

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 132  
5597907

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

AND                                PRESANNA  
   THILAKARATNE  
   Respondent

Member of Authority:        Nicola Craig

Representatives:              Alastair Dumbleton, Counsel for Applicant  
   Respondent in person

Investigation Meeting:        26 April 2016

Date of Oral  
Determination:                26 April 2016

Date of Written Record:      02 May 2016

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**ORAL DETERMINATION OF THE AUTHORITY**

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- A.     The Labour Inspector (Kate Feeney) is authorised to bring action against the Respondent Presanna Thilakaratne (Mr Thilakaratne).**
- B.     Mr Thilakaratne is jointly and severally liable with Danuja International (PVT) Limited (Danjuja) for \$1965.38 gross in outstanding holiday pay owing to Danuja’s former employees Kylie Matiasi and Charulada Solanki.**
- C.     Costs of \$350.00 are awarded to the Labour Inspector, along with reimbursement of \$71.56 for the filing fee.**

## **Employment relationship problem**

[1] A Labour Inspector (Kate Feeney) seeks authorisation from the Authority to bring action against the Respondent Presanna Thilakaratne (Mr Thilakaratne) for recovery of holiday pay owing to two former employees of Danuja. Mr Thilakaratne was the sole director of Danuja. The company was removed from the Companies Register on 17 November 2015.

[2] The investigation meeting was held on 26 April 2016. Evidence was given by the Labour Inspector and by Mr Thilakaratne. The meeting was adjourned and resumed to allow an oral determination to be given.

## **Background**

[3] In 2014 the Labour Inspector commenced a claim in the Authority against Danuja, a registered company, to recover annual and public holiday pay owing to two employees of the company, Kylie Matiasi (Ms Matiasi) and Charulada Solanki (Ms Solanki).

[4] A determination of the claim was issued on 2 May 2014<sup>1</sup>, ordering Danuja to comply with the Labour Inspector's Improvement Notice and to pay a penalty of \$5,000.

[5] Danuja approached the Authority in June 2014, about having the investigation re-opened.

[6] An agreement was reached between the Labour Inspector and Danuja (represented by Mr Thilakaratne) which was recorded in a Joint Memorandum of the Parties, signed on 24 September 2014 and the Authority issued a consent determination on 25 September 2014<sup>2</sup> based on the Memorandum.

[7] The terms of the Memorandum required Danuja to pay the following for arrears of annual and public holiday pay:

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<sup>1</sup> [2014] NZERA Auckland 165

<sup>2</sup> [2014] NZERA Auckland 392

- a) \$100 weekly every Friday to the Ministry of Business, Innovation and Employment (MBIE) who shall forward the net portion to Ms Matiasi until \$2612.61 gross is paid; and
- b) \$100 weekly every Friday to MBIE who shall forward the net portion to Ms Solanki, until \$2752.77 gross is paid off.

[8] In both cases the first payments were to occur on 12 September 2014.

[9] Although the Joint Memorandum also covered the payment of penalties, they are not the subject of this proceeding, as s234 of the Employment Relations Act (the Act) only applies to minimum wages and holiday pay.

[10] The Labour Inspector gave evidence that between September 2014 and February 2015, Danuja made 13 payments of \$100 for each of the two employees. The order required a total of 30 payments for one worker and 31 payment for the other. Payments therefore ceased before all the money owed was paid.

[11] Mr Thilakaratne was written to and advised that enforcement action would be taken against Danuja, and against him as director of the company. There was discussion about settlement at this time, but a formal settlement agreement was not executed.

[12] The Labour Inspector applied to the District Court for a warrant to seize property from Danuja. The warrant was not executed because the Court bailiff could find no “sizeable assets” (sic) to satisfy the debt.

### **This Proceeding**

[13] The Labour Inspector then made the current application for an order under s234 of the Act authorising the Labour Inspector to bring an action against Mr Thilakaratne for recovery of the arrears of holiday pay.

[14] In response Mr Thilakaratne filed a Statement in Reply which stated that his company is not active. He subsequently provided a list of points which he wished to be considered by the Authority.

## Issues

[15] The issues for determination are:

- (i) Does the Authority authorise the Labour Inspector to bring action against Mr Thilakaratne?; and
- (ii) If so, what amount of holiday pay is owing by Mr Thilakaratne?

### Application under s234 of the Act

[16] As of 1 April 2016, s234 of the Act was repealed by the Employment Relations Amendment Act 2016 (the 2016 Act). However, under s38 of the 2016 Act the following clause is inserted into Schedule 1AA of the Act:

#### **3 Application, savings and transitional provisions arising from 2016 Act**

- (1) The amendments made by the 2016 Act do not apply to conduct that occurred before the commencement of the Act...
- (7) Section 234 ... continues to apply (despite its repeal of section 35 of the 2016 Act) to proceedings brought in relation to conduct that occurred before the commencement of the 2016 Act, whether or not the proceedings were brought before that commencement.

[17] In this case the conduct alleged to have occurred well before 1 April 2016.

[18] Section 234 of the Act permits officers, directors or agents of a company to be liable for minimum wages and holiday pay. The section applies 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<sup>3</sup>. Holiday pay is defined to include amounts payable for annual holidays or public holidays<sup>4</sup>.

[19] The Authority may authorise a Labour Inspector to bring an action for recovery against any officer, director, or agent of the company who has "directed or authorised" the default in payment of holiday pay<sup>5</sup>.

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<sup>3</sup> S234(1) of the Act

<sup>4</sup> S234(4) of the Act

<sup>5</sup> S234(2) of the Act

[20] The Labour Inspector must establish on the balance of probabilities that the amount claimed is, if judgment is given for that amount, unlikely to be paid in full, 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<sup>6</sup>...

[21] Where the Authority has authorised an action and it is proved that the officer, director or agent “directed or authorised the default in payment”, that officer, director or agent is, with the company, jointly and severally liable to pay the amounts recoverable and judgment may be given accordingly<sup>7</sup>.

[22] Section 234 was considered by a full bench of the Employment Court in **Labour Inspector (Macrury) v Cypress Villas Ltd**<sup>8</sup>. The Court found as follows:

- (a) Section 234 lifted the employing company’s corporate veil in limited circumstances where specific tests were met;
- (b) The liability was limited to recovery and did not extend to penalties;
- (c) The onus of proof to establish reasonable grounds to believe that the company lacked sufficient assets to pay entitlements rested on the Labour Inspector to the balance of probabilities; and
- (d) (By majority) the Labour Inspector had to establish on the balance of probabilities that the director had directed or authorised those defaults by a positive act or acts rather than mere passivity.

### **Authorisation to bring action**

[23] The first question is whether Danuja was unlikely to pay because there are reasonable grounds for believing that it does not have sufficient assets to pay the amount owing in full (s234(2)(b) of the Act).

[24] The Labour Inspector gave evidence of her basis for belief that Danuja could not pay the holiday pay due. This included a report from the District Court bailiff that

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<sup>6</sup> S234(2) of the Act

<sup>7</sup> S234(3) of the Act

<sup>8</sup> [2015] NZEmpC 157

an attempt to seize assets to satisfy the company's obligations under the consent determination was unsuccessful due to there being no seizeable assets. She also relied on what Mr Thilakaratne had told her about the company's inability to pay. The company was removed from the register in November 2015 and the Labour Inspector had no indication that there was any liquidation process in place.

[25] Mr Thilakaratne in evidence confirmed that Danuja was unable to pay and that the company had been removed from the Companies Register. He said that the company had no assets at the moment.

[26] I am satisfied that there are reasonable grounds for believing that Danuja does not have sufficient assets to pay the amount of holiday pay owing in full.

[27] The next question is whether the further test under s234(2) of the Act is satisfied, namely that Mr Thilakaratne directed or authorised the default in payment.

[28] At the investigation meeting Mr Thilakaratne gave evidence that he was the sole director of Danuja, that he was running the hairdressing and beauty business where the Danuja employees worked, and that he calculated the wages and holiday entitlements. He said that he was the person who had arranged payment of the employees' final pay when they finished work, and that he had told them that he was not paying them their holiday pay at that time as he was running out of money.

[29] I am satisfied that Mr Thilakaratne had more than a passive role in Danuja's non-payment of holiday pay. I find that he authorised the default, in that he decided not to pay the holiday pay owing to these employees in their final pay.

[30] I find that the tests in s 234 are satisfied and the Labour Inspector is authorised to bring action against the Respondent Mr Thilakaratne.

### **Amount of holiday pay owing by Mr Thilakaratne**

[31] The Labour Inspector gave evidence that \$1965.38 gross was outstanding in holiday pay to both employees. Mr Thilakaratne was asked whether he disputed that as the amount owing and he said that he did not. The Labour Inspector confirmed that that figure included only holiday pay, and not any penalty.

[32] I find that Mr Thilakaratne is jointly and severally liable with Danuja for \$1965.38 gross in outstanding holiday pay owing to Danuja's former employees Ms Matiasi and Ms Solanki.

[33] Interest was sought on behalf of the Labour Inspector. However, the initial liability for this holiday pay fell on Danuja, and Mr Tillakaratne's liability for this sum arises now only as a result of this determination allowing action to be taken against him as director and the determination of the amount of his personal liability. I therefore decline to award interest.

[34] Mr Thilakaratne gave evidence of his financial circumstances and sought an order from the Authority that he was entitled to repay by instalments. However in the absence of consent to such a proposal from the Labour Inspector, and without clear authority for me to make such an order in circumstances where holidays payment are due, I decline to order payments by instalments.

### **Costs**

[35] On behalf of the Labour Inspector, costs were sought by Mr Dumbleton. In light of the Authority's nominal daily tariff of \$3,500, and the investigation meeting before adjournment taking only just over an hour, Mr Dumbleton sought a contribution of \$350 towards costs. Mr Thilakaratne made no submission on this issue.

[36] I consider that the figure of \$350 is a reasonable contribution to the Labour Inspector's costs in this matter and order that Mr Thilakaratne pay that as costs in this proceeding. I also order Mr Thilakaratne to pay the Labour Inspector \$71.56 for the filing fee.

Nicola Craig

Member of the Employment Relations Authority