

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 96/10
5085018

BETWEEN MUSTAFA KANAR
 Applicant

AND EROL GURLEYEN and
 SULTAN'S HAREM LIMITED
 Respondents

Member of Authority: P R Stapp

Representatives: Tanya Kennedy Counsel for the Applicant

 No appearance and no representative for Mr Gurleyen

 Alyn Higgins Advocate for Sultan's Harem Limited

Investigation Meeting: 7 and 8 April 2010 at Wellington

Determination: 14 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Kanar has claimed that he was employed by Mr Erol Gurleyen to work in his business called Harem Café and Meze Bar in Manners Mall, Wellington. Mr Kanar says he started work on 2 February 2006. There was no employment agreement. No wage and time and holiday records have been produced, despite being requested from Mr Gurleyen and Sultan's Harem Limited.

[2] Mr Kanar claimed that he was not aware of a company called Sultan's Harem Limited before March 2006. He has claimed in the alternative, if the Authority finds that Mr Gurleyen was not his employer, that he was employed by Sultan's Harem Limited.

[3] Mr Gurleyen and Sultan's Harem Limited have denied that they employed Mr Kanar. They say he was undertaking due diligence to purchase the business and that explains why he was in attendance at the business's premises. They say it explains why there was no employment agreement and wages time and holiday records.

[4] Mr Kanar left the restaurant on 5 July 2006 after he had not been paid and when he says Mr Gurleyen told him that he could leave.

[5] Mr Kanar has claimed arrears of wages, holiday pay, lost wages, compensation, penalties and costs.

[6] He has also requested a compliance order for Mr Gurleyen to pay an earlier order made by the Authority for a \$250 contribution to costs. Mr Gurleyen has been put on notice.

The issues

[7] The issues for investigation are:

- Was Mr Kanar employed by Mr Erol Gurleyen and/or Sultan's Harem Limited?
- Was Mr Kanar actually dismissed or constructively dismissed on 5 July 2006?
- Is Mr Kanar owed wages and holiday pay?
- Has there been a deliberate and wilful breach of the Wages Protection Act and or Minimum Wage Act and the Employment Relations Act for any penalties?

Mr Gurleyen's failure to appear and/or be represented

[8] Mr Gurleyen was not present at the Authority's investigation meeting on 7 April 2010. I decided to continue because I was not satisfied there was any good cause for Mr Gurleyen's failure to appear or be represented. I did note that there is considerable correspondence on the file with regard to Mr Gurleyen's claims about his health that prevented him from attending the Authority's investigation meeting.

At the time Mr Gurleyen was represented by a lawyer who applied unsuccessfully for an indefinite adjournment of the statement of problem being investigated.

[9] After considerable delays in this matter being set down for an investigation meeting, I decided to proceed and put all parties on notice of the investigation meeting date.

[10] In reply to correspondence from Mr Gurleyen and his lawyer at the time, the Authority gave notice that Mr Gurleyen would have to provide up to date information and make arrangements for representation and the attendance of witnesses who might corroborate and support his reasons for not attending. He was also put on notice that the Authority wanted up-to-date information and verification of his personal circumstances he was relying on for not being able to attend. Indeed the same notice was conveyed to Gwen Sander, an associate of Mr Gurleyen's, when she contacted the Authority on his behalf. There has been no attendance by any witnesses to support Mr Gurleyen. No up to date information has been provided by the time of the investigation meeting. Ms Sander was not representing Mr Gurleyen, but a witness for Sultan's Harem Limited.

[11] I came to the conclusion that that there was no good cause for Mr Gurleyen's failure to appear or to be represented at the Authority's investigation meeting. Therefore I decided to proceed fully in the matter as if he appeared or was represented (clause 12 of Schedule 2 of the Employment Relations Act 2000).

Consideration of mediation

[12] I considered mediation as I must under s.159 of the Employment Relations Act 2000 and did not direct the parties to mediation because, at that time, there had been no statements in reply filed, difficulties of service and contacting Ms Gurleyen proved problematic. As there had been considerable difficulties in serving and even locating Mr Gurleyen, I decided that mediation would not constructively contribute to resolving the matter. Indeed even after receiving documents from the respondents I decided that there was not enough to guarantee that Mr Gurleyen would cooperate and attend or make arrangements to be represented at mediation. It now falls on the Authority to determine the issues.

The facts

[13] Mr Kanar has claimed that he had several discussions with Mr Gurleyen with regard to the opportunity to work at the Harem Café and Meze Bar in Wellington. Mr Kanar says these discussions took place over some time 2005 (Mr Kanar's written statement paras.3-12).

[14] Mr Kanar understood that Mr Gurleyen would pay him \$1,000 per week setting up the menu and the kitchen and when he had done that his hours would increase and that he would work Tuesday to Saturday.

[15] Mr Kanar claimed that the payment of \$1,000 per week equated to \$52,000 per annum and was supported by a letter signed by Mr Gurleyen dated 22 February 2006 (document 1 bundle of documents "BOD").

[16] Mr Kanar shifted to Wellington from Auckland at the end of January 2006 to take up the job. He started work at the restaurant on 2 February 2006 and initially started working Monday to Saturday from 10am until 5 or 6pm.

[17] He says he asked Mr Gurleyen for an employment agreement when he started work. He says he kept on asking Mr Gurleyen for an employment agreement right up until his employment ended. Mr Kanar says Mr Gurleyen promised to provide the agreement but it never happened.

[18] Mr Kanar claimed that he had to request Mr Gurleyen to pay him. He says Mr Gurleyen made excuses because the business was not making any money. Mr Kanar has claimed that he had ongoing discussions about the payment of his wages and to obtain an employment agreement with promises and representations being made by Mr Gurleyen without anything eventuating (Mr Kanar's written statement, paras.18-22).

[19] Mr Kanar says that Mr Gurleyen introduced him to Gwen Sander, an associate, and along with Mr Gurleyen's accountant, they spoke to him about buying shares in a company called Sultan's Harem Limited (Mr Kanar's written statement paras.23-32). Mr Kanar says this was the first time that he had heard about the name of this company.

[20] In March 2006, an agreement was drafted [2 BOD] purporting to appoint Mr Kanar as manager Ms Sander was also appointed as manager. The record shows that there were no shares transferred or held by Mr Kanar in Sultan's Harem Limited and that he was never appointed a director of that company. The record shows that Ms Sander was appointed a director of Sultan's Harem Limited on 20 March 2006 and that Mr Gurleyen had resigned as a director on the same date.

[21] Mr Kanar claimed that, despite Mr Gurleyen's resignation as a director, Mr Gurleyen continued to run the business and had a continuing involvement in it because he was present at the Harem Café and Meze Bar.

[22] Mr Kanar claimed that notwithstanding the agreement that he had signed (20 March 2006) he continued to be employed after 20 March 2006 but that there were ongoing issues over payment of his wages. He accepted that some wages were received and that Mr Gurleyen paid some of his bills. There are documents (a pay slip and bank statements) that support the payment of wages by Sultan's Harem Limited. There is no indication of any arrangements between Mr Gurleyen and Sultan's Harem Limited on the payment of wages.

[23] In June and early July 2006, Mr Kanar did investigate purchasing the Harem Café and Meze bar business, and his legal representative at the time prepared some legal documents. There is correspondence on this issue dated 5 July 2006 [15 BOD]. Mr Kanar approached a solicitor in June because of his concerns and a letter on his behalf dated 2 June 2006 expressed a concern about the enforceability of the 20 March 2006 agreement. Mr Kanar says that he attempted to have a discussion with Mr Gurleyen about the documents and his employment and how an investigation into another lease arrangement had fallen over. He says that Mr Gurleyen said he could not pay him anything and that if he was not happy then he should just go.

Who was Mr Kanar's employer?

[24] The first issue that I need to determine is whether Mr Kanar was employed by Erol Gurleyen and/or Sultan's Harem Limited.

[25] There is a clear conflict between Mr Kanar; Ms Sander; Mr Greg Churcher, a friend and business associate of Mr Gurleyen; and Mr Gurleyen's accountant. The accountant incidentally did not turn up for the Authority's investigation meeting for

the reason that he needed to attend to family in India. His written statement is part of the record.

[26] Despite the considerable conflicts between these people, the documentation supports, on the balance of probabilities, that Mr Gurleyen was Mr Kanar's employer when he started working at Harem Café and Meze Bar on 2 February 2006. This is supported by:

- (i) Mr Kanar's direct evidence in his affidavit that he affirmed by video conference at the Authority's investigation meeting;
- (ii) A letter dated 22 February 2006 to a bank confirming Mr Kanar's employment as the head chef at the Harem Café and Meze Bar [BOD page 1]. There is no mention of Sultan's Harem Limited in this letter, and the letter is signed by Mr Gurleyen as the *restaurant owner*;
- (iii) Summary of earnings for the tax year 1 April 2005 to 31 March 2006 [para.44] which is consistent with Mr Gurleyen being Mr Kanar's employer, particularly at the start of his employment;
- (iv) An application for a general manager's certificate [9 BOD], this does not state that he was employed by Sultan's Harem Limited, but only that he was working at *Harem Café Meze Bar*;
- (v) In a document [BOD page 37] Mr Gurleyen does not actually state that he never employed Mr Kanar, and nor that he was never his employer. The document states that *at no time was an employment agreement entered into between myself and your client*;
- (vi) In another document produced after the statement of problem was initiated there is a denial (in the third person) that he held himself out as the employer.
- (vii) Mr Kanar was paid in April and May 2006 and his bank statements [24 and 25 BOC] refer to *Harem Café and Meze ... Wages*;
- (viii) Mr Kanar incorporated a company Muhlis Limited on 22 May 2006, and he put down Mr Gurleyen's home address as the registered office

and address for service etc, but there is no evidence of any activity involving this company;

- (ix) Ms Sander took over as a director of Sultan's Harem Limited from 20 March 2006 when Mr Gurleyen resigned as a director.
- (x) A document from IRD (BOD page 43) that refers to the employer: Sultan's Harem Limited with gross wages and PAYE paid. This information was provided to IRD by the employer.

[27] I hold that Mr Kanar was employed by Erol Gurleyen personally prior to 20 March because there is no evidence of any disclosure to Mr Kanar of the existence of Sultan's Harem Limited.

[28] The significance of the effect of the 20 March 2006 agreement is that it contains a statement *the applicant is appointed as manager with effect from 20 March 2006*. Mr Kanar has stated in his statement [para.33] that he was advised that the March agreement was completely separate from his employment and that he would be receiving an employment agreement shortly. It was submitted on his behalf that the March agreement therefore did not change his employer. However, the paperwork and documents that are available would indicate that at least from 20 March 2006 Mr Kanar would have known about the company by name despite not having an employment agreement and where references were being made to Sultan's Café and Meze Bar. The name also appears on a payslip provided [8 BOD]. Other documents refer to Harem Café and Meze Bar and or Sultan's Harem Limited are:

- Letter signed by Erol Gurleyen: [1 BOD]. This confirms full time employment on a salary of \$52,000 as of 1 March 2006.
- 2 BOD: (agreement between Sultan's Harem Limited and Mustafa Kanar dated 20 March 2006;
- 5 BOD page 6: (30 March 2006 letter: Confirmation of appointment as manager);
- 6 BOD, Page 7: (2 April 2006 letter confirming Mr Kanar's employment as a part time manager);
- 7 BOD, Page 8: (pay slip);

- 12 BOD, Page 14: (15 June 2006 letter confirming that Mr Kanar commenced employment with Sultan's Harem Limited as a capacity manager);
- 17 BOD, Page 37: (letter dated 8 August 2006: Erol Gurleyen to Mr Kanar's lawyer);
- 2 BOD, Page 43: (April and May 2006 IRD records).
- Payments *Harem Café and Meze Bar ... wages weekly from 4 April 2006 to 9 May 2006* (6 in total) [24 and 25 BOD].

[29] In addition, the following evidence is relevant:

- (i) Mr Gurleyen signed the 20 March agreement on behalf of Sultan's Harem Limited as a director;
- (ii) Mr Kanar's evidence that Mr Gurleyen and Ms Sander made him aware of the company's existence well after he had started work (Kanar's written statement para.23);
- (iii) Mr Kanar's evidence that Mr Gurleyen advised him that he wanted to remove himself from being a director of the company because he owed money;
- (iv) Sultan's Harem Limited, during the relevant time, was essentially a one-person company involving Mr Gurleyen. He was a registered director until 20 March 2006 and his associate, Ms Sander, was registered to replace him as a director from 20 March 2006 to August 2006. Mr Gurleyen had apparent authority to bind Sultan's Harem Limited where Ms Sander, by her own evidence, was the manager;
- (v) Mr Gurleyen worked at the restaurant during the relevant time along with Ms Sander and other family (one of whom later became a director of Sultan's Harem Limited).

[30] After 20 March 2006 Sultan's Harem Limited became Mr Kanar's employer. Indeed Mr Kanar told me he was aware of the company's existence from at least that time. In the absence of any other records, both Mr Gurleyen and Sultan's Harem Limited are jointly and severally liable as the employer for any claims.

[31] It is possible that Sultan's Harem Limited was an agency administering the pay for Mr Gurleyen. There is authority that the source of the salary payment is not conclusive evidence of employment (see *Kruesi v. Hamua Holdings Ltd* [1992] 3 ERNZ 135). There is no evidence, and it is not likely that Sultan's Harem Limited was used to make payments for the employer, Mr Gurleyen, because the documentation produced support wages being paid and that Sultan's Harem Limited became the employer. Also, while Mr Gurleyen was divesting his responsibilities in the companies I have no doubt he retained some form of role at the very least by his presence and contacts with other people involved: eg Ms Sander and Mr Churcher.

Credibility

[32] I have preferred Mr Kanar's evidence because of the following:

- (i) Mr Gurleyen failed, without good cause, to appear or to arrange to be represented, and therefore, I prefer Mr Kanar's evidence, because none of the other evidence reliably contradicts, challenges or refutes what he says;
- (ii) Sultan's Harem Limited could have called Mr Gurleyen as a witness but did not do so. It would have been entirely reasonable to expect Sultan's Harem Limited to call Mr Gurleyen because of the extensive evidence with regard to his role in this matter. The Authority heard from his sister-in-law, Mervet Gurleyen, who says she was working during the relevant period. I hold that her evidence was too limited to be taken into account. I also did not find her evidence and answers to questions persuasive because of a lack of detail and her inability to recall any detail.
- (iii) Ms Sander's contemporaneous documentation does not support the position that Mr Gurleyen and the second respondent have taken. I have decided that her change in position over the two documents has not assisted me and I have decided her evidence is not reliable.
- (iv) Ms Sander could not give any plausible explanation for asserting that the documentation she had signed at the time (the written response document) was somehow not an accurate reflection of the facts at the time.

- (v) Ms Sander has deliberately assisted Mr Gurleyen in the completion of documentation that has at best been left deliberately vague and deliberately ambiguous, such as the application for renewal of a manager's certificate.
- (vi) Ms Sander could not produce any corroborative evidence to support her claims that Mr Kanar put pressure on her. She relied on Mr Churcher and his evidence, but his evidence only referred to one incident and he could not offer any other examples or any other detail of any other circumstances regarding Mr Kanar's behaviour. She did not make any complaints to the Police with regard to the demands she is making now. This is despite her making other complaints to the Police with respect to other matters.
- (vii) I agree with Ms Kennedy that Ms Sander's demeanour and communication during the course of the Authority's investigation proved that she is a person not easily pressurised or persuaded to do something she did not want to do. Also, I hold that she is cleverly argumentative in developing issues to support her own position and mask what might be the obvious.
- (viii) During the investigation meeting, Ms Sander sought to distance herself from her earlier written response (August 2009 statement filed in the Authority), and yet in that document (at least at paras.15, 17, 32, 35, 48, 49 and 50), the document purported to give her direct evidence on matters she apparently could talk about. She was very deliberately vague and non-committal about this, and evasive, I hold.
- (ix) Ms Sander's independence is also questionable. This is because of a close relationship to the Gurleyen family. She claimed to provide professional advice and assistance to Mr Gurleyen. However, the evidence suggests she is much closer to Mr Gurleyen than that because for several years she has lived with him, there is a common address that has been used between the Gurleyens and their businesses. There is also the linkage with other business and charitable activities that she is involved in that have a linkage to Mr Gurleyen.

[33] Other factors that are relevant include:

- (i) Under cross-examination, Ms Sander admitted to helping in a business in Tauranga called Abrakebabra that Mr Gurleyen apparently has some association with and she had been living at his Tauranga address. This contradicted her evidence that she had no knowledge of Mr Gurleyen's current business activities;
- (ii) Misleading information with regard to an application for renewal of a manager's certificate under *employment details* where it is stated that Ms Sander works at Abrakebabra, and she informed the Authority that she had not and did not work there. She relied upon a definition of work that was deliberately ambiguous, I hold, compared with Mr Kanar's assertion that he was an employee.
- (iii) Ms Sander produced a photograph of Mr Kanar dressed up working in the Harem and Meze bar and restaurant's kitchen to try and taint him. Other photos were produced by Mr Kanar through his lawyer that show Ms Sander also dressed up and clearly these photos lead to the impression that they involved work and social functions and that there might be some other context to her photos with Mr Kanar, other than trying to taint him. There is also a photograph of Mr Gurleyen dressed up.

[34] I have given little weight to the accountant's written statement because without any prior notice he did not turn up for the Authority's investigation meeting, and did not initiate any other arrangements to be questioned. There was no advance notice that he would be absent and could not attend. He may have had good reason for not attending, but there has been no evidence and no supporting documents produced to substantiate the reason given by Sultan's Harem Limited's advocate at the investigation meeting.

Unjustified dismissal

[35] Mr Kanar's employment ended on 5 July 2006 when he was told he could leave by Mr Gurleyen. It is more than probable that Mr Kanar decided not to return because he was not being paid. He was entitled to decide to leave because his

employer was not paying him and it means that the action of the employer repudiated the employment agreement. This conclusion is supported by:

- (i) There are no wages time and holiday records for Mr Kanar's employment relationship with Mr Gurleyen and Sultan's Harem Limited. No other wage and time and holiday records were produced to scrutinise the activities of Sultan's Harem Limited.
- (ii) There was no employment agreement despite Mr Kanar making requests for an agreement. An example of an individual employment agreement was produced by Ms Sander to show that employees received them. This was not sufficient to support the respondent's claim that Mr Kanar was not an employee.
- (iii) The March purported sale and purchase agreement involved a reference to employment and an employment position for Mr Kanar.
- (iv) The purported sale and purchase agreement turned sour. On its own the agreement was not enough to satisfy me that Mr Kanar's role in the business had anything to do with due diligence at least at the start and his involvement with Mr Gurleyen.
- (v) Discussions and investigations on a lease in Willis Street Wellington did not eventuate. This was separate to any involvement in the Harem Café and Meze Bar and the March agreement.
- (vi) The changing involvement of different people in Sultan's Harem Limited.
- (vii) Mr Kanar had been paid some wages, supported by the payslip and bank statements.

[36] It is my decision that Mr Kanar is entitled to remedies for a personal grievance of unjustified dismissal. I have decided that Mr Kanar did not contribute to the situation giving rise to the personal grievance. He is therefore entitled to lost wages. He has produced evidence of his attempt to mitigate his loss and post employment

earnings. I award him 3 months lost wages to cover the time after his dismissal which included getting other work and being sick for a short period, less the post employment earnings of \$4,360. Mr Gurleyen and Sultan's Harem Limited are to jointly and severally pay Mr Kanar the sum of \$8,640.

[37] Mr Kanar is entitled to compensation for humiliation loss of dignity and injury to feelings. There was an impact on him, but at the lower end of the scale as it only related to his evidence of saying he was shocked, worried, disappointed and stressed, without much detail and corroborating evidence. His evidence entitles him to \$3,000 under s 123 (1) (c) (i) of the Act.

Remaining claims

[38] Mr Kanar gave evidence of dates and times he worked at the Harem Café and Meze Bar and was not properly paid. On the basis of his claim for \$18,348, including a deduction for the amount of pay he did receive, and salary of \$52,000 per annum, I award him \$18,348 for the period 2 February 2006 until 5 July 2006 (21 weeks).

[39] Mr Kanar is entitled to Holiday pay of \$1,100.88 as calculated by his Counsel. The payments were due at least by 5 July 2006.

[40] The non payment of wages was in breach of s 5 of the Wages Protection Act. The wages should have been paid at the end of the employment on 5 July 2006.

[41] The employer's failure to provide a wage time and holiday record as requested by Mr Kanar's lawyer, at the earliest by 18 July 2006 is in breach of the Employment Relations Act and Holidays Act. I conclude none was kept. The respondents' explanations that as Mr Kanar was never an employee no records were kept carries little weight considering the evidence of Mr Kanar's employment.

[42] These are flagrant breaches. The employers' conduct was wilful and deliberate. Such behaviour should incur a penalty. I am satisfied that the claim for penalties meets the requirements of s 134 (5) of the Employment Relations Act where the proceedings were commenced on 18 April 2007 (SOP Kanar and Gurleyen) and 12 June 2007 (amended SOP Kanar and Gurleyen and Sultan's Harem Limited) and that the date when the cause of action first became known to Mr Kanar or the date when the cause of action should have reasonably become known to him to bring the action was within 12 months. Therefore I impose a penalty of \$1,000 to be paid to Mr

Kanar for the trouble he has been put to and being denied the use of wages and holiday pay he was entitled to.

[43] Mr Kanar has attempted with the assistance of his lawyer to get payment of an earlier costs determination made by the Authority. I am satisfied that the sum of \$250 contribution to Mr Kanar's costs has deliberately not been paid by Mr Gurleyen. This is a matter for a compliance order. I order Mr Gurleyen to comply and pay Mr Kanar the \$250 contribution of costs made by the Authority in a determination issued on 18 August 2009. Mr Gurleyen is to pay this sum in 28 days from the date of this determination.

[44] Costs are reserved.

Summary of the Authority's orders

[45] Erol Gurleyen is required to comply and pay Mr Kanar the \$250 in accordance with the Authority's determination issued on 18 August 2009. Mr Gurleyen is to pay this sum in 28 days from the date of this determination.

[46] Erol Gurleyen and Sultan's Harem Limited are jointly and severally required to pay Mustafa Kanar:

- (i) \$18,348 arrears of wages
- (ii) \$1,100.88 Holiday pay
- (iii) \$8,640 lost wages
- (iv) \$3,000 for compensation under s 123 (1) (c) (i) of the Act
- (v) \$1,000 penalties.

[53] Costs are reserved.