

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 164
3003440**

BETWEEN NARASIMHA REDDY-ALLU
Applicant

AND SAHANA INZ LIMITED t/a
SAHANA SOUTH INDIAN
RESTAURANT
Respondent

Member of Authority: Eleanor Robinson

Representatives: May Moncur, Counsel for Applicant
Maxwell Rusero, Counsel for Respondent

Investigation Meeting: On the paper

Submissions received: 29 May 2017 from Applicant
31 May 2017 from Respondent

Determination: 6 June 2017

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] The Applicant, Mr Narasimha Reddy Allu, is claiming that the First Respondent, Sahana INZ Limited t/a Sahana South Indian Restaurant (Sahana), unjustifiably dismissed and unjustified disadvantaged him, and owes him monies in respect of wages arrears pursuant to the Minimum Wages Act 1983 (MWA) and statutory holiday pay entitlement pursuant to the Holidays Act 2003 (HA).

[2] Mr Allu further claims that the Second Respondent, Ms Sasikala Krishnasamy, sole director and shareholder, aided and abetted the breach of his statutory wage and holiday entitlements.

[3] The preliminary matter which is before the Authority for determination is whether or not Ms Krishnasamy should remain a party to the proceedings as the Second Respondent,

[4] The parties agreed to the Authority determining this issue based on the Statement of Problem and the Statement in Reply, documents submitted by the parties, and on submissions from the parties.

Key Background Facts

[5] Mr Allu commenced employment with Sahana on 18 December 2016 in the position of Duty Manager. Mr Allu was offered full-time employment by Ms Krishnasamy, sole director and shareholder, and claims that he was offered and accepted the rate of \$19.00 for working 6 days a week.

[6] Mr Allu claims he worked in excess of 40 hours per week during December 2016, January 2017 and February 2017.

[7] Although Mr Allu had a valid work visa when he applied for employment at Sahana, he was required to apply for a visa variation and claims Ms Krishnasamy agreed to support him during this process by providing an individual employment agreement, however she failed to supply one, despite his repeated requests.

[8] Mr Allu said that during 7 February 2017 he raised his concern at the lack of an employment agreement with Ms Krishnasamy and was dismissed during the conversation.

[9] Sahana claims that Mr Allu was offered an hourly rate of \$16.25 per hour in respect of a 40 hour full-time employment position. Mr Allu requested that his hourly rate of pay was stated as \$20.00 per hour for immigration purposes. Sahana refused to increase the hourly rate from \$16.25 whereupon Mr Allu offered to return to Sahana the additional \$3.75 payment in the form of cash.

[10] Sahana claims it provided Mr Allu with an individual employment agreement which stated the agreed basis of employment as a 40 hour week to be worked Tuesday – Sunday at an annual salary of \$33,800.00 (\$16.25 per hour) and included a 90 day trial period provision. Mr Allu withheld signing the individual employment agreement provided to him and further refused to provide Sahana with bank account details, insisting that he wanted to be paid in cash. As a result Sahana paid Mr Allu in cash, deducting the requisite amount of PAYE from that payment.

[11] The individual employment agreement provided to the Authority is undated and has not been signed by either party.

[12] Sahana claims that it did not dismiss Mr Allu on 7 February 2017 but that he left of his own volition.

[13] Sahana agrees that Mr Allu is owed monies in respect of holiday pay entitlement, but that this payment has not been made due to a lack of bank account information.

Determination

[14] Mr Allu was employed as a Duty Manager by Sahana which is noted as his employer in the unsigned and undated individual employment agreement which has been provided to the Authority. The New Zealand Inland Revenue (IRD) monthly schedule provided to the Authority states that the employing entity was Sahana INZ Limited rather than Ms Krishnasamy personally.

[15] Ms Krishnasamy will only be held liable in this matter if there is found to have been breaches of the MWA and HA by Sahana in respect of those made to Mr Allu, and if Ms Krishnasamy is found to have aided and abetted such breaches.

[16] Section 134 (2) of the Employment Relations Act 2000 (the Act) is relevant to the issue of inciting, instigating, aiding and abetting:

Section 134 Penalties for breach of employment agreement

(2) Every person who incites, instigates, aids or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

[17] The wording of s134 (2) is generally accepted as clearly deriving from s 66 of the Crimes Act 1961. A leading commentary on employment law¹ states of s 134(2):

The concept of inciting, instigating, aiding and abetting has been interpreted extensively in cases turning on the liability of secondary parties in criminal law ... In Attorney-General's Reference (No 1 of 1975) [1975] QB 773, Lord Widgery CJ said that the words should be given their ordinary meaning, although their common use as synonyms has led to a tendency to construe the phrase as a whole as connoting every form of actual assistance or encouragement committed before or during the act of the principal (Martyn v Police [1967] NZLR 396, Larkins v Police [1987] 2 NZLR 282 (CA)).

...
The particular knowledge required to be proved against an alleged party to a breach of contract under subs (2) is that the defendant must have known of the contract and deliberately intended to interfere with it, although knowledge of the exact terms is not required; it is sufficient that the defendant "knew of the general contractual situation or practice in a particular field" (Credit Consultants Debt

¹ Andrew Gray (ed) *Mazengarb's Employment Law* (loose leaf ed, LexisNexis)

Services NZ Ltd v Wilson Employment Court, Wellington WC 12B/07, 1 May 2007, Judge Shaw).²

[18] In *Musa v Whanganui District Health Board*³ the Employment Court observed that for a party to be liable under s 134(2), there must be a breach of an employment agreement by a primary breacher.

[19] If it is determined that a party to an action has incited, instigated, aided or abetted a breach of an employment agreement, a penalty may be awarded pursuant to s 135 of the Act:

S135 Recovery of penalties

(5) An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of –

(a) the date when the cause of action first became known to the person bringing the action, or

(b) the date when the cause of action should reasonably have become known to the person bringing the action.

[20] The maximum amount of such a penalty is \$10,000.00 in the case of an individual.

[21] A person deemed to be the ‘mind’ of the company may be found guilty of aiding and abetting the company to commit a breach.

[22] In this case Ms Krishnasamy is the sole director and shareholder of Sahana. In those circumstances, should a determination be made finding that Sahana failed to pay Mr Allu in respect of wage arrears and holiday entitlement pay, and that Ms Krishnasamy was the directing ‘mind’ of the company in respect of such default, she may be found guilty of aiding and abetting the company to commit a breach.

[23] I therefore determine that Ms Krishnasamy should remain a party to these proceedings as Second Respondent.

Costs

[24] Costs are reserved pending the final determination of the matter.

Eleanor Robinson
Member of the Employment Relations Authority

² Ibid at ERA134.9

³ [2010] NZEmpC 120, (2010) 7 NZELR 710 at [66]