

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 538
3062992

BETWEEN PANKAJ SHARMA
Applicant

AND PANKAJ KHANNA
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Sarah Law, Counsel for the Applicant
Pankaj Khanna, in person

Investigation Meeting: 13 September 2019

Date of Determination: 19 September 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 27 November 2018 the Authority issued a determination that ordered GRPL International Limited (GRPL) to pay wage and holiday pay arrears to Pankaj Sharma totalling \$20,112.96 plus \$71.56 in costs. Other than payments totalling \$300 made in January 2019, GRPL have paid no amount towards this sum.

[2] Mr Sharma applied to the Authority for orders under s 142Y of the Employment Relations Act 2000 (the Act) that Pankaj Khanna was a person involved in the default in the payment of wages and other money owed to Mr Sharma by GRPL. Mr Khanna is, and was at material times, the sole director of GRPL.

[3] 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 but has not recorded all evidence and submissions received.

The Authority's process

[4] No Statement in Reply was filed by Mr Khanna despite him being in contact with the Authority and many opportunities being afforded for him to do so.

[5] The day before the investigation meeting Mr Khanna contacted the Authority, asking for the investigation meeting to be adjourned as he was unwell. This application was declined. Correspondence from the Authority set out the reasons why, concluding with:

In the circumstances, taking into account the period of time since the Respondent was served, the fact that he has had the ability to respond to the Applicant's claim since his return to NZ (at least for the period from 27 August to 3 September inclusive), and the on-going failure by Mr Khanna's company to attend to payment of the monies it was ordered to pay to Mr Sharma in November 2018, I am not willing to grant an adjournment of the investigation meeting. However, the Respondent is granted leave to attend the investigation meeting by telephone if he cannot attend in person. He should provide his contact phone number to the Authority to enable this to occur.

[6] The commencement of the investigation meeting was delayed to enable Mr Khanna to appear by telephone, which he did, and leave was granted for him to be heard. Mr Sharma and his legal representative were also granted leave to appear by telephone.

Was Mr Khanna a person involved in the breach?

The law

[7] Section 142Y sets out when a person involved in a breach can be held liable for default in payment of wages or other money due to an employee. Specifically it provides:

- (1) A Labour Inspector or an employee may recover from a person who is not the employee's employer any wages or other money payable to the employee if—
 - a. there has been a default in the payment of wages or other money payable to the employee; and
 - b. the default is due to a breach of employment standards; and

- c. the person is a person involved in the breach within the meaning of section 142W.

(2) However, arrears in wages or other money may be recovered under subsection (1) only,—

- a. in the case of recovery by an employee, with the prior leave of the Authority or the court; and
- b. to the extent that the employee's employer is unable to pay the arrears in wages or other money.

[8] Section 142W defines when a person is “involved in a breach”:

(1) In this Act, a person is involved in a breach if the breach is a breach of employment standards and the person—

- a. has aided, abetted, counselled, or procured the breach; or
- b. has induced, whether by threats or promises or otherwise, the breach; or
- c. has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
- d. has conspired with others to effect the breach.

(2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.

(3) For the purposes of subsection (2), the following persons are to be treated as officers of an entity:

- a. a person occupying the position of a director of a company if the entity is a company:
- b. a partner if the entity is a partnership:
- c. a general partner if the entity is a limited partnership:
- d. a person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership:
- e. any other person occupying a position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.

(4) This section does not apply to proceedings for offences.

[9] In *Gibson v Crane* Member Arthur addressed the statutory discretion that the Authority has to grant or decline an application for leave to recover arrears in wages. I agree with the comments made and repeat them in full:¹

The word "prior" does not mean the application needs to be made and granted before an employee can begin an action to recover arrears. The question of seeking to recover against a person involved in the breach only arises after liability for arrears and involvement of the person has been established. As a matter of practicality a single Authority investigation and determination may consider both the issues of liability for arrears, leave to recover against another person and orders for the relevant amounts. The leave application, during the course of that proceeding, is simply a check that the necessary statutory requirements have been met. This is what must be done "prior" to considering which legal or personal entities may be subject to orders for recovery of arrears.

Analysis

[10] For reasons that follow, and in accordance with the preliminary indication of findings provided to the parties at the conclusion of the investigation meeting, I grant leave to Mr Sharma to recover from Mr Khanna the arrears of wages that remain outstanding from the Authority's determination dated 28 November 2018 (the first determination).²

[11] First, there has been a default in the payment of wages or other money payable to Mr Sharma. The first determination issued by the Authority found there had been a default in the payment of wages and holiday pay by GRPL to Mr Sharma. This default occurred over a period from August 2016 to March 2018 and totalled \$20,112.96.³

[12] Second, the default is due to a breach of an employment standard as defined by s 5 of the Act. Employment standards include the requirements of s 130 of the Act to keep wage and time records, the minimum entitlements under the Holidays Act 2003, the minimum entitlements under the Minimum Wages Act 1983, and the provisions of the Wages Protection Act 1983. The failure to pay Mr Sharma's holiday pay was a breach of the employment standard referring to minimum entitlements under the Holidays Act 2003. In addition, the failure to pay Mr Sharma the entire amount of his wages was a breach of s 4 of the Wages Protection Act.

¹ *Gibson v Crane* [2018] NZERA Auckland 360 at [53].

² *Pankaj Sharma v GRPL International Limited* [2018] NZERA Auckland 373.

³ Above at n 2.

[13] Third, Mr Khanna is a person involved in the breach within the meaning of s 142W. Mr Khanna was the sole director of GRPL for the whole of Mr Sharma's employment and continues to remain so. He was in all respects the face of the Company. He clearly aided, abetted or procured the breaches both prior to the first determination being issued and afterwards.

[14] In answer to questions from the Authority Mr Khanna accepted that he was responsible for making payment of wages and other payments to staff. He said that while it was his wife who calculated the amount due to each employee, and attended to payment, her calculation was based on the rosters he prepared and was based on his instructions. He acknowledged he provided his wife with his password to enable her to make payment to staff. The evidence showed that he was also the person who staff communicated with over their hours and their wages.

[15] Fourth, GRPL is unable to pay the arrears in wages. Mr Khanna told the Authority that GRPL had sold all of its assets. He said that the proceeds of sale had been applied to loans and there was no money remaining to pay Mr Sharma or to pay IRD who GRPL is also indebted to. He said that but for him being overseas until recently, and then catching the flu, he would have placed GRPL into liquidation.

[16] Mr Khanna's evidence is consistent with email correspondence that he sent to Mr Sharma on 8 January 2019 that offered to pay the arrears by time payments because "my company is not financially sound" and could not "pay the whole amount together to you right now". The evidence was that Mr Khanna then paid \$300 of his own money, on behalf of GRPL, towards repayment of the outstanding debt.

[17] I conclude in the circumstances that Mr Khanna was a person involved in the breach and is liable, jointly and severally with GRPL, for the default in payment of wages due to Mr Sharma. For the avoidance of doubt, I confirm that the wage arrears outstanding now totals \$19,812.96 gross taking into account the \$300 paid by GRPL towards the debt in January 2019.

Costs

[18] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[19] If they are not able to do so and an Authority determination on costs is needed Mr Sharma may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Khanna will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[20] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁴

Outcome

[21] The overall outcome that I have reached is:

- a) Leave is granted to Pankaj Sharma to recover from Pankaj Khanna the arrears of wages that remain unpaid (\$19,812.96 gross) on the Authority's determination *Pankaj Sharma v GRPL International Limited* [2018] NZERA Auckland 373.
- b) Pankaj Khanna is jointly and severally liable with GRPL International limited to pay the outstanding sum of \$19,812.96 gross to Pankaj Sharma.
- c) Costs are reserved

Jenni-Maree Trotman
Member of the Employment Relations Authority

⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].