

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 639  
3194759

BETWEEN ASOKA SEPALA  
SENEVIRATNE  
Applicants

AND NAMINDA THUSHARA  
KARUNATILLAKE  
Respondent

Member of Authority: Peter Fuiava

Representatives: Christopher Griggs, counsel for the Applicant  
Respondent in person

Investigation Meeting: 6 October 2023 and 17 July 2024 in Auckland and by  
audio-visual link

Submissions received: 19 July 2024 from the Applicant  
26 July 2024 from the Respondent

Determination: 25 October 2024

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**DETERMINATION OF THE AUTHORITY**

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**What is the employment relationship problem?**

[1] Asoka Seneviratne applies for leave from the Authority to have Naminda Karunatillake declared a person involved in the default in payment of wages or other money payable to an employee under s 142Y of the Employment Relations Act 2000 (the Act).

[2] Leave is sought because Mr Seneviratne claims to have been an employee of Mr Karunatillake's company, Jericho Contractors Limited (JCL or the company), which was placed into liquidation on 12 August 2022. Mr Seneviratne further says that he is owed \$46,824 in wage and annual leave arrears which has been calculated on the basis that he worked (allegedly) 20 hours per week at \$18 per hour or the applicable adult minimum wage from 19 November 2018 to 13 April 2021.

[3] While Mr Karunatillake accepts that he has given Mr Seneviratne money from time to time, he says that he did so out of charity and not in payment of wages for he was never an employee of his company and neither was he required to do work for his wife's company, JC Quarry Products Private Ltd (JCQ), which was placed into liquidation on 24 February 2023.

[4] The primary issue for investigation and determination is whether Mr Seneviratne was an employee of JCL. For the reasons that follow, I find that he was not. The application for leave under s 142Y of the Act is dismissed and is unsuccessful.

### **How did the Authority investigate?**

[5] Mr Seneviratne is represented by counsel on a pro bono basis. Mr Karunatillake on the other hand was self-represented and did not file a statement in reply. I was invited to proceed by way of formal proof against him as the Authority had done in *Hiri-Gualeni v Kaukau t/a Sew Sew*.<sup>1</sup> I declined to do so. Mr Karunatillake has been actively involved with this investigation including participating in case management conferences, complying with timetabling directions, filing witness statements, and attending the investigation meeting on two non-consecutive days. As such, his involvement sets him apart from the non-engaging respondent in *Hiri-Gualeni* who in addition to not filing a statement in reply also failed to attend the investigation meeting.

[6] For the Authority's investigation, Mr Seneviratne provided three written witness statements: an affidavit attested 27 July 2023 and two subsequent reply written statements filed on 2 October and 30 November 2023. He was the sole witness for his case.

[7] For the respondent, witness statements were received from Mr Karunatillake, his wife Nalika Hewage, family friend, Rani Kirimatiyawa, president of the New Zealand Sri Lanka Buddhist trust, Pathmasiri Fernando, school principal, Krishan Gallage, and Buddhist monk, Walgama Thera. It became apparent during the first day of the investigation meeting that Mr Karunatillake's witness statement to the Authority had been drafted by his wife because his own ability to read and write English was "not good".

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<sup>1</sup> *Hiri-Gualeni v Kaukau t/a Sew Sew* [2019] NZERA 714.

[8] Mr Fernando and Mr Gallage gave their evidence remotely through audio-visual link (AVL). All witnesses answered questions under oath or affirmation from me and the representatives, who also filed closing written submissions that have been considered.

[9] The investigation meeting was originally scheduled for one day but a second day was required to hear additional witnesses for the respondent. On the morning of the first day of the investigation meeting (6 October 2023), Mr Karunatilake brought with him to the meeting Mr Thera whom no witness statement had previously been provided. Out of fairness to Mr Seneviratne, Mr Thera was excused from the meeting for his evidence to be heard on another day.

[10] The investigation meeting was adjourned part heard to 8 February 2024. However, on the morning of the meeting, I was advised that Mr Karunatilake had been admitted to hospital with a heart-related illness. For this reason, the meeting was further adjourned to 11 April 2024. However, on that occasion, it was discovered that the Sinhala interpreter engaged to assist the Authority (a different interpreter from the initial investigation meeting who was unavailable) had a conflict of interest with the parties as she attended the same temple as Mr Seneviratne and Mr Thera and knew them both personally. Out of an abundance of caution, the meeting was further adjourned.

[11] To avoid further costs being incurred by counsel acting pro bono, leave was given for him to attend the investigation meeting by AVL which resumed on 17 July 2024. As permitted by s 174E of 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 evidence and submissions received.

### **The Applicant's Case**

[12] Mr Seneviratne is a retired citizen of Sri Lanka in his 70s. In 1994, he moved to New Zealand and has lived here since as a resident. Mr Seneviratne has previously worked for the United Nations Development Programme (UNDP) in various roles including being the Head of Economics for a university in Papua New Guinea in 2002, a senior consultant in Ethiopia from 2003 to 2006, and a Special Advisor for the Office of the President of Namibia and the Director of Program and Institutional Development at a university in Namibia from 2006 to 2016.

[13] Mr Seneviratne stated that he first met Mr Karunatillake in 2000 at the Sri Lankaramaya Buddhist Temple at Ōtāhuhu where a much younger Mr Karunatillake was selling some potted plants. Because he reminded him of his own son who died at a young age in 1996, Mr Seneviratne purchased some rose flowerpots from him.

[14] From 2000 to 2018, the pair would occasionally see each other at the same temple. Mr Seneviratne stated in his affidavit of 27 July 2023 that Mr Karunatillake offered him a job in his landscaping business (JCL). At that time, he was in receipt of a WINZ benefit of \$319 per week which did not leave him with much after paying rent for his room of \$175 per week.

[15] Mr Seneviratne claimed that Mr Karunatillake promptly agreed to employ him at 20 hours per week at \$18 per hour totalling \$360 per week and that he would be employed by JCL as its office administrator starting 19 November 2018. There was no written employment agreement provided. The offer was a purely verbal one made by Mr Karunatillake as the sole director and owner of JCL.

[16] Mr Seneviratne further claimed in his affidavit that he officially worked from 8 am to 12 pm every week day and that sometimes he would leave later than 12 pm when there was more work to be completed and worked weekends when required. He was given a JCL laptop and the keys to the company's storeroom shed and office.

[17] In terms of his duties, Mr Seneviratne stated that he drafted invoices, prepared quotes, reconciled bank statements, and wrote marketing letters to prospective clients. Of his own accord, he created a list of the company's tools and equipment, cleaned the office, and improved Mr Karunatillake's office and filing system.

[18] Mr Seneviratne further stated that he provided business advice to Mr Karunatillake as to what site his wife, Ms Hewage, should operate JCQ from. He stated that he was taken to four possible work sites and that after looking at the cost and benefits of each, advised Mr Karunatillake to choose a site on Smales Rd, East Tamaki as a place of business for JCQ.

[19] Mr Seneviratne claimed that Mr Karunatillake had told him that he would be employed as the manager for JCQ and that he would be provided with a car, an office, work boots and protective clothing. However, Mr Seneviratne noticed that Mr Karunatillake was avoiding him and later discovered that the manager role had been given to someone else. Mr Seneviratne further stated that in 2020, his work hours reduced from 20 to 8-10 hours per week despite him being available to work his usual hours.

[20] As his work with JCL decreased, Mr Seneviratne stated that he was required by Mr Karunatillake to work for JCQ. However, his employment ended altogether on 13 April 2021, when Mr Karunatillake came to his home and uplifted the company laptop and quotations folder. Mr Seneviratne believes that JCL failed as a business because it owed GST to Inland Revenue (IR).

[21] It was claimed that JCL did not pay Mr Seneviratne the wages which had been agreed to and that the company had failed to keep pace with increases to the adult minimum wage resulting in further arrears. While Mr Seneviratne did not work on public holidays, he stated that he was not paid annual leave during the course of his employment from 19 November 2018 to 13 April 2021.

[22] Annexed to Mr Seneviratne's affidavit to the Authority was a reconstructed wages and time record which recorded bank transfer payments of \$2,785.75 by JCL, cash payments of \$2,300, and wage arrears and unpaid annual leave of \$46,824.

[23] Mr Seneviratne provided the Authority with the following support documents:

- (a) his Kiwibank bank statements from January 2019 to December 2021;
- (b) his Westpac transactions summary from March 2019 to December 2021;
- (c) handwritten notes (undated) recording the start date of his employment (19 November 2018) and a list of payments received;
- (d) a marketing letter (5 August 2019) introducing JCL to a potential customer;

- (e) a schedule containing the contact details of 42 residential builders;
- (f) a list of 86 tools and instruments belonging to JCL;
- (g) a three-page marketing document by Mr Seneviratne for JCL;
- (h) a schedule of six invoices owed by customers of JCL;
- (i) an advertisement for JCQ;
- (j) email from a WINZ case officer (19 November 2018) informing Mr Seneviratne of the maximum income he could earn per week before his emergency benefit was affected;
- (k) letter from Mr Karunatillake (15 May 2019) to the same WINZ case officer;
- (l) email from Mr Seneviratne to Mr Karunatillake (22 March 2021) about a software application (SiteWise) that Mr Seneviratne paid using his own credit card;
- (m) Companies Office information for JCL and JCQ;
- (n) Liquidator's first report for JCL (19 August 2022);
- (o) 68 text messages sent from Mr Seneviratne to Mr Karunatillake from 2021 and 2022 including a text (31 May 2021) stating that he was owed \$1,625.50; (28 September 2021) requesting payment by instalment of \$500 per month; (21 October 2021) requesting payment of \$4,220 as soon as possible; subsequent text messages from Mr Seneviratne in November 2021 that he had not received the \$500 instalment payment; (3 December 2021) acknowledging receipt of a \$500 payment from Mr Karunatillake; and text messages from February 2022 requesting payment of \$3,720;
- (p) new customer application from Just Sheds portable building hire which Mr Seneviratne says he completed for JCQ;
- (q) email (30 March 2019) from Mr Seneviratne's predecessor (Mr Karunatillake's brother) regarding quotations, invoices, health and safety documents, and office emails he did for JCL; and
- (r) a sample of JCL invoices that Mr Seneviratne says he drafted.

## **The Respondent's Case**

[24] Mr Karunatillake recalls being introduced to Mr Seneviratne at the temple by Buddhist monk Walgama Thera, but he denies offering him employment in his company. He understood that Mr Seneviratne was in need; he was retired, had separated from his wife, and was in an estranged relationship with their son. He desired to help him as a result by donating money to him from time to time. However, Mr Seneviratne was never employed as an office administrator as the business was small and there were no job opportunities for him there.

[25] Mr Karunatillake stated that Mr Seneviratne had told him on several occasions about his financial difficulties and had sought his help, for example, he asked for money for new hearing aids as his cochlear implant was not working. Mr Karunatillake gave him \$1,000.

[26] In addition, Mr Karunatillake stated that he had signed a letter to a WINZ case officer (see above at [23](k)) without reading it. The letter had been drafted for him by Mr Seneviratne because his own ability to read and write in English was not good. The letter purported that JCL had employed Mr Seneviratne as a casual/on call cleaner from the beginning of March 2019 at \$80 per week with first payment on 6 March 2019.

[27] Mr Karunatillake stated that he had only signed the letter to help Mr Seneviratne get a car loan and was saddened by his breach of trust. Mr Karunatillake further stated that Mr Seneviratne started visiting his work office in 2018 to access the office Wi-Fi to check his emails and access the internet for free which did not bother Mr Karunatillake who wanted to help.

[28] In 2021, Mr Karunatillake received a telephone call from Mr Seneviratne who claimed that he owed him \$4,000. The assertion took Mr Karunatillake by surprise because it had not been explained how the amount was calculated.

[29] Mr Karunatillake denies making a verbal offer of employment to Mr Seneviratne of 20 hours per week at \$18 per hour and he denies his wage arrears claim of \$46,824. No written offer of employment or wages and time record exist for him because he was never employed. The written examples Mr Seneviratne has provided of the alleged work he did for JCL are not his. He has written over documents

created by his wife and Mr Karunatillake's brother in an effort to pass that material off as his own.

[30] At the investigation meeting on 6 October 2023, Mr Karunatillake accepted that he had made cash payments to Mr Seneviratne of \$600 on 26 November 2018, \$400 on 17 December 2018, \$300 on 24 December 2018 and \$600 on 21 January 2019. However, none of these payments were made in payment of wages but were donation payments to Mr Seneviratne and not wages.

[31] Mr Karunatillake accepted that he paid Mr Seneviratne several payments of \$80 per week by bank transfer. The reconstructed wage and time record provided to the Authority records 20 such payments between 4 May to 2 December 2019. However, those payments were donations also that did not affect Mr Seneviratne's WINZ benefit.

[32] Mr Karunatillake stated that he did not have enough work to employ Mr Seneviratne who would come to his office for eight hours per month to access his fibre broadband and the internet. While there, he worked on 8-10 invoices and 7 quotations of his own accord. Mr Karunatillake further stated that he never asked him to clean the toilets or to compile a list of tools and equipment for JCL. He saw him like his own father and allowed him access to the office.

[33] Mr Karunatillake stated that his and his wife's businesses came to an end not because of tax debts to IR but because of the actions of a competitor who used gang connections to damage JCQ's machinery and equipment. As a result of an arson in April 2021, JCQ lost a soil screen machine, a digger and a truck and it was the loss of that equipment that ultimately put both companies out of business.

[34] At the resumption of the investigation meeting on 17 July 2024, Ms Hewage said under oath that her company, JCQ, never had an employment relationship with Mr Seneviratne. He was never required to provide any services or do any work for her company. She denied that he completed the Just Sheds new customer application (see [23](p) above) which her accountant completed.

[35] Ms Hewage further stated that Mr Seneviratne had texted her on 19 March 2022 claiming that her husband owed him wages of \$3,720. She blocked him from her phone

and expressed disappointment with Mr Seneviratne who was taking advantage of her husband's generosity. Ms Hewage accepted that he did do some invoices, quotes and a list of tools for her husband's business but he did so in order to not feel guilty about the charity he received from her husband. However, when Mr Seneviratne asked Mr Karunatillake for \$3,000 after his laptop was stolen, she advised her husband not to have any further contact with him.

[36] Buddhist monk Walgama Thera stated that he first met Mr Seneviratne sometime in 2016 and at the request of his chief monk introduced him to Mr Karunatillake. When questioned about what he may have overheard, Mr Thera stated that he did not hear what was discussed and neither did he know that the two men had already met before. Mr Thera denied that, in introducing the two men, he intended Mr Karunatillake to give Mr Seneviratne a job.

[37] Mr Thera stated that he usually saw Mr Seneviratne every morning between 8-9 am. He would usually visit the temple then and stay until 1 pm before returning home. While not wanting to comment on what this meant in terms of Mr Seneviratne's claim of working for JCL between 8 am to 12 pm during the week, Mr Thera said that he was not the only person who saw him at the temple.

[38] Mr Thera explained that he and the other priests would leave the temple grounds at 10.30 am to serve laypeople in the community. This occurred four days per week and while they were away, Mr Seneviratne had the keys to the shrine room, lunch room, store room, kitchen, and meditation hall. He was known to do various tasks at the temple such as cleaning, helping in the kitchen and serving tea which he did very well.

[39] Mr Thera recalled a burglary at the temple where Mr Seneviratne's laptop was stolen at 11-11.30 am that morning. In addition to the theft of his laptop, the temple's charity box was also stolen. The incident was reported to the Police.

[40] Concerning the time Mr Seneviratne spent at the temple, Rani Kirimatiyawa, a fellow worshipper at the temple for the last 20 years and a mutual friend of the parties stated that she would retrieve from Mr Seneviratne the door keys when the monks were away. When she visited the temple, she would see him at 9 am when *dānas* or alms

were being offered. She observed him cleaning the temple inside and out and opening the door to the shrine room.

[41] During the investigation meeting, Ms Kirimatiyawa accepted that she was not at the temple every day and could therefore not comment on what Mr Seneviratne may have done when she was not present. However, it was common for her to see him there in the morning as she attended the 9 am morning classes and did not leave the temple until 1.30 pm. Ms Kirimatiyawa was not able to comment on the suggestion made by Mr Seneviratne in his second reply statement to the Authority of an arrangement in place between the temple and Mr Karunatillake that allowed him to work for JCL while still doing his voluntary work at the temple.

[42] President of the New Zealand Sri Lankan Buddhist Trust, Pathmasiri Fernando, stated that when he visited the temple, which was not every day, he saw Mr Seneviratne in the morning receiving food alms. When asked whether he was aware of an arrangement between the temple and Mr Karunatillake, Mr Fernando stated that he was not aware of such an arrangement. However, he recalled being told by Mr Seneviratne that he worked for Mr Karunatillake but Mr Fernando did not question him further about this as he considered it none of his business.

[43] Mr Fernando recalled an incident in 22 February 2022 between 12-12.30 pm when Mr Seneviratne's laptop was stolen. Krishan Gallage was also aware of the burglary having assisted Mr Seneviratne set up that laptop at the temple where he was seen most mornings.

### **Credibility Assessment**

[44] Mr Seneviratne seeks leave from the Authority to recover unpaid wages and annual leave arrears from Mr Karunatillake as a person involved in the default of payment of wages or other money payable to an employee under s 142Y of the Act. One of the matters that I must be satisfied with is whether Mr Seneviratne was an employee of JCL.

[45] However, his claim that Mr Karunatillake offered him employment at 20 hours per week at \$18 per hour was self-reported. Although Mr Fernando recalled an occasion when he had been told him by Mr Seneviratne that he worked for Mr

Karunatillake, that information had come from Mr Seneviratne himself and not an independent third party.

[46] The liquidator's report provided to the Authority does not advance matters for Mr Seneviratne as the report does not record what efforts (if any) were taken by the liquidator to verify his claim of alleged wage and annual leave arrears.

[47] During the first day of the investigation meeting, I asked Mr Seneviratne whether he had asked Mr Karunatillake for a written employment agreement. His response was that he had not been given one and nor did he ask. I find the response difficult to reconcile with what is known about Mr Seneviratne's work experience as a contracted employee for the UNDP for several years.

[48] The documentary evidence Mr Seneviratne provided to the Authority was also problematic. If his reconstructed wages and time record were true and that wage arrears were being incurred as early as 19 November 2018, he was not able to explain why his earliest text to Mr Karunatillake about being owed money was from May 2021, some two-and-half years later. When asked where his text messages were relating to his arrears from 2018, Mr Seneviratne could not answer.

[49] Mr Thera gave evidence under affirmation on 17 July 2024 that he did not overhear what may have been said between Mr Seneviratne and Mr Karunatillake when he introduced them. Nor did he know that the pair had previously met several years earlier. It was submitted that the only reason why Mr Thera had introduced Mr Seneviratne was for him to obtain a job from Mr Karunatillake because of his financial difficulties which Mr Thera denied.

[50] While that is one interpretation of the evidence, Mr Thera's denial is consistent with his earlier written statement to the Authority of 26 October 2023 in which he made clear that any discussions between Mr Karunatillake and Mr Seneviratne were not known to him. I accept that evidence.

[51] It was further submitted that there were religious or other reasons why Mr Thera was reticent to comment on anything he may have overheard which had to do with an

alleged arrangement between the temple and Mr Karunatillake that allowed Mr Seneviratne to continue his voluntary work there while being employed by JCL.

[52] However, that assertion was made by Mr Seneviratne only and was not supported by Mr Karunatillake, his wife, Mr Thera or Mr Fernando. Ms Kirimatiyawa had no knowledge of such an arrangement and could not comment as a result. While it may come as no surprise to Mr Seneviratne that the respondent and most of his witnesses would disagree with him on this point, the voluntary work he undertook for the temple was not out of the ordinary and could have been done by any number of people. There was nothing particularly special about Mr Seneviratne's voluntary work that would motivate the temple to enter into such arrangement with Mr Karunatillake in order to secure his services as a volunteer.

[53] While Mr Seneviratne is adamant that such an arrangement between the temple and Mr Karunatillake existed, this has not always been a feature of his case from the beginning. His statement of problem, his first affidavit to the Authority and first reply witness statement are silent about the alleged arrangement.

[54] Mr Seneviratne's first affidavit to the Authority and the evidence he gave at the first day of the investigation meeting was that he worked from 8 am to 12 pm every weekday. There was no mention of the "arrangement" until the abovementioned time frame was challenged by Mr Karunatillake and most of his witnesses. This recent feature to Mr Seneviratne's claim comes some thirteen-and-a-half months after his statement of problem, and some four months after his first affidavit, were lodged with the Authority. If there was an arrangement in place, I would have expected this to have been mentioned much earlier than it has. Further, it is reasonable to have expected some communications about the alleged arrangement involving Mr Seneviratne, the temple and Mr Karunatillake but nothing of this sort has been provided.

[55] In addition, the reconstructed wages and time record provided to the Authority makes no allowance for Mr Seneviratne's voluntary work at the temple. Instead, the calculation of wage and annual leave arrears is on the basis of 20 hours of uninterrupted work per week. However, that cannot have been the case if during this time Mr Seneviratne was also undertaking voluntary work at the temple which he was.

[56] Mr Seneviratne's supplied documents conflicted with his own version of events. I was provided with a letter from Mr Karunatilake to a WINZ case officer (see above at [23](k) which I am satisfied he did not draft. The letter records that Mr Seneviratne was employed by JCL as a casual/on call cleaner from March 2019. However, that statement is entirely inconsistent with Mr Seneviratne's claim that he was employed as an office administrator for JCL some three and a half months earlier on 19 November 2018.

[57] When I asked about the contents of this letter, Mr Seneviratne denied that it was the truth, but even so, as the letter was addressed to his WINZ support worker, he is more likely than not, its author. Having drafted a letter knowing that its contents were not true, the documents Mr Seneviratne has provided to the Authority as evidence of his work at JCL must be approached with caution.

[58] Ms Hewage gave evidence that the invoices, quotations, and a new customer application form were completed either by herself, her brother-in-law, or was outsourced to a third party that provided secretarial support. While Mr Seneviratne's handwriting is on these documents, it is not possible to ascertain the contemporaneity of that handwriting with the underlying document.

[59] I have considered the possibility of Mr Seneviratne being employed on a casual basis by JCL. However, both parties agreed that this was not the case. Consequently, I must decide between two quite different possibilities, namely whether Mr Seneviratne was an employee of JCL or not. While there was no middle ground, there remains one other possibility, that he was a subcontractor for the company.

[60] Mr Seneviratne's Westpac bank statements record payments on 1 September 2021 of \$650 and 3 December 2021 of \$500 both of which used the reference of "sub con", short for subcontractor. As noted above, the use of subcontractors by the company was not out of the ordinary for it outsourced its secretarial and accounting services to third parties. The possibility that Mr Seneviratne was a subcontractor for JCL cannot be discounted. However, such a finding does not assist him as any unpaid work as a contractor falls outside the meaning of an employment relationship under s 4(2) of the Act for the Authority to have jurisdiction and for s 142Y to apply.

[61] I acknowledge that there will be cases where despite a lack of documentary evidence and corroborative witnesses, the real nature of the parties' relationship is one of employment. However, that is not the case here. The difficulty in accepting Mr Seneviratne's evidence is its mobility and inconsistency which leaves me finding against an alleged employment relationship between him and JCL.

### **Conclusion**

[62] Before the Authority can grant leave under s 142Y of the Act, it must, among other things, be satisfied that there are wages and other money payable to an employee. For the reasons given above, I find that Mr Seneviratne was not an employee of JCL to engage s 142Y of the Act. It follows that the application for leave against Mr Karunatillake must be declined and is unsuccessful.

### **Costs**

[63] As Mr Karunatillake has successfully defended himself in this proceeding but has not incurred costs in having a lawyer or advocate represent him in any way, the parties shall each bear their own costs.

Peter Fuiava  
Member of the Employment Relations Authority