

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 380
5593075 & 5627732

BETWEEN	A LABOUR INSPECTOR Applicant in 5593075 and 5627732
AND	ADAMAR NO. 2 LIMITED (IN LIQUIDATION) Respondent in matter 5593075
AND	CORRADO RAMADA First Respondent in matter 5627732
AND	KIM RAMADA Second Respondent in matter 5627732

Member of Authority: Robin Arthur

Representatives: Marija Urlich, Counsel for the Labour Inspector
No appearance for the liquidators of Adamar No 2
Limited (in liquidation)
No appearance for Corrado Ramada
Radhe Nand, Counsel for Kim Ramada

Investigation Meeting: 14 and 15 November 2016

Determination: 21 November 2016

DETERMINATION OF THE AUTHORITY

- A. Arrears of wages for minimum wages and holiday, totalling \$70,053.54 (the default amount), are due to eight former employees of Adamar No 2 Limited (in liquidation). Interest on the default amount must also be paid to the eight former employees, for periods set in this determination.**
- B. The Labour Inspector has established, on the balance of probabilities, that the default amount due is unlikely to be paid in full because Adamar No 2 Limited is in liquidation.**

- C. The Labour Inspector is authorised to bring an action for recovery of that amount against Kim Ramada.**
- D. In the authorised action against Mrs Ramada the Labour Inspector has proved, on the balance of probabilities, that Mrs Ramada was an officer of Adamar No 2 Limited and, in that capacity, Mrs Ramada directed or authorised the default in payment.**
- E. Mrs Ramada is jointly and severally liable to pay the amounts recoverable for the default in payment, including the interest on the amounts due.**
- F. Payment of the default amount and interest must be made to the Labour Inspector, for the benefit of the eight former employees of Adamar No 2 Limited, by no later than 28 days from the date of this determination.**
- G. Costs are reserved with a timetable set for memorandum to be lodged if the parties cannot resolve any costs issues between themselves.**

Employment Relationship Problem

[1] This determination resolves two applications by Labour Inspector Rama Yeleswaram in relation to arrears of minimum wages and holiday pay said to be owed to eight workers previously employed by Adamar No 2 Limited (in liquidation) (Adamar). The arrears said to be due totalled \$70,053.54.

[2] Adamar had operated a restaurant under a Nando's franchise in Henderson. The restaurant closed after Nando's New Zealand Limited (NNZL) cancelled Adamar's franchise in late May 2015.

[3] The Labour Inspector's first application (the Adamar matter) sought a finding that the arrears claimed were owed to the workers and an order that interest should be

paid on the arrears. After commencing the Adamar matter the Labour Inspector made the second application seeking authority to also bring an action, under s 234 of the Employment Relations Act 2000 (the Act), against Corrado Ramada and Kim Ramada (the Ramada liability matter).¹ Mr Ramada was the sole director and shareholder of Adamar. Kim Ramada is the wife of Mr Ramada. Authority for an action against her was sought on the basis that she was alleged to have been an “officer” of Adamar. If the action against one or both was authorised, and was then successful, they could be held personally liable for any amounts found to be owed for minimum wages and holiday pay to the former Adamar employees.

[4] The Henderson restaurant was one of four operated under the Nando’s brand by four separate companies using the Adamar name (which is Ramada spelt backwards) followed by a number. Each of those companies is in liquidation. The Labour Inspector’s applications related only to the No 2 company, which was the employer of the former workers at the Henderson restaurant, and liability for minimum wages and holiday pay said to be owed to them.

[5] Section 234 of the Act was repealed by amendments to the Act that came into effect on 1 April 2016. It was replaced by new measures to impose liability on people involved in breaches of employment standards.² However, under transitional provisions relating to those amendments, s 234 continued to apply to proceedings brought in relation to conduct that occurred before the amendments came into effect.³ The conduct at issue in the Ramada liability matter occurred before 1 April 2016 so s 234 applied to determination of the Labour Inspector’s application.

[6] The Authority investigated the Labour Inspector’s two applications together. The Employment Court’s decision in *Labour Inspector Melissa MacRury v Cypress Villas Limited* provides comprehensive guidance on the application of s 234. It confirmed an application against a company for arrears due as minimum wages and holiday pay may be investigated at the same time as questions, under s 234 of the Act, of whether to authorise an action against a third party for recovery of those arrears and, if an action is authorised, of whether the third party is liable for those arrears.⁴

¹ *Labour Inspector Melissa MacRury v Cypress Villas Limited* [2015] NZEmpC 157 at [61] and [118].

² Employment Relations Act 2000, Part 9A, ss 142A – 142ZD.

³ Employment Relations Act 2000, Schedule 1AA clause 3(7).

⁴ *Cypress Villas*, n 1 above, at [71].

[7] Because Adamar No 2 Limited was in liquidation from 20 November 2015 the Labour Inspector's application in the Adamar matter could not continue without the consent of the liquidators or an order of the High Court.⁵ By letter of 23 May 2016 the liquidators consented to continuation of the proceedings and advised that "given the lack of funds in the liquidation" they would not appear in the proceedings on behalf of the company. Instead the liquidators advised they would abide by the Authority's decision.

[8] Adamar No 2 Limited had lodged no statement in reply to the Labour Inspector's application in the Adamar matter. Her application was made on 2 November 2015, 18 days before the company went into liquidation. For reasons already noted the liquidators lodged no statement in reply to an amended application made by the Labour Inspector on 24 May 2016.

[9] Mrs Ramada did, through counsel, lodge a statement in reply in the Ramada liability matter. It said she "has no official relation" with Adamar and stated she "was not an officer of the company at any time". She stated she had only "facilitate[d] the operation of the business" for a short period when her husband was in hospital due to a heart attack. She said she did so by assisting the company accountant and store manager and "each and every direction" to them was made after discussing the matter with Mr Ramada.

[10] Mr Ramada made no statement in reply in the Ramada liability matter. On 21 July 2016 he was adjudicated bankrupt. The Employment Court has described a declaration of bankruptcy as one of the "clear and unarguable circumstances" where the Authority may exercise its discretion, under s 234(2) of the Act, not to authorise a Labour Inspector to bring an action against a third party.⁶ The application against Mr Ramada as a director appeared unable to proceed any further and was not pursued by the Labour Inspector.

The Authority's investigation

[11] For the purposes of the Authority's investigation written statements were lodged by the Labour Inspector, Mrs Ramada, NNZL general manager Garth Parker

⁵ Companies Act 1993, s 248.

⁶ *Cypress Villas*, above n 1, at [78].

and business development manager Luke Benefield, and eight former employees of Adamar: Manpreet Kaur, Sanjana Kumari, Nitin Setia, Pardeep Singh, Shewta Sharma, Alok Godara, Bhupinder Singh, and Gurpreet Kaur. The eight former employees had worked at the Henderson restaurant for various periods between April 2012 and June 2015, some for only a few months and others for two or more years.

[12] Each witness attended the investigation meeting and, under oath or affirmation, answered questions from me and the parties' representatives. The representatives also had an opportunity to provide oral closing submissions on the issues for determination.

[13] As permitted by 174E of the Employment Relations Act 2000 (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.

The issues

[14] The questions for resolution in this investigation and determination were:

- (i) Did Adamar fail to pay minimum wages and holiday pay due to eight employees (the default) assessed as totalling \$70,053.54 (the default amount)?
- (ii) If so, should liability for the default amount include an order for interest on it, and if so, from when?
- (iii) Did the Labour Inspector establish, on the balance of probabilities, that the default amount was unlikely to be paid in full because Adamar was in liquidation?
- (iv) Did the Labour Inspector's pleadings adequately name the proposed third party (being Mrs Ramada), identify the capacity in which authorisation for an action against her was sought, and allege Mrs Ramada directed or authorised the default?⁷
- (v) If so, should the Authority exercise its discretion under s 234(2) to authorise the Labour Inspector to bring an action for recovery of the default amount against Mrs Ramada?⁸

⁷ *Cypress Villas*, above n 1, at [82] and [83].

⁸ *Cypress Villas*, above n 1, at [77], [78] and [83].

- (vi) If the action against Mrs Ramada was authorised, had the evidence available from the Authority's investigation proved to the balance of probabilities that:
 - (a) Mrs Ramada was an officer of the company, for the purposes of s 234 of the Act; and
 - (b) if so, whether in that capacity Mrs Ramada had directed or authorised the default?
- (vii) If so, should the Authority exercise its discretion under s 234(3) to impose liability on Mrs Ramada, jointly and severally with Adamar No 2 Limited (in liquidation), for the default amount?⁹
- (viii) Should either party contribute to the costs of representation of any other party?

The law

[15] The relevant section of the Act, now repealed but applicable at the time of the conduct in the Ramada liability matter, is:

234 Circumstances in which officers, directors, or agents of company liable for minimum wages and holiday pay

(1) This section applies in any case where a Labour Inspector commences an action in the Authority against a company to recover any money payable by way of minimum wages or holiday pay to an employee of the company.

(2) Where, in any case to which this section applies, the Labour Inspector establishes on the balance of probabilities that the amount claimed in the action by way of minimum wages or holiday pay or both is, if judgment is given for that amount, unlikely to be paid in full, whether because—

- (a) the company is in receivership or liquidation; or
- (b) there are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full,—

the Authority may authorise the Labour Inspector to bring an action for the recovery of that amount against any officer, director, or agent of the company who has directed or authorised the default in payment of the minimum wages or holiday pay or both.

(3) Where, in any action authorised under subsection (2), it is proved that the officer, director, or agent of the company against whom the action is brought directed or authorised the default in payment of the minimum wages or holiday pay or both, that officer, director, or agent is with the company (and any other officer, director, or agent of the company who directed or authorised the default in payment) jointly and severally liable to pay the amounts recoverable in the action and judgment may be given accordingly.

(4) In this section,—

⁹ *Cypress Villas*, above n 1, at [68], [69] and [108].

company has the meaning given to it by section 2(1) of the Receiverships Act 1993

holiday pay means any amount payable under the Holidays Act 2003 to an employee as pay for an annual holiday or public holiday

minimum wages means minimum wages payable under the Minimum Wage Act 1983.

(5) Nothing in this section affects any other remedies for the recovery of wages or holiday pay or other money payable by a company to any employee of that company.

[16] At the time this determination was issued, the Authority was bound by the interpretation of s 234 given in the majority judgement of the Employment Court decision in *Cypress Villas*,¹⁰ although the Court of Appeal has given leave for an appeal from that decision.¹¹ Further below this determination has considered whether Mrs Ramada would also be liable for the default if the applicable interpretation was that of a narrower reading of s 234(3) given in the minority judgment of the Employment Court in that decision.¹²

(i) Had Adamar defaulted on payment of \$70,053.54 due in minimum wages and holiday pay?

[17] On 16 June 2015 the Labour Inspector began formal efforts to secure wage and time records from Adamar. Her request for the records was made under s 229 of the Act and s 82 of the Holidays Act 2003. Adamar did not comply with her request.

[18] Relying on information from the workers, the Labour Inspector prepared a schedule of wage arrears due to seven of them. It was included in her amended statement of problem in the Adamar matter, lodged on 24 May 2016. At that time she calculated the amounts due added up to \$50,157.47. The Labour Inspector later re-calculated those amounts after further information came to her attention. The information comprised copies of electronic timesheets one of the workers had copied from company records at the store before his employment ended. Amounts due to an eighth worker who had also sought the Labour Inspector's assistance were added to the schedule. The Labour Inspector provided the updated schedule at the investigation meeting on 14 November 2016. It identified \$70,053.54 as due to the eight workers. The amount calculated as due to the additional eighth worker was \$16,823.08 of that total. The updated schedule also adjusted calculations for the other

¹⁰ Judgment of Chief Judge Colgan and Judge Perkins.

¹¹ *Brill v Labour Inspector Melissa MacRury* [2016] NZCA 262 (15 June 2016).

¹² Judgment of Judge Christina Inglis, paragraphs [117]-[152].

seven workers due to better information available in the timesheets about hours and public holidays worked. The adjustments identified some workers as due larger amounts and other workers as due lesser amounts than calculated in the earlier version of the schedule.

[19] Both versions of the schedule were accompanied by a detailed fortnight-by-fofortnight analysis of the payments made to each worker during their employment, their resulting entitlements to annual and public holiday, and shortfalls in the amounts due. The analysis relied on information provided by the workers and, for the updated schedule, the timesheets which had been copied by one worker. In light of the failure of Adamar to produce its records when asked to do so by the Labour Inspector, and having heard from her and the workers to whom the amounts were said to be due, the Labour Inspector's analysis was to be preferred as the best possible information on what was due to those workers but not paid to them by Adamar.¹³ There was no information available from Adamar or Mrs Ramada that reliably cast any real doubt on the analysis of the amounts due. Accordingly, the following amounts are confirmed as the arrears of wages (for minimum wages and holiday pay) due to the following former employees of Adamar:

Manpreet Kaur	\$21,836.74
Pardeep Singh	\$16,823.08
Bhupinder Singh	\$14,570.77
Alok Godara	\$6,637.63
Shewta Sharma	\$2,364.60
Sanjana Kumari	\$2,439.90
Nitin Setia	\$1,618.94
Gurpreet Kaur	\$3,761.88
Total default amount	\$70,053.54

[20] In respect of liability for the parts of those amounts that fall to the liquidators to consider as preferential claims under s 312 of the Companies Act 1993, for certain categories of payment under Schedule 7 of that statute, the updated and detailed schedules provided by the Labour Inspector at the start of the investigation meeting are accepted and adopted by this determination as the necessary evidence. From those schedules the liquidators could identify, for example, the relevant information about wages due but not paid for services provided by those workers in the four months before the liquidation (if they were still working for Adamar in that period) and for

¹³ Employment Relations Act 2000, s 132.

holiday pay due at the end of their employment before or because of the start of the liquidation.¹⁴ None of the amounts due to each worker exceed the maximum allowed under clause 3(1) of Schedule 7. Although ultimately a matter for the liquidators is discharge of their statutory duties, the information available at the time of the investigation meeting suggested there were unlikely to be assets sufficient to meet such preferential claims. In those circumstances, where joint and several liability with a third party (such as a director or officer of the company now in liquidation) was found under s 234 of the Act, liability for the default amount would fall on that third party.

(ii) Should interest apply to the default amount and, if so, from when?

[21] The Authority has a discretionary power to order the inclusion of interest on amounts such as the default amount due to the former employees of Adamar.¹⁵ The time from when such interest should apply may be for all or some of the period from when the cause of action arose until whatever date of payment may be ordered by the Authority. Interest may apply to all or some of the amount due.

[22] In this case the cause of action arose when the various workers were not paid minimum wages and holiday pay due to them, which ranged from dates in 2012 through to June 2015 after Adamar ceased to operate the Henderson store.

[23] One practical date from which interest could fairly apply would be from when the liable party or parties were clearly on notice of the obligation and the extent of it. For the amounts due to seven out of the eight workers in this case that occurred once the Labour Inspector's amended statement of problem was served. According to Authority records it was served on the liquidators on 26 May 2016. The earlier statement of problem was lodged in the Authority on 6 November 2015 and the Labour Inspector made diligent efforts in the following weeks to personally serve it on Mr Ramada. An affidavit of service from her indicated the Labour Inspector did so on 25 November 2015. However, by then, Adamar was in liquidation.

[24] Against that background I thought the following order for inclusion of interest on the sum for which determination has been given was fit. In addition to the default amount due to each worker, payment must be made by the party or parties jointly and

¹⁴ Companies Act 1993, Schedule 7, clauses 1(2)(a) and (c).

¹⁵ Employment Relations Act 2000, Schedule 2 clause 11(1).

severally liable, of interest on the amount of \$50,157.47 from 26 May 2016 until the date of issue of this determination. From that latter date interest must be paid on amount of \$70,053.54 until the default amount is paid in full. Allocation to each worker of the interest paid, whether that is made voluntarily or by enforcement action, should be on a basis proportionate to the amount due to each worker in the default amount.

[25] The applicable rate of interest is five per cent a year.¹⁶

(iii) Was the default amount unlikely to be paid in full because of the liquidation?

[26] Because Adamar was in liquidation the Labour Inspector readily established, on the balance of probabilities, that the default amount was unlikely to be paid in full.

[27] The liquidators' first report (17 December 2015) and first six-monthly report (12 June 2016) disclosed no funds available to meet amounts due to creditors. In their letter to the Labour Inspector on 23 May 2016 the liquidators advised there were "no funds in the liquidation at this time". A representative of the liquidators reiterated that position by email to the Authority on 26 May 2016 and stated the liquidators would abide by the Authority's decision.

(iv) Were the Labour Inspector's pleadings sufficient to authorise an action against Mrs Ramada?

[28] By showing the default amount was unlikely to be paid in full due to the liquidation the Labour Inspector satisfied the 'financial test' set in s 234(2) of the Act. Her application for authority to bring an action against Ms Ramada then had to satisfy three other obligations.¹⁷ Firstly, she identified Mrs Ramada as the party against whom she sought to bring an action for recovery of the default amount. Secondly, she identified the capacity in which, if authorised, the action would be brought against Mrs Ramada. That capacity was as an "officer" of the company, rather than as its director or as an agent. Thirdly, she alleged Mrs Ramada had directed or authorised the default. The Labour Inspector was not required at the subs (2) stage, of seeking authority to bring the action, to prove to any evidential standard that Mrs Ramada was

¹⁶ Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), clause 4.

¹⁷ *Cypress Villas*, n 1 above, at [82] and [83].

an officer who had directed or authorised the default in payment.¹⁸ The allegation was sufficient.

(v) Should the Authority authorise the action against Mrs Ramada?

[29] Having reached the conclusion that the Labour Inspector had met the s 234(2) requirements regarding a financial test and the identity, capacity and alleged conduct of Mrs Ramada, the Authority was required to consider whether any other grounds made it sufficiently sure that the action for recovery could not succeed on its merits. If so the Authority could exercise its discretion to decline to authorise the action.¹⁹ No such grounds appeared to apply to Mrs Ramada. She was not a declared bankrupt. Her involvement with Adamar was not only before or after the defaults had occurred.

[30] Having met the requirements under s 234(2) for authorisation of an action and there being no grounds shown for exercising the discretion to decline her application, it was appropriate to authorise the Labour Inspector to bring an action for recovery of the default amount against Mrs Ramada.

(vi) Did the evidence prove Mrs Ramada was an officer who directed or authorised the default?

[31] In her written witness statement, which she confirmed under oath at the investigation meeting, Mrs Ramada firmly denied the allegations about her role and actions in the Adamar business. The following paragraphs of her statement are set out in full because the evidence of the eight workers along with Mr Parker and Mr Benefield, along with Mrs Ramada's own oral evidence in answer to questions at the investigation meeting, established that her written account of the extent of her involvement and role of the business was more likely than not to be unreliable:

I have never been either a director or shareholder of any of the Adamar companies and have no official relation with either Adamar No 2 Limited or any other company.

I have at no point of time been appointed or acted as an officer of the company or acted as an agent of the company.

However, at a short period when my husband was hospitalised due to cardiac arrest and multiple bypass surgeries, I only assisted the company accountant and store manager in order to facilitate the operation of the business. ...

¹⁸ *Cypress Villas*, n 1 above, at [82].

¹⁹ *Cypress Villas*, n 1 above, at [67] and [77] - [79].

I gave each and every direction to the store manager and accountant only after discussing the matter with my husband. I always discussed these matters with my husband in order for them to manage the business efficiently.

The manager and the accountant were fully responsible for calculating of wages, paying tax and keeping time records.

I was merely facilitating the operation of the business as a non-officer of the company and helping in my husband's business.

The accountant was conveying out (sic) all the tax & wages compliance and I have nothing to do with those records.

I worked as full time employee of [an engineering consultancy business] in a project management position until the end of 2014 as prior to that I had to reduce my working hours due to my husband's ill health and children responsibility. I was the one who looked after my both worlds, my children and my sick husband ... I did not have any spare time that I could be involved in any specific payroll and other business transactions.

My husband had the full control of making all payments and I never had any authority to make any payroll payment. Payroll payments were delayed while my husband was in hospital.

I am being incriminated (sic) into these proceedings merely because I am the wife of Mr Ramada and as I assisted him during his sickness.

[32] On the account of the evidence that follows, and for the reasons given with it, what the other witnesses said was more likely than not to be true. On points of difference or conflict I have preferred their evidence as more reliable than that of Mrs Ramada. What she said and did at the relevant times in the business also needed to be assessed on an objective standard of how her actions would have appeared to a reasonably well-informed observer rather than on what she subsequently said in her evidence to the Authority about how those actions should have been understood by others at the time.

[33] There was no evidence Mrs Ramada was appointed by any formal resolution or similar measure as an officer of Adamar. However it was not correct to say she was not a shareholder of any Adamar company and had no official relation with any other company. She had been a shareholder in a company called Adamar Holdings Limited, removed from the Companies Office register in June 2013. The liquidators' first report identified that entity as an "associated" company. She was also the sole director and shareholder of a company called Adamar Group Limited incorporated on 25 November 2015, in the week after the liquidation of Adamar.

[34] Neither was her role in the business confined to the period that Mr Ramada was incapacitated by a heart attack and subsequent surgery in May 2015. Mrs Ramada was involved in various activities, from as early as April 2013 after Adamar took over operation of the Henderson store. She sometimes visited the store, either with Mr Ramada or alone, to collect cash takings. On some occasions Mrs Ramada had arranged for cash takings to be deposited to her personal bank account by the store manager. Mrs Ramada said those deposits were to reimburse her for payments that she had made on Adamar's behalf. Although it was not produced in evidence Mrs Ramada said, in answer to questions, that she had a written loan agreement with Adamar for the value of payments she made on its behalf from her personal funds.

[35] She sometimes delivered stock or supplies to the store. She sometimes picked up and dropped off staff from other stores operated by Adamar companies to work at the Henderson store. She had sometimes worked at the Henderson store herself when it was short of staff. From February 2015 she had overseen operation of a system for providing timesheets because of concerns she and Mr Ramada had that some workers were being paid for hours they had not actually worked.

[36] The workers said Mr Ramada referred queries they made about their pay to Mrs Ramada to answer. They said he told them to talk to her because she was in charge of such matters. While Mrs Ramada denied she had control over whether payments were made or not made, she accepted in her oral evidence that Mr Ramada did tell staff to talk to her about pay issues. She said Mr Ramada did so because he found it difficult to talk to and deal with staff on such matters, a difficulty she attributed to his personality and long term health difficulties associated with his heart and the stress of business. She said he was "not a paperwork person". Instead she said he was "polite but evasive" when asked questions by staff about their pay and "he wanted me to effectively be the face of things so he did not have to face them". She said staff knew she was "likely to have more influence" with Mr Ramada and when they asked her about getting their pay she could "at least go home and have a more direct conversation with him".

[37] Further evidence of how Mrs Ramada was 'held out' to have authority to act on Adamar's behalf was found in emails between her and the workers and between her and Mr Benefield of NNZL.

[38] In December 2014 Mr Benefield contacted Mr Ramada about complaints received by NNZL, which was the franchisor of the Nando's brand, from workers at the Henderson store. Mrs Ramada replied on behalf of Adamar in an email with a subject heading that referred to the "Henderson payroll dispute and HR audit". She wrote that she was "confident that there is a solution to this which will resolve any grievances any of our staff may have and this process will enable us to improve our systems and processes going forward". Her email ended with a sign off that read "Kim Ramada, Adamar Group".

[39] Mrs Ramada said Mr Ramada had set up her email signature with the reference to the "Adamar Group". She used it in a period that extended from at least April 2013 to March 2015. Examples included an email to the store manager about a supplies receipt (30 April 2013), an email to the store manager about making savings on store telephones (27 June 2014) and an email sending the week's staff roster to the store assistant manager (5 March 2015). In each case Mrs Ramada was clearly acting in a managerial role on behalf of the company.

[40] This authority and role was further exhibited by an email to Bhupinder Singh when he resigned as the store's assistant manager in December 2014 because of repeated delays in paying his wages. The following extract from Mrs Ramada's email reply on 30 December 2014 was relevant:

Both Corrado and I have appreciated your efforts in supporting us at Nando's West City.

It has been a difficult time for us, particularly over the last couple of years, and we have been continuing to make efforts to improve our situation in order to benefit all of our staff as well as the stores. ...

I will update our records accordingly and our payroll system will calculate outstanding holiday etc. ...

[41] The direct reference to Mr Ramada and her use of the words "us", "we" and "our", along with her Adamar Group signoff, showed Mrs Ramada was speaking on behalf of the business and its management. She was clearly holding out herself, as Mr Ramada did also, as someone who spoke for and on behalf of Adamar. The evidence of all eight workers confirmed that they understood her to be part of the management of the company with the capacity and authority to direct their work on behalf of Adamar and its director, Mr Ramada.

Was Mrs Ramada an “officer” of Adamar, for the purposes of s 234 of the Act?

[42] No definition of the word “officer” is made in the Act or the Companies Act 1993 or the Receivership Act 1993. The Employment Court has provided the following guidance on what the word “officer” means in the context of s 234 (bold emphasis added):²⁰

In the context of a company (the relevant Acts not making reference to “officer” or otherwise assisting in the definition), we consider that s 234 is intended to cover **persons involved at a senior level in the directorate or management of a company and, in particular, who may have an executive or managerial responsibility for the employment of staff and the payment to them of their remuneration.** Whether someone is an “officer” under s 234 will not turn only or even substantially on whether that word is present or absent in his or her title. Determining whether someone is an officer will be a question of fact and degree to be determined in each case by the Authority or the Court.

[43] Examples already given show Mrs Ramada was involved in management of the company and staff matters. A further example of direct responsibility for employment was given by Shewta Sharma. She said she had talked to Mrs Ramada about delays in getting paid and asked if she would get a written employment agreement. Mrs Ramada later gave her an agreement. Before doing so Mrs Ramada paid Ms Sharma a cash amount that was equivalent to \$10 an hour for work already done. Ms Sharma’s evidence was that, when paying her that money, Mrs Ramada said: “Corrado doesn’t know anything. I deal with pay and you should be grateful that I give you \$10 because you don’t have an employment agreement and I should not be giving you any pay”.

[44] The evidence of Mr Parker and Mr Benefield also confirmed they understood, from their dealings with Adamar, that Mrs Ramada was involved as a senior level in management of the company and had managerial responsibility for paying staff.

[45] Mr Parker said Mrs Ramada was involved in around two thirds of about 20 meetings he had with Adamar over a 12 month period. Some of those meetings were at the Adamar office in a building near the Nando’s Wairau Park store. One of the other Adamar companies operated that store.

²⁰ *Cypress Villas*, above n 1, at [101].

[46] Both Mr Ramada and Mrs Ramada worked in that office at Wairau Park. Mrs Ramada accepted she used the office but said she often did so as a place to do her ongoing part-time work for an engineering consultancy business. She said she was sometimes in the office when Mr Parker met Mr Ramada there but was doing her own work while they talked.

[47] However Mr Parker had a different view. He saw Mrs Ramada as someone who “called the shots”. He recalled his second meeting with Adamar, in late May 2014 and soon after NNZL had taken over as franchisor of the Nando’s chain, was forcefully called to a halt by Mrs Ramada. He said it was a tense meeting because NNZL wanted to know why Adamar companies were operating four restaurants under the Nando’s brand when they held only three franchise agreements. He said Mrs Ramada called the meeting to an end because she thought they should seek advice from legal counsel. Mrs Ramada, in her oral evidence, accepted she had ended the meeting but said she did so because Mr Ramada was “getting worked up” and she was worried about his health.

[48] In December 2014 Mr Benefield told Mrs Ramada that NNZL wanted to conduct an “HR audit” following the complaints he had received from Henderson store staff about problems with their pay. As noted earlier in this determination it was Mrs Ramada who responded to Mr Benefield’s initial query to Mr Ramada. It was Mrs Ramada who provided him with some Adamar pay records and met with him to begin the audit process, which involved looking at a sample of the available information. From her actions and his dealings with her, Mr Benefield understood Mrs Ramada had managerial responsibility for remuneration to staff.

[49] Against that background and on the standard of the balance of probabilities, Mrs Ramada’s actions over an extended period of time were those of someone involved at a senior level in the management of a company with responsibility for significant aspects of staff employment and pay. She was, accordingly, an officer for the purposes of s 234 of the Act.

Did Mrs Ramada direct or authorise the default in payments?

[50] An officer is not liable under s 234 simply because of that status alone.²¹ Before the Authority could find Mrs Ramada had directed or authorised defaults in payments of workers' minimum wages and holiday pay, the Labour Inspector had to have established Mrs Ramada had done so "by a positive act or acts rather than mere passivity".²² However, on the interpretation of s 234 made by the majority of the judges in the *Cypress Villas* case, it was unnecessary to establish Mrs Ramada had deliberately embarked on a course of action designed to deprive the eight workers of their legal entitlements. Evidence of such a deliberate or intended motivation for her actions was not necessary. It was sufficient if her actions had the effect of directing or authorising the failure to pay them properly.

[51] The Employment Court has given this explanation of what the words "directed" and "authorised" mean in the context of s 234 (bold emphasis added):²³

These words connote the doing of something by the third party as opposed to that person's passivity alone, for which that person will not be liable. "Directing" connotes the **giving of an instruction to another to do something** and "authorising" connotes the **giving of consent to another to do something, sometimes at the request of another person**. That is consistent with the ... wish of Parliament that liability would attach to some overt positive action taken by the third party.

[52] Mrs Ramada's defence to the allegation that she was involved in directing or authorising the default was based on the notion that she was not, ultimately, in control of the decision on whether or not to make a payment to any worker and that she lacked the authorisation in the payroll system and Adamar bank accounts to make payments.

[53] On the objective standard of what would be apparent to a reasonable bystander, from what she and Mr Ramada said to their employees and others, Mrs Ramada appeared to be responsible for whether or not wages were paid. In mid-2014 Mr Ramada told a meeting of store managers that he was reducing the role of an accountant who had managed payroll matters and that Mrs Ramada was going to manage the payroll. An example of her doing so was an email to Mr Godara on 28

²¹ *Cypress Villas*, above n 1, at [97].

²² *Cypress Villas*, above n 1, at [111](iii).

²³ *Cypress Villas*, above n 1, at [96].

February 2015. She sent him the week's store roster with a note that read: "Let me know if there are any changes, as I am using this for the payroll hours (along with store visits)". The reference to store visits, as Mrs Ramada confirmed in her oral evidence, was that she might visit the store to see whether a staff member who was rostered on was in fact present and working.

[54] A further example involved delays in payments to Mr Singh after he resigned in December 2014, as referred to earlier in this determination. By 14 January 2015 he had not received his outstanding wages. In her 15 January reply to an email from him Mrs Ramada wrote: "I am arranging this, and I already have 1 salary payment set up for payment tomorrow". Mr Singh's evidence was that he had still not received payments due to him by February 2015. He then contacted Mr Benefield by email. Mr Benefield already knew about the earlier delay because Mrs Ramada had referred to the situation with Mr Singh in an email to Mr Benefield in December 2014. On 9 February 2015 Mr Benefield forwarded to Mrs Ramada the email he had received from Mr Singh. He asked for an explanation and included a note that said "I believe you told [Mr Parker] and I that this matter was fully put to rest". The example showed Mrs Ramada presenting herself as someone able to 'arrange' and 'set up' payments, so able to give instructions for those payments or consent to them being made. As a matter of inference, from what she said she would do and what happened, she directed or authorised the default.

[55] Mrs Ramada's oral evidence was that she would talk to Mr Ramada about workers' requests for pay, in direct conversations with him at home, and "on occasion said to [him], you can't let staff not be paid". She said there were times she used money in her personal bank account to make payments on the basis that when Adamar got "money from the store" it would get paid back to her. An email she sent Manpreet Kaur on 6 January 2014 showed one example of such a payment:

I'm just about to email all staff to let them know that salaries have been paid. There were a couple which couldn't be paid, one of which was yours, but I will ensure this is paid as soon as possible – definitely this week.
...
With regards to your last payment, I made the payment through my personal account ...

[56] It was a further example of Mrs Ramada presenting herself as in control of payments to Adamar's staff and when or when not they were made.

[57] Her evidence that Mr Ramada retained formal authorisation to make payments was not sufficient to displace Mrs Ramada's own liability for defaults. Mr Ramada would also have been at risk of a finding of liability for his own role in the outcome of their discussions, if not for his subsequent personal bankruptcy. A finding of liability against Mrs Ramada relates to her joint role in those decisions about who was paid and when, rather than a finding that she was solely responsible for the defaults that resulted from them continuing to run the business when they had insufficient funds or income to pay workers for their hours of work and holiday entitlements.

[58] Neither was Mrs Ramada's evidence that an external accountant was responsible for payments to the store staff sufficient to tip the balance of probability against a finding that she was involved in authorising or directing the defaults in payment. Mr Ramada had told store managers that he reduced the accountant's involvement because the accountant charged too much and Mrs Ramada would manage the payroll. Invoices for the accountant's services showed that he may have helped administer PAYE and other payroll matters but there was no evidence that he made the decisions that resulted in staff not getting paid.

If a finding of liability did require knowledge and intention, was Mrs Ramada liable?

[59] As already noted, the currently binding interpretation of s 234 did not require Mrs Ramada to have acted with knowledge and intention in directing or authorising the default in payment. The narrower interpretation of s 234 given in the minority judgement in *Cypress Villas* would require a finding that, as a matter of fact, Mrs Ramada knowingly directed or authorised the default and had not simply made arrangements for wages and holiday pay to be paid on Adamar's behalf which later turned out to be incorrect.²⁴

[60] While Mrs Ramada could not reliably be said to have made decisions on her own that authorised or directed the default, her own evidence of talking with Mr Ramada about the issue of paying staff showed her knowledge of ongoing defaults in payments due to them. There was ample evidence, in the form of many emails and texts to her from the workers, to confirm she knew about the true situation. Many of those messages were ignored and went without response from her, so the default continued with her knowledge. Given her wider role in the management and

²⁴ *Cypress Villas*, above n 1, at [135]-[137].

operation of the business, her evidence that she was “merely” a wife helping her sick husband for a short period lacked credibility. On the balance of probabilities, it was more likely than not that she, with Mr Ramada, as the “human actors” through whom Adamar interacted with the world, had deliberately attempted to avoid responsibility for the payment of minimum entitlements.²⁵

(vii) Was Mrs Ramada jointly and severally liable with Adamar No 2 Limited (in liquidation) for the default amount?

[61] Having established Mrs Ramada, on the balance of probabilities had directed or authorised the default, the Authority had a discretionary power under s 234(3) to not make a determination that she should be jointly and severally liable along with the company or others. The discretion must be exercised carefully, on principle, and in practice may be rarely exercised.²⁶

[62] Mrs Ramada was not casually or peripherally involved in Adamar’s affairs. She was intimately involved with its staff and operation for more than three years. The situation was not one in which she was passive, innocent of the reality, ignorant or lacked influence. There was no evidence or principle identified that would warrant exercise of the discretion to excuse Mrs Ramada from joint and several liability for the default.

(viii) Should either party contribute to the costs of representation of any other party?

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

[64] No costs could be awarded against the company in liquidation for the Adamar matter. The liquidators consented to the proceedings continuing, co-operated with the Labour Inspector in respect of requests for information (if it was available), and agreed to abide by the Authority’s determination.

[65] However Mrs Ramada could probably not fairly be liable for costs on the Ramada liability matter for the whole two days of the investigation meeting necessary for both matters. As a preliminary indication and subject to submissions if necessary,

²⁵ *Cypress Villas*, above n 1, at [141].

²⁶ *Cypress Villas*, above n 1, at [68]-[69].

\$3500 would likely be awarded as costs Mrs Ramada should pay to the Labour Inspector. It is the amount of the daily tariff applicable at the time that the application was lodged against Mrs Ramada (prior to 1 August 2016).

[66] If the Labour Inspector and Mrs Ramada are not able to agree any costs issue and an Authority determination on costs is needed, the Labour Inspector may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mrs Ramada would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. As indicated above the usual daily rate is a likely award unless particular circumstances or factors required an upward or downward adjustment of that tariff.²⁷

Robin Arthur
Member of the Employment Relations Authority

²⁷ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].