

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 28
3001324

BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESSES, INNOVATION AND EMPLOYMENT Applicant
AND	ANKURS NICE & SPICE LIMITED First Respondent
AND	HITESH KUMAR VYAS Second Respondent

Member of Authority:	M B Loftus
Representatives:	Jodi Ongley, Counsel for Applicant No appearance for First Respondent Guido Ballara, Paul McBride and Angelo Papageorgiou, Counsel for Second Respondent
Investigation Meeting:	27 April 2017 at Wellington
Submissions Received:	At the investigation meeting
Determination:	27 April 2017

DETERMINATION OF THE AUTHORITY

[1] The applicant, a Labour Inspector of the Ministry of Business, Innovation and Employment (the Inspector), claims the first respondent (Ankurs) failed to pay a former employee, Mahendra Chauhan, no less than the minimum wage¹ and holiday pay². The Inspector seeks to recover the arrears.

[2] The Inspector also claims Ankurs failed to maintain holiday and leave records as required by s 81 of the Holidays Act 2003 or retain a signed copy of Mr Chauhan's

¹ Section 6 of the Minimum Wage Act 1983

employment agreement contrary to the requirements of s 64 of the Employment Relations Act 2000.

[3] Penalties are sought for the various breaches along with the arrears.

[4] The Inspector also alleges Hitesh Vyas, Ankur's sole director and shareholder, is a person involved in the breaches in that he was knowingly concerned in, and party to, them.³ The Inspector asks he be required to pay any penalty imposed upon Ankurs to the extent it is unable to pay.⁴

[5] The respondents' positions are unknown. Neither participated in the Authority's process until Mr Vyas contacted it through Counsel on the evening of 25 April. Two preliminary issues arose as a result and they are the subject of this determination.

[6] The Statement of Problem was lodged on 20 December 2016. Copies were then sent to both Ankurs registered address and Mr Vyas' private one as understood by both the applicant and recorded with the Companies Office.

[7] It is not known what happened to the copy sent to Mr Vyas as there is no record of receipt and it was not returned as undelivered. Receipt of the copy sent to Ankurs was acknowledged by signature on 22 December. The signature, however, was not Mr Vyas' as he was in India. He returned on 16 January 2017.

[8] On 24 January Ankurs was placed in liquidation and Mr Vyas once again departed for India on 3 February. In the absence of authorisation from the Liquidator that prevents the continuation of proceedings against Ankurs.⁵ The Inspector notes that which means Mr Vyers is effectively the sole respondent at present.

[9] Mr Vyas returned to Wellington on 25 March. In the interim a telephone conference had been held, today's investigation date set and a copy of the notice of investigation personally served at Mr Vyas' home address by the Inspector. Notwithstanding that Mr Vyas says he did not see the notice immediately and when he did he chose not to act on it. That he left till quite recently.

² Section 28 of the Holidays Act 2003

³ Section 142W(1)(c) of the Employment Relations Act 2000

⁴ Section 142X of the Employment Relations Act 2000

⁵ Section 248(1)(c) of the Companies Act 1993

[10] At 6.11pm on 25 April a Barrister instructed to act on Mr Vyas' behalf sent an e-mail to the Authority. It advised he was in receipt of the notice of investigation meeting; asked what issues were being investigated and what questions Mr Vyas might face and indicated an adjournment application was likely.

[11] The response, sent on 26 April, advised that for three reasons an adjournment may not necessarily be granted. The response also pointed out that as Mr Vyas has failed to provide a Statement in Reply there was an question about whether he could even defend the defend the claim.⁶

[12] At 3.24pm a formal adjournment application arrived. It was declined and Mr Vyas was told to appear and at least argue the leave issue and the adjournment application. He was also told to be prepared for a determination the substantive matter proceed. He attended as instructed, hence this determination.

[13] For Mr Vyas it is submitted the question of leave is irrelevant as the Statement of Problem must be personally served and there is no evidence that ever occurred. Here it should be remembered he was out of the country when the copy was sent to his home in December and there is no evidence it was actually delivered. Mr Vyas denies seeing it and the Inspector advises a second copy was not attached to the notice of investigation.

[14] Ultimately questions about the adequacy of service and whether or not regulation 8(3) is an issue need not be determined. The Inspector has effectively conceded Mr Vyas attendance today means it is appropriate he be allowed to defend the claim.

[15] Turning to the adjournment application. It is Mr Vyas' positon he would be at an unacceptable disadvantage should he be required to proceed given he did not see the statement of problem till it was sent to his Barrister yesterday.

[16] The fact there is no evidence the Statement of Problem was delivered to Mr Vyas' home address has already been discussed. That along with the fact he was absent for another month or so leads me to accept the denial he received one there.

⁶ Regulation 8(3) of the Employment Relations Authority Regulations 2000

[17] Mr Vyas also denies seeing the copy delivered to Ankurs prior to the liquidation. This he attributes to being completely distracted by a number of issues including the state of the company and personal pressures including a recent bereavement. When answering questions about why he failed to address the notice of investigation when it came to his notice he cited various health issues.

[18] While these answers may be considered unsatisfactory there are two additional factors which favour granting the adjournment sought by Mr Vyas. The first is that the consequences are serious with Mr Vyas potentially facing personal liability for around \$120,000. It is only fair he be allowed to address these matters properly now he has shown an inclination to do so. The second is that the Inspector has again essentially conceded the issue though that may only be because she wishes to amend the Statement of Problem.

[19] Having considered the evidence, the submissions and a discussion with the parties toward the end of today's meeting I make the following orders:

- a. Mr Vyas may defend the claim; and
- b. The adjournment sought by Mr Vyas is granted; and
- c. The Inspector is to file her amended Statement of Problem no later than 4.00pm Friday 28 April. I also note Mr McBride has instruction to accept service on Mr Vyas' behalf; and
- d. Mr Vyas is to file his Statement in Reply no later than 4.00pm Friday 12 May 2017.

[20] Costs are reserved but for the parties benefit I express a view it is appropriate that await a conclusion in respect to the substantive claim.

M B Loftus
Member of the Employment Relations Authority