

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2022] NZERA 436  
3166601

BETWEEN                      LALIT BHAMBHANI  
Applicant

A N D                              UNDERGROUND  
HOSPITALITY LIMITED  
Respondent

Member of Authority:        Nicola Craig

Representatives:              Nathan Santesso, advocate for the applicant  
Matthew Blomfield and Olivia Hyslop, advocates for the  
respondent

Investigation Meeting:        On the papers

Submissions (and other        2 and 17 August 2022 for the applicant  
information) received:        16 August 2022 for the respondent

Date of Determination:        6 September 2022

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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- A.     Grady Elliot is joined as second respondent to this proceeding.**
- B.     Costs are reserved.**

**What is the employment relationship problem?**

[1]     Lalit Bhambhani undertook bartending work for Underground Hospitality Limited (Underground) in Auckland.

[2]     Mr Bhambhani believes that Underground did not provide him with the rate of pay and hours of work they agreed on. He seeks reimbursement of wages and various penalties. Underground sees itself as having assisted Mr Bhamhbani when he was

under immigration pressure. It denies breaching its statutory or employment agreement obligations to Mr Bhambhani.

### **How has the Authority investigated to this point?**

[3] Mr Bhambhani's original statement of problem from March 2022 named only Underground as respondent. Mr Elliot was mentioned in the description of facts but not named as a party nor were remedies sought against him.

[4] An amended statement of problem lodged in May this year named Mr Elliot was an additional respondent. The Authority was asked to determine whether Mr Elliot was involved in a failure to provide minimum (employment) standards and breaches of Mr Bhambhani's employment agreement. Underground was recognised to be the employer.

[5] The Authority took the amended statement of problem as including an application to join Mr Elliot as a party to the proceeding. A case management conference was held with the representatives. There was strong objection by Underground to Mr Elliot being joined as a party.

[6] At the conference the parties were currently amenable to the joinder question being dealt with on the papers. I indicated that they were able to return to the Authority if, after having seen material to be provided, an in-person investigation meeting seemed necessary.

[7] Submissions were provided by both parties, along with unsworn witness statements from Mr Bhambhani and Underground's sole director and shareholder Wayne Clark. A third statement of problem was also lodged.

[8] There was no indication from the parties that they then saw an in-person investigation as needed, so I have proceeded to determine the joinder question on the papers.

### **Should Mr Elliot be joined?**

[9] The Authority is able to join a party in order to more effectually dispose of a matter according to the substantial merits and equities of the case.<sup>1</sup>

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<sup>1</sup> The Act, s 221.

[10] Both parties' submissions moved from the question of whether Mr Elliot should be an joined to whether a claim should be upheld against him. Those latter submissions will be more relevant at the next stage of the process. For the moment all that is considered is whether there is sufficient basis to join Mr Elliot as a party to this proceeding.

[11] Mr Elliot is Underground's operations manager. According to Companies Office records Mr Elliot was a director of Underground for some years until his directorship ceased on 1 July 2020.

[12] The claim regarding Mr Elliot appears to be founded on him being the main person from Underground to interact with Mr Bhambhani about significant work arrangements. However, elements in Mr Bhambhani's witness statement hint at the prospect of him suggesting Mr Elliot was his employer. This is despite three statements of problem clearly identifying Underground as his employer. I focus on the two remedies sought regarding Mr Elliot in the latest statement of problem.

#### *Employment agreement*

[13] Mr Bhambhani seeks that a penalty be imposed on Mr Elliot for involvement in breaches of the employment agreement by not providing agreed work hours or paying the agreed pay rate.

[14] Any person who incites, instigates, aids or abets a breach of an employment agreement is liable to a penalty, under a 134(2) of the Employment Relations Act 2000 (the Act). Clearly that covers people who are not the employer. Penalties against a party to the employment agreement are covered separately under s 134(1).

[15] Underground accepts that Mr Elliot was involved in interactions with Mr Bhambhani regarding work, including about his employment agreement, work hours and pay. Without in any way making a finding about whether there was a breach or what Mr Elliot's exact involvement was, on the basis of the available undisputed material, it is feasible that Mr Elliot could be found to have been involved in steps which bring s 134(2) into play.

### *Employment standards*

[16] The other resolution sought regarding Mr Elliot is a declaration that he was involved in a failure to provide minimum employment standards. I take this as a claim under s 142W of the Act that Mr Elliot was a person involved in a breach of employment standards. Mr Bhambhani asserts that Underground failed to provide wages and time records as per s 130(2) of the Act, pay minimum wages as per s 6 of the Minimum Wage Act 1983 and pay wages when due as per s 4 of the Wages Protection Act 1983. These are all employment standards matters.<sup>2</sup>

[17] Submissions for Mr Elliot emphasise that he is not a director of Underground. It appears that Mr Elliot was not an Underground director for almost a year prior to the start of the relevant period of Mr Bhambhani's employment.

[18] The assessment at this stage is not whether Mr Elliot was a person involved as defined in s 142W of the Act. Rather it is whether there is sufficient basis for him to be a party to this proceeding based on the allegation regarding s 142W.

[19] There are several steps in a s 142W assessment:

- Under s 142W(1) various actions connected with breaches are described, such as aiding and abetting a breach.
- Where a breach is by an entity such as a company, s 142W(2) requires the person to be an officer of the entity.
- There is further definition in subsection (3) of those to be treated as officers. This includes directors and "any other person occupying a position" in the company "if that person is in a position to exercise significant influence" over its "management or administration".

[20] The unsworn statements conflict regarding the level of Mr Elliot's authority. Mr Bhambhani describes his impression of Mr Elliot acting like he had absolute authority. In contrast, Mr Clark describes Mr Elliot's role as including staff relationships but indicates that Mr Elliot does not have authority to make decisions for the business or pay staff. Further, Mr Elliot does the paperwork for payroll but Mr Clark reviews it and makes payment. The statement refers to Mr Clark not being aware

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<sup>2</sup> The Act, s 5 definition of employment standards.

of Mr Elliot acting outside his authority and acting in a capacity that would indicate he was a director.

[21] At this point I do not need to decide whether Mr Elliot comes within the definition of an officer. The extent of Mr Elliot's authority will need to be examined later when, in association with any breach established, a decision is made about whether he was a person involved.

[22] On the available evidence Mr Elliot could be said to have sufficient involvement in at least the administration of Underground to be a party for the purposes of s 142W.

### *Conclusion*

[23] I am satisfied that there is sufficient basis for Mr Elliot to be a party here. Under s 221(a) of the Act I order that Grady Elliot be joined as second respondent to this proceeding.

[24] The question of whether Mr Elliot is to lodge a statement in reply will be discussed at a case management conference to be arranged shortly by the Authority officer.

### **Costs**

[25] Costs are reserved and will be determined, if necessary, with costs regarding the determination of remainder of the issues.

Nicola Craig  
Member of the Employment Relations Authority