

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 211A/10
5092431 and 5099244

BETWEEN	AKBAR SINGH AND BISHAN SINGH Applicants
AND	J R HOSPITALITY LIMITED (IN LIQUIDATION) First Respondent
	C G HOSPITALITY LIMITED Second Respondent
	BOLLIWOOD LIMITED Third Respondent
	J J HOSPITALITY LIMITED (PREVIOUSLY VEDANA LIMITED) Fourth Respondent

Member of Authority:	Robin Arthur
Representatives:	Bruce Murray for Applicants Karen Jones for Second, Third and Fourth Respondents and, until 22 June 2010, for First Respondent Geoff Bevan for First Respondent from 22 June 2010
Investigation Meeting:	31 May, 1 June, 2 June and 3 June 2010
Determination:	15 July 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority has now conducted a four-day investigation meeting of applications first lodged by Akbar Singh in July 2007 and by Bishan Singh in September 2007. The investigation was postponed for more than two years because of a criminal trial involving Rupinder Singh Chahil, director of the respondent companies.

[2] Mr Chahil, through the respondent companies, operated Indian restaurants and had arranged for Akbar Singh and Bishan Singh to come to New Zealand to work as cooks.

[3] The two men seek orders for wages and holiday pay they say is due to them for hours and days worked but not paid. They also seek orders on whether their employer could deduct the costs of immigration fees and airline fares from their wages, interest on any money found owed to them, and penalties against their employer for withholding wages and holiday pay due to them.

[4] A further issue is whether what happened to them in the hours after their resignations on 10 June 2007 amounted to a constructive dismissal. If so, they seek compensation under s123(1)(c)(i) of the Employment Relations Act (the Act) for distress and humiliation.

[5] The Authority's investigation on this matter was postponed in February 2008 (AA65/08) on the application of the respondents. Mr Chahil, and some of his other employees, faced criminal charges for alleged actions against Akbar Singh and Bishan Singh during the night of 10 June 2007 after the two cooks had handed letters of resignation to their restaurant manager. The charges included kidnapping and aggravated wounding.

[6] The Authority's reasons for agreeing to postpone its investigation on employment matters until after the criminal trial are set out in determination AA 65/08 (28 February 2008).

[7] That trial took place before a judge and jury in the District Court on several days between 15 and 24 June 2009 (CRI 2007-044-006781). The criminal matter has since been subject of an appeal at which the conviction of Mr Chahil for aggravated wounding was quashed but an appeal against his conviction for kidnapping was dismissed.¹ Appeals of other employees against convictions for kidnapping were also dismissed. Matters relating to sentencing are still before the Court of Appeal.

[8] Postponement of the Authority's investigation had been granted on the basis of

¹ *Singh & Ors v The Queen* [2010] NZCA 244 (10 June 2010) and [2010] NZCA 253 (14 June 2010).

the respondents providing \$80,000 as security in the event of orders being made for wages and other remedies to be paid to Akbar Singh and Bishan Singh. The security sum (and interest already accrued on it) is presently held, under the Authority's orders, by the Department of Labour in an interest bearing account.

[9] Following the investigation meeting, J R Hospitality Limited was placed in liquidation on 9 June 2010.

Publication

[10] In February 2008 the Authority made orders prohibiting publication of the names of Mr Chahil, the respondent companies and the restaurants. Similar orders were in place in respect of the criminal matter. Those orders are no longer needed in the Authority and Ms Jones advised, after making inquiries, that neither the District Court nor the Court of Appeal had non-publication orders in place. During the investigation meeting I removed the Authority's earlier non-publication orders.

The investigation

[11] For the purposes of the Authority's investigation written witness statements were lodged by nine witnesses who each attended the investigation meeting and, under oath or affirmation, answered questions from the Authority member and counsel for the parties. As credibility was at issue in much of the evidence, counsel were permitted extensive questioning more akin to adversarial cross-examination.

[12] Evidence was heard from:

- (i) Akbar Singh; and
- (ii) Bishan Singh; and
- (iii) Ashraful Islam, a cook who had worked at another of Mr Chahil's restaurants but left the job and complained to the Immigration Service about the long hours he was required to work; and
- (iv) Rory McKechnie, a former waiter and shift manager who had assisted Mr Islam leave and complain to the Immigration Service; and
- (v) Mr Chahil; and
- (vi) Joti Jain, a restaurant manager and former general manager and executive

- chef of the respondents' group of restaurants; and
- (vii) Charanjit Singh, a cook who was involved in recruiting Akbar Singh and Bishan Singh in India, travelled to Auckland with Akbar Singh in January 2006, and who was later charged and found guilty of kidnapping Akbar Singh in the evening following his resignation; and
 - (viii) Andrew Dann, manager of the restaurant at which Akbar Singh and Bishan Singh worked in 2006 and 2007; and
 - (ix) Varinda Kumar, the former accountant for the respondents' restaurant businesses (attending under a witness summons issued by the Authority).

[13] The written statements of Akbar Singh and Bishan Singh were translated from Hindi to English. In giving evidence they were assisted by an interpreter provided by the Authority, interpreting questions from English to Hindi and translating their answers from Hindi to English. That assistance was also available to Charanjit Singh, and other witnesses to the extent they needed it.

[14] Judge Emma Aitken, who had presided in the criminal trial, also granted the Authority's application for a copy of the notes of evidence from that trial to be available to the Authority and the parties. Some of that evidence was relevant for the Authority's investigation, both for background information and on the consistency of evidence given by Bishan Singh and Akbar Singh.

[15] In preparing this determination I have reviewed the statements of witnesses, their answers to questions in the Authority investigation, relevant background documents provided by the parties (including the respondents' time and pay records over which there is much dispute), some relevant sections of the notes of evidence given in the District Court trial (particularly by Bishan Singh and Akbar Singh), and the opening statements and closing submissions of the representatives. As provided for under s174 of the Act I have not recorded here all evidence and submissions received but state findings of facts and issues of law and express conclusions on the issues for determination.

Credibility and balance of proof

[16] This is a case with some difficulties regarding the quality of evidence. The

employer's documentary evidence offered regarding working hours and payments made to the two cooks is incomplete and hotly contested. The evidence of Akbar Singh and Bishan Singh for their claim around the hours and days worked is entirely oral with no contemporaneous documentation.

[17] The opposing parties in this case each characterise the evidence of their opponents as – to paraphrase it bluntly – an elaborate lie.

The Applicants' case

[18] Akbar Singh and Bishan Singh say they were each recruited in India after brief telephone calls with Mr Chahil. Mr Chahil had recruited Charanjit Singh and asked him to recommend other cooks who could be brought to New Zealand on permits to work in the restaurants owned and run by Mr Chahil's companies.

[19] They were told they would work as cooks for \$14 an hour and get free food and accommodation provided by the business which would also make the arrangements for their immigration visa and travel to New Zealand.

[20] They say that once here they began work within a few days and worked six-and-a-half days a week without any days off at the Curry & Spice Restaurant in Whangaparaoa and lived in a house with their restaurant manager, Mr Dann, and other employees within walking distance of the restaurant.

[21] They say their working hours totalled around 60 hours a week but they were not paid for many weeks after they started worked. They were later each helped by Mr Dann to open a bank account into which the business then began crediting wages for around 34 hours work a week. Each also got some additional lump sum payments that they requested from Mr Chahil but were paid many thousands of dollars less than they were due for the hours worked.

[22] On the evening of 10 June 2007 they each handed Mr Dann a letter of resignation in English, prepared with the help of Puneet Ghatak, a friend who ran an Indian restaurant elsewhere. Mrs Ghatak had told them that one, but not both, of them could work at her restaurant.

[23] They say they told Mr Dann they would work out three weeks notice and then walked home to their accommodation.

[24] In the following hours they say Mr Chahil and others – including Charanjit Singh – arrived at the house, assaulted them, and took them to other places where they were held against their will. Bishan Singh was later taken to Middlemore Hospital where he was treated for a broken ankle and other injuries. Those allegations were the subject of the criminal trial where Mr Chahil, Charanjit Singh and others were found guilty on a number of charges.

[25] Akbar Singh and Bishan Singh say documents produced by their former employer are either fabrications or were signed by them because they were told to do so, without understanding the contents. They also say their employer took their passports and never returned them.

The respondents' case

[26] Taking the evidence of Mr Chahil, Ms Jain and Charanjit Singh as a whole, the respondents' case is that Akbar Singh and Bishan Singh understood and agreed they would pay the costs of the legal fees for their immigration applications and their airfares to New Zealand. If the money was advanced by the employer, it would be reimbursed by deductions from their pay.

[27] Once here neither man started work for several weeks, explaining an absence of pay for that period. When they did start work, Akbar Singh and Bishan Singh were paid from three sources: firstly, some occasional cash advances made by the restaurant manager from the till; secondly, regular payments to their bank accounts; and, thirdly, lump sums paid on request from wages kept back by agreement and held on trust for employees wanting to save money to send back to India.

[28] The respondents also say the arrangement for withholding some wages was by agreement and common practice in India. While such verbal arrangements may not then be fully or properly documented, this should be understood in its cultural context where Indian employers and employees often operated on a "trust" or "honour" basis.

[29] Relying on various timesheets and pay records produced, the respondents say Akbar Singh and Bishan Singh worked between 30 and 35 hours a week. It is accepted that the respondents failed to properly pay time-and-a-half for public holidays. This was accounted for in a calculation of final pay due to the two cooks. This included adding in holiday pay but also deducting sums said to have already been paid during the employment as cash advances or lump sums as well as deducting some money said to have been a loan for immigration fees and also (in Akbar Singh's case only) an airfare. From that assessment, the respondents were said to have owed \$498.76 to Akbar Singh and \$442.30 to Bishan Singh.

[30] The respondents say both men worked at a number of restaurants which is shown by signed timesheets and explains why payments were made to them in the names of more than one of the respondent companies. Their records show neither cook worked 60 hours a week nor worked six-and-a-half days each week. Rather they say both had at least half of Sunday off and one other full day off during each week. They deny that either man's passport was taken and kept from them.

[31] They also deny either man was subjected to the alleged criminal actions. Although Mr Chahil and Charanjit Singh had intended giving some evidence to the Authority about the events of that evening, they did not eventually do so as the appeal process in the criminal proceedings was still underway and they had elected not to give evidence in those proceedings.

[32] However the respondents insist Akbar Singh and Bishan Singh resigned with immediate effect on 10 June 2007 and neither told Mr Dann that they would work out any notice. The respondents say they are entitled to have wages deducted for a contractual period of two weeks and an order of damages for the cost of recruiting replacement cooks from India.

Credibility

[33] On careful review of all the evidence available to me, I have concluded the evidence of Mr Chahil, Ms Jain, Mr Dann and Charanjit Singh was generally less credible than that of Akbar Singh and Bishan Singh. Four factors led me to this

conclusion.

[34] Firstly, and decisively, the respondents' evidence was that some typed time records prepared for certain periods, and which managers had workers sign, were not accurate. Rather these documents were created only to satisfy the Immigration Service that employees in New Zealand under work permits were working appropriate hours. The respondents did not want its own document accepted as accurate by the Authority because some entries showed Bishan Singh and Akbar Singh started work for the lunch shift at 10am, returned for the evening shift at 4pm and worked until 10pm – consistent with their evidence of long hours – while the respondents' insisted the cooks generally worked from 11.30am to 2.30pm and returned for an evening shift from 4.45pm until 9.30pm at the latest. Having established that the respondents were prepared to manufacture or 'massage' information for particular purposes, I have little confidence in the veracity of other documents they produced.

[35] Even where those documents – including timesheets and various employment agreements – were signed by Bishan Singh and Akbar Singh, I am not satisfied their contents can be relied on as accurate. The evidence established Bishan Singh had only a primary school education in Hindi while Akbar Singh had some high school education in reading and writing English. Neither man had sufficient basic literacy in English to know what they were signing. They relied entirely on what they were told by managers in Punjabi or Hindi – signing whatever they were told to as a matter of either deference or fear for their continued employment.

[36] Secondly, while respondents' counsel went to extensive efforts to identify correlations between timesheets and pay records produced by the respondents, the effect ultimately was to establish only that they were at best internally consistent rather than probative of any external reality. Noticeably absent were the actual handwritten timesheets and a supposed roster for days off which Mr Dann testified he had kept at the restaurant and sent into the business' central office for preparing pay. Mr Kumar could not explain the absence of those documents either, saying that he threw nothing away.

[37] The onus rests with the employer to be able to establish that it has correctly paid its employees and provide accurate records that it had done so. Where it fails to

do so, it bears the risk of negative findings on the balance of probabilities.

[38] Thirdly, the respondents' case that it had accurately accounted for what was owed to and by workers was not supported by the evidence of its former accountant, Mr Kumar. He appeared under summons and resiled from most of a draft witness statement prepared for him by the respondents' solicitors. Importantly he did not corroborate the evidence of Mr Chahil and Ms Jain that an accurate ledger was kept of funds held as savings for those employees who requested such an arrangement, and that deductions for cash advances and lump sums would be accounted for in that way, along with any instalments paid on money said to be owed to the employer for immigration fees and airline fares.

[39] Fourthly, the evidence of Mr Islam and Mr McKechnie was consistent with the evidence of Akbar Singh and Bishan Singh. While neither man had worked with the two cooks, their evidence of migrant staff working long hours and being underpaid elsewhere in the respondents' Indian restaurants corroborates the claims of Akbar Singh and Bishan Singh.

[40] Having reached this view on credibility, the Authority must determine this matter on the basis of the balance of probabilities. This involves a common sense assessment – having weighed available evidence – of what was more likely than not to have occurred.

[41] On that basis, while I find important parts of their evidence to be more credible than that of the respondents' witnesses, I do not accept the evidence of Akbar Singh and Bishan Singh in its entirety. Rather, in making their case, I consider it likely that they have, to some degree, exaggerated the span of hours they were required to be at the restaurant. I also doubt their evidence about having given two or three weeks notice at the time of resigning on 10 June 2007 as being unlikely in the circumstances, a point explained later in this determination.

Issues for determination

[42] Against that background and those conclusions, the following issues (either of fact or law) remain for determination:

- (i) Could money to repay airfares and immigration fees legitimately be deducted from pay?
- (ii) When did they start work?
- (iii) Who was the employer?
- (iv) What hours and days were worked?
- (v) What wages were paid?
- (vi) Did Akbar Singh and Bishan Singh give notice when they resigned, and, if not, should damages be awarded?
- (vii) When did the employment relationship end?
- (viii) What remains to be paid?
- (ix) Is any penalty warranted?
- (x) What orders are to be made?

Were the immigration fees and airfare legitimately deducted from pay?

[43] Charanjit Singh knew Bishan Singh and Akbar Singh through having worked as cooks at a hotel in the north-west Indian city of Amritsar. During 2005 he spoke with both men about coming to work in New Zealand. Both men then had brief telephone interviews with Mr Chahil who arranged for immigration application forms and employment agreements to be sent to them.

[44] Charanjit Singh later contacted Mr Chahil to arrange for money for an airfare to be sent for him, and a similar arrangement was made for Akbar Singh, before both men travelled together to New Zealand in January 2006. Bishan Singh paid his own airfare and travelled to New Zealand in June 2006.

[45] Akbar Singh denies he was told before accepting the job that he would be liable for the cost of his work permit application. Mr Chahil had arranged for the application to be handled by Ryken & Associates which sent an invoice for \$2000 addressed to Akbar Singh, care of Mr Chahil. Akbar Singh says he was told his expenses would be covered and he understood this to include the airfare and immigration fees.

[46] Bishan Singh says Mr Chahil told him on the telephone that he should talk to Charanjit Singh who would explain all the arrangements. He says Charanjit Singh

told him that he would get free food, accommodation and an airline fare but get no pay for the first two months except for some pocket money. The respondents have also produced a Ryken & Associates invoice for \$2000 addressed to Bishan Singh care of Mr Chahil.

[47] The evidence of Mr Chahil was that, while not recalling the specific telephone conversations, he invariably told potential recruits that they could get assistance with the immigration process but would have to repay the legal costs. He insists no-one was told their immigration costs and airfare would be paid for by the business and that when Charanjit Singh and Akbar Singh asked for airfares they would have been told the money would have to be paid back.

[48] The evidence of Mr Islam was that he repaid his immigration costs and airfare advanced by the company.

[49] Whatever practices Mr Chahil had established of having Indian employees pay the costs of his business recruiting and importing them, I find his own evidence fails to establish with sufficient certainty that Akbar Singh and Bishan Singh understood and agreed that they would have to reimburse their employer for those costs. He had written employment agreements sent to them in India (for immigration purposes) before they came to New Zealand, and if that was an intended term it could and should have been expressly recorded there. Accordingly I find that the employer was not entitled to deduct those costs, either by the mechanism of not paying either man for a certain period once they started work or by deducting a supposed outstanding amount from the balance due to them in their final pay.

When did they start work?

[50] Akbar Singh arrived in New Zealand on 16 January 2006 and was met at the airport by Mr Chahil. He says he started work in the restaurant on 18 January 2006. Ms Jain says he did not work until 13 February 2006.

[51] Bishan Singh arrived in New Zealand on 24 June 2006 and was met at the airport by Charanjit Singh. He says he started work in the restaurant on 25 June 2006. Ms Jain says he did not work until 31 July 2006.

[52] The employer witnesses provided no real explanation on why there would have been a delay of around four weeks in each man starting work. These were workers for whom the business was providing free food and accommodation and I consider it unlikely that the employer would not have got the two new arrivals working sooner. The later dates simply match the dates at which the employer's records show it started paying them but do not reflect what I consider to be the more likely reality that each man was working without pay for the initial period.

Who was the employer?

[53] Akbar Singh began work having signed an employment agreement with C G Hospitality Limited identified as the employer. He later signed other agreements – with identical wording (apart from the pay rate and identified employer) – with Vedana Limited and later J R Hospitality Limited. Documents from the immigration agent's file show he had a work visa issued on 12 January 2006 to work for the restaurant name under which C G Hospitality Limited traded. A further work permit was issued on 6 April 2006 to work for Vedana. An Immigration New Zealand letter dated 15 December 2006 indicates his work permit conditions were varied to allow him to work for J R Hospitality Limited.

[54] Bishan Singh began work having signed an employment agreement with Bolliwood Limited. He later signed another agreement – with identical wording (apart from the pay rate and identified employer) – with J R Hospitality Limited. Documents from the immigration agent's file show he had a work visa issued on 12 June 2006 to work for Bolliwood Limited. An Immigration New Zealand letter dated 21 December 2006 indicates his work permit conditions were varied to allow him to work for J R Hospitality Limited.

[55] While the employment agreements each man signed refer to having been advised of the right to seek independent advice and being given reasonable opportunity to do so, there is no reliable evidence that this happened – either for the original agreement signed or for the later documents formally varying the legal entity by which they were said to be employed.

[56] Mr Chahil's evidence was that his restaurant businesses had initially arranged for work permits to refer to the particular company which ran particular restaurants but this caused compliance difficulties when staff were needed to work in other restaurants. By 2006 the business was restructured so all staff were employed through J R Hospitality Limited and immigration applications were made identifying that company as the employer.

[57] While I accept that rationale, the employment and immigration documentation is not necessarily determinative of the actual employment relationship. Neither are the entities identified on the payments made to their bank accounts, as the supposed source of wages is nothing more than an accounting exercise.

While Mr Chahil operated his business through a variety of limited liability companies, the reality is that they were all part of an extensive operation owned and run by him and his managers. He was the director and shareholder of each company. In reality he was 'the employer' of Akbar Singh and Bishan Singh and the various legal entities through which he formalised that arrangement (as presented to Immigration New Zealand and IRD among others) should properly be taken to be jointly and severally liable for whatever obligations remain to the two cooks. I reach that conclusion on the basis of the substantial merits of the case, without regard to technicalities and acting in equity and good conscience.²

What hours and days were worked?

[58] The respondents say the two cooks generally worked between 30 and 35 hours over five-and-a-half days, with one full day off each week.

[59] Akbar Singh and Bishan Singh say they worked in excess of 60 hours a week, working on every day of the week, only getting time off on Sundays up to 5pm when they would then work to 10.30pm. Both men say that Monday to Saturday they worked "*from 10.30am to 2.30pm or when lunch finished, and again from 4.30pm to 10.30pm or closing time*".

[60] Inconsistencies in the evidence from both sides on this issue is likely to be for

² Section 157(1) and (3) and s160(2) of the Act.

two reasons. Firstly, the respondents' estimate of hours comes from its pay records which do not reflect actual hours worked. Secondly, the two cooks have included in their evidence on hours worked, time when they were not required to stay at work but did so as a matter of convenience (such as waiting for a lift home from Mr Dann rather than walking) and have included time travelling to and from their accommodation.

[61] I accept as more likely than not that the respondents' records and evidence do not accurately reflect the number of days worked each week. There is no reliable evidence that the two cooks in fact had any days off.

[62] I also consider it likely that they worked at least eight hours a day for each of the six days and a further four hours on a Sunday, resulting in at least a 52 hour week.

What wages were paid?

[63] I accept Mr Murray's submission that the only reliable record of actual wage payments made are the bank statements of Akbar Singh and Bishan Singh, to which should be added two cash payments each accepts was made to them (\$500 each to open a bank account and \$1290 in April 2007 to Akbar Singh and \$2800 in October 2008 to Bishan Singh). Relying on schedules prepared from their bank statements, I find the total net amount paid as wages to Akbar Singh was \$18,420 and to Bishan Singh was \$10,771.

[64] I note these amounts are less than what is shown on the IRD summary of earnings certificates available for each man. That appears to be explained by the difference between what is shown on the few available payslips as being paid to them and what was actually deposited into their bank accounts – for example a payslip for Akbar Singh on 25 February 2007 shows “*take home pay*” of \$383.90 (which would be net pay for just over 34 hours a week at \$14 an hour) but what was deposited in his bank account was only \$310. The usual weekly amount deposited in the bank accounts of each man was \$310. The respondents explain the difference as being money each man had asked to be kept on trust or as savings for him but I do not accept such deductions were returned in full to either man.

[65] The tax rate applied to the wages actually paid to the two men appears to have been 20 percent. This is based on the few payslips provided. If that rate is less than what should have been paid as income tax, that is a matter for Akbar Singh and Bishan Singh to later reconcile with IRD. For present purposes I have applied that tax rate to the net wages they received to identify the following gross value of what they were actually paid: Akbar Singh - \$23,025 and Bishan Singh - \$13,463.

Was resignation given on notice and, if not, are damages due?

[66] Akbar Singh and Bishan Singh say that on handing over their resignation letters prepared for them by Mrs Ghatak, Mr Dann told them they would have to work out notice and they told him that they would work for two or three weeks. They argue notice could not then be worked because of the criminal acts committed against them later on the evening of 10 June 2006. In Bishan Singh's case, this involved a broken right ankle and a seriously sprained left ankle, requiring plaster for six weeks and using crutches for six months.

[67] Mr Dann's evidence was that no period of notice was given orally and the respondents submit the two cooks' evidence on the point is inconsistent – telling the District Court jury that they gave two weeks' notice and swearing written statements in the Authority that say they gave three weeks' notice.

[68] I prefer Mr Dann's evidence on this point and do so because of another point of evidence on which Mr Chahil and Bishan Singh agree. It is this. Sometime in the previous week Bishan Singh spoke by telephone with Mr Chahil. He told him that he wanted to leave and wanted his passport. Mr Chahil responded by saying words to the effect that "*you can go whenever you want to go*" or "*if you want to go, you can go*".

[69] I consider it more likely than not that the two cooks, even if they knew and understood the requirement for notice in their written employment agreements, took this as license by their employer to leave immediately. Mr Chahil had waived the notice period and the employer is not entitled to deduct the supposed notice period from any wages still due to the two cooks.

[70] While the written employment agreements require 30 days notice, I do not accept that the respondents have established that the business actually incurred any additional costs or damages as a result of the immediate resignation of Akbar Singh and Bishan Singh. There are no documents confirming any money was spent recruiting replacement staff and Mr Chahil's evidence was that they had relief staff available elsewhere in the business. For that reason the respondents' claim for damages is declined.

The end of the employment relationship

[71] The 'flip side' of that conclusion is that I also accept that the employment relationship came to an end on Akbar Singh and Bishan Singh handing their resignation letters to Mr Dann and walking out of the restaurant. This was more than a mere breach of the terms of their employment – it was a statement that the relationship was at an end.

[72] The result is that what then happened later that evening occurred outside the employment relationship. Whatever wrong was done to them is a matter to be dealt with solely in the criminal jurisdiction, and not by this Authority.

[73] Accordingly those events cannot form the basis of a personal grievance and no remedies, such as distress compensation for what the jury found were proven charges of kidnapping, can be awarded under the Act.

What remains to be paid?

[74] There are three elements, established with sufficient certainty, of obligations to Akbar Singh and Bishan Singh not met by their employer: (i) the shortfall between hours worked and hours paid each week; (ii) holiday pay; and (iii) public holiday pay.

[75] What remains due to the two men is not amenable to a 'nickel-and-dime' analysis. Any calculation requires some estimates and rounding which I have carried out as follows:

	Akbar Singh		Bishan Singh	
Total wages due (at 52 hours a week)	72 weeks at \$14 an hour	\$52,416	50 weeks at \$14 an hour	\$36,400
Add additional pay entitlement for public holidays worked (based on half day's pay for an 8 hour day)	12 days claimed	\$672	8 days Claimed	\$448
Annual leave entitlement	15 days (at average weekly earnings of \$776) ³	\$2,202	Nil	-
Holiday pay for part year (at 8% of gross earnings)	Based on entitlement to gross earnings of \$14,728 for 142 days from 19 January to 10 June 2007	\$1,178	Based on entitlement to gross earnings of \$36,300 for 350 days from 25 June 2006 to 10 June 2007	\$2,904
Total pay due		\$56,468		\$39,752
Less total actually paid		\$23,025		\$13,463
Deficit		\$33,443		\$26,289

[76] I find that the respondents owe Akbar Singh \$33,443 and Bishan Singh \$26,289 in unpaid wages, public holiday pay and holiday pay. These are gross amounts. It is for Akbar Singh and Bishan Singh to individually account to IRD for any income tax owed on those amounts.

[77] I accept each man is entitled to interest on that amount – from the last day of work to the date of this determination. Clause 11 of Schedule 2 of the Act requires that I set the rate at which to calculate such interest no higher than today's 90-day bill rate plus two percent – that is 5.2 per cent. Applied to the pay due to each man for the period of 1131 days, interest of \$5388 is awarded to Akbar Singh and \$4235 to Bishan Singh.

³ 52 weeks x 52 hours pw x \$14 plus \$56 x 6 public holidays worked up to anniversary = \$38,192 divided by 52 weeks = \$734 average earnings per week x 3 weeks = \$2202.

Is a penalty also due?

[78] Both men seek a penalty to be imposed on their employer and paid to them for the failure to pay their wages and holiday pay in full and on time. The respondents breached the terms of employment and their statutory obligations under the Holidays Act 2003 and the Wages Protection Act 1983. I accept the breaches were a deliberate feature of how Mr Chahil and his managers operated the restaurant business and dealt with their migrant staff. It caused harm to Akbar Singh and Bishan Singh by reducing their income and reducing the amounts which they could remit to their wives and children living in India. In all the circumstances I am satisfied that a penalty should be imposed and paid entirely to each man. Under ss135 and 136 of the Act a penalty of \$6000 is jointly and severally imposed on the respondents for these breaches, with \$3000 of that penalty to be paid to Akbar Singh and \$3000 to Bishan Singh.

What orders are to be made?*The security sum*

[79] By order of the Authority on 28 February 2008 the respondents were to deposit \$80,000 in the trust account of an independent solicitor. This sum was to “*secure the prospect that the Applicants – if their pay claims are eventually established on the balance of probabilities in an Authority investigation – can ultimately receive amounts to which they are entitled*”.

[80] A solicitor, nominated by the respondents and accepted by the applicants, provided an undertaking to the Authority dated 10 March 2008 to receive and hold the security sum in an interest bearing trust account, confirming receipt on 20 March 2008.

[81] In April 2010 the Authority received notes of evidence of the criminal trial held in June 2009 and found that the nominated solicitor holding the security sum had acted as the respondents’ commercial solicitor and was an alibi witness for Mr Chahil in the criminal trial (having been with him on the evening of 10 June 2007).

[82] Concerned that this solicitor did not meet the Authority’s requirement for the

security sum to be held by an independent solicitor, the Authority made inquiries through counsel and then directed the security sum to be transferred to the Department of Labour. This was done by way of consent determination (AA211/10, 5 May 2010). At this point it was also revealed that the nominated solicitor had not placed the security sum in an interest bearing deposit. A suitable sum for interest that should have been earned was agreed between the parties' counsel (\$8164.19) and the solicitor paid that amount into the Authority. The Authority arranged for both the security sum and interest earned to that date to be held in an interest bearing account by the Finance Section of the Department of Labour.

Liquidation of the first respondent

[83] After J R Hospitality Limited was placed in liquidation on 9 June 2010, the liquidators (Richard Agnew and Grant Burns of Pricewaterhousecoopers), through counsel, consented to the Authority determining the wage arrears issue.

[84] However the liquidators have advised they do not consent to the Authority making any order for payment of the security sum, "*other than for payment back to the first respondent*". They want the opportunity to make a claim for all or part of the security sum and say that if the Authority does not do what they want, they may ask the High Court for directions or other orders.

[85] I do not accept the liquidators' position on this point, particularly on supposed "*payment back*" to J R Hospitality Limited, which was not identified to the Authority as the source of funds. The security sum was paid in on behalf of all the respondents and held (under orders made by consent determination AA65A/08, 6 March 2008) "*for the benefit of all parties' respective rights and interests, as determined by the Authority in due course, or otherwise earlier agreed in writing by the parties*".

[86] But for the payment of the security sum in March 2008, the Authority would have heard and determined the employment matter within a few months and the applicants would, on the findings since made, have been able to enforce orders for wages arrears before the end of 2008. That process was postponed to meet other demands of justice – which was avoiding the risk of prejudicing the rights of Mr Chahil and others to a fair trial (see determination AA65/08 at [51]). It would be

repugnant to justice to further delay or deny Akbar Singh and Bishan Singh access to the security sum now proven to have been held, largely, for their rights and interests.

Orders for payment

[87] I have held the respondents to be jointly and severally liable. J J Hospitality Limited was struck off the Companies Office register on 10 January 2010. J R Hospitality Limited went into liquidation on 9 June 2010. However the formal entities by which the two men were said to be employed in 2006 – Boliwood Limited (Bishan Singh) and C G Hospitality Limited (Akbar Singh) – both remain on the register although the Registrar of Companies has begun steps to remove both companies due to inactivity.

[88] I find the following amounts, as at the date of this determination, are due to the applicants from the respondents and order the Department of Labour Finance Treasury Officer to make payment on Friday, 13 August 2010 of the following amounts from the security sum:

- (i) \$41,831 to Akbar Singh as wages and holiday pay (\$33,443), interest on that amount (\$5,388) and recovery of a penalty (\$3,000); and
- (ii) \$33,524 to Bishan Singh as wages and holiday pay (\$26,289), interest on that amount (\$4,235) and recovery of a penalty (\$3,000).

[89] A residual amount of \$12,809 remains to be disbursed, along with any additional interest which has accrued on the security sum and interest earned to date.

[90] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the applicants may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The respondents will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this timeframe without prior leave.

Robin Arthur
Member of the Employment Relations Authority