

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 400  
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5620232  
5620222

BETWEEN A LABOUR INSPECTOR,  
MINISTRY OF BUSINESS,  
INNOVATATION AND  
EMPLOYMENT

A N D NEELAM AHUJA, CHIRAG  
AHUJA and RHYTHM AHUJA (RE  
KHOBSURAT LIMITED) (IN  
LIQUIDATION)  
Proposed Respondent

A N D NAARI COLLECTION LIMITED  
(IN LIQUIDATION) and NEELAM  
AHUJA and CHIRAG AHUJA  
Respondents and Proposed  
Respondents

A N D KHOBSURAT COLLECTIONS  
LIMITED (IN LIQUIDATION) and  
NEELAM AHUJA and CHIRAG  
AHUJA  
Respondents and Proposed  
Respondents

Member of Authority: Eleanor Robinson

Representatives: Sarah Blick, Counsel for Applicant  
Greg Bennett, Advocate for Respondents

Investigation Meeting: 5 and 6 October 2016 at Auckland

Submissions Received: 20 September & 12 October from Applicant  
20 September & 11 October from Respondent

Date of Determination: 8 December 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The Applicant, a Labour Inspector, seeks a total of \$68,782.77 in arrears of wages and holiday pay on behalf of the former employees of the Respondent companies, Khoobsurat

Limited (KL), Naari Collections Limited (NCL), and Khoobsurat Collections Limited (KCL), in the applications to the Authority (the Respondent Companies).

[2] The Respondent Companies are all in liquidation, and the Labour Inspector claims that the Respondent Companies former employees, Ms Renuka Devi Kumar, Ms Azimun Nisha, who were employed by KL, Ms Kalpana Nandni who was employed by NCL, and Ms Anita Prasad who was employed by KCL, are owed the outstanding minimum wages and statutory holiday entitlements by the Respondent Companies officers, directors, and agents.

[3] The officers, directors and officers of the Respondent Companies comprised Mrs Neelam Ahuja, and/or Mr Chirag Ahuja and/or Ms Rhythm Ahuja, whom the Labour Inspector states are personally liable under s.234 of the Employment Relations Act 2000 (the Act).

### ***Section 234 Application***

[4] The Labour Inspector applies for authorisation to bring an action to recover money which is payable by way of minimum wages or holiday pay against Mrs Ahuja, and/or Ms Rhythm Ahuja and /or Mr Chirag Ahuja under s.234(2) of the Act.

[5] Although s.234 is now repealed following the passing of the Employment Standards Legislation Bill which came into force on 1 April 2016, there are new provisions in Part 9A of the Act which now impose liability on persons previously covered within the ambit of s.234 of the Act.

[6] Under clause 3(7) of Schedule 1AA of the Act, s.234 continues to apply to proceedings brought in relation to conduct which occurred before 1 April 2016, this is regardless of whether or not the proceedings were brought before that date.

[7] The conduct as claimed by the Labour Inspector in this case occurred prior to 1 April 2016. On that basis, I have proceeded to determine the matter under the now repealed s.234 of the Act pursuant to clause 3(7) of Schedule 1AA of the Act.

[8] Repealed s.234A of the Act states:

234 ***Circumstances in which officers, directors, or agents of the 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, -*
- 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 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.*

[9] In the Employment Court decision *Labour Inspector v. Cypress Villas Ltd and Barry Brill*<sup>1</sup> (*Cypress Villas*), a Full Bench held that the purpose of s.234 of the Act is to ensure that minimum employment entitlements are available to employees, even in a situation where employers which are companies may either be insolvent or otherwise unable to pay those minimum entitlements. Third parties may be held liable (jointly or severally) for the defaults of their companies if they directed or authorised the defaults<sup>2</sup>.

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<sup>1</sup> [2015] NZEmpC 157

<sup>2</sup> Ibid at [34]

[10] The steps to be completed are therefore firstly that proceedings have been commenced by a Labour Inspector, secondly that to my satisfaction on the balance of probabilities that the amount claimed in the action is unlikely to be paid in full, and thirdly that one or more of the Respondents directed or authorised the default.

***Proceedings commenced***

[11] Pursuant to s.234(1) of the Act, before granting an application, a Labour Inspector must have commenced an action in the Authority against a company to recover any money payable as minimum wages or holiday pay to an employee of the company.

[12] The Labour Inspector commenced proceedings against KL by lodging a statement of problem in the Authority on 19 January 2016. The Labour Inspector commenced proceedings against NCL by lodging a statement of problem in the Authority on 11 April 2016. The Labour Inspector commenced proceedings against KCL by lodging a statement of problem in the Authority on 11 April 2016.

[13] I find that the Labour Inspector commenced an action against KL, NCL and KCL as envisaged under s.234 (1) of the Act.

***The amounts claimed unlikely to be recovered?***

[14] Pursuant to s.234 (2) of the Act, the Labour Inspector must establish on the balance of probabilities that the amount claimed in the Act by way of minimum wages or holiday pay or both is unlikely to be paid in full either because:

- (a) The company is in receivership or liquidation; or
- (b) There are reasonable grounds to believe the company does not have sufficient assets to pay the amount claimed.

[15] I am satisfied that KL, NCL and KCL are all in liquidation.

***Mrs Neelam Ahuja, Mr Chirag Ahuja and Ms Rhythm Ahuja as an officer, director or agent directed or authorised the default?***

[16] The Labour Inspector must establish to a balance of probabilities standard that Mrs Neelam Ahuja, Mr Chirag Ahuja and/or Ms Rhythm Ahuja respectively directed or authorised those statutory minimum entitlement defaults claimed by a positive act or acts rather than passively.<sup>3</sup>

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<sup>3</sup> *Labour inspector v Cypress Villas Ltd and Barry Edward Brill* [2015] NZEmpC 157 at [96]

## **Note**

[17] At the Authority's investigation on 5 and 6 October 2016 the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties' representatives. The representatives have also submitted closing submissions on the facts and law.

[18] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s.174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on the issue necessary to dispose of the matter, and specified orders made as a result

## **Issues for determination**

[19] The issues for determination are:

- (a) In respect of Khoobsurat Limited (KL) which the Authority has previously determined owes the arrears sought on behalf of Ms Devi Kumar and Ms Nisha:
  - (i) Did Mrs Neelam Ahuja, Mr Chirag Ahuja and Ms Rhythm Ahuja direct or authorise default in the payment of minimum wages and holiday pay to Ms Kumar and Ms Nandni?
  - (ii) Should the Labour Inspector be authorised to bring an action for recovery of minimum wages and holiday pay against Mrs Neelam Ahuja, Mr Chirag Ahuja and Ms Rhythm Ahuja in respect of arrears owing to Ms Devi and Ms Nisha;
- (b) In respect of Naari Collection Limited (NCL):
  - (i) Should the Labour Inspector be authorised to bring an action for recovery of minimum wages and holiday against Mrs Ahuja and Mr Chirag Ahuja in respect of arrears owing to Ms Nandni;
  - (ii) If such authorisation is given, whether Mrs Neelam Ahuja and Mr Chirag Ahuja directed or authorised the default in the payment of the minimum wages and holiday pay;

- (iii) What is the liability of NCL to pay minimum wages and holiday pay, and the amount of any holiday pay and minimum wages NCL is required to pay?
- (c) In respect of Khoobsurat Collections Limited (KCL) :
- (i) Should the Labour Inspector be authorised to bring an action for the recovery of minimum wages and holiday against Mrs Neelam Ahuja and Mr Chirag Ahuja in respect of arrears owing to Ms Prasad;
  - (ii) If such authorisation is given, whether Mrs Neelam Ahuja and Mr Chirag Ahuja directed or authorised the default in payment of the minimum wages and holiday pay;
  - (iii) What is the liability of KCL to pay minimum wages and holiday pay, and the amount of any holiday pay and minimum wages KCL is required to pay?

### **Khoobsurat Limited (KL)**

#### **Background facts**

[20] In 2014, the Labour Inspector commenced an action in the Authority against the registered company, KL, to recover minimum wages under the Minimum Wage Act 1983 and holiday pay under the Holidays Act 2003 owing to two former employees of the company, Ms Kumar and Ms Nisha.

[21] KL operated an Indian clothing retail store trading as Khoobsurat Collections (the KL Store). Ms Kumar worked at KL from July 2011 to December 2011. Ms Nisha worked at KL between July 2013 and March 2014.

[22] Ms Kumar said that during the majority of time she was employed at KL, Mrs Neelam Ahuja opened the KL store and would remain there for the majority of the working day, Ms Rhythm Ahuja provided her with an individual employment agreement and gave advice to Mrs Neelam Ahuja on employment matters, and Mr Chirag Ahuja gave her Ms Kumar) instructions in respect of her duties in the shop.

[23] Ms Kumar said she was paid partly in cash and partly by credit transfer to her bank account. She primarily received cash payments from Mrs Neelam Ahuja with whom she would discuss her wage payments, but on occasion, Mr Chirag Ahuja and/or Ms Rhythm Ahuja would also pay her wages by way of a cash payment.

[24] The Labour Inspector brought a claim to recover wages on behalf of Ms Kumar and Ms Nisha pursuant to s.131 of the Act which was heard by Chief Member Crichton on 20 July 2015. KL was advised by the Authority that the matter was proceeding but was not represented in the subsequent investigation meeting.

[25] Following the Authority investigation, a determination was issued by the Chief Member on 23 July 2015 determining that KL owed the arrears sought by Ms Nisha and Ms Kumar. Whilst an officer, director or agent of KL had not attended that investigation meeting, no good cause had been shown for the non-attendance and the Member determined that he could proceed with the investigation pursuant to clause 12, Schedule 2 of the Act.

[26] Member Crichton determined that wage and time records provided by KL were false and that KL owed the arrears sought by Ms Nisha and Ms Kumar.<sup>4</sup> It was following this determination that KL was placed into liquidation on 10 September 2016.

[27] I have considered the Respondents' submission that there were discrepancies between Ms Nisha and Ms Kumar's written and oral evidence given at the Investigation Meeting.

[28] Whilst there were discrepancies, I accept that there has been considerable delay in these claims reaching resolution, during which time it is inevitable that some discrepancies in memory can arise.

[29] Moreover Ms Kumar and Ms Nisha were questioned and cross-examined at length during the Investigation Meeting about the nature of their employment at KL.

[30] Having considered the matter I prefer the evidence of Ms Kumar and Ms Nisha to that of the Respondents and I accept on the balance of probabilities that Ms Kumar and Ms Nisha worked in excess of the hours recorded by KL.

[31] I am therefore satisfied in respect of the claims concerning Ms Kumar and Ms Nisha that they have been established as determined in determination [2015] NZERA Auckland 217.

### **Determination**

**Should the Labour Inspector be authorised to bring an action for recovery of minimum wages and holiday pay against Mrs Neelam Ahuja and/or Mr Chirag Ahuja and/or Ms Rhythm Ahuja in respect of the arrears owing to Ms Kumar and Ms Nisha?**

[32] In *Cypress Villas* the Court held that under s. 234(2) of the Act, a Labour Inspector is required only to name and identify a third party as being an officer, director or agent and to

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<sup>4</sup> Determination [2015] NZERA Auckland 217

allege that they directed or authorised the default and proof of the allegation is not required at this stage.<sup>5</sup>

[33] As evidenced in the Companies Office record, Mrs Neelam Ahuja and Mr Chirag Ahuja were directors of KL during the period Ms Kumar and Ms Nisha was employed.

[34] Ms Rhythm Ahuja was not a director of KL, however KL was operated as a family owned business and the evidence of Ms Kumar and Ms Nisha is that she was active in the running of KL. In particular their evidence was that Ms Rhythm Ahuja:

- Advised Mrs Neelam Ahuja on documentation pertaining to the business;
- Offered them employment agreements;
- Paid them wages in cash;
- Gave the employees instructions regarding the sales operation; and
- Had arguments with the employees on pay issues.

[35] Mr Darren Carr, Labour Inspector conducted an investigation at KL in November 2011. His evidence was that Ms Rhythm Ahuja was present at KL during a workplace visit, and informed him that she was the person who would be ensuring time and wage records were completed correctly.

[36] The Court held in *Cypress Villas* that in regard to whether or not someone was an officer of a company:<sup>6</sup>

*... 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.*

[37] I find that the evidence establishes that Ms Rhythm Ahuja was responsible for taking actions essential to the business operation of KL, including issuing Ms Kumar and Ms Nisha with employment agreements and paying their remuneration in cash.

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<sup>5</sup> *Cypress Villas* at [82]

<sup>6</sup> *Ibid* at [101]

[38] I am satisfied that Ms Rhythm Ahuja was an officer of KL during the time when Ms Kumar and Ms Nisha were employed.

[39] The Labour Inspector applies to have Mrs Neelam Ahuja, Mr Chirag Ahuja and Ms Rhythm Ahuja held jointly and severally liable for the recovery of wages and holiday pay owing to Ms Kumar and Ms Nisha. Mrs Neelam Ahuja and Mr Chirag Ahuja will be liable if the Labour Inspector establishes on the balance of probabilities that they, as the directors of KL, directed or authorised the alleged default in the payment of the minimum wages or holiday pay or both.<sup>7</sup>

[40] In order for me to authorise the Labour Inspector to bring an action for recovery of minimum wages and holiday against Mrs Neelam Ahuja and/or Mr Chirag Ahuja and/or Ms Rhythm Ahuja, the Labour Inspector must establish on the balance of probabilities that they directed or authorised the statutory minimum employment entitlement defaults by a positive act.

**Did Mrs Neelam Ahuja, Mr Chirag Ahuja and Ms Rhythm Ahuja direct or authorise the default in the payment of the minimum wages and holiday pay to Ms Kumar and Ms Nisha?**

[41] I have found that Mrs Neelam Ahuja and Mr Chirag Ahuja were director of KL and Ms Rhythm Ahuja was an officer of KL during the period Ms Kumar and Ms Nisha were employed. The Labour Inspector alleges that they authorised the alleged default in payment of Ms Kumar and Ms Nisha's holiday pay and minimum wages

[42] In *Cypress Villas* the Court considered the meaning of 'default in payment' and to 'direct or authorise the default in payment'. The Court concluded that a 'default' in payment of minimum wages or holiday pay or both is the non-payment of those amounts, whether by a failure or refusal to pay: "*It does not connote implicitly notions of intention or deliberateness. It is well established 'minimum code' employment law that these additional attributes are irrelevant to recovery for non-payment.*"<sup>8</sup>

[43] Employers in New Zealand are expected and considered to know the minimum legal requirements in respect of their employees, and to adhere to them. Ignorance of the law is no defence.

[44] The Labour Inspector has brought a claim to recover minimum wages and holiday pay on behalf of Ms Kumar and Ms Nisha pursuant to s.131 of the Act.

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<sup>7</sup> S.234(3) of the aCT

<sup>8</sup> Ibid at [92]

[45] The evidence establishes that Mrs Neelam Ahuja, Mr Chirag Ahuja and Ms Rhythm Ahuja were active in the management of KL and responsible for paying Ms Kumar and Ms Nisha remuneration either in cash or by bank transfer.

[46] KL was placed into liquidation following the issuing of determination [2015] NZERA Auckland 217. I accept the findings in that determination in respect of wages actually paid, the hours, days, and time worked, and any leave taken as calculated by the Labour Inspector.

[47] I find that there has been a default in the payment of the minimum wages and holiday pay due to Ms Kumar and Ms Nisha, and I find that Mrs Neelam Ahuja, Mr Chirag Ahuja and Ms Rhythm Ahuja either jointly or individually directed or authorised the default.

[48] I find that Mrs Neelam Ahuja, Mr Chirag Ahuja and Ms Rhythm Ahuja are jointly and severally liable to pay the amount of \$18,515.71 gross in respect of the non-payment of minimum wages and holiday pay due to Ms Kumar and Ms Nisha.

#### **Authorisation**

[49] I accordingly authorise the Labour Inspector to bring an action for recovery of minimum wages and holiday pay against Mrs Neelam Ahuja, Mr Chirag Ahuja and Ms Rhythm Ahuja in respect of arrears of \$18,515.71 owing to Ms Kumar and Ms Nisha.

[50] Mrs Neelam Ahuja, Mr Chirag Ahuja and Ms Rhythm Ahuja are jointly and severally to pay the amount of \$18,515.71 in respect of the non-payment of minimum wages and holiday pay due to Ms Kumar and Ms Nisha.

#### **Naari Collection Limited (NCL)**

#### **Background Facts**

[51] NCL was an Indian clothing retail store (NCL store). As established by the company registration documentation (the company changed its name to NCL on 19 September 2012), Mrs Neelam Ahuja was a director of NCL from 11 April 2011 until it was placed into liquidation on 10 September 2015, and Mr Chirag Ahuja was a director of NCL during the period from 4 February 2010 to 14 February 2013 and from 1 March 2014 to 14 August 2015.

[52] Ms Kalpana Nandni commenced employment at NCL in September 2012 and her employment ceased in late June 2015.

[53] Ms Nandni said that during the first six weeks of her employment she worked from 10 a.m. to 9 or 10 p.m. 7 days per week as this was the period prior to the Indian festival

Diwali. Thereafter she would start work at 10 a.m. and finish at 5.30 or 6 p.m., working 6 days per week.

[54] Ms Nandni was interviewed and offered a job by Mrs Neelam Ahuja who informed her that NCL could not afford to pay her the minimum wage, and that she would be paid \$50.00 per day.

[55] After she had been employed for 3 months, Ms Rhythm Ahuja had taken her for a coffee and told her that her work was appreciated and therefore her rate of pay was being increased to \$60.00 per day and a future increase might be considered. In addition, she claimed that Ms Rhythm Ahuja visited the NCL store from time to time and would chat to her.

[56] During the first few months of her employment Ms Nandni said she was paid in cash: \$300.00 per week. However in January 2013 she approached Mr Chirag Ahuja and asked to be paid through her bank account and to pay PAYE to comply with immigration requirements.

[57] Mr Chirag Ahuja had agreed to this request and subsequently her wages were split with 20 hours being paid into her bank account, and she received the remaining amount owed in cash.

[58] Ms Nandni said that another employee or Mr Chirag Ahuja prepared a weekly timesheet which she was asked to sign stating that she worked 20 hours per week, although in fact she worked 49 hours. During the working day she was able to take a rest break of between 10 and 30 minutes.

[59] Ms Nandni said that she had not received payslips during her employment, nor did she receive annual holiday leave when she ceased employment at NCL.

[60] Ms Nandni stated that she had worked on Thursday 26 December 2012, 2 January 2013, Waitangi Day 6 February 2013 and Anzac Day 25 April 2013. She had not received payment at time and a half, or a day in lieu for working on a public holiday.

[61] Ms Nandni's evidence is that she is owed the sum of \$21,176.49 by NCL in respect of minimum employment entitlements consisting of:

- a. \$17,296.75 (Minimum wages)
- b. \$ 2,376.86 (Annual holiday pay)
- c. \$ 958.88 (Statutory holiday pay)

d. \$ 550.00 (Alternative holiday pay)

[62] Mrs Neelam Ahuja and Mr Chirag Ahuja denied that Ms Nandni had at any time worked in excess of 49 hours per week as the NCL store was only open for 49 hours per week. They stated that the timesheets signed by Ms Nandni were a true record.

[63] Mrs Neelam Ahuja, who confirmed that she was overseas from time to time during the period of Ms Nandni's employment, said that during the periods when she was not in the NCL store, Mr Chirag Ahuja could access NCL bank accounts in order to pay the employees.

[64] Ms Rhythm Ahuja said that she was a student during the period Ms Nandni worked at NCL, however the Companies Office record show that she was appointed as a director on 4 February 2010 and removed on 11 April 2011. Whilst she was able to advise Ms Rhythm Ahuja on the legislative requirements due to her command of the English language being better than that of Mrs Neelam Ahuja or Mr Chirag Ahuja, and agreed that her involvement with Ms Nandni was as described, she denied having responsibility for the NCL payroll or making payments to the employees.

#### **Determination**

#### **Should the Labour Inspector be authorised to bring an action for recovery of minimum wages and holiday pay against Mrs Neelam Ahuja and Mr Chirag Ahuja in respect of arrears owing to Ms Nandni?**

[65] In *Cypress Villas* the Court held that under s. 234(2) of the Act, a Labour Inspector is required only to name and identify a third party as being an officer, director or agent and to allege that they directed or authorised the default and proof of the allegation is not required at this stage.<sup>9</sup>

[66] As evidenced by the Companies Office record, Mrs Neelam Ahuja was a director of NCL throughout the period of Ms Nandni's employment, and Mr Chirag Ahuja was a director of NCL from 4 February 2010 to 14 February 2013, and from 1 March 2014 to 14 August 2015, approximately half the period of Ms Nandni's employment.

[67] For the purposes of s.234(2) of the Act, I find Mrs Neelam Ahuja and Mr Chirag Ahuja to have been directors of NCL during the periods of employment of Ms Nandni and at the time of the alleged default in payment of her minimum wages and holiday pay.

[68] The Labour Inspector applies to have Mrs Neelam Ahuja and Mr Chirag Ahuja jointly and severally liable for the recovery of wages and holiday pay. Mrs Neelam Ahuja

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<sup>9</sup> *Cypress Villas at [82]*

and Mr Chirag Ahuja will be liable if the Labour Inspector establishes on the balance of probabilities that they, as directors of NCL, directed or authorised the alleged default in the payment of the minimum wages or holiday pay or both.<sup>10</sup>

[69] In order for me to authorise the Labour Inspector to bring an action for recovery of minimum wages and holiday against Mrs Neelam Ahuja and Mr Chirag Ahuja the Labour Inspector must establish on the balance of probabilities that Mrs Neelam Ahuja and Mr Chirag Ahuja respectively directed or authorised the statutory minimum employment entitlement defaults by a positive act.

**Did Mrs Neelam Ahuja and Mr Chirag Ahuja direct or authorise the default in the payment of the minimum wages and holiday pay to Ms Nandni?**

[70] I have found that Mrs Neelam Ahuja and Mr Chirag Ahuja were directors of NCL during the period Ms Nandni was employed. The Labour Inspector alleges that they authorised the alleged default in payment of her holiday pay and minimum wages.

[71] In *Cypress Villas* the Court considered the meaning of ‘default in payment’ and to ‘direct or authorise the default in payment’. The Court concluded that a ‘default’ in payment of minimum wages or holiday pay or both is the non-payment of those amounts, whether by a failure or refusal to pay: *“It does not connote implicitly notions of intention or deliberateness. It is well established ‘minimum code’ employment law that these additional attributes are irrelevant to recovery for non-payment.”*<sup>11</sup>

[72] As previously stated, employers in New Zealand are expected and considered to know the minimum legal requirements in respect of their employees, and to adhere to them. Ignorance of the law is no defence.

[73] The evidence establishes that both Mrs Neelam Ahuja and Mr Chirag Ahuja had access to the NCL bank accounts and were responsible for paying Ms Nandni her remuneration either in cash or by bank transfer.

[74] The Labour Inspector brought a claim to recover wages on behalf of Ms Nandni pursuant to s.131 of the Act.

[75] I note that in determination [2015] NZERA Auckland 256 issued on 21 August 2015 Member Arthur required NCL by no later than 4 September 2015 to deliver to the Labour Inspector: *“a true and complete copy of its wage, time, holiday and leave records for its*

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<sup>10</sup> S.234(3) of the Act

<sup>11</sup> Ibid at [92]

*former employee Kalpana Nandni*". Member Arthur also awarded a penalty against NCL of \$4,000.00 for failing to provide records as required under s.229 of the Act.

[76] NCL was placed into liquidation on 10 September 2015.

[77] Not only did NCL fail to fulfil this order of the Authority by the required date, but it was still unable to produce wage, holiday and leave records for Ms Nandni by the date of the Authority's investigation on 5 & 6 October 2016, more than a year later.

[78] The onus of proof therefore moves to NCL as the employer to prove Ms Nandni's claims are incorrect, otherwise I may accept as proved all claims made by Ms Nandni in respect of wages actually paid and the hours, days and time worked.<sup>12</sup>

[79] I note the evidence of the timesheets, however Ms Nandni said that these were not a true picture of the hours actually worked by her, and NCL has been unable to refute this evidence by producing wage and time records.

[80] I find that NCL's failure to produce records has prejudiced Ms Nandni's ability to bring a wholly accurate claim.

[81] I find that NCL has failed to prove that Ms Nandni's claims are incorrect. I therefore accept Ms Nandni's evidence as proven in respect of wages actually paid, the hours, days, and time worked, and any leave taken as calculated by the Labour Inspector.

[82] I find that there has been a default in the payment of the minimum wages and holiday pay to Ms Nandni, and I find that Mrs Neelam Ahuja and Mr Chirag Ahuja either jointly or individually directed or authorised the default.

**What is the liability of NCL to pay minimum wages and holiday pay, and the amount of any holiday pay and minimum wages NCL is required to pay?**

[83] NCL defaulted in its obligations to pay Ms Nandni minimum wages and holiday pay as set out in an earlier paragraph in this determination.

[84] NCL is in liquidation. I am satisfied that there are reasonable grounds for believing therefore that it does not have sufficient assets to pay the amount owing in respect of minimum wages and holiday pay to Ms Nandni in full.<sup>13</sup>

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<sup>12</sup> S.132(2) of the Act

<sup>13</sup> S.234 (2) of the Act

[85] I authorise the Labour Inspector to bring an action for the recovery of those amounts against any officer, director or agent of the company who directed or authorised the default in pursuant to s. 234 (2) of the Act.

[86] I am satisfied that the Labour Inspector has proved that Mrs Neelam Ahuja and Mr Chirag Ahuja as directors of NCL either jointly or individually directed or authorised the default in the payment of the minimum wages and holiday pay to Ms Nandni.

[87] The Labour Inspector is seeking authorisation against Mrs Neelam Ahuja and Mr Chirag Ahuja as directors.

[88] I find that Mrs Neelam Ahuja and Mr Chirag Ahuja are jointly and severally liable to pay the amount of \$21,176.49 gross in respect of the non-payment of minimum wages and holiday pay due to Ms Nandni.

### **Authorisation**

[89] I accordingly authorise the Labour Inspector to bring an action for recovery of minimum wages and holiday pay against Mrs Neelam Ahuja and Mr Chirag Ahuja in respect of arrears of \$21,176.49 owing to Ms Nandni.

[90] Mrs Neelam Ahuja and Mr Chirag Ahuja are jointly and severally liable to pay the amount of \$21,176.49 gross in respect of the non-payment of minimum wages and holiday pay due to Ms Nandni.

### **Khoobsurat Collections Limited**

#### **Background Facts**

[91] Khoobsurat Collections Limited (KCL) was an Indian clothing retail store (KCL store). As established by the company registration documentation, Mrs Neelam Ahuja was a director of NCL from 1 September 2008 until it was placed into liquidation on 10 September 2015.

[92] Ms Anita Prasad said she was employed at KCL from October 2010 until October 2011. During her period of employment she worked six days per week from 10 00 a.m. until 6.00 p.m. or sometimes 6.30 p.m. if there were customers in the store requiring assistance, except for Thursdays when she would work until 7.00 p.m.

[93] During the four weeks leading up to Diwali she said the KCL store was open 7 days a week and she would work from 10.11 a.m. to 8.00 p.m. each day. She was allowed to take a 10 minute lunch break, but there were no other breaks during the day.

[94] After she had been employed for three weeks Ms Prasad requested payment in respect of the weeks she had worked, and Mrs Neelam Ahuja responded that she had forgotten to pay her.

[95] Ms Prasad said she was paid \$300.00 per week. Until January 2011 Ms Prasad said she was paid in cash, but after that date Mr Chirag Ahuja had asked for her bank account details and she started to receive payments into her bank account, with the first bank payment being made on 7 January 2011.

[96] Ms Prasad's evidence was that Mrs Neelam Ahuja managed the KCL store and was present most days, except during the periods of absence when she was on an overseas business trip. Mr Chirag Ahuja and Ms Rhythm Ahuja were in the store on a regular basis and would give her instructions.

[97] Ms Prasad's evidence is that she is owed the sum of \$29,090.57 by KCL in respect of minimum employment entitlements consisting of:

- a. \$24,917.75 (Minimum wages)
- b. \$2,810.22 (Annual holiday pay)
- c. \$ 842.60 (Statutory holiday pay)
- d. \$ 520.00 (Alternative holiday pay)

[98] KCL denies the claims made by Ms Prasad.

[99] Mrs Neelam Ahuja said that during the periods when she was not in the store, Mr Chirag Ahuja could access KCL accounts in order to pay the employees, which he confirmed in the Investigation Meeting held 5&6 October 2016.

### **Determination**

**Should the Labour Inspector be authorised to bring an action for recovery of minimum wages and holiday pay against Mrs Neelam Ahuja and Mr Chirag Ahuja in respect of arrears owing to Ms Prasad?**

[100] In *Cypress Villas* the Court held that under s. 234(2) of the Act, a Labour Inspector is required only to name and identify a third party as being an officer, director or agent and to

allege that they directed or authorised the default and proof of the allegation is not required at this stage.<sup>14</sup>

[101] As evidenced by the Companies Office record, Mrs Neelam Ahuja was the sole director of KCL throughout Ms Prasad's employment.

[102] For the purposes of s.234(2) of the Act, I find Mrs Neelam Ahuja to have been the director of KCL during the periods of employment of Ms Prasad and at the time of the alleged default in payment of her minimum wages and holiday pay.

[103] Mr Chirag Ahuja was not a director of KCL during the period of Ms Prasad's employment. However on the evidence of Mrs Neelan Ahuja, who confirmed that during the periods when she was not in the store, Mr Chirag Ahuja was in effect in charge and could access KCL bank accounts in order to pay the employees. The Labour Inspector seeks to have Mr Chirag Ahuja held liable as an officer of KCL for the alleged defaults in payments to Ms Prasad.

[104] The Court held in *Cyress Villas* in regard to whether or not someone was an officer of a company:<sup>15</sup>

*... 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.*

[105] I find that Mr Chirag Ahuja was an officer of KCL.

[106] The Labour Inspector applies to have Mrs Neelam Ahuja and Mr Chirag Ahuja held jointly and severally liable for the recovery of wages and holiday pay in respect of Ms Prasad. Mrs Neelam Ahuja and Mr Chirag Ahuja will be liable if the Labour Inspector establishes on the balance of probabilities that they, Mrs Neelam Ahuja as director, and Mr Chirag Ahuja as officer, of KCL, either jointly or individually directed or authorised the alleged default in the payment of the minimum wages or holiday pay or both.<sup>16</sup>

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<sup>14</sup> *Cyress Villas* at [82]

<sup>15</sup> *Ibid* at [101]

<sup>16</sup> S.234(3) of the Act

[107] In order for me to authorise the Labour Inspector to bring an action for recovery of minimum wages and holiday pay in respect of Ms Prasad against Mrs Neelam Ahuja and Mr Chirag Ahuja the Labour Inspector must establish on the balance of probabilities that Mrs Neelam Ahuja and Mr Chirag Ahuja either jointly or individually directed or authorised the statutory minimum employment entitlement defaults by a positive act.

**Did Mrs Neelam Ahuja and Mr Chirag Ahuja direct or authorise the default in the payment of the minimum wages and holiday pay to Ms Prasad?**

[108] I have found that Mrs Neelam Ahuja was the director of KCL and Mr Chirag Ahuja was an officer of KCL during the period Ms Prasad was employed. The Labour Inspector alleges that they either jointly or individually authorised the alleged default in payment of Ms Prasad's holiday pay and minimum wages.

[109] In *Cypress Villas* the Court considered the meaning of 'default in payment' and to 'direct or authorise the default in payment'. The Court concluded that a 'default' in payment of minimum wages or holiday pay or both is the non-payment of those amounts, whether by a failure or refusal to pay: "*It does not connote implicitly notions of intention or deliberateness. It is well established 'minimum code' employment law that these additional attributes are irrelevant to recovery for non-payment.*"<sup>17</sup>

[110] As previously stated, employers in New Zealand are expected and considered to know the minimum legal requirements in respect of their employees, and to adhere to them. Ignorance of the law is no defence.

[111] The Labour Inspector has brought a claim to recover minimum wages and holiday pay on behalf of Ms Prasad pursuant to s.131 of the Act.

[112] The evidence establishes that both Mrs Neelam Ahuja and Mr Chirag Ahuja had access to the KCL bank accounts and were responsible for paying Ms Prasad her remuneration either in cash or by bank transfer.

[113] The Labour Inspector has previously requested wage and time records from KCL on behalf of Ms Prasad. Following the non-production of the requested records, the Labour Inspector lodged an application with the Authority seeking a compliance order against KCL for it to supply the records. KCL was placed into liquidation prior to determination of that matter.

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<sup>17</sup> Ibid at [92]

[114] KCL also failed to provide wage, holiday and leave records in respect of Ms Prasad by the date of the Authority's investigation on 5 & 6 October 2016.

[115] The onus of proof therefore moves to KCL as the employer to prove Ms Prasad's claims are incorrect, otherwise I may accept as proved all claims made by Ms Prasad in respect of wages actually paid and the hours, days and time worked.<sup>18</sup>

[116] I find that KCL's failure to produce records has prejudiced Ms Prasad's ability to bring a wholly accurate claim.

[117] I find that KCL has failed to prove that Ms Prasad's claims are incorrect. I therefore accept Ms Prasad's evidence as proven in respect of wages actually paid, the hours, days, and time worked, and any leave taken as calculated by the Labour Inspector.

[118] I find that there has been a default in the payment of the minimum wages and holiday pay to Ms Prasad, and I find that Mrs Neelam Ahuja and Mr Chirag Ahuja either jointly or individually directed or authorised the default.

**What is the liability of KCL to pay minimum wages and holiday pay, and the amount of any holiday pay and minimum wages NCL is required to pay?**

[119] KCL defaulted in its obligations to pay Ms Prasad minimum wages and holiday pay and in the non-payment of the minimum wage and holiday payments as set out in an earlier paragraph in this determination.

[120] KCL is in liquidation. I am satisfied that there are reasonable grounds for believing therefore that it does not have sufficient assets to pay the amount owing in respect of minimum wages and holiday pay to Ms Prasad in full.<sup>19</sup>

[121] I authorise the Labour Inspector to bring an action for the recovery of those amounts against any officer, director or agent of the company who directed or authorised the default in pursuant to s. 234 (2) of the Act.

[122] I am satisfied that the Labour Inspector has proved that Mrs Neelam Ahuja as the director and Mr Chirag Ahuja as an officer of KCL either jointly or individually directed or authorised the default in the payment of the minimum wages and holiday pay to Ms Prasad.

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<sup>18</sup> S.132(2) of the Act

<sup>19</sup> S.234 (2) of the Act

[123] The Labour Inspector is seeking authorisation to bring an action for recovery of minimum wages and holiday pay against Mrs Neelam Ahuja and Mr Chirag Ahuja as the director and an officer respectively in respect of arrears owing to Ms Prasad..

[124] I find that Mrs Neelam Ahuja and Mr Chirag Ahuja are jointly and severally to pay the amount of \$29,090.57 gross in respect of the non-payment of minimum wages and holiday pay due to Ms Prasad.

[125] I accordingly authorise the Labour Inspector to bring an action for recovery of minimum wages and holiday pay against Mrs Neelam Ahuja and Mr Chirag Ahuja in respect of arrears owing to Ms Prasad.

#### **Authorisation**

[126] I accordingly authorise the Labour Inspector to bring an action for recovery of minimum wages and holiday against Mrs Neelam Ahuja and Mr Chirag Ahuja in respect of arrears owing to Ms Prasad.

[127] Mrs Neelam Ahuja and Mr Chirag Ahuja are jointly and severally to pay the amount of \$29,090.57 gross in respect of the non-payment of minimum wages and holiday pay due to Ms Prasad.

#### **Summary of authorisations:**

##### **Khoobsurat Limited (in liquidation)**

[128] I authorise the Labour Inspector to bring an action for the recovery of minimum wages and holiday pay against Mrs Neelam Ahuja, Mr Chirag Ahuja and Ms Rhythm Ahuja in respect of arrears of \$18,515.71 owing by Khoobsurat Limited (in liquidation) to Ms Kumar and Ms Nisha.

##### **Naari Collections Limited (in liquidation)**

[129] I authorise the Labour Inspector to bring an action for recovery of minimum wages and holiday pay against Mrs Neelan Ahuja and Mr Chirag Ahuja in respect of arrears of \$21,176.49 owing by Naari Collection Limited (in liquidation) to Ms Nandni.

##### **Khoobsurat Collections Limited (in liquidation)**

[130] I authorise the Labour Inspector to bring an action for recovery of minimum wages and holiday pay against Mrs Neelam Ahuja and Mr Chirag Ahuja in respect of arrears of \$29,090.57 owing by Khoobsurat Collections Limited (in liquidation) to Ms Prasad.

## **Costs**

[131] Costs are reserved.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**