

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 417
3093632

BETWEEN GOPAL AND NANDI BISHT
Applicants

AND SULTAN GRILLS & FOOD
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicants in person
Nadeem Rashid Shaikh for the Respondent

Investigation Meeting: 12 October 2020 at Auckland

Submissions [and further 5 October 2020 from the Applicant
Information] Received: 5 October 2020 from the Respondent

Date of Determination: 13 October 2020

DETERMINATION OF THE AUTHORITY

- A. The respondent, Sultan Grills & Food Limited is to pay the applicants, Mr Gopal Bisht and Mrs Nandi Bisht the sum owing under the settlement agreement totalling \$5,775 together with the filing fee of \$71.56 within 28 days of the date of this determination.**

Employment Relationship Problem

[1] On 19 November 2018, a record of settlement (the settlement) was signed under s 149 of the Employment Relations Act 2000 (the Act). The applicants, Mr and Mrs Bisht, and Mr Nadeem Rashid Shaikh, (Mr Rashid) who was the sole director and shareholder of the respondent, Sultan Grills & Food Limited (Sultan Grills) at the time, were all parties to, and signed the settlement.

Investigation meeting

[2] Mr and Mrs Bisht attended the investigation meeting and affirmed their evidence to the Authority to be true and correct. Mr Rashid also attended the investigation meeting on behalf of Sultan Grills. Mr Rashid affirmed his evidence to the Authority to be true and correct. An interpreter fluent in the Hindi language attended the investigation to assist the Authority.

[3] At the conclusion of the investigation meeting, I gave the parties an oral indication of my findings on the matter pursuant to s 174(1)(b) of the Act. This determination records my findings in writing, in accordance with s 174(2) of the Act.

[4] As permitted under s 174E of the Act, this determination does not set out all of the evidence; relevant facts and legal issues are set out along with the Authority's conclusions.

Issue

[5] The issue brought to the Authority by Mr and Mrs Bisht relates to non-payment by Sultan Grills and Mr Rashid of sums agreed to be paid by them under the settlement agreement.

[6] Mr and Mrs Bisht seek a compliance order requiring Sultan Grills and Mr Rashid to comply with the settlement agreement. Mr and Mrs Bisht also seek imposition of a penalty against Sultan Grills for its breach of the settlement agreement, and reimbursement of the filing fee.

Settlement Agreement

[7] The settlement states in its background information that Sultan Grills is "insolvent and is no longer trading ..." and that "Mr Rashid intends putting the company into liquidation in the near future." The background information further states that "This agreement is reached in settlement of the proceedings between all the parties, and in contemplation of the proposed liquidation."

[8] Clauses 2 and 3 of the settlement agreement state:

2. Mr Rashid will advise the liquidator that the applicants should be paid a combined total of 350 hours of work, at the current minimum wage of \$16.50 per hour.

3. If the applicants have not by then been paid this amount in full through the liquidation process, Mr Rashid will pay the applicants the amount still owing to them on or before 19 November 2019.

[9] The settlement was signed by a mediator employed by the Ministry of Business, Innovation and Employment (MBIE) and certified under s 149 of the Act on 19 November 2018.

[10] That certification confirmed that, before signing the agreement, the parties were advised and accepted they understood the effect of s 149(3) of the Act which states that the agreed terms of settlement:

- (a) Is final and binding on and enforceable; and
- (b) Could not be cancelled; and
- (c) Could not be brought before the Authority or the Court for review or appeal, except for the purposes of enforcing those terms.

Application for compliance order

[11] On 25 February 2020, an application for a compliance order was filed in the Authority by Mr and Mrs Bisht claiming that despite request, Sultan Grills and Mr Rashid had failed to comply with the terms of settlement and pay them monies owing under the settlement.

Response by Sultan Grills and Mr Rashid

[12] Mr Rashid did not file a statement in reply. However, in a letter to the Authority dated 8 March 2020, Mr Rashid accepted that there was a record of settlement entered into between the parties and that monies were owing to Mr and Mrs Bisht. However, he had suffered huge losses and the closure of his business in 2018 and neither Sultan Grills nor he were able to pay the amounts owing.

Determination

[13] Mr Rashid accepted that the monies owing under the settlement agreement were payable by Sultan Grills. However, due to its financial circumstances, Sultan Grills was unable to settle the debt. Further, Mr Rashid accepted that under the settlement agreement he was liable to pay the monies owing under the settlement agreement to Mr and Mrs Bisht in the event that they were not paid following the liquidation of Sultan Grills.

[14] Sultan Grills was not placed into liquidation and has not paid Mr and Mrs Bisht for the 350 hours of work at the rate of \$16.50 per hour owing to them under the settlement agreement.

Mr Rashid's bankruptcy

[15] Mr Rashid filed a petition for bankruptcy and on 1 November 2019 was adjudicated bankrupt. The insolvency summary report by New Zealand Insolvency and Trustee Service provided to the Authority by Mr Rashid states he owes \$191,657.23 in claims to unsecured creditors.

[16] Mr Rashid is bankrupt. Accordingly, proceedings cannot continue, or be brought, against him personally. Mr Rashid is unable to make any payments under the settlement agreement due to his bankruptcy.

[17] However, the Authority may issue a compliance order against Sultan Grills in respect of its breach of the settlement agreement.

Order

[18] I therefore make an order that Sultan Grills is to pay Mr and Mrs Bisht the sum owing under the settlement agreement for 350 hours at \$16.50 per hour totalling \$5,775 within 28 days of the date of this determination. I further order Sultan Grills to pay Mr and Mrs Bisht the filing fee of \$71.56 within 28 days of the date of this determination.

Penalties

[19] Mr and Mrs Bisht sought a penalty against Sultan Grills for the breaches of the settlement agreement. As explained at the Authority's investigation meeting, I am not satisfied that in the circumstances a penalty should be awarded.

Anna Fitzgibbon
Member of the Employment Relations Authority

Certificate of Determination

[20] I direct that pursuant to the Regulation 26 of the Employment Relations Authority Regulations 2000, Mr Gopal Bisht and Mrs Nandi Bisht be provided with a certificate of determination, sealed with the seal of the Authority, recording that Sultan Grills and Food Limited is ordered within 28 days of this determination to pay Mr Gopal Bisht and Mrs Nandi Bisht the total sum of \$7,556 owing under the settlement agreement together with reimbursement of the Authority's filing fee of \$71.56.