

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 287
3071952

BETWEEN	KASTHURI SITIA Applicant
AND	BANANA LEAF LIMITED First Respondent
AND	MANICKAM MUNIANDY Second Respondent
AND	BANANA LEAF 2019 LIMITED Third Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Graeme Ogilvy, advocate for the Applicant
No appearance for the First and Second Respondent
Shanti Devi Kila Sitia for the Third Respondent

Investigation Meeting: 24 June 2022 and 7 October 2022 at Wellington

Submissions Received: Received at investigation meeting

Date of Determination: 1 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant Kasthuri Sitia is the sister in law of Mr Muniandy, who was the shareholder and director of Banana Leaf Limited (BLL). She says that Mr Muniandy offered her employment with BLL but before doing so, required her to pay what she says was an unlawful payment, namely the sum of \$71,387.53 (the payment). Ms Kasthuri Sitia made the payment by transferring money to her mother’s account in New Zealand. She did so by selling her house in Malaysia and paid the money into her mother’s account because this is what Mr Muniandy instructed her to do.

[2] She understood that if she did not transfer the payment she would not have employment with BLL, would not be supported by that company in applying for a work visa, and would not be given a shareholding in BLL.

[3] Subsequently, Ms Kasthuri Sitia received an invitation letter to work at BLL which was used to support her work visa application. On 9 February 2018 she signed an employment agreement with BLL which provided for 40 hours work per week.

[4] It had also been raised that she would purchase shares in BLL and she remained under the impression there would be some formal agreement in that regard.

[5] On 13 April 2018, Ms Kasthuri Sitia was granted a working visa which also recorded that she was to be paid not less than \$20.65 per hour. She worked for BLL for some 33 weeks. During this time no agreement was reached in respect of the share transfer, indeed there was no agreement regarding the amount she was to pay. She worked 42 hours a week throughout the 33 weeks but noted she was not being paid properly and payment was irregular. She asked Mr Muniandy what was happening with her pay and because there was no proper response, she became impatient and concerned about outstanding wages.

[6] Throughout her employment she was not provided with any payslips and on 16 July 2018 she moved out of Mr Muniandy and her sister's home.

[7] By May 2018, Ms Kasthuri Sitia had also become concerned that Mr Muniandy was steadily withdrawing the payment from her mother's account without any agreement being formalised and was using the money for his own purposes. She did not know for certain whether or not this was authorised by her mother.

[8] Over the next four months she continued to raise concerns regarding outstanding wages and by 30 November 2018, she felt her relationship with her sister and brother in law was so strained mainly because there was no agreement regarding the payment and wages were not being paid, that she felt a need to confront Mr Muniandy about the problems. The discussion became heated and resulted in Mr Muniandy telling her to leave BLL.

[9] Ms Sitia said she was extremely upset and was left to walk home. She was crying the entire time and felt stressed and panicked. She continued to contact Mr Muniandy both by email and text asking that he address unpaid wages and holiday pay. She received no response.

[10] Finally on 25 January 2019 she received a letter alleging she had abandoned her employment and had effectively resigned. She said she felt so embarrassed and ashamed to tell her family back in Malaysia about what had happened.

[11] Ms Kasthuri Sitia says she is owed the following:

- (a) \$28,620.90 gross less the net payment she received during her employment of \$7,330.50;
- (b) Unpaid holiday pay of \$2,289.67;
- (c) Unpaid employer KiwiSaver contributions of \$775.00;
- (d) \$10,000 compensation for humiliation, injury to feelings and loss of dignity;
- (e) Costs.

[12] Ms Kasthuri Sitia initially brought her claims against BLL and Manickam Muniandy as a director and a person involved in any breach of employment standards. Mr Muniandy was joined because he was the sole shareholder and director of BLL.

[13] During the investigation it was apparent that BLL was no longer trading. However another company, Banana Leaf 2019 Limited (BLL 2019), had been set up by Ms Kasthuri Sitia's sister, Shanti Sitia, as the sole shareholder and director. Ms Kasthuri Sitia believed that this company was in fact a phoenix company and had simply taken over the business. It had been set up for the sole purpose of thwarting her claims.

[14] BLL 2019 was therefore joined to the proceedings on the direction of the Authority and the matter was heard on 7 October 2022. BLL 2019 Limited (BLL 2019) was represented at the hearing by its shareholder and director Shanti Sitia, the Applicant's sister.

[15] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all the evidence and submissions received.

[16] This determination has been issued outside the timeframe set out in s 174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

[17] In the Authority's investigation, evidence was given by Kasthuri Kila Sitia her husband, Ponnusamy Prabakaran, and by Shanti Sitia on behalf of BLL 2019. There was no appearance by anyone on behalf of BLL nor Mr Manickam Muniandy. The witnesses all gave evidence either by oath or affirmation. The following issues were identified:

- (a) Was Kasthuri Sitia unjustifiably dismissed from her employment with BLL?
- (b) If so, was Manickam Muniandy a person involved in the breach in respect of s 142W of the Act?
- (c) Is BLL 2019 an independent entity or was it simply a manifestation of BLL and therefore responsible for any payments due to Kasthuri Sitia?
- (d) Was the payment made by Kasthuri Sitia at the request of Manickam Muniandy an illegal premium?
- (e) If Kasthuri Sitia was unjustifiably dismissed, what remedies should flow?

The evidence and analysis

Was the payment an illegal premium paid to secure employment?

[18] Kasthuri Sitia gave evidence that in 2017, Mr Muniandy raised the possibility of her purchasing a 50 percent share in BLL. At this stage she was still living in Malaysia. Mr Muniandy explained that BLL needed investment to be able to afford to expand before it would have the ability to employ her. She says he made it clear to her that her savings would be required if she was to be employed by BLL.

[19] In August 2017, Kasthuri Sitia arranged a payment of some \$71,387.53 to her mother's account. This was on the instruction of Mr Muniandy.

[20] Kasthuri Sitia says she was required to show both her sister and brother in law that she was serious about gaining employment at BLL and in investing and purchasing shares in BLL. As stated above, the money was paid into the mother's account on the express instruction of Mr Muniandy. She was told that if she banked it into her personal account, Immigration NZ may not accept her Visa application.

[21] By the end of August 2017, Kasthuri Sitia became aware that her sister Shanti Sitia and brother in law Mr Muniandy had begun to make withdrawals from her mother's account. She became concerned, because the withdrawals were made without consent from either herself and to the best of her knowledge, her mother.

[22] On 9 February 2018, Kasthuri Sitia signed an employment agreement with BLL. She says, however, that no agreement was reached regarding the sale of shares.

[23] Kasthuri Sitia's claim faces two immediate barriers, first, the payment was not made to Mr Muniandy but rather to her mother. The mother did not give evidence before the Authority and I have no real way of ascertaining whether or not any deductions made from her account to Mr Muniandy and Ms Shanti Devi were authorised or not. In any event, the payment was not paid to BLL and at least on the face of it, neither BLL nor Mr Muniandy had the necessary control to make the withdrawals.

[24] Secondly, it seems more likely than not that the purpose of the payment was to enable Kasthuri Sitia to purchase shares in BLL and accordingly, was not a payment paid to secure employment but rather a payment to purchase shares in the business.

[25] While Mr Muniandy may well be guilty of some breach of a commercial agreement, the payment was not a premium paid to secure employment. There is no evidence that Kasthuri Sitia's mother could not have withdrawn the money herself, or indeed transferred it back to her daughter on request.

The status of Banana Leaf 2019 Limited

[26] Kasthuri Sitia was concerned that BLL 2019 was a phoenix company arising from the ashes of Banana Leaf Limited which had ceased trading. The concern was that the new company had simply been set up to defeat any claim that Kasthuri Sitia might have had against it. As a result of this, Banana Leaf 2019 Limited was joined as the third respondent.

[27] Ms Shanti Sitia, the sole director and shareholder of BLL 2019, gave evidence on oath and also produced documentation showing how she came to be the sole shareholder and director of the new entity. Ms Shanti Sitia said that her relationship with Mr Muniandy had broken down and that he was no longer in New Zealand. She said he did offer to sell the business formerly undertaken by BLL to her for a set sum. She arranged the financing, took legal advice and as a result set up a new company, Banana Leaf 2019 Limited to purchase the business.

[28] The evidence before the Authority showed that this transaction was an arm's length transaction. Banana Leaf 2019 Limited produced evidence that it purchased the business and there was no commercial link between it and Banana Leaf Limited. The sale and purchase of the old business was a bona fide commercial transaction, for valuable consideration.

Was Kasthuri Sitia unjustifiably dismissed by Banana Leaf Limited

[29] Kasthuri Sitia came to New Zealand in February 2018 and stayed with Mr Muniandy and her sister, Shanti Devi. She says it was during this trip that BLL offered her employment and agreed to support her in applying for an essential skills work visa. It was agreed that once her visa application had been processed and approved she would start employment with BLL, working full time as a Malaysian Chef. She signed an employment agreement on 9 February 2018.

[30] The agreement provided that she was to work for BLL for 40 hours a week. The agreement was silent in respect of the sale of shares.

[31] On 13 April 2018 Kasthuri Sitia obtained a working visa which amongst other things recorded that she was to be paid no less than \$20.65 per hour. Once the work visa was granted, she commenced working for BLL.

[32] The employment lasted 33 weeks. Kasthuri Sitia says she worked for 42 hours a week for all of those weeks but noticed she was not being paid properly and when payments were made they were irregular. She was not provided with any payslips and although she says she raised issues both verbally and via text with BLL through Mr Muniandy, she was not paid outstanding wages.

[33] By 30 November 2018, the relationship with BLL and Mr Muniandy and indeed Shanti Devi had become strained. There were of course issues regarding the amount paid to the mother's account and I am told, major concerns regarding unpaid wages. The discussion became heated and on 30 November 2018, Kasthuri Sitia was told to leave BLL. 30 November 2018 was her last day of work. I accept that this was a dismissal.

[34] BLL has not engaged in the Authority's process and has not given evidence. Accordingly I am entitled to accept Kasthuri's evidence regarding unpaid wages. She tells me she should have received \$28,620.90 but received instead some \$7,330.50. She has also claimed the sum of \$2,289.67 on account of unpaid holiday leave.

[35] Kasthuri Sitia also gave evidence regarding the effect the dismissal had on her. She says she was embarrassed and ashamed to tell her family what had happened and felt she looked like a failure.

[36] There was no process attached to Kasthuri Sitia's dismissal. There has been no attempt by BLL to justify it. Kasthuri Sitia was unjustifiably dismissed and is entitled to remedies.

Was Manickam Muniandy a person involved in a breach in terms of s 142W of the Act?

[37] Mr Muniandy was the sole director and shareholder of BLL. There has been a breach of employment standards by BLL and Mr Muniandy was an officer of that entity.

[38] The evidence before the Authority shows that BLL ceased trading and sold its business. BLL is not in a position to pay the arrears in wages or other money, and its default is due to a breach of employment standards. Mr Muniandy is a person involved in the breach within the meaning of s 142W of the Act. Leave was given to Kasthuri Sitia to recover wages and holiday pay which remain unpaid.

Summary and orders

[39] Kasthuri Sitia was unjustifiably dismissed by Banana Leaf Limited. She is entitled to unpaid wages of \$21,290.40 gross together with holiday pay of \$2,289.67. She has claimed \$10,000 compensation for humiliation, loss of dignity and injury to feelings. I consider that sum reasonable in all the circumstances. Banana Leaf Limited is ordered to pay Kasthuri Sitia within 14 days:

- (a) The sum of \$21,290.40 gross;
- (b) The sum of \$2,289.67 gross on account of holiday pay;
- (c) The sum of \$10,000 compensation for humiliation, loss of dignity and injury to feelings.

[40] Manickam Muniandy is a person involved in a breach of employment standards. Accordingly, as Banana Leaf Limited is not in a position to meet payment of the unpaid wages and holiday pay, Manickam Muniandy is ordered to pay the sum of:

- (a) \$21,290.40 gross, being unpaid wages;
- (b) \$2,289.67 being unpaid holiday leave.

Costs

[41] 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 on costs is needed, Kasthuri Sitia may lodge, and then should serve, a memorandum on costs within 14 days of the

date of issue of this determination. From the date of service of that memorandum Banana Leaf Limited would then 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.

[42] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.

Geoff O'Sullivan
Member of the Employment Relations Authority