

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 64  
5517963

BETWEEN ANIL REDDY TUMMURU  
Applicant  
A N D KHAN ENTERPRISES LIMITED  
Respondent

Member of Authority: Helen Doyle  
Representatives: Sudhir Nannapaneni, Advocate for the Applicant  
Jonathan Everist, Counsel for the Respondent  
Investigation Meeting: 7 April 2015 at Ashburton  
Information Received: 9 April 2015  
Date of Determination: 19 May 2015

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**DETERMINATION OF THE AUTHORITY**

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- A I have found that Anil Reddy Tummuru was an employee of Khan Enterprises from 21 December 2013 until 20 June 2014.**
- B Taking payments made to Anil Tummuru for wages into account I have made the following orders:**
- (i) Khan Enterprises Limited is to pay to Anil Reddy Tummuru the sum of \$13741.50 gross being unpaid wages.**
  - (ii) Khan Enterprises Limited is to pay to Anil Reddy Tummuru the sum of \$256.50 gross for an additional payment for working on four public holidays and \$594.00 gross for payment for four alternative days.**

- (iii) **Khan Enterprises Limited is to pay to Anil Reddy Tummuru the sum of \$1597.68 gross being holiday pay.**
- (v) **Khan Enterprises Limited is to reimburse Anil Reddy Tummuru the filing fee of \$71.56.**
- (vi) **There may be no issue of costs but in the event there is, costs are reserved.**

### **Employment relationship problem**

[1] Anil Tummuru says that he was employed by Khan Enterprises Limited (Khan Enterprises) between late December 2013 and 20 June 2014. Mr Tummuru says that during his period of employment he was either unpaid or only paid a portion of what he says is owed to him.

[2] Mr Tummuru says Khan Enterprises owe him the following amounts:

- (a) For the period 21 December 2013 to 9 February 2014 when he was training at Nando's Riccarton the sum of \$6,540.75 for 484.50 hours worked at \$13.50 per hour of which he received only \$150 leaving an outstanding balance. I note the minimum wage at that time was \$13.75 per hour;<sup>1</sup>
- (b) For the period between 12 February 2014 and 23 June 2014 working at Nando's Ashburton the sum of \$21,252 for 1288 hours worked at \$16.50 per hour of which he was paid the sum of \$5,000.

[3] In addition, Mr Tummuru seeks holiday pay, days in lieu for working on public holidays together with time and a half for the public holidays worked. His total claim, taking into account amounts he says were paid, is \$28,601.55.

[4] Mr Tummuru was represented by his current employer Mr Nannapaneni at the investigation meeting. Submissions were provided following the investigation meeting which sought in addition to the amounts set out above a penalty. The Authority is not prepared to consider penalties in this case as they were not part of the original claim which was responded to by

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<sup>1</sup> Minimum Wage Order (No 2) 2013

Khan Enterprises. It would be unfair to determine a belated application for a penalty by way of a submission having already heard evidence from both parties.

[5] Khan Enterprises operates a Nando's franchise restaurant in Ashburton. It does not accept that Mr Tummuru was an employee from 21 December 2013. It accepts that from 21 February 2014, Mr Tummuru worked at Nando's Ashburton in a part-time, on-call position working for a maximum of 20 hours per week at the minimum wage of \$13.75. When the Authority heard evidence from the directors of Khan Enterprises, Mohammed Imran Khan and Tracey Khan it appeared there may have been some dispute whether he was an employee for that period so that will need to be resolved.

[6] Khan Enterprises says that in June 2014, Mr Tummuru asked for a managerial position as his work visa was about to expire and he needed a better paying position. An offer of employment was made in writing to Mr Tummuru as a shift supervisor for 35 hours a week at \$16.50 per hour. On 6 June 2014, the employment agreement was signed and Mr Tummuru continued working until 20 June 2014.

[7] Khan Enterprises accept that there are no wage and time records as required by s 130 of the Employment Relations Act 2000 (the Act). Materially in this case the hours between which Mr Tummuru was employed on each day and the days of his employment during each pay period are not recorded. There is no record as to whether he worked on public holidays.

[8] Mr Tummuru says that when he received payment from Khan Enterprises it was in cash. Mr Khan said that he deposited all cash amounts he received into his bank in the sum of \$5000 but that he was underpaid for the hours that he worked. I have calculated from the bank statements provided by Mr Tummuru that cash deposits of \$5229 were made for the material period.

[9] At a later stage Khan Enterprises realised that it would have to calculate its tax liability for payments made to Mr Tummuru as it had not deducted PAYE. Some payslips were prepared with varying hours and payments each week. Khan Enterprises says that it paid Mr Tummuru \$400 per week in cash because he did not give them his IRD number and bank

account. I do not find that to be likely. Mr Tummuru had PAYE deducted for period of employment either side of working for Khan Enterprises.

[10] Mr Khan said that the cash was paid from money in the till. As Mr Tummuru does not accept he was paid \$400.00 every week I gave Khan Enterprises an opportunity following the investigation meeting to provide any proof that \$400 was the amount it had paid each week. Nothing in support of payment of that amount being paid to Mr Tummuru was forthcoming.

### **The issues**

[11] It is convenient to break the issues in this case down to three periods of time.

- a. Was Mr Tummuru, when he undertook some training in working as a grill chef at Nando's Riccarton, an employee of Khan Enterprises between 21 December 2013 and 9 February 2014?
- b. If it is found that Mr Tummuru was an employee of Khan Enterprises, then what hours was he working and what is he entitled to be paid?
- c. Was Mr Tummuru an employee of Khan Enterprises for the period from February 2014 to 6 June 2014? If he was an employee, what hours did he work, what was he paid and is he owed any money for that period?
- d. The final period is that between 6 June 2014 and 20 June 2014. There appears no dispute for this period that Mr Tummuru was an employee. The issue is what hours he worked for this period and what he was paid and are there any monies owing to him.
- e. Did Mr Tummuru work on public holidays and if he did, is there an additional payment owing and payment for alternative days?
- f. Holiday Pay.

**Was Mr Tummuru an employee of Khan Enterprises when he undertook some training at Nando's Riccarton Christchurch?**

[12] An employee is defined in s 6 of the Act as meaning *any person of any age employed by an employer to do any work for hire or reward under a contract of service*. The definition also includes a person intending to work but excludes a volunteer.

[13] Before the training got underway Mr Khan talked to Mr Tummuru to whom he had been introduced by a mutual friend. He said that he told him that he would need *two or three guys* to help out when he opened the new Nando's store in Ashburton which Khan Enterprises was to operate.

[14] The evidence supported a requirement that those doing the cooking/grilling in a Nando's store have to be properly trained and signed off in the Nando's way. As Nando's Ashburton had not opened there was no ability to get training from that store. Mr Khan said that the training then undertaken by Mr Tummuru at Nando's Riccarton was at his initiative in the event a position became available at the Ashburton store and that during training

Mr Tummuru was never an employee of Khan Enterprises. Mr Khan says that it was never intended he be an employee of Khan Enterprises at that time. He said that he made it clear to Mr Tummuru that training would be at his expense.

[15] Mr Tummuru was in New Zealand on a work visa which enabled him to work for any employer in any occupation. He had a different view of the situation to that of Mr Khan. He said that Mr Khan told him that he would need to take care of the kitchen at the Ashburton store and undertake the cooking and that he would need full training from start to end at Nando's Riccarton. His evidence is that he had an expectation of payment.

[16] Mr Khan introduced Mr Tummuru to the owner at Nando's Riccarton Christchurch and he undertook his training from 21 December 2013.

[17] The background to the training commencing is not very clear. There are though several text messages supplied by Mr Tummuru that were sent between him and Mr Khan during training that are more informative. Text messages before 5 January 2014 were not able to be recovered but on 5 January 2014 Mr Tummuru advised Mr Khan of the hours he is working in the morning and then after a break from 5pm to closing at Nando's Riccarton. Materially on 6 January 2014 Mr Tummuru asks Mr Khan to let him know how he will get his pay after training *because if it hourly can you able to give 150 dollars a week so that I can manage my rents and all. I am not working anywhere.*

[18] On 6 January 2014 Mr Khan sends a text and advises that he will get Mr Tummuru's pay sorted. On 22 January Mr Tummuru asks *how many days left in training.* Mr Khan asks Mr Tummuru whether he had started doing chargrilled chicken and when Mr Tummuru said that he was doing that Mr Khan advised him to give it another week to do it thoroughly.

[19] There were a number of text messages to and from Mr Tummuru and Mr Khan on 29 January. Mr Tummuru asks again about pay. Mr Khan responds and advises that he will let him know and *will get pay sorted that day with Mohan.* Mr Tummuru then sends a text message to say that he has heard that the restaurant [Nando's Ashburton] is opening on 10 February 2014. He asks *how many days still do u want me to work.* Mr Khan then responds and advises Mr Tummuru that *If you can work closely to that date will be great you will be our go to man when we up and running I will lot of hope from you with your training.*

[20] I do not find that the text messages sent during that period support it was intended that Mr Tummuru, who left another job to be trained at Nando's Riccarton, undertook the training at Nando's Riccarton as a volunteer without any expectation of payment. I find that the requirement to undertake the training was consistent with working at the end of it in the Nando's Ashburton store. That I find goes to the intention of Mr Tummuru and Mr Khan during this time about the nature of the relationship as one of employment.

[21] Mr Khan said that he gave Mr Tummuru \$150 every time he came to Christchurch during this training period but he accepted that he could not

prove that this money was actually paid to Mr Tummuru. I asked him why he would pay him \$150 cash and he said that he lent Mr Tummuru the money. Mr Tummuru said that he only received one payment of \$150 from Mr Khan for the whole period of training and I accept that as most likely.

[22] I find that the issue is whether Mr Tummuru was an employee of Nando's Riccarton or Khan Enterprises which operated Nando's Ashburton. Mr Tummuru says that he was an employee of Khan Enterprises and Khan Enterprises says that it did not employ Mr Tummuru and he should look to the Riccarton Nando's store for payment.

[23] Mr Tummuru said in his oral evidence that he worked at Nando's Riccarton hours between 10am to 2pm and then from 5pm to close which was 10pm.

[24] An email dated 23 February 2015 was provided by Noby Joseph who is the manager of Nando's restaurant in Riccarton which provided about dates and hours of work as follows:

*This is to inform you that Anil Reddy, who was an employee of Nando's Ashburton had undergone training at Nando's Riccarton as per the instructions of the owner, Mr Imran (Nando's Ashburton) from 21 December 2013 to 9 February 2014. His work hours were from 10 am to 2.30 pm and in the evening from 5 pm to 10 pm. He used to work six day a week.*

[25] During the Authority investigation meeting a telephone call was made to Mr Joseph to discuss the period during which Mr Tummuru worked at Nando's Riccarton. Mr Joseph confirmed that he had been the manager of Nando's Riccarton for the past two years and was the manager at the time Mr Tummuru was working there. He said that he knew that Mr Tummuru had been sent from the Ashburton store for training and that the Riccarton store does not keep any records in those circumstances as it is up to other owner to decide how many hours their employee comes and undertakes for training. He said that trainees like Mr Tummuru are paid through the system of the store that sent them to train and that there were no records kept at Riccarton store.

[26] There is also a letter dated 2 August 2014 from the owner of Nando's Riccarton, Yateen Lallu, that Mr Tummuru was regarded as having been sent there to train for a new store in Ashburton.

[27] There was never any suggestion in the text messages when Mr Tummuru asked for payment from Mr Khan that he should seek payment from Nando's Riccarton. Likewise Mr Khan did not say that Mr Tummuru would not be paid during his time of training. Mr Khan instead made promises of payment which aside from one payment of \$150 did not come to fruition. It is further I find not credible that there was no intention that Mr Tummuru would, once trained and signed off, work at the Nando's Ashburton store. The content of the text messages and updates on training provided do not support this.

[28] The text messages support that Mr Tummuru advised Mr Khan of the hours he was working whilst training and that Mr Khan had a degree of supervision or control over the training directing Mr Tummuru when he asked if he should continue training to do so on at least one occasion. That is consistent with an employment relationship. Mr Tummuru was concerned that he was not paid whilst he was training and attempted to address that matter with Mr Khan. His evidence was that he discussed payment with Mr Joseph who told him that payment was the responsibility of Mr Khan.

[29] There was no evidence of any employment relationship with Nando's Riccarton or integration into that store. The evidence supports that Mr Tummuru was vulnerable during this period of training having left another job to undertake the training and, my impression, was that he felt he needed to keep on side with Mr Khan for work at the Nando's Ashburton store.

[30] I find that Mr Tummuru was an employee of Khan Enterprises whilst he trained at Nando's Riccarton. His training was for the benefit of that company. He is entitled to payment for the hours he worked.

[31] I am going to calculate the hours Mr Tummuru was working during this time at 9 hours per day being 4 hours in the morning and 5 hours at night. His oral evidence was that he worked from 10am to 2pm in the morning and then from 5pm to closing in the evening at 10pm. There was no record of Mr Tummuru working on public holidays that fell between 21 December 2013 and 9 February 2014 both days inclusive. Mr Joseph could not recall if Mr Tummuru worked on public holidays but Mr Tummuru says that he did. Mr Khan says that there were some days, he thought about a week, when

Mr Tummuru did not present for training around the Christmas/New Year period. Mr Tummuru was in training and I find it less likely that there would be any need or requirement for him to work on a public holiday and I could not be satisfied that he did. I make no award for working on a public holiday during that period although I could not be satisfied that Mr Tummuru had a full week without training.

[32] Mr Tummuru in the absence of any other agreed rate of pay is entitled to be paid the minimum wage applicable at that time for hours he worked. For completeness there was no suggestion that he should have been paid less than the minimum adult rate. The minimum adult wage rate at that time was \$13.75 per hour. There are seven complete weeks during the period from 21 December 2013 and 9 February 2014 and one extra day. Nine hours per day at \$13.75 is \$123.75 multiplied by six for the days of each week worked is \$742.50 multiplied by seven weeks plus one additional day worked at \$123.75 is \$5321.25 gross.

[33] \$150 was paid over this period and when I have calculated the gross wages that should have been paid to Mr Tummuru during his employment I will attend to that deduction.

**Was Mr Tummuru an employee of Khan Enterprises for the period from February 2014 to 6 June 2014?**

[34] There is no dispute that Mr Tummuru after he was trained and signed off worked at Nando's Ashburton from February 2014. Mr Khan said that he worked as a friend and not an employee and Mr Khan made it clear to him that it was only going to be on a part time basis. He said that he felt sorry for Mr Tummuru so offered him an on call kitchen hand role at minimum wage even though he had enough staff. Mr Tummuru said he thought he was a shift supervisor and did not accept that he was employed as a kitchen hand.

[35] I have little difficulty concluding that Mr Tummuru was an employee of Khan Enterprises for this period. There was some dispute as to the start date. The pay records that Khan Enterprises prepared after Mr Tummuru had left his employment show that Mr Tummuru started earlier than 21 February because his first pay was on Wednesday 19 February 2014. I have also relied

on a text query from Mr Tummuru on 16 February 2014 asking Mr Khan where he is to go. At 8.26am on 17 February 2014 Mr Khan advises him of the address of Nando's Ashburton. I will assess wages owing if any from 17 February 2014.

**What hours did Mr Tummuru work, what was he paid and is he owed any money for that period?**

[36] As earlier set out Mr Khan kept no records of hours worked by Mr Tummuru and there is considerable dispute about what the hours were that Mr Tummuru worked.

[37] The payslips which were prepared by Khan Enterprises were done so after the end of the relationship and for tax purposes. I accept they were never seen by Mr Tummuru. I do not find them reliable for assessing hours worked by Mr Tummuru or payments made and have not had regard to them.

[38] Section 132 of the Act specifically deals with situations where there is a claim to recover wages and a failure to keep or produce a wage and time record. If that failure prejudices the employee's ability to bring an accurate claim for arrears of wages the Authority may, unless the respondent proves the claims are incorrect, accept as proved all claims made in respect of wages paid to the employee and the hours, days and time worked by the employee.

[39] I accept that the failure to keep records of payments made to Mr Tummuru and records for the hours and days he worked has prejudiced his ability to bring an accurate claim. Mr Khan was unable to establish as he said in his evidence that Mr Tummuru was paid \$400 cash each week.

[40] Mr Tummuru says that he worked an 11 hours a day from 10am to the time the restaurant closed at 9pm with cleaning taking a further half hour to 45 minutes. He said that he only took a short lunch break and worked six days a week. Mr and Mrs Khan said that Mr Tummuru worked a maximum of 20 hours per week and that the main employees at Nando's Ashburton were Nikal and Azene. Mr Tummuru adamantly denies that he only worked 20 hours a week.

[41] The evidence supported that Nikal stopped working at Nando's in March or April 2014 and Azene was a student at Christchurch Polytechnic from late February 2014 and was only available on a part time basis to work. I cannot make any assessment of their hours as they were not called as witnesses and there were no records provided as to the hours they worked.

[42] Mr Khan said that he would never have had Mr Tummuru work for 11 hours a day as the business was just starting up and could not afford to pay an employee for this amount of hours. Mr Khan also says that Mr Tummuru would spend his leisure time at Nando's when he was not working.

[43] Most of the matters advanced by Mr and Mrs Khan do not establish Mr Tummuru's claim is incorrect in the absence of records. I am quite satisfied that Mr Tummuru worked in excess of 20 hours per week. There is however some evidence that suggests Mr Tummuru did not work 11 hours a day every day. For about a week during this period Mr Tummuru undertook other work and although this was a night shift I find it likely that he started work later the following day at Nando's Ashburton. Some of the text messages also support on occasion a later start time and finally there were other employees at the start of the employment including those trained to work in the kitchen which could support shorter working hours at that time.

[44] Consistent with the work pattern at Nando's Riccarton it seemed to me that there would be a period where a break could be taken after lunch and sometimes variable finish/start times. Assessing lost wages in these circumstances is not an exact science. In fact in this case it is extraordinarily difficult. I find a fair assessment overall taking all matters into account is 9 hours a day for six days a week.

[45] Mr Tummuru said that no pay rate was discussed and agreed. I find that wages until 6 June 2014 should be assessed on the basis of the applicable minimum wage rate and not the higher amount that was in the employment agreement presented on 6 June 2014 of \$16.50. The minimum wage rate is \$13.75 from 17 February 2014 to 1 April 2014 which is a period of six weeks and one day and thereafter, from 1 April to 6 June 2014, the minimum wage rate is \$14.25 for the period of nine weeks and four days.

[46] For the period of employment up to 6 June 2014 I find that Mr Tummuru is entitled to be paid from 17 February 2014 until 1 April 2014 at \$13.75 per hour for 9 hours which is a daily rate of \$123.75. Converted to a weekly sum ( $123.75 \times 6$ ) that is \$742.50 which for a six week period is the sum of \$4455 gross and for one additional day an extra day \$123.75. That is a total gross sum for this first period due and owing of \$4578.75.

[47] Mr Tummuru is entitled to be paid from 1 April 2014 until 6 June 2014 at \$14.25 per hour for 9 hours which is a daily rate of \$128.25. Converted to a weekly sum ( $\$128.25 \times 6$ ) that is \$769.50 which for a nine week period is \$6925.50 and a further four days is \$513. That is a total for that second period of \$7438.50 gross.

[48] The combined amounts for wages due and owing from 17 February 2014 to 6 June 2014 are \$12,017.25 gross.

#### **6 June to 20 June 2014**

[49] The final period for consideration is that between 6 June and 20 June 2014. There was an employment agreement covering this period providing for an hourly rate of \$16.50. Much was made about the reason why the employment agreement was provided but that is irrelevant for my purposes as there is a written employment agreement providing an hourly rate of pay. Based on a six day working week this final period of employment is two weeks.

[50] The employment agreement provided for 35 hours to be worked each week but in the absence of wage and time records and on the basis of Mr Tummuru's evidence that his hours exceeded that I will assess wages on the same basis as set out above. On that basis \$16.50 multiplied by 9 is the sum of \$148.50 per day. \$148.50 multiplied by 6 is the sum of \$891 per week and for two weeks is \$1782.00 gross.

[51] For this last period of employment this is the sum of \$1782.00 gross.

***Conclusion and orders for wages***

[52] Gross wages due and owing to Mr Tummuru for the different periods and different hourly rates are as follows:

(a) \$5321.25 (17 December 2013 to 9 February 2014)

(b) \$4578.75 (17 February 2014 to 1 April 2014)

(c) \$7438.50 (1 April 2014 to 6 June 2014)

(d) \$1782.00 (6 June 2014 to 20 June 2014)

Total \$19120.50 gross.

[53] The sum of \$19120.50 has to be reduced by payments made to Mr Tummuru by Khan Enterprises of \$150 and \$5229.00. \$19120.50 less \$5379.00 leaves a balance due and owing for unpaid wages of \$13741.50.

[54] I order Khan Enterprises Limited to pay to Anil Reddy Tummuru the sum of \$13741.50 gross being unpaid wages.

**Public Holidays**

[55] Mr Khan accepted that the Ashburton Nando's restaurant probably operated on public holidays and Mr Tummuru could have worked on those days. There are no records one way or the other. Mr Tummuru said that he worked all public holidays. I intend to proceed on the basis that Mr Tummuru worked the two statutory days over Easter, ANZAC day and Queen's Birthday and is therefore entitled to be paid at time and a half for those days. All days fell within a period assessed to be paid at \$14.25. Mr Khan suggested that the days worked were less than full days but again I have no record of that.

[56] I intend to assess payment on the daily rate of \$128.25 at time and a half and that is an extra \$64.12. I have multiplied that by four because there are four public holidays to arrive at the sum of \$256.50 gross being additional payment at time and a half for working on public holidays.

[57] Mr Tummuru is also entitled to payment for four alternative days and as these were not taken before the date employment ended they should be

calculated at the rate of the relevant daily pay for the last day of employment. That is based on an hourly rate of \$16.50 a daily rate of \$148.50 multiplied by four which is the sum of \$594 gross.

***Conclusion and orders for public holidays***

[58] For working on four public holidays Mr Tummuru is entitled to additional payments of \$256.50 gross and four alternative days not taken before employment ended in the sum of \$594.00 gross.

[59] I order Khan Enterprises Limited to pay to Anil Reddy Tummuru the sum of \$256.50 for an additional payment for working on four public holidays and \$594.00 for payment for four alternative days.

***Holiday pay***

[60] It was accepted by Khan Enterprises that holiday pay had not been paid. It is to be calculated on 8% of gross earnings which should have been paid including amounts that were paid as set out above. That is the gross unpaid wages of \$19120.50 together with the payments for working on a public holiday and alternative days of \$850.00 gross which amounts to \$19971 gross. \$19971 gross multiplied by 8% is \$1597.68 gross.

***Order for holiday pay***

[61] I order Khan Enterprises Limited to pay to Anil Reddy Tummuru the sum of \$1597.68 gross being holiday pay.

***Costs***

[62] Mr Tummuru is entitled to be reimbursed for his filing fee of \$71.56 by Khan Enterprises and I so order. There may be no issues of costs but in the event I am incorrect about that I will reserve costs.