

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 128  
3065514

BETWEEN	DENISE TUBBY Applicant
AND	SR NZ INVESTMENTS LIMITED First Respondent
AND	NADEEM MOHAMMED Second Respondent
AND	JASBIR JASWAL Third Respondent

Member of Authority: Michele Ryan

Representatives: Margaret Williams, advocate for the Applicant  
No appearance by, or on behalf of, the First, Second or  
Third Respondents

Investigation Meeting: 29 June 2020, and 28 April 2021, at New Plymouth

Submissions [and further Information] Received: 8 July 2020 in writing, and orally at the meeting of 28  
April 2021 from the Applicant  
Nothing received from the Respondents

Date of Determination: 6 April 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Denise Tubby seeks orders to have her previous employer, SR NZ Investments Ltd (“SR”) pay outstanding wages, annual holiday pay and payment for two public holidays, that she says is owed to her.

[2] SR initially provided a statement in reply and Ms Tubby's claims were denied. Later, the third respondent, a director of SR sent several emails to the Authority. However, none of the three respondents attended the Authority's investigation meetings.

[3] Despite the respondents' failure to engage, I have taken the contents of SRNZ's statement in reply together with documents attached to it as SR's position on the claims before the Authority. Taking into account that material alongside the (unchallenged) testimony of Ms Tubby and her witnesses this determination states findings of fact and law, and recorded conclusions on issues necessary to dispose of the matter including orders where necessary.

### **Background information**

[4] Ms Tubby began working part-time for SR in March 2018 at its then recently opened superette based in Stratford. The arrangements between Ms Tubby and SR's manager (known to Ms Tubby as Sandy) were that she would receive a fixed rate of \$150 per week and would be back-paid all outstanding wages when his visa was issued. Ms Tubby says she needed paid employment and trusted she would be paid appropriately in due course.

[5] At the start of Ms Tubby's employment she worked part time. She says her hours of work quickly increased to between 35-65 hours per week and she was left largely in sole charge. In contrast, SR says in its statement in reply Ms Tubby's hours of work did increase but not significantly.

[6] Ms Tubby says her contact with Sandy was mostly by phone. She believes Sandy resided in Auckland. She says he would frequently travel to Stratford (although not always) on a Saturday with supplies for the superette and would inform Ms Tubby of the following weeks' hours. Ms Tubby says recorded her hours of work in a notebook/diary held in the superette's premises, but she also kept a record of her hours in a personal dairy.

[7] At first Ms Tubby was paid \$150 every week by SRNZ. But by late April 2018 payment of her wages had become irregular. When she raised this matter, she says Sandy would either deposit monies into her bank account or promise she would be paid the following week.

[8] In the second half of June 2018 Ms Tubby became aware Sandy had received his visa. She referred to the agreement to have her wages back-paid. Ms Tubby says he told her "It doesn't work that way". Following this conversation it is said he avoided her attempts to further discuss the matter, and would not answer her calls. Ms Tubby further reports that

around the same time there was a discernible reduction of stock at the superette and she received complaints from some suppliers that goods had not been paid for by SRNZ.

[9] By Friday 6 July 2018 Ms Tubby says there was little by way of goods for sale, and she felt sufficiently dissatisfied with SRNZ's failure to pay her wages as promised, that she closed the shop and sought to return the key.

[10] Ms Tubby was subsequently visited by Sandy and his companion, Ms Nadeem Mohammed, at her home on Tuesday 10 July 2018. Ms Tubby voiced her ongoing concerns about the deficit in her wages. She reports Ms Mohammed verbally abused her for refusing to return to the superette under the prevailing conditions.

[11] Several weeks later Ms Tubby noticed that SR was seeking a shop assistant. She was upset to find the role was advertised as providing minimum wage when she had not been paid at that level.

[12] She sought legal advice, and a request for wage and time, and holiday and leave records was subsequently sent to SR on her behalf. No response was received. Ms Tubby notes the superette appears to have since stopped trading.

[13] Ms Tubby calculates she is owed \$8,846.80 gross in total. She seeks interest on that sum, and requests penalties be imposed on SR for various breaches of the Employment Relations Act (the Act,) the Holidays Act 2003 and the Wages Protection Act 1983. If SR is unable to pay the sums owed, Ms Tubby seeks payment from each of SR's directors, Ms Nadeem Mohammed and Mr Jasbir Jaswal (the second and third respondents respectively) on the basis that each was a person "*involved in a breach*" of employment standards.<sup>1</sup> I shall return to each of these matters also.

### **The issues**

[14] To determine whether Ms Tubby is owed monies (and if so by whom) the follows issues need to be examined:

- (a) Who was Ms Tubby's employer?
- (b) Was Ms Tubby a casual or permanent employee?

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<sup>1</sup> See Employment Relations Act 2000, s 142W

- (c) Is Ms Tubby owed wages, holiday pay and payment for public holidays?
- (d) If Ms Tubby is owed the monies, who is liable for payment?
- (e) Should interest be ordered?
- (f) Should penalties be ordered?

### **The Authority's investigation**

[15] It is necessary to detail the Authority's attempts to have the respondents engage with it for the purpose of investigating Ms Tubby's claims.

#### *SRNZ's involvement with the Authority's investigation*

[16] A detailed statement of reply in response to Ms Tubby's claims was lodged by a law firm acting on behalf of SR in October 2019. SR said Ms Tubby was a casual employee who generally worked about 10 hours per week, and advised all monies owed to her had been paid. Timesheets, payslips and bank statements were attached to support SR's position on these matters.

[17] Several months after the Authority had directed Ms Tubby and SR to attend mediation, the Authority was advised by SRNZ's representatives that it had no further instructions to act and withdrew from the proceedings.

[18] SR did not respond to the Authority's subsequent correspondence, despite remaining registered on the New Zealand Companies Register. As it transpires the statement in reply and accompanying documents lodged with the Authority was the only interaction it had with the Authority.

#### *Mr Jasbir Jaswal*

[19] In the lead up to the first investigation meeting, leave was granted by the Authority to have the then director of SRNZ, Mr Jasbir Jaswal, joined as a respondent pursuant to s 142Y of the Act, on the basis there was evidence to suggest SR may not be able to meet any the debt if established.<sup>2</sup>

[20] Mr Jaswal subsequently communicated with the Authority in two separate emails. In the first of these, he advised he became a director (sole) of SR on 11 June 2018, some 2-3

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<sup>2</sup> See *Tubby v SR NZ Investments Ltd and Jaswal* [2020] NZERA 224, dated 9 June 2020.

months after Ms Tubby had started working at the superette. He said Ms Tubby had been employed by the previous sole director of SR (and/or the manager) and liability for unpaid wages should rest with those individuals.<sup>3</sup> In a later email he advised he would not be attending the Authority's investigation, which was scheduled to occur on 29 July 2020.<sup>4</sup> There has been no further contact with the Authority by Mr Jaswal.

*Ms Nadeem Mohammed*

[21] Following receipt of Mr Jaswal's email correspondence, it became apparent to Ms Tubby and her representative that Ms Mohammed had been the sole director of SR from its incorporation in January 2018 until 10 June 2018, and therefore covering a material portion of Ms Tubby's employment.<sup>5</sup>

[22] Ms Mohammed did not respond to Ms Tubby's application to have her [Ms Mohammed] also joined as a respondent. The application on that matter was granted on 9 December 2020 and Ms Mohammed was joined to these proceedings.<sup>6</sup>

[23] Despite having received notice of the Authority's reconvened meeting planned for 28 April 2021,<sup>7</sup> Ms Mohammed did not attend that event either. Her position as regards the claims against SRNZ, and herself personally, is completely unknown. In the absence of any communication as to why Ms Mohammed did not attend the scheduled meeting, the Authority's investigation into this matter went ahead without her.<sup>8</sup>

*Further comment*

[24] As must be apparent, a portion of Ms Tubby's claims concerns the liability of the directors. Concurrent to the progress of this case, the Court of Appeal granted leave to determine the level of knowledge needed for an individual to be deemed a person in breach of employment standards, and potentially liable for payment of outstanding minimum entitlements. With Ms Tubby's consent a determination on her claims was adjourned whilst the Court of Appeal determined the relevant legal issue. It has since recently issued the

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<sup>3</sup> Email dated 11 June 2020.

<sup>4</sup> Email dated 22 June 2020.

<sup>5</sup> NZ Companies Office, Companies Register.

<sup>6</sup> See *Tubby v Mohammed* [2020] NZERA 512, issued on 9 December 2020

<sup>7</sup> Ms Mohammed is recorded as accepting a NZ CourierPost *TracknTrace* package delivered on 14 April 2021. The package contained a copy of the applicant's statement of problem and a Notice of Investigation setting out the date, time and location of the Authority's investigation meeting.

<sup>8</sup> Pursuant to cl 12 of Schedule 2, Employment Relations Act 2000.

judgement *A Labour Inspector v Southern Taxis Ltd* which has informed the Authority's approach to this aspect of Ms Tubby's claims.<sup>9</sup>

## Discussion

### *Who was Ms Tubby's employer?*

[25] Mr Jaswal's email dated 11 June 2020 rejected the suggestion that SR was Ms Tubby's employer. His response appears to rely on the ground that Ms Mohammed and Sandy were the people who arranged to have Ms Tubby work at the superette.

[26] For a several reasons I must reject Ms Jawal's approach on this matter. Firstly, his position reflects a misunderstanding as to the status and obligations of the SR as an incorporated company, in contrast to that of a company shareholder and/or a director. The Companies Act records at s 15 that;

A company is a legal entity in its own right separate from its shareholders and continues in existence until it is removed from the New Zealand registrar.

[27] The effect of the above section and taking into account the circumstances of the parties, and in particular that;

- SR is in the business of operating the superette.<sup>10</sup>
- Ms Tubby worked at the superette.
- The calculation of wages for the work performed by Ms Tubby at the superette is recorded in payslips. Each payslip was generated by SR and each refers to SR as the "pay point".
- SR's bank statements further reflect monies recorded into the statements as "wages", deposited from SR's account to Ms Tubby's.

[28] I find it more likely than not that Ms Tubby was employed by SR as an entity separate to its shareholders or directors. Further, there is nothing in the statement in reply to indicate SR did not consider it was Ms Tubby's employer, noting that document was accompanied by time sheets said by SR to record when Ms Tubby worked for it, payslips which set out the quantum and timing of wages paid by SR to her, and bank statements reflecting payments characterised as "wages" to Ms Tubby. Moreover, the statement in reply advised there had been a written casual employment agreement between SR and Ms Tubby, albeit it said that

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<sup>9</sup> *A Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705 [20 December 2021]

<sup>10</sup> The Companies Register records SRNZ as a Diary/Superette operation.

document had been inadvertently discarded following Ms Tubby's resignation. All of this material strongly suggests SR regarded Ms Tubby as an employee.

[29] Further, whilst payment of wages by a particular company to an employee does not irrefutably mean that entity is an employee's employer, it is a persuasive factor in this matter. The payment of wages together with evidence that Ms Tubby was undertaking SRNZ's business activity on its premises, alongside the way SR characterised the relationship between them supports a finding that SR was Ms Tubby's employer. I am satisfied SR was the entity that employed Ms Tubby in March 2018.

[30] Next, Mr Jaswal's correspondence to the Authority says Ms Tubby's employment did not carry over when he took over the superette on 11 June 2018. Again, this assertion does not sit comfortably with SRNZ's own documentation whereby, at least for the month after Mr Jaswal's appointment as a director of SRNZ, Ms Tubby continued to work at the superette, as demonstrated by timesheets which are said to record her hours of work, as well as payslips and banks statements which respectively reflect wages being earned and paid over this timeframe.

[31] SR continues to be registered on the Companies Register. There is no evidence that the identity of Ms Tubby's employer altered and I am satisfied SR remained Ms Tubby's employer for the duration of her employment at the superette until she resigned in July 2018.

***Was Ms Tubby a permanent or casual employee?***

[32] In its statement in reply SR says Ms Tubby was a casual employee who worked limited hours. In this way I understand SR to refute Ms Tubby's assertions regarding how her claims emerged, and in particular the number of hours she says she worked.

[33] To assess whether Ms Tubby was a casual or permanent employee the law requires the real nature of the relationship between the parties to be examined. The law recognises the true nature of an employment relationship can change over time.<sup>11</sup> Relevant to this application I need to examine whether Ms Tubby's work pattern was intermittent and unpredictable or consistent and regular.<sup>12</sup>

[34] I need to note I have some doubts about the genuineness of the weekly timesheets that were attached to the statement in reply which are said by SR to reflect Ms Tubby's working

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<sup>11</sup> *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225

<sup>12</sup> *Barnes v Whangarei RSA (Inc)* [1998] ERNZ 626

hours. This is because Ms Tubby's unchallenged evidence is that it was not until SR lodged its reply to her claim that she first viewed the time sheets. I accept her testimony that she did not fill in time sheets. It follows that SR must have completed these. Even if I were to accept the accuracy of the time sheets, they do not assist SR's assertions that Ms Tubby was a casual employee.

[35] SR's time sheets reflect Ms Tubby as routinely working Monday to Friday inclusive. They also record she worked most Saturdays and, from time to time, also on Sundays. For the first 5 weeks' Ms Tubby is recorded as working (approximately) 10 hours each week and thereafter 20 hours per week (or thereabouts). Whether it be a 10 or 20 hour week, over each of these timeframes Ms Tubby's attendance at work was regular and predictable with the timesheets recording she would work either 1 to 2 hours early in the morning and with a break in between, a further 1 or 2 hours in the afternoon.

[36] If SRNZ's records are to be believed Ms Tubby undertook a regular pattern of work for the 4 months' (or so) that SR says she was employed by it. It may be that SR mistakenly perceives part-time employment as being the same as casual employment, but part-time work by an employee does not mean the employee is a casual worker. I find Ms Tubby's shift pattern was sufficiently consistent and regular that I am bound to conclude her employment with SR created mutual expectations of ongoing employment and was permanent.

[37] Setting aside the above factual finding, in any event I have no grounds on which to reject Ms Tubby's testimony that her hours of work were much greater than those set out in the time sheets SR forwarded to the Authority. Having accepted Ms Tubby's evidence concerning her hours and pattern of work, I must find she was an integral necessity to the operation of the business and not a casual employee.

[38] Finally, the Holidays Act allows holiday pay entitlement to be included alongside the payment of wages for work undertaken if the employee is a casual worker.<sup>13</sup> This is because the nature of the employment relationship means there can be no expectation on the employer to provide the employee with further work, nor is the employee obliged to accept it if offered. In this case Ms Tubby was paid her holiday pay at the end of her employment which tends to suggest the relationship was not regarded as casual by SR.

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<sup>13</sup> Holidays Act 2003 at s 28(1)(a)(ii).

[39] Ms Tubby was a permanent employee of SR.

***Is Ms Tubby owed monies?***

Wages

[40] Ms Tubby alleges there is a shortfall between the sum of wages paid to her by SR, and the sum she should have been paid in wages for all hours worked.

[41] Section 130 of the Employment Relations Act 2000 requires an employer to hold specific information in respect to each employee which meets the requirements of s 130 of the Act to form a wage and time record that is easily accessed. Similarly, the employer must also hold a holiday and leave record for each employee.<sup>14</sup> Section 132 of the Act then provides that where the employer fails to keep or provide an employee's wage records, the Authority may accept the employee's wage claim unless the employer can prove it is incorrect.

[42] I have already indicated that I have doubts about the accuracy of SR's records. Via her representative, Ms Tubby points to a number of discrepancies between the various documents SR forwarded to the Authority. By way of example, timesheets for the week ending 13 May 2018 and 17 June 2018 were not provided. Monies were deposited into Ms Tubby's account on 21 May 2018, purportedly for the week ending 13 May 2018.<sup>15</sup> A subsequent timesheet for the following week (ending 20 May 2018), also records that the wages for this period were paid on 21 May 2018. There is a similar pattern for the week ending 17 June 2018.<sup>16</sup> In each instance the amount deposited appears to be insufficient to remunerate hours of work performed over a fortnight, even if I accept Ms Tubby worked the number of hours SR purports. Notably, no payslip corresponding to the week ending 13 May or 17 June was provided. There are several further timesheets that assert payment for the hours of work recorded (in the time sheet) and when the payment is made. But the bank statements do not reflect wages being paid on several of the dates asserted.<sup>17</sup>

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<sup>14</sup> Sections 81 and 83 of the Holidays Act 2003.

<sup>15</sup> Handwriting alongside the material entry date of 21 May 2018 contained in SRNZ's bank statement records the payment was for wages ending 13 May 2018.

<sup>16</sup> A subsequent time sheets for the week ending 24 June 2018 records payment for wages over this period were paid on 27 June 2018.

<sup>17</sup> See for example time sheets for weeks ending 26 May and 2 June 2018 both of which contain statements the corresponding wages will be paid on 5 June 2018 compared to a bank statement reference that wages ending 3 June were paid on 13 June 2018.

[43] Ms Tubby also points to a range of examples where the total hours recorded on a time sheet for a particular pay period do not match the corresponding payslip. This is particularly evident in the payslips for the weeks ending 1, 8, and 15 April and 6 May 2018, where the quantity of hours in the timesheet appear to have been rounded in such a way so as to result in a payment of \$149.80 (net). In these instances Ms Tubby says her hours of work were not reflected in the payslips, but rather, they were manufactured by SRNZNZ after the event to create a paper trail to support its response to her claims.

[44] Moreover, each time sheet requires both the employee and employer to sign a declaration that the hours of work recorded in the timesheet are correct. This portion has not been signed by either party in any of the timesheets furnished to the Authority. Ms Tubby similarly says she was never provided with a payslip. As with the time sheets she says she first sighted these on receipt of SRNZNZ's statement in reply.

[45] The disparity between the information recorded in the timesheets and corresponding payslips leads me to conclude neither set of documents can be regarded as accurate, and I agree they are likely to have been fabricated by SRNZ, as Ms Tubby suggests.

[46] It is further clear the timesheets, payslips and bank statements documents do not individually or collectively meet with the requirements of a wage and time record as required by s 130(1)-(1D) of the Act.

[47] Applying s 132 of the Act, Ms Tubby is entitled to the difference between what she was paid and what she ought to have been paid. I accept her calculations and find she is owed \$8,198.46 (gross) in unpaid wages.

#### Public holidays

[48] Ms Tubby claims she is owed payment for two public holidays: Anzac Day (on Wednesday 25 April 2018) and Queen's Birthday (observed on Monday 4 June 2018).

[49] SRNZ's statement of reply reports Ms Tubby did not work either of these days and is therefore not entitled to payment. SRNZ's appraisal as to its obligation concerning public holidays is incorrect. Section 49 of the Holidays Act 2003 provides;

#### **49 Payment if employee does not work on a public holiday**

If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay or average daily pay for that day.

[50] Ms Tubby regularly worked Mondays and Wednesdays and I am satisfied that both these days would have been an otherwise working day for Ms Tubby, but for each public holiday.<sup>18</sup> Ms Tubby is owed \$307.49 (gross) in public holiday pay corresponding to Anzac Day and Queen's Birthday in 2018.<sup>19</sup>

Annual holiday pay

[51] Where an employee's employment ends and the employee has not yet worked for 12 months, the employer must pay the employee 8% of the employee's gross earning as annual holiday pay, less any payments made for any annual holidays taken in advance or any holiday pay made on a pay-as-you-go basis.<sup>20</sup> There is no evidence Ms Tubby took paid holiday leave over the course of her employment.

[52] After Ms Tubby's employment ended SR paid Ms Tubby the sum of \$603.00 in holiday pay. Surprisingly, the payment significantly exceeds Ms Tubby's entitlement to holiday pay if SR recorded hours of work performed were correct.

[53] In the absence of any explanation as to how SR calculated Ms Tubby's entitlement to holiday pay, I accept the submission that the sum paid to Ms Tubby as holiday pay tends to further undermine the accuracy of the time sheets and payslips, and lends support to Ms Tubby's claim that she worked much greater hours than SRNZ's records assert.

[54] I have already accepted Ms Tubby's personal diary provides a reliable appraisal of the hours she worked and therefore the quantum of wages she should have been paid.<sup>21</sup> Based on that analysis I find Ms Tubby is owed a further \$340.87 gross in annual holiday pay.<sup>22</sup>

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<sup>18</sup> Excluding the day on which Queen's Birthday was observed, there were 13 Mondays between 27 March 2018 and 6 July 2018, the period Ms Tubby says she worked for SRNZ. She worked 11 of these. Ms Tubby worked 12 out of 14 Wednesdays that occurred over the course of her employment. \$153.14 in wages for Anzac Day and \$154.35 for Queen's Birthday. These sums were calculated in accordance with s 9A of the Holidays Act to ascertain Ms Tubby's "average daily pay" at the time the entitlement was due.

<sup>20</sup> Holidays Act 2003, s 23(2).

<sup>21</sup> Ms Tubby's personal diary records she worked 697.05 hours over the course of her employment. On this basis her gross earnings should have been \$11,798.32 (taking into account that Ms Tubby's rate of pay traversed two minimum wage orders of \$15.75 per hour and \$16.50 per hour). 8% of Ms Tubby's gross earnings of \$11,798.32 is \$943.87. \$340.87 is the difference between the \$603.00 she was paid as holiday pay and the sum she should have been paid.

***Who is liable for payment of the above sums?***

[55] SRNZ, as Ms Tubby’s employer, is liable for the payment of \$8,198.46 (gross) in wages, \$307.49 (gross) for public holidays, and annual holiday pay of \$340.87 which equates to \$8,846.82 (gross) in total. It is appropriate that interest be awarded on that sum for the period beginning on 10 July 2018 when Ms Tubby effectively resigned and the last possible date in which monies owed were due, until the date of the Authority’s first investigation meeting on 29/06/2020. This sum is \$567.92.<sup>23</sup> In total SR must pay \$9,414.74 (gross) to Ms Tubby.

[56] The above finding does not necessarily bring these matters to an end however. To the extent SR may be unable to pay the above sum, Ms Tubby seeks orders that each of the directors become personally liable for the debt.

[57] Sections 142W, and 142Y of the Act set out limited circumstances in which a director of a company may be deemed personally liable for monies owed to an employee if the default was a breach of “employment standards”. The term “employment standard” is defined at s 5 of the Act, and, amongst other things, concerns minimum entitlements and payments under the Holidays Act, and minimum entitlements under the under the Minimum Wage Act.

[58] Section 142W of the Act defines who may be a “person involved in a breach” of an employment standard. I have set out the provisions relevant to this case, as follows:

- (1) In this Act, a person is involved in a breach if the breach is a breach of employment standards and the person—
  - ...
  - (c) has been in any way, directly or indirectly, knowingly concerned in or party to, the breach; or
  - ...
- (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.
  - (a) a person occupying the position of a director of a company if the entity is a company:
  - ...

[59] Section 142Y(1) of the Act provides:

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<sup>23</sup> Pursuant to cl. 11, Schedule 2 of the Employment Relations Act in accordance with the Interest on Money Claims Act 2016.

- (1) A Labour Inspector or an employee may recover from a person who is not the employee's employer any wages or other money payable to the employee if—
- (a) there has been a default in the payment of wages or other money payable to the employee; and
  - (b) the default is due to a breach of employment standards; and
  - (c) the person is a person involved in the breach within the meaning of section 142W.

[60] Applying s 142Y(1) to this case, I have already established SR was in breach of its obligations to pay Ms Tubby's wages for all hours worked and to pay entitlement to public holiday and annual leave pay. These failings are a breach of employment standards. Subsections 142Y(1) (a) and (b) are established.

[61] The remaining critical issue is whether one or both of the directors of SR was "a person involved in the breach within the meaning of section 142W".

[62] In *A Labour Inspector v Southern Taxis Ltd*,<sup>24</sup> the Court of Appeal focused on the third limb of the test regarding whether a person was involved in a breach (at s 142W(1)(c)). The Court examined the level of knowledge required to be "*knowingly concerned in*" a breach and found:<sup>25</sup>

The level of knowledge required to establish liability for a person involved in a breach of employment standards under s 142W(1) of the Employment Relations Act 2000 is knowledge of the essential facts that establish the contravention of the employer.

[63] It cannot be that the directors may avoid a finding as to their involvement (respectively) in the established breaches by simply not attending the Authority's investigation. Assessing the information provided to the Authority I am satisfied it can be inferred by the conduct of each director that he or she knew of the essential facts that formed the breach, as follows.

[64] Firstly, the breaches in relation to the payment of minimum wages occurred throughout the length of Ms Tubby's employment, despite each director holding that position at separate times. I find it more likely that there must have been some agreement between the directors (at least at the time the directorship transferred from one to the other) to continue with the approach previously used whereby neither the way in which Ms Tubby's hours of work were

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<sup>24</sup> At n 9.

<sup>25</sup> Above at para. [62].

recorded, or the sum of wages paid, matched the work she performed in reality. Notably no explanation was given in response to Ms Tubby's assertion (contained in the statement of problem) that she did not fill out time sheets. I have already found the time sheets and pay slips produced by SR misrepresent the hours Ms Tubby's worked and the wages she was owed, and were fabricated. My view that there has been collaboration between the directors is indirectly reinforced by the content of the statement in reply itself. That document spanned the entirety of Ms Tubby's employment, despite Mr Jaswal's appointment as a director occurring several months after that event. Details as to how the employment relationship between Ms Tubby and SR began could not have been known to Mr Jaswal without input from Ms Mohammed or Sandy on her behalf.

[65] I have not been persuaded by the narrative recorded in the statement in reply and, on balance find it more likely that both directors were very much aware Ms Tubby was not being paid for all the hours she worked. It follows, both directors were a person involved in a breach of an employment standard. That breach resulted in further breaches of employment standards concerning Ms Tubby's entitlement to, and payment of, holiday pay. Ms Mohammed's misapprehension (reported by Mr Jaswal) as to an employee's right to be paid for a public holiday if that day would otherwise have been a working day for the employee, does not excuse her breach of this employment standard. I am further mindful that each director must be regarded as the controlling mind of SR for the duration of their individual appointments as a director and the person who was responsible for ensuring SR complied with its legal obligations including employment standards over the period that each was a director. .

[66] To the extent SR is unable to pay the total sum ordered at para. [55] above, Ms Mohammed and Mr Jaswal are personally liable for arrears caused by the default which became due for payment over the course of their (separate) directorships.<sup>26</sup>

### **Penalties**

[67] Ms Tubby seeks penalties against SR for its failure to:

- (i) supply a written employment agreement: - s 65 of the Act;
- (ii) provide compliant wage and time records:- s 130(2) of the Act;
- (iii) pay wages when they became due: - s 4 Wages Protection Act

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<sup>26</sup> Pursuant to s 142Y of the Act.

(iv) pay full entitlement to holiday pay: - s 23 of the Holidays Act.:

[68] I am satisfied each of these statutory obligations recorded above were breached by SRNZ.

[69] In assessing whether penalties should be imposed against SRNZ, and the quantum of any order, s 133A of the Act requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach, vulnerability of the victims and, finally, previous conduct.

[70] Notably section 133A does not limit the factors that may be relevant to an inquiry into penalties however and my assessment in this matter has been assisted by the four-step framework set out in *Borsboom v Preet PTV Ltd*,<sup>27</sup> which provides a methodology by which to appropriately quantify penalties to the material circumstances.

[71] Having considered the mandatory and common law considerations, I reach the following findings:

- (a) SR's actions in failing to pay Ms Tubby her entitlement to minimum wage for all hours worked undermined the Act's objective to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and the employment relationship.
- (b) The total penalty available in respect of the four breaches is \$80,000, with a maximum penalty of \$20,00 against SR for each breach.
- (c) There are several aggravating factors in this matter. The breach concerning payment of wages when due was intentional, ongoing, and can be viewed as significant. SR's action in this way has resulted in Ms Tubby losing the use of the wages and holiday pay at the time it was due, and it can be inferred SRg ained some financial advantage by retaining the use of the money. The failure to provide a written employment agreement and respond to requests for wage and time records has exacerbated the difficulties Ms Tubby has experienced in bringing her claim.
- (d) I am not aware of any other previous similar conduct by SRNZ.

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<sup>27</sup> See *Borsboom v Preet PTV Ltd* [2016] NZEmpC 143, at [151]

- (e) It is important that a penalty be set at a level where it deters employers from failing to adhere to their statutory obligations. Although SR remains on the NZ Companies Register, I must however also take into account that it is no longer conducting its business operations. Further, the recovery of the arrears of wages owed to Ms Tubby is likely to provide some restitution.

[72] A penalty order of \$4,000 is proportionate to the seriousness of the breaches; the harm occasioned by them, but is appropriate, taking into account the likely of the companies strained financial situation, and is just in all the circumstances.

### **Costs**

[73] Ms Tubby's claims have been successful. Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination is needed, the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the issue of this determination. From the date of service of that memorandum the respondent(s) have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

### **Summary of Orders**

[74] SR NZ Investments Limited, is ordered to pay to Denise Tubby, on or by 20 April 2022, the sum of \$9,414.74 (gross) in total, comprising:

- (i) minimum wages arrears of \$8,198.45;
- (ii) public holiday pay of \$307.49;
- (iii) annual holiday pay of \$340.87;
- (iv) interest on above sums of \$567.92.

[75] To the extent SR NZ Investments Ltd does not pay the total sum above because it is not able to, liability for the debt shifts to the directors. In these circumstances the payments recorded below at (a) and (b) must be made on or before 4 May 2022, as follows:

- (a) Ms Nadeem Mohammed is liable to pay \$7,449.04 (gross), comprising
  - (i) minimum wage arrears of \$6,696.59; and
  - (ii) public holiday pay of \$307.49

- (iii) Interest of 444.96<sup>28</sup>
  
- (b) Mr Jasbir Jaswal is ordered to pay \$1,961.02 comprising:
  - (i) \$1,501.86 for minimum wage arrears; and
  - (ii) \$340.87 in annual holiday pay arrears.
  - (iii) Interest of \$118.29.

[76] SR NZ Investments Ltd is further ordered to pay a penalty of \$4,000 to the Crown via the Authority for its breach of the statutory obligations set out at para. [67]. Payment is to be made on or before 4 May 2022.

[77] Costs will be determined in accordance with para. [73].

Michele Ryan  
Member of the Employment Relations Authority

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<sup>28</sup> Pursuant to the Interest on Monies Act, this sum accrued between 10 July 2018 and 29 June 2020 inclusive.