

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 151
5635413

BETWEEN A LABOUR INSPECTOR OF THE
 MINISTRY OF BUSINESS,
 INNOVATION AND
 EMPLOYMENT
 Applicant

AND VINOD KUNDU
 Respondent

Member of Authority: M B Loftus

Representatives: Aaron McIlroy, Counsel for Applicant
 No appearance for Respondent

Investigation Meeting: 8 December 2016 at Wellington

Submissions Received: At the investigation meeting

Determination: 8 December 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, a Labour Inspector of the Ministry of Business, Innovation and Employment (the Inspector), seeks authorisation under Section 234 (now repealed) of the Employment Relations Act 2000 (the Act) to bring an action against the respondent, Vinod Kumar, for the recovery of minimum wages and holiday pay.

[2] Mr Kundu's initial response was the claim could not proceed due to the repeal of s 234. When advised the Acts' transitional provisions appeared to allow the application¹ Mr Kundu expressed the view it was unfair and he was being victimised.

¹ Schedule 1AA at 3(1) and 3(7)

Non-appearance of the Respondent

[3] Mr Kundu was neither present nor represented at the investigation meeting. The absence was neither notified nor explained, at least by Mr Kundu. That raised the question of whether or not I proceed in his absence.

[4] The absence does not come as a surprise as the business which accrued the debts to which this application is said to apply² and of which Mr Kundu was the sole Director and Shareholder is now, at the suit of the Inland Revenue Department, in liquidation. There is strong evidence Mr Kundu has, since the liquidation, left New Zealand and is now in India.

[5] That said Mr Kundu participated in an early telephone conference regarding the claim and the notice of investigation meeting was sent to the address he advised as that which should be used for the purpose of service.

[6] In the absence of a Statement In Reply and applying Regulation 16(3)(a)(ii) of the Employment Relations Authority Regulations 2000 I am satisfied service has been properly affected.

[7] Furthermore copies were also taken to the address by a document server though not delivered to Mr Kundu as he had by that time departed to places unknown by the new occupant. Finally I note Mr Kundu is well known to the Authority. Despite past problems with physical addresses and a penchant for failing to participate meaningfully in the Authority's process he has always remained contactable by e-mail. A further copy of the notice of investigation meeting was, upon my instruction, sent to his e-mail address so applying Regulation 16(3)(a)(vi) I can again say I am satisfied service has been affected.

[8] The Notice of Investigation Meeting includes advice that should the respondent fail to attend the Authority may, without hearing from the respondent, proceed and issue a determination in favour of the applicant.³

[9] I am satisfied Mr Kundu is, or at least should be, aware of the investigation meeting and the consequences of non-attendance. The Inspector has made it clear she wishes to proceed. She is entitled to do so and Mr Kundu cannot be allowed to avoid

² Hutt City Veterinary Care Limited (in Liquidation)

³ Note 2 to Form 8 of the Employment Relations Authority Regulations 2000

the claim by running away as he has done. In the circumstances I consider it appropriate to continue.

Background

[10] As already said Mr Kundu was the sole director and shareholder of Hutt City Veterinary Care Limited (HCVC).

[11] In March 2015 and having received complaints alleging HCVC was failing to comply with minimum employment standards the Inspector commenced an investigation into it and an associated business, Upper Hutt Veterinary Care.

[12] The Inspector's investigation confirmed the alleged failures.

[13] On 17 September 2015 the Inspector served an Improvement Notice⁴ addressing HCVC's failure to pay both the minimum wage and annual holiday pay to six employees. A seventh was later added. The total involved is \$16,211.64.

[14] On 19 October 2015 Mr Kundu lodged an objection to the improvement notice with the Authority.⁵ The objection was unsuccessful and HCVC was ordered to comply and make the requisite payments no later than 29 April 2016.⁶

[15] Notwithstanding the objections failure neither the improvement notice nor the Authority's order has been complied with. The monies sought by the Inspector remain outstanding and HCVC is now in liquidation.⁷

[16] HCVC's debts currently total approximately \$260,000 though the amount is likely to increase. Of this some \$92,000 is owing to the Inland Revenue Department and this includes money deducted from and allegedly being forwarded on behalf of those the Inspector represented such as PAYE, Student loans and Kiwisaver contributions (both employee and employer contributions).

[17] Also included and in addition to the \$16,211 sought by the Inspector is another \$18,150 or so in unpaid wages owing to other employees she does not represent.⁸

⁴ Section 223D of the Act

⁵ Section 223E of the Act

⁶ *Kundu v Smith* [2016] NZERA Wellington 45

⁷ *First Liquidators' Report* dated 30 August 2016 and subsequent telephone conversations between the Liquidator and myself

⁸ For example see *Barr v Kundu and Hutt City Veterinary Care Limited* [2016] NZERA Wellington 54

Determination

[18] This is an application MBIE be allowed to pursue Mr Kundu for moneys owing as a result of the failure of his company, HCVC, to pay minimum entitlements.

[19] It is brought pursuant to s 234 of the Act. While now repealed the section continues to apply to conduct which occurred before its repeal on 1 April 2016. This is such conduct.

[20] The pertinent parts of s 234 read:

- (1) *This section applies in any case where a Labour Inspector commences an action in the Authority against a company to recover any money payable by way of minimum wages or holiday pay to an employee of the company.*
- (2) *Where, in any case to which this section applies, the Labour Inspector establishes on the balance of probabilities that the amount claimed in the action by way of minimum wages or holiday pay or both is, if judgment is given for that amount, unlikely to be paid in full, whether because—*
 - (a) the company is in receivership or liquidation; or*
 - (b) there are reasonable grounds for believing that the company does not have sufficient assets to pay that amount in full,—**the Authority may authorise the Labour Inspector to bring an action for the recovery of that amount against any officer, director, or agent of the company who has directed or authorised the default in payment of the minimum wages or holiday pay or both.*
- (3) *Where, in any action authorised under subsection (2), it is proved that the officer, director, or agent of the company against whom the action is brought directed or authorised the default in payment of the minimum wages or holiday pay or both, that officer, director, or agent is with the company (and any other officer, director, or agent of the company who directed or authorised the default in payment) jointly and severally liable to pay the amounts recoverable in the action and judgment may be given accordingly.*

[21] The leading case about how the section is to be applied is *Labour Inspector v Cypress Villas Limited and Barry Edward Brill*.⁹

[22] By previously dismissing Mr Kundu's s 223E application the Authority has effectively confirmed the arrears sought are owed.¹⁰ Applying *Cypress Villas* that means the issues yet to be determined are:

⁹ *Cypress Villas* [2015] NZEmpC 157

¹⁰ *Kundu v Smith* above n 6

- a. whether the amounts claimed are unlikely to be paid in full because the employer company is in liquidation; and
- b. whether the proposed respondent directed or authorised default in the payment of minimum wages and holiday pay; and
- c. Whether the applicant should be authorised to bring an action for recovery of minimum wages and holiday pay against the proposed respondent in respect arrears.

[23] Just prior to the investigation meeting I spoke with the liquidator who advised HVCV's assets are few and the amounts claimed will not be paid. That advice resolves the question posed in 22(a).

[24] Turning to the question of whether or not Mr Kundu directed or authorised the default. To find that he did I have to find he did more than sit passively as an officer or director but that he actively participated in the events which gave rise to the claim against HCVC.¹¹

[25] Evidence supporting a submission I make such a finding came from the Inspector. He said:

Based on my discussions with the witnesses, the investigation of the company and discussions I had with Mr Kundu, and the documentation I reviewed, I determined that Mr Kundu carried out the day to day control and administration of the HCVC business. I also determined that Mr Kundu was the person who the seven employees primarily had dealings with in respect of employment arrangements and their pay.¹²

[26] I agree and in doing so also note the evidence of those the Inspector represented during the s 223E application.¹³ It was clear from that evidence Mr Kundu was the personification of HCVC and it was he who made each and every decision about how the company would be run and managed. He also organised the payment of wages and here I note the definition of officer used by the Court in *Cypress Villas*.¹⁴

¹¹ *Kundu v Smith* above n 6 at [96] and [97]

¹² Brief of evidence at paragraph [17]

¹³ *Kundu v Smith* above n 6

¹⁴ *Cypress Villas* above n 9 at [101]

[27] To that I add the fact he was not only responsible for the inclusion of unlawful and draconian provisions in the staff's employment agreements he went so far as to appear before the Authority to try and have them enforced.

[28] One example was a provision under which any period of notice was unpaid. This applied irrespective of which party initiated the cessation of employment and included a situation in which the employee resigned but worked the notice period.¹⁵ Another provides a whole days pay may be deducted if the employee leaves the workplace even a minute early.

[29] Other examples included work trials and training clauses under which staff either suffered reduced hourly rates or were required to pay HCVC for training it allegedly provided.¹⁶ These were nothing more than devices designed to reduce an employee's hourly rate, often to one lower than the minimum wage.

[30] Having heard evidence in this and two other investigations involving HCVC I conclude Mr Kundu not only actively participated in the decisions that led to HCVC's breaches of minimum employment standards, he was solely responsible.

[31] That leaves the question of whether or not the Inspector should be authorised to bring an action against Mr Kundu. In *Cypress Villas* the Court held that once 22(a) and (b) are determined in the applicants favour the threshold has been achieved and the Authority should rarely decline to give authorisation.¹⁷ In the absence of any argument as to why I should not grant the order sought and given Mr Kundu's high level of personal culpability I do so.

[32] That, however, raises the question of where to next and whether or not the Inspector need bring another application or whether I can hold Mr Kundu personally liable at this point. The reason for the conundrum lies in the fact the application is, on the face of it, one under which the Inspector goes no further than obtaining permission to bring an action against Mr Kundu personally.¹⁸ Section 234(3) however states that should the application be granted the officer / director can be held liable if able if s/he directed or authorized the breach. In deciding to grant the s 234(2) application I have

¹⁵ See Cecelia Barr's Individual Employment Agreement at 12.2

¹⁶ *Kundu v Smith* above n 6 at [13], [14] and [15]

¹⁷ *Cypress Villas* above n 9 at [77] to [79]

¹⁸ Section 234(2) of the Act

already determined Mr Kundu did direct and/or authorize the breaches. The provisions appear somewhat circular.

[33] In support of its submission I go ahead and order Mr Kundu pay the amounts originally sought against HCVC Mr McIlroy refers to both *A Labour Inspector v Freemind Enterprise Limited (in liquidation), Lally and Singh*¹⁹ and *A Labour Inspector v Adamar No.2 Limited (in liquidation), Ramada and Ramada*.²⁰ In both instances orders for payments were made against an officer notwithstanding the fact the arrears were sought via a separate filing against a company.

[34] That said, in both *Freemind* and *Adamar* the arrears and s 234 applications were heard simultaneously. That is not the case here but I do not think it should make a difference.

[35] In *Cypress Villas* the Court held the purpose of section 234 is to ensure minimum employment entitlements are available to employees even where employers which are companies may either be insolvent or otherwise unable to pay those minimum entitlements. Section 234 is a liability-transfer provision available if certain statutory prerequisites are met.²¹

[36] Liability has been established via the Improvement Notice and the failure of the subsequent s 223E application. I have now found the grounds have been satisfied for a transfer of the liability to Mr Kundu. Given the absence of any attempt by Mr Kundu to defend this claim and the statutory imperative the Authority dispose of matters in a timely manner there seems little merit in requiring another step Mr Kundu can use to further stall or otherwise delay the process.

[37] The Inspector also seeks interest. Interest is to reimburse someone for use, by others, of money that is theirs. Given those the Inspector represents have been deprived of the use of money which was rightfully theirs and the lack of a contrary argument this is, I conclude, a situation in which interest should be payable. The current rate is 5%.²²

¹⁹ [2016] NZERA Auckland 165

²⁰ [2016] NZERA Auckland 380

²¹ *Cypress Villas* above n 9 at [34]

²² Judicature (Prescribed Rate of Interest) Order 2011 (2011/177)

[38] According to the Improvement Notice the arrears were originally payable no later than 16 October 2015. That means as of the date of this determination the interest payable is \$928.28. That will increase by \$2.22 for each day which passes between the date of this determination and payment.

Conclusion and costs

[39] For the above reasons I grant the Inspectors application Mr Kundu be held personally liable for Hutt City Veterinary Care Limited's failure to pay various staff minimum statutory entitlements.

[40] As a result Mr Kundu is ordered to pay \$16,211.64 (sixteen thousand, two hundred and eleven dollars and sixty four cents) to the Ministry of Business, Innovation and Employment for subsequent disbursement to those the Ministry represents. Payment is to be made no later 4.00pm Thursday 22 December 2016.

[41] Mr Kundu is, in addition to the amount in [40] above, to pay a further \$928.28 (Nine hundred and twenty eight dollars and twenty eight cents) being interest owing as at the date of this determination. This will increase by \$2.22 (two dollars and twenty two cents) with each calendar day that passes between 8 December 2016 and the date of payment.

[42] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority