

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2019] NZERA 16
5623657

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

AND HARPREET SINGH MUNDRA
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Claire English, counsel for the Applicant
 No appearance for the Respondent

Investigation Meeting: 30 October 2018

Submissions Received: 30 October 2018 from the Applicant

Date of Determination: 18 January 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 18 March 2016, I found Shopperstop1 Limited (Shopperstop) had received employment premiums from its employee Tarun Bhola.¹ I also found Mr Bhola was entitled to payment for annual leave that he had not taken at the termination of his employment and for arrears of wages resulting from the employer's failure to pay him for all the hours he worked. Additionally, I found Mr Bhola was owed payment for working on public holidays and for alternative days off to which he was entitled for working on those days.

¹ [2016] NZERA Wellington 35.

[2] In total, I ordered Shopperstop to pay Mr Bhola \$38,872.71. Additionally I ordered it to pay a penalty of \$15,000 to the Crown in respect of statutory breaches and to reimburse the Labour Inspector for the cost of the Authority's filing fee. Shopperstop did not challenge the determination.

[3] Following unsuccessful attempts to obtain those monetary awards from Shopperstop, the Labour Inspector commenced proceedings in the Authority seeking authorisation under repealed s 234 of the Employment Relations Act 2000 (the Act) to bring an action for the recovery of some of those awards against Harpreet Singh Mundra. Mr Mundra was the sole director and sole shareholder of Shopperstop at the time of Mr Bhola's employment.

[4] Mr Mundra responded by stating he had no money to pay his creditors, including his accountant and lawyer, and by accusing Mr Bhola, the Labour Inspector, and the Authority of exploiting him. He denied having received employment premiums from Mr Bhola.

[5] Mr Mundra included, amongst a number of attachments, a statement from his accountant, Ian Possenniskie, who confirmed he had not been paid for his services for more than a year at that time, and was providing his services free on a compassionate basis.

Section 234

[6] The Labour Inspector's proceedings rely on s 234 of the Act. The section was repealed on 1 April 2016 but continues to apply to proceedings brought in relation to conduct that occurred before that date, whether or not the proceedings were brought before that commencement.²

[7] The repealed section provided as follows:

234 Circumstances in which officers, directors, or agents of company liable for minimum wages and holiday pay

- (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

² Schedule 1AA, clause 3(7) of the Act.

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.
- (4) In this section—

company has the meaning given to it by section 2(1) of the Receiverships Act 1993

holiday pay means any amount payable under the Holidays Act 2003 to an employee as pay for an annual holiday or public holiday

minimum wages means minimum wages payable under the Minimum Wage Act 1983.

- (5) Nothing in this section affects any other remedies for the recovery of wages or holiday pay or other money payable by a company to any employee of that company.

The Authority's investigation

[8] Mr Mundra lodged a statement in reply but did not take part in any telephone conferences with the Authority despite being informed of them. The matter was initially set down for hearing on two separate occasions but was postponed both times. The first postponement was to await the Court of Appeal's judgment in *Brill v Labour Inspector*,³ while the second was due to medical evidence provided by Mr Mundra concerning his then current state of health. His doctor's diagnosis at that stage was "general anxiety disorder exacerbated by situational stress" with "the principal stressors being related to financial stress secondary to his previous business..."

³ [2017] NZCA 169 [9 May 2017].

[9] Section 234 of the Act provides the Authority with the discretionary power to authorise a Labour Inspector, in certain circumstances, to bring an action against officers, directors or agents of a company for the recovery of amounts claimed as minimum wages, holiday pay, or both. In the current situation it was decided that a single Authority investigation meeting and determination would consider the issues of authorisation, recovery and orders, if relevant.

[10] The investigation meeting held on 30 October 2018 was advised to the parties by way of a Notice of Investigation Meeting dated 12 July 2018 which I am satisfied Mr Mundra received. This was made clear by an email sent by Mr Mundra at 11:36 pm on the night of 29 October 2018 in which he stated he was unable to attend the meeting due to some "unavoidable conditions". He implied those conditions related to his health but provided no medical evidence in support. Mr Mundra attached to his email income tax statements providing earnings information between 1 April 2012 and 31 March 2016.

[11] In light of Mr Mundra's stated intention not to attend, with no good cause shown, I proceeded with the investigation meeting in his absence, in accordance with clause 12, Schedule 2 of the Act. Evidence was provided under oath by a Labour Inspector of the Ministry of Business, Innovation and Employment who provided a written brief of evidence and answered questions from me. Mr Bhola also provided evidence by way of affidavit. Ms English, counsel for the Labour Inspector, provided oral and written submissions.

[12] I have not referred in this determination to all the evidence received, or submissions advanced in this matter, in accordance with s 174E of the Act. I have, however, considered all material provided to the Authority in making findings on relevant matters of fact and law and in reaching decisions on this matter.

Authorisation

[13] The Court of Appeal in *Brill v Labour Inspector* considered what threshold the Labour Inspector must meet in order to obtain authorisation under s 234(2) of the Act.

[14] The Court determined that:

The Labour Inspector must satisfy the Employment Relations Authority that there is a tenable cause of action.⁴

⁴ n3 at [27] i.

[15] The Labour Inspector gave evidence of the attempts made to obtain from Shopperstop the amounts I ordered it to pay in my substantive determination. These comprised correspondence with Mr Mundra, his accountant and lawyer who had represented him in the proceedings against Stoppershop. When those attempts failed the Labour Inspector lodged the current proceedings in the Authority.

[16] The Labour Inspector's evidence was that none of the monies awarded in my determination of the substantive matter had been paid to Mr Bhola or to the Crown. Mr Bhola's affidavit evidence supported that of the Labour Inspector in relation to monies ordered to be paid to him.

[17] Shopperstop remains on the New Zealand Companies Office register, with its last annual return recorded as being filed on 1 November 2017. Currently its sole director is Mr Possenniskie who, according to the Companies Office website, has been a director of Shopperstop since 6 November 2016. Mr Possenniskie advised the Authority in correspondence in April 2016 that he had been the accountant for Mr Mundra and Shopperstop for approximately five years at that time.

[18] Mr Mundra was the sole director of Shopperstop from 23 May 2011 to 1 April 2017. This covered the entire period of Mr Bhola's employment, which was from September 2012 to June 2014. Mr Mundra is not currently a director of Shopperstop but has a 49 percent shareholding in it.

[19] Mr Possenniskie currently holds a 50 percent shareholding in Shopperstop, with the remaining one percent being held by Christine Possenniskie. Shopperstop was renamed Ian L Possenniskie Limited from 23 July 2018 but reverted to its original name with effect from shortly before 5 am on 30 October 2018 which, coincidentally or not, was the date of the Authority's investigation meeting.

[20] Although Shopperstop remains registered with the Companies Office and is not in receivership or liquidation, the Labour Inspector's evidence is that she has found no evidence of it operating a business. The Labour Inspector outlined the nature of the inquiries that had been made into Shopperstop, the conclusion of which was that no money was going through the company's books.

[21] From the evidence of the Labour Inspector, and from the statements made in correspondence with the Authority and Labour Inspector by Mr Possenniskie as to the insolvent state of Shopperstop, I am satisfied on the balance of probabilities there are reasonable grounds for belief that the company does not have sufficient assets to pay the amounts ordered in my substantive determination.

[22] In reaching that opinion I have also taken into account views expressed in writing to the Authority by Mr Mundra regarding the current state of Shopperstop's finances. I am satisfied from the Labour Inspector's evidence that there is a tenable cause of action under s 234(2).

[23] The second question considered by the Court of Appeal in *Brill v Labour Inspector* was what the Labour Inspector must prove in order to establish that any officer, director or agent of the company had "directed or authorised the default in payment" within the meaning of s 234(3) of the Act. The Court concluded:

The Labour Inspector must prove the officer, director or agent knew the payment was in default of the company's obligations under the Minimum Wages Act 1983 or the Holidays Act 2003. The relevant knowledge may be proved by direct evidence or by inference.⁵

[24] Counsel for the Labour Inspector has submitted that Mr Mundra, as the sole director of Shopperstop at all material times, directed or authorised that company's default. In her submission this is borne out by the fact of him being the "hands" of the company and by the absence of anyone else with the authority to bind Shopperstop during the course of Mr Bhola's employment.

[25] I accept that submission and agree with counsel that Mr Mundra hired Mr Bhola, instructed him as to his duties and hours of work, and managed monies himself. In my determination of the Labour Inspector's claims against Shopperstop I referred to Mr Mundra acknowledging under questioning that he was aware of minimum wage and holiday pay requirements as he had worked in the hotel industry in New Zealand between 2006 and 2011.

[26] Mr Mundra accepted that Mr Bhola was owed payment for untaken annual leave at the conclusion of his employment and acknowledged that he took employment premiums from Mr Bhola although he claimed not to know that was unlawful.

⁵ n3 at [27] ii.

[27] Mr Mundra, while not agreeing with the hours Mr Bhola said he had worked, acknowledged in that investigation meeting he had "reconstructed" wage and time records for Mr Bhola after his employment had ended. He accepted the reconstructed records were inaccurate. In my determination of 18 March 2016 I accepted evidence Mr Bhola had given to the Labour Inspectorate about his hours of work.⁶

[28] I am satisfied from my previous investigation, resulting in the awards made against Shopperstop, that Mr Mundra knowingly did not pay Mr Bhola for all the hours he worked. I therefore decline to take into account Mr Mundra's rejection of the validity of Mr Bhola's minimum wage claim in deciding the current matter.

[29] In light of the above I have considered it appropriate to authorise the Labour Inspector to recover from Mr Mundra the amounts awarded against Shopperstop in respect of minimum wages and holiday pay owed to Mr Bhola. I am satisfied that Mr Mundra was the person who, as director of Shopperstop, was responsible for the defaults in payment to Mr Bhola: he was the person who authorised or directed them.

[30] Mr Mundra, his wife, and his accountant provided some unsworn information regarding his financial situation which I have considered. The Inland Revenue Department (IRD) income tax earnings information provided by Mr Mundra on 29 October 2018 reveals he received income of \$11,407.00 over a two month period in the financial year ending 31 March 2012 and no other earnings during that financial year.

[31] IRD earnings information for income tax for the financial years ending 31 March in 2013, 2014, and 2015 records that IRD has no earnings information for Mr Mundra for those years. I note that Shopperstop was still trading in June 2014 when Mr Bhola's employment ceased.

[32] Mr Possenniskie informed the Labour Inspectorate in an email dated 9 April 2016 that Mr Mundra sold the assets of the business in 2015 and "used the little money he got from that...to pay Creditors incurred in normal trading." He noted there was insufficient money to pay all remaining creditors. Mr Possenniskie subsequently purchased fifty percent of the shareholding and took over the directorship of Shopperstop. In an email to the Authority in January 2018 he said he did so to take the company off Mr Mundra's hands "at a time when

⁶ n1at [23].

he was in suffering both financial and health issues". Mr Possenniskie said the shares were sold to him at a nominal price of \$1.00.

[33] For the financial year ending 31 March 2016, IRD earnings information shows Mr Mundra's earnings and Work and Income Benefits totalled \$18,259.74. No information was supplied in respect of 2017 earnings.

[34] There is no current information before the Authority as to Mr Mundra's medical or financial situation. The last information I received was an email exchange between Mr Mundra and Mr Possenniskie, forwarded to the Authority by Mr Mundra on 1 November 2018, presumably because he wished me to be aware of it when determining this matter.

[35] I do not find the information either helpful or persuasive. Mr Mundra chose not to attend the investigation meeting. He has not provided the Authority with any current medical evidence to support the claim he made in his email of 25 October 2018 to Mr Possenniskie about his mental health. Nor has he provided information about whether he is presently working or about his current income. In such circumstances I decline to give any weight to suggestions of impecuniosity made by Mr Mundra in his email exchange with his accountant.

[36] Counsel for the Labour Inspector acknowledged there can be no recovery of the \$15,000 penalty or the \$71.56 costs award as these are neither minimum wages nor holiday pay and are therefore not covered by the provisions of s 234. Ms English submitted that the premiums unlawfully demanded by Shopperstop, and paid by Mr Bhola during his employment, were in reality payments relating to minimum wages and/or holiday pay. She submitted they should be included in any award made by the Authority.

[37] I have considered that submission but reject it on the basis that the Labour Inspector's claim in relation to employment premiums was made, and determined, under s 12A of the Wages Protection Act. Section 234 of the Employment Relations Act concerns defaults in payment of minimum wages or holiday pay or both. It does not extend to employment premiums and it is outside my jurisdiction to include the premium payments made by Mr Bhola to Shopperstop in any orders I make.

Summary

[38] Shopperstop has failed to make minimum wage and holiday payments to Mr Bhola as ordered by the Authority. The Labour Inspector has established on the balance of

probabilities that those payments are unlikely to be paid in full because there are reasonable grounds for believing Shopperstop does not have sufficient assets to do so.

[39] Mr Mundra, as sole director of Shopperstop during the time of Mr Bhola's employment, knew the company's obligations regarding minimum wages and holiday pay and authorised the default in payments to Mr Bhola. He has been found jointly and severally liable with the company to pay the amounts awarded to Mr Bhola under minimum wage and holidays legislation in my determination of 18 March 2016.

Orders

[40] Harpreet Singh Mundra is ordered, pursuant to repealed s 234 of the Act to pay Tarun Bhola the following sums:

- (a) \$6,576.96 under s 27(2) Holidays Act 2003, being payment of holiday pay owing at termination of employment;
- (b) \$8,412.75 under ss 6 and 11 Minimum Wage Act 1983, being arrears of wages;
- (c) \$1,269.00 under s 50(1) Holidays Act, being arrears of wages in respect of the difference between wages paid and wages due at time and a half;
- (d) \$2,538.00 under s 56(2) Holidays Act, being arrears of wages in respect of alternative days due.

Trish MacKinnon
Member of the Employment Relations Authority