

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 286
5595396

BETWEEN LAWRENCE BANABA SAMI
 Applicant

A N D OPTIMIZER HQ LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: I Hutcheson, Counsel for the Applicant
 No appearance for the Respondent

Date of Determination: 24 August 2016

DETERMINATION OF THE AUTHORITY

- A. Lawrence Banaba Sami was employed by Optimizer HQ Limited. Costs are reserved.**
- B. The respondent is directed to file a copy of the wages and leave record for Lawrence Banaba Sami by 31 August 2016 3 pm. This direction is made pursuant to s160(1)(a) Employment Relations Act 2000;**
- C. The liquidator of ODEV Limited is also directed to file a copy of the wages and leave record for Lawrence Banaba Sami by 31 August 2016 3 pm. This direction is made pursuant to s160(1)(a) Employment Relations Act 2000;**
- D. The respondent is to file any evidence about the wage arrears claim for \$60,826.91 unpaid wages and holiday pay \$43,896.51 by 31 August 2016 3 pm;**
- E. The applicant may file any evidence in reply by 7 September 2016 3 pm**

Employment Relationship Problem

[1] The issue for determination is whether the respondent or another company ODEV Limited employed Lawrence Banaba Sami. ODEV Limited is in liquidation. The respondent is not.

[2] Mr Sami also seeks wages and holiday pay of \$104,723.42 and kiwisaver entitlements of \$1,316.90.

Failure of Respondent to take further steps

[3] The respondent has not taken any steps in this proceeding. It was served at its company address for service by courier post on 16 November 2015. Despite efforts to contact the respondent director, Manus Kumar, it did not attend a teleconference set down for 19 January 2016. A minute issued with directions for determining this matter upon the papers and filing evidence and submissions.¹ The respondent has failed to file any evidence or submissions or to explain why it has failed to do so.

[4] I have the power to proceed if a party fails to attend or be represented at a hearing.² Attempts have been made by the Authority Officer to contact the respondent via its director Manas Kumar without success. In the circumstances I intend proceeding to determine this matter in absence of hearing from the respondent.

Relevant Facts

[5] Mr Sami signed an employment agreement with Optimizer HQ Ltd on 13 February 2012. The employer company changed its name to ODEV Limited on 30 April 2013. It was placed in liquidation on 10 December 2015.

[6] On 4 July 2012 and 1 April 2013 Mr Sami received pay increases to his salary. The letterhead advising the pay increases was headed "Optimizer HQ Limited."

[7] The respondent was formerly known as OPH Holdings Limited. It was incorporated on 11 April 2013. It changed its name to Optimizer HQ Limited on 30 April 2013.

¹ Minute dated 19 January 2016.

² Clause 12 Schedule 2 Employment Relations Act 2000 (Act).

[8] By 2014 Mr Sami was owed wages. On 11 October 2014 he entered into a share agreement with “Optimizer HQ Limited” to receive shares in lieu of wage arrears owed up to the date of the agreement.

[9] Mr Sami terminated the agreement due to ill health in May 2015.

[10] On 15 December 2015 ODEV Limited was placed in liquidation.

[11] Mr Sami now seeks to recover his wage arrears from the respondent.

Who was Mr Sami’s employer?

[12] An employer is any person employing any employees.³ An employee is any person employed by an employer to do work for hire or reward under a contract of service.⁴ This requires determination of what the “real nature of the relationship” is between them.⁵ I must consider all relevant matters including any matter that indicates the intention of the parties. However, I am not to treat as a determining matter any party’s statement describing the nature of their relationship.⁶

[13] The essential question is who would an independent but knowledgeable observer have said was the applicants’ employer?⁷ The onus is upon Mr Sami to prove the existence of the employment relationship with the respondent.

Employment agreement

[14] The employment agreement dated 13 February 2012 is between Mr Sami and ODEV Limited (formerly known as Optimizer HQ Limited). It provides that “*no variation shall be effective or binding on either party unless it is in writing and signed by both parties.*” (clause 15.1). This must include a variation to the identity of the employer.

[15] There is little doubt ODEV Limited employed Mr Sami up and until 11 April 2013. A company office search of the respondent shows it did not exist prior to 11 April 2013.

³ Section 5 of the Act.

⁴ Section 6(1) of the Act.

⁵ Section 6(2) of the Act.

⁶ Section 6(3) of the Act.

⁷ *Hutton v Provencadmus Limited (in receivership) & Anor* [2012] NZEmpC 207 at [79] citing *Mehta v Elliot (Labour Inspector)* [2003] 1 ERNZ 451 at [22].

Discussions with Mr Kumar

[16] Mr Sami refers to discussions with Manas Kumar about his position as Group CFO for “Optimizer HQ”. There are no dates for these discussions. I assume they may have occurred around the respondent’s incorporation but there is little or no detail about this. There is some uncertainty about what discussions (if any) were held about the terms and conditions of his appointment and if there was an intention to transfer his employment to another company. From the evidence, the discussions appear to be about his role not his employer.

PAYE records - ODEV Limited

[17] I directed the liquidator of ODEV Limited to provide further information. It provided ODEV Limited’s PAYE records for the period up to March 2014 and commentary on the records and its beliefs about the employment of Mr Sami.

[18] The First Liquidators Report dated 17 December 2015 for ODEV Limited listed Lawrence Sami as a creditor. The report also refers to preferential claims of \$59,043 from former employees. I sought information from Mr Sami about why he was listed as a creditor.⁸ This was provided on 5 July 2016. Mr Sami stated he did not make any notice of claim against ODEV Limited.

[19] The liquidator emailed the Authority on 1 and 18 July advising:⁹

We have included Lawrence Banaba Sami in Odev Limited (In Liquidation)’s 1st report for the following reason:

The former employee of Optimizer has forward our office a letter issued by Employment Relations Authority dated on the 16 November 2015 (see attachment). We then included him into the Odev’s creditor list as we have been advised Optimizer HQ Limited is the holding company, and Odev Limited (In Liquidation) was the entity engaged with employment. We would like to send all known creditor the 1st report to notice the liquidation, if the creditor believe the entity in debt with the company, they will be required to file a claim form with us within a specific period. Otherwise, we will adjust the creditor list in the subsequent reports.

“ODEV Limited (In Liquidation) engaged with employment” is because the three entities are registered for group tax, ODEV file all the PAYE for the group. Further on this, the records on

⁸ Minuted dated 3 June 2016.

⁹ Emails E Li to ERA dated 1 and 18 July 2016.

hands indicated that the recent year employment agreements were signed with ODEV. I assumed that the ODEV would deal with employment for the group.

[20] The liquidator also provided copies of the PAYE records between March 2012 to 2014. These all continue to be upon Optimizer HQ letterhead irrespective of the change in names between the companies. These tax payment arrangements are not conclusive of the identity of the employer.

Pay rises

[21] Mr Sami has attached two letters dated 4 July 2012 and 1 April 2013 embodying variations to his pay on letterhead headed “Optimizer HQ Limited.”

[22] Given the respondent was not incorporated at the time these variations occurred, they cannot indicate evidence of any agreement regarding transfer of employment. At best they show a practice of confirming variations in writing as required by the employment agreement.

The Agreement dated 11 October 2014

[23] It is the agreement dated 11 October 2014 between Mr Sami and Optimizer HQ Limited that on its face creates a new employment agreement changing the identity of his employer.

[24] Clause 2A states “The parties have entered into an employment agreement whereby the employee receives salary in return for providing services as an employee to Optimizer”. At that time, the respondent had been incorporated and renamed as “Optimizer HQ Limited.” On its face it purports to create a new employment relationship between Mr Sami and the respondent.

[25] This agreement also purports to issue Mr Sami 50,000 shares in the employer Optimizer HQ Limited in lieu of his unpaid salary.

[26] An independent observer would have concluded Mr Sami was from that date employed by Optimizer HQ Limited.

[27] Lawrence Banaba Sami was employed by Optimizer HQ Limited. Costs are reserved.

Unpaid wages

[28] Mr Sami owns 50,000 shares in Optimizer HQ Limited. There is a disagreement whether he is able to claim unpaid salary as a consequence for the period prior to 11 October 2014.

[29] The applicant seeks \$60,826.91 unpaid wages and holiday pay \$43,896.51. No wage and time record has been produced. A spreadsheet attached to the evidence of I Mikhalev purports to record Mr Sami's wages and holiday pay owed. Given this witness is no longer the company accountant I am concerned to ascertain if this evidence is Mr Sami's correct wage record. Therefore I direct as follows:

- a) The respondent is directed to file a copy of the wages and leave record for Lawrence Banaba Sami by **31 August 2016 3 pm**. This direction is made pursuant to s160(1)(a) Employment Relations Act 2000;
- b) I understand the PAYE records may be held by the liquidator of ODEV Limited. The liquidator of ODEV Limited is also directed to file a copy of the wages and leave record for Lawrence Banaba Sami by **31 August 2016 3 pm**. This direction is made pursuant to s160(1)(a) Employment Relations Act 2000;
- c) The respondent is to file any evidence about the wage arrears claim for \$60,826.91 unpaid wages and holiday pay \$43,896.51 by **31 August 2016 3 pm**;
- d) The applicant may file any evidence in reply by **7 September 2016 3 pm**;
- e) The file is to be referred to me to consider making the decision about wages owed upon the papers.
- f) A copy of this determination is served upon the respondent at its company address for service.

T G Tetitaha
Member of the Employment Relations Authority