

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 227
3026454

BETWEEN	A LABOUR INSPECTOR Applicant
AND	INDIAN HEAVEN LIMITED First Respondent
AND	SAYED MASOUN NOORI Second Respondent
AND	NAJIMA NOORI Third Respondent
AND	FATIMA NOORI Fourth Respondent

Member of Authority: Andrew Dallas

Representatives: Claire English, counsel for the Applicant
Fatima Noori for the First, Second, Third and Fourth Respondents

Investigation Meeting: 7 August 2018 with further information received up to and including 7 February 2019

Date of Determination: 15 April 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A Labour Inspector, Mike Heyward, lodged proceedings in the Authority against Indian Heaven Limited, Sayed Noori, Najima Noori and Fatima Noori citing breaches of minimum employment standards in respect of seven employees.

[2] The Labour Inspector alleged in relation to the employers, Indian Heaven:

- (i) failed to provide employment agreements in contravention of s 65 of the Employment Relations Act 2000 (the Act);
- (ii) failed to maintain and produce wage and time records in contravention of ss 130 and 132 of the Act;
- (iii) failed to comply with an improvement notice issued under s 223D of the Act;
- (iv) contravened ss 24 and 27 of the Holidays Act 2003 (payment of holiday pay);
- (v) contravened ss 50, 55 and 60 of the Holidays Act (payment, variously, of public holiday pay and for sick leave and bereavement leave);
- (vi) contravened ss 81 and 83 of the Holidays Act (failure to keep records);
- (vii) contravened s 75 of the Holidays Act (failure to pay accrued holiday pay on termination of employment); and
- (viii) failed to pay, at least, minimum wages in contravention of s 6 of the Minimum Wage Act 1983;

[3] For these contraventions, the Labour Inspector sought arrears and penalties from Indian Heaven. The arrears of wages and holiday pay said to be owed to the seven employees was as follows:

- (a) Om Prakash: \$17,908.80
- (b) Vishav Singh: \$4,147.52
- (c) Prem Singh Bagiyal: \$5,292.00
- (d) Mohammed Noushad Akhatar: \$7,422.68
- (e) Pyar Singh Rawat: \$5,115.60
- (f) Sameer Mohammed: \$813.64
- (g) Birender Rawat: \$988.32

Total arrears sought: \$41,688.56

[4] The Labour Inspector also sought orders against Sayed Noori, Najima Noori and Fatima Noori as persons involved in breaches of minimum employment standards under s 142W(1)(c) of the Act.

[5] Indian Heaven denied liability for any of the arrears. Sayed Noori, Najima Noori and Fatima Noori also said they were not persons involved in the breach of minimum employment standards.

The Authority's investigation

[6] During the investigation meeting, I heard evidence from Labour Inspector Mike Heyward and several of the affected former employees. For Indian Heaven, I heard evidence from Sayed Noori, Najima Noori and Fatima Noori.

[7] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during my investigation of the Labour Inspector's employment relationship problem. While I have not referred to all submissions advanced by the parties during the investigation meeting, I record I have fully considered them.

What happened?

[8] Indian Heaven operated two restaurants in Christchurch. One in the suburb of Opawa and the other in Woodham Road, Avonside. These restaurants have now been sold by Indian Heaven.

[9] The director of Indian Heaven is Najima Noori. Sayed Noori and Najima Noori are both shareholders. Their daughter Fatima Noori was involved, along with her parents, in the day-to-day running of the business.

[10] Former employees who gave evidence said Najima Noori employed them and set their initial terms and conditions of employment. Sayed Noori managed the day-to-day operations of the restaurants including directing employees hours and shifts. Fatima Noori managed the "backroom" functions including setting rosters and hours of work, operating the payroll system and undertaking English language liaison duties on behalf of her parents.

[11] The restaurants were open for lunch and dinner. Employees said they covered both lunch and dinner shifts and worked around 50 hours per week over a six day cycle. Monday or Tuesday were non-rostered days. However, one former employee said he worked 7 days a week.

[12] Employees were paid 30 or 45 hours per week regardless of how many additional hours they worked. Indian Heaven appeared to suggest this “cap” on paid hours related to immigration restrictions. However, these were not specified and it is unclear what they even were.

[13] Even accounting for the cap on paid hours, two employees said Indian Heaven even withheld some of these wages. Indian Heaven claimed this was the result of a loan. However, no documentation was produced to support such “loans” nor any consent under the Wages Protection Act 1983 to such deductions by affected employees.

[14] The employees said they were not paid holiday pay during, or upon termination, of their employment or public holiday pay. When asked by the Labour Inspector as to why employees were not paid correctly under the Holidays Act, Indian Heaven appeared unaware of the requirement to do so.

[15] The Labour Inspector said the wage and time records provided by Indian Heaven were inaccurate and deficient. The Labour Inspector said they appeared to have also been created after the fact of his request.

[16] The Labour Inspector said Indian Heaven made no attempt to comply with an Improvement Notice directed at paying arrears and implementing compliant business systems. Indeed, it continued to operate as it had done before. A representation made by Fatima Noori that arrears would be paid to affected employees “around December” of 2017 came to nothing. During the investigation meeting, Indian Heaven did not provide a satisfactory answer, nor, indeed, did it really seek to, as to why it did not comply with the Notice.

[17] In the face of such non-compliance and unwillingness to cooperate with the Labour Inspectorate, it was inevitable that these proceedings would eventually be brought in the Authority.

The Authority's view

[18] The Labour Inspector's case discloses serious default by Indian Heaven in complying with minimum employment standards. The affected workers who also gave evidence supported that given by the Labour Inspector.

[19] While Indian Heaven sought to resist the Labour Inspector's case, it was done on the basis of a blanket denial of liability and chastising its former employees for having the audacity to give evidence in the face of its generosity as an employer. This was supported, on occasion, by minor theatrics.

[20] Moreover, surprisingly given the weight of evidence, Fatima Noori effectively claimed to have no knowledge of Indian Heaven's business dealings and insisted her own involvement in the Labour Inspector's proceeding, despite being named as a respondent, was to assist her parents.

[21] Ultimately, the Labour Inspector presented a very convincing and, in many ways, overwhelming case of default by Indian Heaven in complying with minimum employment standards. I find, on the balance of probabilities, the Labour Inspector has proved his claims against Indian Heaven that it breached employment standards. As a consequence of this finding, the arrears of wages and holiday pay calculated by the Labour Inspector and reproduced at paragraph [3] above must be paid by Indian Heaven to the named former employees.

Are Sayed Noori, Najima Noori and Fatima Noori persons involved in the breaches of employment standards?

[22] The Labour Inspector has applied to the Authority under s 142W of the Act for a finding that Sayed Noori, Najima Noori and Fatima Noori were "persons involved" in Indian Heavens' breaches of employment standards.

[23] The Court provided useful guidance in *A Labour Inspector v Sampan Restaurant Limited* about how to approach this issue.¹ The Court of Appeal has also given guidance about how to approach the question, albeit under the predecessor statutory provisions, evidentially.²

Najima Noori

[24] Najima Noori is sole director and joint shareholder (with Sayed Noori) of Indian Heaven. Najima Noori was involved in hiring employees, setting their initial terms and conditions of employment, authorising payments to employees and resisting their claims for payment for actual hours worked. The Labour Inspector said these actions together with holding office in Indian Heaven and being a shareholder means she meets the test set out in s 142W of the Act.

[25] I accept this submission. I find Najima Noori was a person involved in Indian Heaven's breaches of employment standards in respect of the employees identified in paragraph [3] above.

Sayed Noori

[26] Sayed Noori is a joint shareholder (with Najima Noori) of Indian Heaven. Sayed Noori was responsible for the day-to-day running of Indian Heaven's restaurant operation(s). He directed employees hours of work and their shift patterns. Sayed Noori authorised payments to employees and, like Najima Noori, resisted their claims for payment for actual hours worked. The Labour Inspector said these actions together with being a shareholder means Sayed Noori meets the test set out in s 142W of the Act.

[27] I accept this submission. I find Sayed Noori was also a person involved in Indian Heaven's breaches of employment standards in respect of the employees identified in paragraph [3] above.

¹ [2018] NZEmpC 69 at [46]

² *Brill v A Labour Inspector* [2017] NZCA 169 (CA)

Fatima Noori

[28] Fatima Noori was not a director or shareholder of Indian Heaven. She was, however, a senior representative of the company and involved in its management and day-to-day operations. Like her parents, Fatima Noori directed the hours of work and shift patterns of employees, authorised payments to employees and resisted their claims for payment for actual hours worked. She was also responsible for maintaining Indian Heaven's payroll and, such as they were, business records.

[29] Fatima Noori liaised with the Labour Inspector and made representations on behalf of Indian Heaven including about possible compliance with employment standards after the Improvement Notice was given. The Labour Inspector pointed to her level of sophistication as a business operative and observed she had established her own company, Noori's NZ Limited, with the same registered address as Indian Heaven.

[30] The Labour Inspector said Fatima Noori exercised considerable influence over both the management and administration of Indian Heaven such as to bring her within the parameters of s 142W(1) and s 142W(3) of the Act. I accept this submission. I find Fatima Noori was also a person involved in Indian Heaven's breaches of employment standards in respect of the employees identified in paragraph [3] above.

Summary

[31] In summary:

- a) Indian Heaven has breached employment standards;
- b) The arrears of wages and holiday pay calculated by the Labour Inspector as set out in paragraph [3] above must be paid by Indian Heaven to the employees within 28 days of the date of this determination;
- c) Sayed Noori and Najima Noori and Fatima Noori are persons involved in breaches of employment standards;
- d) To the extent these arrears set out in paragraph [3] above are not, or cannot be, met by Indian Heaven, they are to be paid by Sayed Noori, Najima Noori and Fatima Noori on a joint or several liability basis; and

- e) The effect of the findings in (a) and (c) above means the issues set out below are now required to be determined by the Authority.

Next steps

[32] The following issues are reserved for further determination by the Authority:

- (a) Is Indian Heaven liable for the imposition of penalties for the contraventions of the Act, Minimum Wage Act, Wages Protection Act and Holidays Act and if so, in what quantum;
- (b) Are Sayed Noori, Najima Noori and Fatima Noori as person involved in those contraventions liable for the imposition of penalties; and
- (c) Whether parties should contribute to the costs of representation of the other(s)?

[33] An Authority Officer will contact the parties shortly to discuss a timetable for a sequential exchange of submissions on those matters.

Costs

[34] Costs are reserved pending disposal of all matters before the Authority.

Andrew Dallas
Member of the Employment Relations Authority