

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 129
3001324 and 3011471

BETWEEN A LABOUR INSPECTOR OF THE
 MINISTRY OF BUSINESSES,
 INNOVATION AND
 EMPLOYMENT
 Applicant

AND ANKUR'S NICE & SPICE
 LIMITED
 First Respondent

AND HITESHKUMAR VYAS
 Second Respondent

Member of Authority: M B Loftus

Representatives: Jodi Ongley, Counsel for Applicant
 No appearance for First Respondent
 Paul McBride and Guido Ballara, Counsel for Second
 Respondent

Investigation Meeting: On the papers

Submissions Received: 23 August and 15 September 2017 from Second
 Respondent
 7 September 2017 from Applicant

Determination: 12 December 2017

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

[1] The applicant, a Labour Inspector of the Ministry of Business, Innovation and Employment (the Inspector), claims the first respondent (Ankur's) failed to pay a former employee, Mahendra Chauhan, the minimum wage¹ and holiday pay². There

¹ Section 6 of the Minimum Wage Act 1983

² Section 28 of the Holidays Act 2003

is also an allegation Ankur's failed to maintain holiday and leave records³ or retain a signed copy of Mr Chauhan's employment agreement.⁴

[2] Penalties are sought, as is payment of the arrears.

[3] The Inspector also alleges Mr 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.⁵ The Inspector asked he be required to pay any penalty imposed upon Ankur's should it be unable to pay.⁶ At the time of lodgement (December 2016) that was considered a distinct possibility and as events transpired Ankur's was placed in liquidation on 24 January 2017.

[4] Neither Ankur's nor Mr Vyas responded to the claims at the time of lodgement. Indeed nothing was heard from either until a Barrister then representing Mr Vyas sent an e-mail to the Authority at 6.11pm on 25 April.

[5] The e-mail was Mr Vyas' late response to the scheduling of an investigation meeting. This had occurred after the Inspector decided proceed against Mr Vyas personally given the liquidation and the absence of permission from either the liquidator or the High Court to continue against Ankur's.⁷

[6] The scheduled investigation turned into the hearing of an adjournment application which was granted.⁸ Also resulting from the investigation meeting was advice the Inspector was going to serve an amended Statement of Claim and a timetable was set for both that and the filing of Mr Vyas' response.

[7] The amended Statement of Problem essentially sought to add a claim under s 142Y of the Act and make Mr Vyas liable for any wages that might be found payable should Ankur's be incapable of making the payment (which according to the liquidator's reports would be the situation).

[8] In response to the fact liability for some of the alleged arrears may have accrued prior to the enactment of s 142Y on 1 April 2016 a claim pursuant to its predecessor, s 234, was also subsequently lodged.

³ Section 81 of the Holidays Act 2003

⁴ Section 64 of the Employment Relations Act 2000

⁵ Section 142W(1)(c) of the Employment Relations Act 2000

⁶ Section 142X of the Employment Relations Act 2000

⁷ Section 248(1)(c) of the Companies Act 1993

⁸ [2017] NZERA Wellington 28

[9] Mr Vyas responded by saying, as he had already indicated he would, that the Authority lacks jurisdiction to hear the applications ... *as the claim against him, as a director of the First Respondent company, is parasitic on there being established a breach by the First Respondent, and there is none.*⁹

[10] It was further alleged such liability could never be established as the Inspector had, during the investigation of 27 April, made comments to the effect the application against the first respondent was being *abandoned*.

[11] That said, and in the interim, the Inspector had cause to revisit the abandonment. It sought and received permission from the liquidator to proceed against Ankur's. Mr Vyas response is those matters had, on the basis of the comments made on 27 April, already been abandoned and their pursuit cannot now be reinitiated.

[12] The parties agreed I determine these issues on the papers and a timetable for the tabling of submissions was agreed.

[13] It has now come to my attention that prior to receipt of Mr Vyas' final submission Ankur's was removed from the companies register. That means the question of whether or not the claims against the first respondent were abandoned in a way which precludes their pursuit has become irrelevant. The legal entity no longer exists. Once again proceedings against Ankur's can no longer continue.

[14] This also means the issue has reverted to the original defence concerning the parasitic nature of the claim against Mr Vyas and the argument there can be no transfer of liability when that liability has not, and cannot, be established.

[15] Having considered the issues and the comments of Counsel when I advised I was considering transferring to the Employment Court the question of whether or not a claim against Mr Vyas can continue absent any finding against Ankur's I have concluded that is an appropriate course of action.

[16] Section 178(2) of the Employment Relations Act 2000 provides:

The Authority may order the removal of the matter, or any part of it, to the court if—

⁹ Statement in Reply at [1.4]

(a) an important question of law is likely to arise in the matter other than incidentally; or

(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or

(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[17] Removal may occur on the Authority's own volition.¹⁰

[18] The sections upon which the application(s) against Mr Vyas rely were designed to enable the enforcement of minimum standards even when an employing company was no longer capable of ensuring that could occur.

[19] The defence tendered here, which I must say appears eminently arguable, could, if successful, have the effect of seriously undermining the statute and its intent by removing the ability to enforce such standards in numerous instances. In my view such an outcome raises serious issues of law and public policy (read public welfare¹¹) which could have widespread ramifications. These are the types of issue I conclude it appropriate the Employment Court should consider in the first instance.

[20] I therefore remove to the Employment Court the preliminary question of whether or not a substantive claim can proceed against Mr Vyas in the absence of proceedings against Ankur's.

[21] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority

¹⁰ Section 178(1) of the Employment Relations Act 2000

¹¹ *Vice-Chancellor of Lincoln University v Stewart (No 2)* [2008] ERNZ 249 at [35]