire into. Its inquiry is limited to whether the first respondent is in a financial position to be compelled to satisfy the orders made of it. How it arrived at its financial position, and whether it could have negotiated a better deal with the third respondent, or any deal at all, is not for the Authority to determine, as that is a matter of company law outside of its jurisdiction.

***Question 1***

*Mr Rajagopal stated that he was going to trade his restaurant business under a new company name, Masaniamman Limited. What was the value of the restaurant business and how was this value determined?*

[9] Mr McBride objects to this question on the basis that it was not relevant to the current ability of the first respondent to meet any payment and whether the second and third respondents should be ordered to require the first respondent to make such payments. I agree.

[10] A better question would be to seek to discover whether any sums were due, and if so, have been paid, to the first respondent from the third respondent in respect of the transfer to the third respondent of the restaurant business. I therefore reframe the question as follows:

- a. Did the third respondent agree to make a payment to the first respondent in respect of the transfer to the third respondent of the restaurant business Bombay Palace Restaurant Wanaka?

If so,

- b. What sum was agreed?
- c. Has the sum been paid to the first respondent?
- d. How has the sum been accounted for in the first respondent's financial statements?

### ***Question 2***

*What assistance and/or advice did you provide in creating and registering Masaniamman?*

[11] I infer that Mr Thompson is seeking to ascertain the state of Mr Krishnadass' knowledge of the third respondent. However, I agree with Mr McBride that the answer to this question will not obviously assist the Authority in ascertaining either the ability of the first respondent to meet any order for payment, nor the appropriateness of requiring the third respondent to require such payment to be made. I therefore disallow it.

### ***Question 3***

*What assistance and/or advice did you provide in transferring Abhishek's assets and business operations to Masaniamman?*

[12] Again, I infer that Mr Thompson is attempting to ascertain the state of knowledge of Mr Krishnadass. However, Mr Krishnadass can only depose on matters that are within his knowledge and, as a professional, I do not expect that he will seek to depose on matters outside of his personal knowledge.

[13] I therefore disallow this question.

### ***Question 4***

*How were Abhishek's prepaid expenses as of 31 March 2015 accounted for in its financial statements?*

[14] Mr McBride contends that this question is irrelevant. It is not entirely clear to me what the question means, but I presume that it seeks to understand whether the first respondent disbursed money in advance of expenses being incurred.

[15] Even if that is wrong, in any event, by their very nature, expenses indicate money paid for services rendered or goods purchased. Therefore, such information would only show that money has been disbursed by the first respondent. Given that

there is no intention to lift the corporate veil of the first respondent, and the only objective of the exercise in asking Mr Krishnadass questions is to ascertain whether the first respondent is legitimately owed money from debtors which it could call upon in order to pay Mr Ali the sums that the Authority has ordered it to pay, I do not accept that this question is relevant.

[16] I therefore disallow it.

### ***Question 5***

*What was the value of the Abhisek-trained employees who were transferred to Masaniamman and how was Abhisek compensated?*

[17] Mr McBride submits that this question *contends for slavery*, and that employees are not transferred and are not bought and sold, let alone valued.

[18] Mr Thompson's question is predicated upon a contention that if one company ceases trading, and the other company takes on the staff of the first company, then the second company must owe the first company some money for doing so. It must be said that this is, whilst not inconceivable, highly unlikely.

[19] In any event, the reframed question at paragraph 10 (a) to (d) subsumes this question. I therefore disallow it.

### ***Question 6***

*Given the restaurant's premium downtown tourist zone location with lake views, what was the value of Abhisek's deed of lease for its restaurant premises and how was the deed of lease transferred to Masaniamman?*

[20] Again, this question presupposes that an agreement had been reached between the first and third respondent for money to be paid to the first respondent by the third respondent with respect to a transfer (or more accurately, an assignment) of the lease in question. From the paperwork lodged by Mr Thompson, it appears that there was no such assignment. In any event, the reframed question at paragraph 10 (a) to (d) subsumes this question. I therefore disallow it.

### ***Question 7***

*What was the value of the food and beverage inventory (stocktake) on 31 March 2015, and how was this value determined?*

[21] For the same reason as cited above, the reframed question at paragraph 10 (a) to (d) subsumes this question. I therefore disallow it.

***Question 8***

*What happened to the stocktake at the end of business on 31 March 2015?*

[22] As the Authority is not enquiring into whether the business was transferred to the third respondent at an undervalue, this question is irrelevant. I therefore disallow it.

***Question 9***

*How was GST accounted for on the transfer of the assets and restaurant business?*

[23] It is not clear what the relevance of this question is. However, it is relevant to know whether the first respondent either owes money to the Inland Revenue Department or has received or is due to receive any refunds from the Inland Revenue Department.

[24] I therefore rephrase the question as follows:

- a. Does the first respondent owe any money to the Inland Revenue Department, not shown on the financial statements? If so, how much?
- b. Is the first respondent owed any refund of any taxes from the Inland Revenue Department, not shown on the financial statements? If so, how much and has it been received?

***Question 10***

*Your views in your affidavit were based on Mr Rajagopal's numbers, and you did not undertake a review or an audit of those numbers. How can you be certain that there are no other assets than those listed on the balance sheet, and expenses detailed in the GL report of legitimate business expenses?*

[25] This question obviously seeks to check the veracity of the financial statements. In truth, the question asked of Mr Krishnadass is probably impossible for him to answer as he cannot be certain that assets and expenses have not been hidden.

[26] Therefore, I decline to allow that question.

**Question 11**

*Who received the payments listed as “staff rent” in the GL Report?*

[27] I believe that this is a question that would be more relevant if Mr Ali were seeking to lift the corporate veil. I therefore disallow this question.

**Question 12**

*Who are the creditors that made up the accounts payable figure?*

[28] Again, this is a question that is more relevant to an exercise in lifting the corporate veil. I therefore disallow this question.

**Question 13**

*The statement that Abhisek “had and has no assets” made on 08 April 2015 was never true, was it?*

[29] This does not assist the Authority in ascertaining whether the first respondent is in a position to pay sums owed to Mr Ali. I therefore disallow this question.

**Question 14**

*What value was placed on Abhisek’s liquor licence?*

[30] Mr McBride objects to this question on the basis that it is irrelevant. He also states that, as a matter of law, any licence is personal to the licensee and that there could be no value.

[31] I believe that Mr McBride is correct, and that it is not conceivable that any payment would have passed between the third and first respondents in respect of the third respondent applying for a new liquor licence. In any event, as I have said above, the Authority is not seeking to investigate whether there was a transfer at an undervalue. I therefore disallow this question.

**Question 15**

*Masaniamman immediately benefited from Mr Rajagopal quickly transferring Abhisek’s liquor licence to it. What value was placed on that quick transfer and how was that value accounted for in Abhisek’s financial statements?*

[32] Again, I agree with Mr McBride that this question presupposes an ability to transfer a liquor licence, which is not the case. Also, again, the Authority is not

seeking to investigate whether there was a transfer at an undervalue. I therefore disallow this question.

### **Conclusion**

[33] Mr McBride indicated during the case management conference call on 7 June 2016 that Mr Krishnadass would voluntarily answer questions asked. This appears to be different from the position he has taken in his submissions received by the Authority on 20 June 2016, in which he submits that Mr Thompson effectively seeks discovery and interrogatories against a non-party, which is outside of the Authority's jurisdiction.

[34] It may be that Mr McBride is distinguishing between Mr Thompson's right to ask Mr Krishnadass questions and the Authority's power to do so under s.160(1)(a) of the Act. Whilst this may be technically correct, it was discussed and agreed upon at the case management telephone conference that Mr Thompson would draft questions that he wished to put to Mr Krishnadass.

[35] In any event, I have either disallowed the questions or reframed them. Those that have been reframed have now become questions of the Authority for Mr Krishnadass. He is to provide answers to the reframed questions contained in this determination (at paragraphs 10 and 24) as well as those contained in the notice of direction dated 7 June 2016, by no later than 4pm on Friday, 15 July 2016 by way of an affidavit. If this timeframe is unmanageable for Mr Krishnadass, he, or Mr McBride on his behalf, may apply to the Authority for an extension.

[36] Mr Thompson has also sought the disclosure of various documents. At this stage, I will not require Mr Krishnadass to produce these documents. Once Mr Krishnadass's answers have been received, Mr Thompson may reapply for disclosure of documents if he believes it necessary and Mr McBride will have the opportunity to comment on any such application.

[37] Once the answers to the questions have been received, and any further interlocutory issues dealt with, the Authority will determine the joinder application. I note now, though, that it may be necessary for the Authority to take evidence from Mr Rajagopal directly before it is able to issue its substantive determination.

**Costs**

[38] Costs are reserved until the determination of the substantive matter.

David Appleton  
Member of the Employment Relations Authority