

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 361  
5345042

BETWEEN                      PARDEEP KUMAR  
   Applicant  
  
AND                              JAYS KITCHENS AND SHOP  
   FITTERS PVT LIMITED  
   Respondent

Member of Authority:        Rachel Larmer  
  
Representatives:              Louise Darroch, Counsel for Applicant  
   Vijay Kumar, Director of Respondent  
  
Investigation Meeting:        2 August 2011 at Auckland  
  
Additional information:        3 August 2011, from Respondent  
   4 August 2011, from Applicant  
   9 August 2011, from Respondent  
   11 August 2011, from Applicant  
  
Submissions                      No submissions were provided  
  
Determination:                17 August 2011

---

**DETERMINATION OF THE AUTHORITY**

---

- A. Mr Pardeep Kumar’s dismissal by Jays Kitchens and Shopfitters PVT Limited (“Jays Kitchens”) was unjustified.**
- B. Mr Pardeep Kumar was disadvantaged by Jays Kitchens’ unjustified actions.**
- C. Jays Kitchens failed to provide Mr Pardeep Kumar’s wage and time records upon request and a penalty of \$4,000 is imposed for that breach.**
- D. Jays Kitchens is directed to pay \$1,000 of the penalty to the Crown Bank Account and \$3,000 of the penalty directly to Mr Pardeep Kumar.**
- E. Jays Kitchens is ordered to pay Mr Pardeep Kumar, within 14 days of the date of this determination, a total of \$49,517.71 made up as follows:**
- (a) \$27,086.15 gross in wage arrears;**

- (b) **\$9,360 gross as lost remuneration pursuant to s.128(2) of the Employment Relations Act 2000 (“the Act”);**
- (c) **\$10,000 without deduction for humiliation, loss of dignity, and injury to feelings, pursuant to s.123(1)(c)(i) of the Act;**
- (d) **\$3,000 as a part penalty under s136(2) of the Act;**
- (e) **\$71.56 as reimbursement for the filing fee.**

## **Employment relationship problem**

[1] Mr Pardeep Kumar claimed:

- (a) unjustified dismissal;
- (b) unjustified disadvantage;
- (c) arrears of wages and holiday pay.

[2] Mr Pardeep Kumar alleged he was summarily dismissed on 14 February 2011 when he turned up to work to find he had been locked out. He said he was not paid anything upon termination.

[3] Mr Pardeep Kumar has not obtained new employment since his dismissal and he claimed lost remuneration from the date of his dismissal plus \$10,000 distress compensation. Although Mr Pardeep Kumar initially claimed reinstatement, he withdrew that claim prior to the investigation meeting.

[4] Mr Pardeep Kumar alleged he had been disadvantaged because Jays Kitchens had underpaid him for every week that he had worked and it had not paid the correct PAYE to the Inland Revenue Department (“IRD”).

[5] Mr Pardeep Kumar’s wage arrears claim consisted of:

- (a) Hours he had worked but not been paid for;
- (b) Failure to pay him time and a half for the hours he worked on public holidays;
- (c) Failure to pay him upon termination for unused alternative holidays;

- (d) Failure to pay him for the period 24 December 2010 to 23 January 2011 when he was available to work but had been locked out of the workplace;
- (e) Failure to pay any annual holiday pay.

[6] Mr Pardeep Kumar claimed he should have been paid \$42,499 gross over the duration of his employment, but was only paid \$12,445.45. He said he was paid \$10,659.50 net and his tax records show that PAYE of \$1,785.95 was paid to the IRD on his behalf. Mr Pardeep Kumar claimed he was owed \$30,053.55.

[7] Mr Vijay Kumar (no relation) is the sole Director of Jays Kitchens. It was his business and he ran it himself. Mr Vijay Kumar was Mr Pardeep Kumar's boss and he was the person who paid his wages. Mr Vijay Kumar accepted that Mr Pardeep Kumar had been underpaid for the duration of his employment, which he attributed to problems with customers/clients paying their bills.

[8] Mr Vijay Kumar said Mr Pardeep Kumar was owed \$7,333.66 which he had calculated at the rate of \$14 gross per hour (not the \$18 gross per hour recorded in Mr Pardeep Kumar's employment agreement). His calculation did not include any annual holiday pay, time and a half for working on public holidays, payment for alternative day holidays or for the period 24 December 2010 – 23 January 2011 when the business was closed. Nor did it include any pay in lieu of notice for termination of Mr Pardeep Kumar's employment without notice.

[9] Mr Vijay Kumar admitted that Mr Pardeep Kumar's employment ended on 14 February 2011, and said that had occurred because the landlord had locked Jays Kitchens out its business premises because it was behind with its rent.

### **Mediation**

[10] Mr Pardeep Kumar's representative wrote to Mr Vijay Kumar on 21 March 2011 raising personal grievance claims, his wage arrears claim, and asking if Jays Kitchens would agreed to attend mediation. No response was received, so Mr Pardeep Kumar's representative wrote again on 7 April 2011 requesting a response. Again no response was received.

[11] On 16 May 2011 Mr Pardeep Kumar's representative wrote to Mr Vijay Kumar for the third time, asking if he would be prepared to attend mediation and

stating that Mr Pardeep Kumar was keen to settle the matters he had raised. No response was received.

[12] Mr Pardeep Kumar filed a statement of problem with the Authority on 24 May 2011, which was served on Jays Kitchens on 25 May 2011. No statement in reply was received.

[13] The parties were directed to mediation on 21 June 2011.

[14] Mediation was arranged for 8 July 2011. Mr Vijay Kumar did not attend mediation but he did call Mediation Services the afternoon before to say that he would not be attending because he was sick. Mediation was rescheduled for 14 July 2011, but Mr Vijay Kumar did not attend.

[15] The mediator attempted to contact Mr Vijay Kumar by telephone but he did not answer his phone and did not return her calls. Mr Pardeep Kumar and the mediator waited until 2pm, but Mr Vijay Kumar did not show up. Mr Pardeep Kumar reported that he had seen Mr Vijay Kumar driving in his work truck about 100 metres from the Manukau Department of Labour at 1pm on the day of mediation.

[16] The matter came back to the Authority and a further direction was made for the parties to attend mediation. Mr Vijay Kumar was asked to explain why he had not complied with the Authority's first direction to mediation, but he never responded.

[17] Mediation was arranged for 28 July 2011. On the day of the mediation Mr Vijay Kumar advised Mediation Services he would not be attending because he was sick. Mediation was rescheduled for 1 August 2011. The parties attended mediation that day but did not resolve the matters between them.

## **Authority directions**

[18] Jays Kitchens has failed to comply with the Authority's written directions dated 21 June 2011, 14 July 2011, 20 July 2011 and 26 July 2011.

[19] In addition to the failure to comply with the Authority's written directions, Mr Vijay Kumar was advised on 2 August 2011 that he was required to bring with him to the investigation meeting the information he had previously been directed to provide.

[20] Mr Vijay Kumar attended the investigation meeting but did not bring any information with him. At the investigation meeting Mr Vijay Kumar confirmed that he had wage and time records for Mr Pardeep Kumar, timesheets for him, a red wages book, and a black/grey work diary which the Authority identified were all relevant to its investigation.

[21] Mr Vijay Kumar was directed to provide the original wage and time records, timesheets, wages book, and work diary to the Authority on 3 August 2011. Mr Vijay Kumar subsequently provided some (but not all) time sheets but not the wage book, work diary, or wage and time records because he said he could not find them.

[22] The Authority is satisfied that all of its written directions were served on Mr Vijay Kumar so it considers there was no good reason for Jays Kitchens not to comply with them. Mr Vijay Kumar's explanation that he could not find wage and time records, wage book, or work diary was unsatisfactory because when he gave his evidence the previous day he confirmed he had those documents and would provide them to the Authority the next day.

### **Request for an adjournment**

[23] On 1 August 2011 Mr Vijay Kumar contacted the Authority asking for an adjournment of the hearing the following day on the grounds that he was too sick to attend. He was told that Jays Kitchens had not filed a statement in reply so would only be able to defend the matter with the leave of the Authority. He was referred to the Authority's letter dated 21 June 2011 and to its written directions of 14, 20, and 26 July 2011 which had made that clear.

[24] Mr Vijay Kumar was told that because he had had no contact with the Authority and because Jays Kitchens had failed to comply with any of the Authority's directions it would not grant an adjournment, particularly in light of the hardship Mr Pardeep Kumar alleged he was suffering. Mr Vijay Kumar was told the Authority would hear from him if he attended the hearing and that it was prepared to delay the start of its investigation from 9.30am to 10.30am to enable him to attend.

[25] Mr Vijay Kumar attended the hearing, questioned Mr Pardeep Kumar, and gave evidence himself. Mr Vijay Kumar did not appear to be unwell, but even if he was, that did not compromise his ability to participate in the hearing.

**Service Issues**

[26] Mr Vijay Kumar initially told the Authority that he had not known anything about Mr Pardeep Kumar's claim or the Authority's hearing until he had attended mediation the day before.

[27] I then retrieved the Support Officer file and showed Mr Vijay Kumar his name and signature (which clearly said signed for by V J Kumar) on the Courier Post Track and Trace record which confirmed he had received the statement of problem on 25 May 2011. Mr Vijay Kumar accepted it was his signature and then agreed he had received the statement of problem.

[28] However, Mr Vijay Kumar maintained that was the only information he had received. I then showed him the Courier Post Track and Trace record which showed that he had signed for receipt of the Authority's letter dated 21 June 2011 advising that leave would be required to file a statement in reply out of time. Although the signature was identical to the one on the 25 May 2011 record, Mr Vijay Kumar denied it was his. I find that it was.

[29] I showed Mr Vijay Kumar the Courier Post Track and Trace record which he had signed as receipt of the Authority's directions dated 14 July 2011. Although Mr Vijay Kumar denied this was his signature, I find that it was.

[30] Mr Vijay Kumar was also shown the Courier Post Track and Trace record which showed that Nalini Kumar had signed for receipt of the Authority's directions dated 20 July 2011. Mr Vijay Kumar admitted that Nalini Kumar was his wife and that they lived together at the same address. Although Mr Vijay Kumar said he had not received this document, I consider it more likely that he did.

[31] Mr Vijay Kumar was shown the Courier Post Track and Trace record which had a squiggle for a signature but which noted that it had been signed "V J Kumar" as receipt of the Authority's directions dated 26 July 2011. Mr Vijay Kumar denied that he had received this document.

[32] Inquiries were made with Courier Post and the courier remembered delivering the document to Mr Vijay Kumar because he identified himself as V J Kumar before the document was handed to him. The description the courier gave fitted Mr Vijay

Kumar's description. I find that the directions of 26 July 2011 were personally served on him.

[33] I find that Jays Kitchens was served with the statement of problem and the Authority's letter of 21 June 2011 as well as the three written directions the Authority issued in July 2011.

### **Wage and time records**

[34] Jays Kitchens was directed on 14, 20, and 26 July 2011 to provide the Authority with a copy of Mr Pardeep Kumar's wage and time records pursuant to s.130 of the Act. When Mr Vijay Kumar contacted the Authority to ask for an adjournment he was asked to bring the wage and time records to the hearing. No wage and time records have been provided.

[35] The Authority's written directions of 14 and 26 July 2011 recorded that failure by Jays Kitchens to provide the wage and time records may result in a penalty being imposed under s.130(4) of the Act. The Authority's directions of 14 and 26 July 2011 also advised that failure to provide Mr Pardeep Kumar's wage and time records may result in it accepting his wage arrears claim as proven pursuant to s.132(2) of the Act.

### **Credibility**

[36] There are a number of conflicts in the evidence given by Mr Pardeep Kumar and Mr Vijay Kumar which I have had to resolve on the balance of probabilities, by determining which version is more likely to be correct. I have resolved these conflicts in favour of Mr Pardeep Kumar's evidence on the basis that it is likely to be more reliable than Mr Vijay Kumar's version of events.

[37] I do not consider Mr Vijay Kumar to be a reliable witness. His evidence contradicted the documentation available, he contradicted himself many times, and he changed his evidence a number of times during the hearing. Some of the examples that support my adverse view of his credibility include:

- He denied receiving any documents from the Authority when he had clearly personally signed for documents himself;
- He said Mr Pardeep Kumar had never worked over 40 hours per week and he said that his wage and time records would prove that, so he was

asked to provide those records the day after the hearing. Although he did not provide wage and time records, he did provide a schedule he had prepared which recorded the hours worked by Mr Pardeep Kumar which showed that every single week he had worked in excess of 40 hours per week. He also provided some timesheets which showed Mr Pardeep Kumar had regularly worked over 40 hours per week;

- He said that he had never met or spoken to Mr Pardeep Kumar's wife, but then later in his evidence he provided information about the discussions he had had with her;
- He said he did not know anything about Mr Pardeep Kumar's immigration status, when the job offer signed by him stated that it was subject to Mr Pardeep Kumar obtaining permission from New Zealand Immigration Services to work for Jays Kitchens;
- Although denying that Mr Pardeep Kumar had ever worked more than 40 hours per week, Mr Vijay Kumar contradicted himself by later saying Mr Pardeep Kumar had sometimes voluntarily worked more than 40 hours per week on the understanding he would not be paid. This contradicted Mr Pardeep Kumar's timesheets, which Mr Vijay Kumar told me he had filled out himself, because he would not have recorded extra hours if they were voluntary;
- He said that he knew Mr Pardeep Kurmar's hours of work because he always dropped Mr Pardeep Kumar at work and collected him at the end of the day but later contradicted that by admitting he did not do so;
- He said he knew Mr Pardeep Kumar had been working in January 2011 because he had seen him driving the work truck, but later in his evidence he said Mr Pardeep Kumar could not drive the work truck because he did not have a licence and he did not know how to drive a manual vehicle;
- He denied that Mr Pardeep Kumar had worked long hours on the Tauranga job which contradicted the timesheets he said he had filled out himself which showed Mr Pardeep Kumar had worked 67 hours in one week and 86.5 hours in the next week;

- He provided a schedule which showed that Jays Kitchens had paid PAYE of \$3,632.44 on Mr Pardeep Kumar earnings when the IRD website printout generated on 22 July 2011 recorded that Mr Pardeep Kumar had only had PAYE of \$1,785.95 deducted from his earnings with Jays Kitchens;
- He said Mr Pardeep Kumar had been paid \$10,809.50, when the IRD earnings information printout for him showed that he had received gross income of \$10,080.00 from Jays Kitchens;
- He said Mr Pardeep Kumar had agreed to work for \$14 gross per hour when the employment agreement and payslip, which had both been prepared by him, recorded the rate of pay was \$18 gross per hour.

### **Immigration issues**

[38] Mr Pardeep Kumar has a wife and two children, aged four years and two years and nine months. He moved his family to New Zealand in 2009 and obtained a work permit from Immigration New Zealand (“INZ”). Mr Pardeep Kumar subsequently extended his work permit to 25 March 2011 on the basis he was a skilled migrant who held skilled employment.

[39] In April 2010 Mr Vijay Kumar offered Mr Pardeep Kumar a job working for Jays Kitchens as a Cabinet Maker. Mr Pardeep Kumar advised Mr Vijay Kumar about his work permit status, so the offer of employment was made subject to INZ agreeing to change Mr Pardeep Kumar’s work permit to enable him to work for Jays Kitchens. INZ approved this change because it involved skilled employment as a Cabinet Maker.

[40] Mr Pardeep Kumar said that after he had been working for two or three months Mr Vijay Kumar raised the issue of permanent residency and encouraged him to apply for it. Mr Vijay Kumar told Mr Pardeep Kumar that when he had managed another company he had supported a worker to get permanent residency and that he would do the same for Mr Pardeep Kumar.

[41] This offer of support was very valuable to Mr Pardeep Kumar because he would be applying under the skilled migrant category. This meant he had to be in skilled employment in order to be eligible for permanent residency, so that had to be

confirmed by his employer and IRD records. Mr Vijay Kumar's offer of support for permanent residency made him very reluctant to push any harder on the underpayment of wages issue in case that resulted in Mr Vijay Kumar withdrawing support for his permanent residency application.

[42] In October/November 2010 Mr Pardeep Kumar filed an expression of interest for permanent residency and he was selected by INZ from its pool of applicants for further consideration. INZ said it would be checking the information he had provided and if it was credible, he would be invited to apply for residence in New Zealand. Mr Pardeep Kumar discussed this at the time with Mr Vijay Kumar who again confirmed he would support a permanent residency application by providing confirmation he had skilled permanent employment.

[43] On or around 15 December 2010 Mr Pardeep Kumar asked Mr Vijay Kumar for a letter confirming his skilled employment. Mr Vijay Kumar said he would ask his accountant to prepare a letter for him to sign.

[44] On 12 January 2011 INZ invited Mr Pardeep Kumar to apply for residency, which he then did. The total cost of his residency application was \$3,368.40 which was paid by a loan from Mr Pardeep Kumar's brother (receipts for the various amounts paid were provided to the Authority) because Mr Pardeep Kumar had insufficient funds to pay this himself.

[45] When Mr Vijay Kumar returned from Fiji on 24 January 2011, Mr Pardeep Kumar again asked him for a letter confirming his skilled employment. Mr Vijay Kumar again told him that Jays Kitchens' accountant was preparing the letter.

[46] Mr Pardeep Kumar called Mr Vijay Kumar on 8 February 2011 and asked when the letter for INZ would be ready. He was told to wait a few days. A few days later Mr Pardeep Kumar called Mr Vijay Kumar again and was told to meet him at a relative's house. Mr Pardeep Kumar and his family travelled to the given address and waited for an hour. They called Mr Vijay Kumar several times, but his mobile phone was turned off. There was no sign of Mr Vijay Kumar, his private vehicle, or the work truck.

[47] Mr Pardeep Kumar asked Mr Vijay Kumar the following day why he had not shown up but he did not answer.

[48] Mr Pardeep Kumar contacted Jays Kitchens' accountant directly on 19 or 20 February 2011 who said he was no longer working for Jays Kitchens and had not been asked to draft any letter.

[49] On 21 February 2011 Mr Pardeep Kumar phoned Mr Vijay Kumar and said he really needed the letter. It was then Mr Vijay Kumar said he could not give him a letter for INZ because he would get into trouble because he had not paid the IRD tax. This was the first that Mr Pardeep Kumar heard that his PAYE tax may not have been paid to IRD.

[50] Mr Pardeep Kumar had to advise INZ of the change to his employment status. INZ turned down Mr Pardeep Kumar's application for residency because he had lost his skilled employment which meant he had insufficient points to qualify for residency.

[51] Mr Pardeep Kumar's work permit expired on 25 March 2011. INZ gave him a visitor permit and three months to find new skilled employment. Unfortunately he was unable to find new skilled permanent employment. Mr Pardeep Kumar said prospective new employers would not employ him unless he had a valid work permit and he could not get a work permit unless he had skilled employment. He has remained in the country on a visitor permit, which prevents him from working.

[52] Mr Pardeep Kumar believed Mr Vijay Kumar purposely mislead him about supporting his permanent residency application so he would not strongly pursue his wage arrears. Based on the evidence I heard I consider that is likely to be correct. Mr Pardeep Kumar said once it became clear Mr Vijay Kumar would no longer be supporting his residence application, he took legal action to recover his arrears.

### **Relevant facts**

[53] Mr Pardeep Kumar worked 56 hours for Jays Kitchens from 3 to 30 May 2010 without pay in order to prove himself as a skilled and valuable employee. He has not claimed wages for this period.

[54] Mr Pardeep Kumar's unpaid trial was successful and he was provided with an employment agreement, which was signed by both parties on 25 April 2010. As an aside I note this agreement contained a number of clauses contrary to New Zealand employment law statutory protections and minimum entitlements. This included the

requirement to arbitrate which is contrary to the Act and therefore unenforceable. It also referred to legislation that does not exist.

[55] Mr Pardeep Kumar's first day of work was 31 May 2010. He said he was paid sporadically and every time he was paid, it was for less than the hours he had worked. Mr Pardeep Kumar said that when he raised his underpayment with Mr Vijay Kumar he was told he would be paid when Jays Kitchens had been paid by its clients.

[56] Mr Pardeep Kumar said that he could see that the business was busy because it had lots of clients and there was always lots of work to be done, so he believed Jays Kitchens was in a position to be able to pay his wages and just had cash flow problems because his clients were slow to pay.

[57] In July 2010 Mr Pardeep Kumar's wife demanded that Mr Vijay Kumar provide Mr Pardeep Kumar with pay slips. Mr Vijay Kumar only ever provided one payslip which stated:

- (a) Mr Pardeep Kumar was employed as a cabinet maker;
- (b) He had worked 40 hours ordinary time in the week ended 16 July 2010;
- (c) He was paid at a rate of \$18 per hour;
- (d) PAYE of \$140.55 had been deducted;
- (e) He had received a cheque for \$579.45.

[58] Mr Pardeep Kumar said he did not understand how the figures had been calculated on that pay slip because it did not relate to the hours he had worked over the relevant period or the pay he had received.

### **Wage arrears claim**

#### *Hours worked in excess of 40 hours per week*

[59] Mr Vijay Kumar said Mr Pardeep Kumar's contract provided he would not be paid for any work he did over 40 hours per week. The relevant clause stated:

*"The hours of work shall not exceed 40 during the week. Where it is necessary to put in additional hours of work as and when required from time to time, compensation for such services rendered will be on*

*a purely voluntary basis notwithstanding any rules and regulations as defined in the Labour Act in New Zealand.”*

[60] Mr Pardeep Kumar said he was continually required to work more than 40 hours per week because Jays Kitchens had a lot of work on and customers were refusing to pay until the work had been done because it was behind on their jobs. He believed he was going to be paid his normal hourly rate for the extra hours he worked.

[61] Although he initially said Mr Pardeep Kumar never worked in excess of 40 hours per week, Mr Vijay Kumar later changed his evidence and said Mr Pardeep Kumar often volunteered to work more than 40 hours per week without payment.

[62] Mr Vijay Kumar's evidence about this was unconvincing. He said that when he arrived to collect Mr Pardeep Kumar to take him back to the business premises at the end of his normal working day Mr Pardeep Kumar would insist on continuing to work. Mr Vijay Kumar alleged he would always tell Mr Pardeep Kumar he would not be paid for the extra hours, but Mr Pardeep Kumar would still insist on staying at work. Mr Vijay Kumar said Mr Pardeep Kumar (despite not having his own transport) would stay working and then find his own way home. I consider that an inherently unlikely scenario.

[63] Mr Pardeep Kumar denied that. He said he only worked late when required to do so and on the basis he would be paid his normal hourly rate for the extra hours he worked. He said he had a young family at home whom he would prefer to spend time with rather than voluntarily working for his employer for free.

[64] I consider Mr Vijay Kumar's version of events is not credible. I prefer Mr Pardeep Kumar's evidence that it was agreed he would be paid his normal hourly rate for all hours worked, whether in excess of 40 or not. Mr Pardeep Kumar had no financial interest in Jays Kitchens so it is not logical for him to have worked the extensive additional hours he did on a voluntary basis. I accept his evidence that he never agreed to work more than 40 hours per week without payment.

#### *Hourly rate*

[65] Mr Pardeep Kumar's employment agreement recorded he would be paid \$18 gross per hour. Mr Vijay Kumar said that the parties had actually agreed on a lesser pay rate of \$14 per hour gross and the amount recorded in the employment agreement

was for immigration purposes only. Mr Pardeep Kumar denied that and said the agreed rate was \$18 gross per hour.

[66] I do not accept Mr Vijay Kumar's evidence about the pay rate. Mr Pardeep Kumar's pay was not relevant to his immigration situation. He had been receiving the minimum wage at his prior job and had still received a work permit. The pay slip prepared by Mr Vijay Kumar recorded the rate of pay as "\$18".

[67] I find that Mr Pardeep Kumar's pay rate was \$18 gross per hour for all hours he worked.

#### *Days and hours of work*

[68] Both parties provided schedules which recorded the same weekly hours of work. The only difference between the schedules in terms of the payments made to Mr Pardeep Kumar was that Mr Vijay Kumar's schedule recorded he had been paid \$150 more than he said he had received. I have preferred Mr Pardeep Kumar's schedule on the basis it is more likely to be accurate.

[69] I therefore find that Mr Pardeep Kumar worked for the hours recorded in column A of the amended wage arrears table "M", and that he was paid the amounts recorded in that table which was provided to the Authority on 4 August 2011.

#### *Unpaid wages*

[70] Mr Pardeep Kumar should have been paid \$30,600 gross for the normal weekly hours he actually worked during his employment - although I note that figure excludes his public holiday pay, alternative day holiday pay, payment over the Christmas/New Year period, and annual holiday pay, all of which I deal with separately below.

[71] I am satisfied Mr Pardeep Kumar was only paid \$12,445.45 (being \$10,659.50 net plus \$1,785.95 PAYE). That leaves a balance owing as wage arrears of \$18,154.55 (being \$30,600 - \$12,445.45), for his normal weekly hours of work.

#### *Public holidays*

[72] Mr Pardeep Kumar was not paid time and a half for working on the following public holidays:

- (a) 7 June 2010 (Queen's Birthday);
- (b) 25 October 2010 (Labour Day); and
- (c) 31 January 2011 (Auckland Anniversary).

[73] I have accepted the calculations provided by Mr Pardeep Kumar's representative and find that he is owed:

- (a) \$256.50 for 31 January 2011;
- (b) \$277.50 for 25 October 2010; and
- (c) \$253.50 for 7 June 2010.

*Alternative day holidays*

[74] Mr Pardeep Kumar was entitled to a total of three alternative day holidays for working on 7 June 2010 and 25 October 2010 and 31 January 2011. He did not take these alternative days as leave during his employment, so he was entitled to be paid for them upon termination. No such payment was made.

[75] I have again relied on Ms Darroch's calculation and find Mr Pardeep Kumar is entitled to \$1,414.50 (3x \$471.50) as pay for the three alternative days holiday he was entitled to be paid for upon termination.

*Period 24 December 2010 – 23 January 2011*

[76] Mr Pardeep Kumar attended work as usual on 24 December 2010. He saw Mr Vijay Kumar that morning but he did not say anything to him about closing the business over the Christmas or New Year period. Mr Pardeep Kumar said he went out on a job and that when he returned to the business premises that afternoon he found they were locked.

[77] He tried to contact Mr Vijay Kumar and was told he had gone to Fiji. He then went to Mr Vijay Kumar's family home and spoke to his son who told him that Mr Vijay Kumar had taken the keys to the business with him on holiday and that he did not have another set of keys he could give him.

[78] Mr Pardeep was very shocked and distressed to hear that because it left him without work and without pay over the holiday period. He said there was lots of work

on so he had been expecting to continue working as usual. Nothing had been said to him to suggest otherwise. He could not believe that Mr Vijay had not said anything to him about closing the business when he saw him that morning.

[79] Mr Vijay Kumar said Mr Pardeep Kumar was not locked out because he had left the keys with another employee. However, I consider that is unlikely because the employee he said he had left the keys with went with Mr Pardeep Kumar to Mr Vijay Kumar's home in an attempt to obtain keys and therefore get access to the business premises. If that employee had been given the keys by Mr Vijay Kumar then it was likely he would have just unlocked the premises, instead of assisting Mr Pardeep Kumar in his quest to obtain a set of keys.

[80] Subsequent to the hearing Mr Vijay Kumar changed his evidence. He wrote to the Authority saying he had not paid Mr Pardeep Kumar over this period because the business had closed down for the Christmas and New Year period. This obviously contradicted his evidence at the hearing that the business had not been closed and that Mr Pardeep Kumar could have worked over this period if he had wanted to.

[81] I find the business was closed from 24 December 2010 to 23 January 2011 but that Mr Vijay Kumar had not discussed that with Mr Pardeep Kumar. I find that Mr Pardeep Kumar was ready, willing, able, and expecting to work over this period and that the only reason he did not do so was because Mr Vijay Kumar had locked the premises and had taken the key.

[82] I find that this was not a closedown in terms of the Holidays Act 2003 because there was no evidence Jays Kitchens customarily had a closedown and, even if there had been, it did not require Mr Pardeep Kumar to take all or some of his annual leave.<sup>1</sup>

[83] Mr Vijay Kumar had not consulted with Mr Pardeep Kumar about a proposed closedown, nor had he informed him that a closedown would be occurring. The employment agreement did not provide for an annual closedown and I find that the parties had not agreed there would be one.

[84] I also find that Mr Vijay Kumar misled Mr Pardeep Kumar into believing there would be work available for him. Both men were at the business premises on

---

<sup>1</sup> S.29HA

the morning of 24 December 2010, but Mr Vijay Kumar did not take the opportunity to tell Mr Pardeep Kumar he would be unable to work until 24 January 2011.

[85] I find that Mr Pardeep Kumar is entitled to be paid for the period 24 December 2010 to 23 January 2011. This period includes annual holidays which will be captured by an order that Jays Kitchens pay Mr Pardeep Kumar four weeks' wages based on his average weekly earnings of \$967 per week (calculated over the 33 weeks he had worked up until then).

[86] The provisions of the Holidays Act 2003 which deal with the calculation of wages during a closedown do not apply because I have found this was not a closedown in terms of that Act.

[87] I find Mr Kumar was entitled to be paid \$3,868 ( $\$967 \times 4$  weeks) for the period 24 December 2010 to 23 January 2011.

#### *Annual holidays*

[88] Mr Pardeep Kumar did not take any paid holiday during his employment and he was not paid any annual holiday pay upon termination. I find that Mr Pardeep Kumar is entitled to holiday pay of 8% of his total gross earnings of \$35,770.

[89] Mr Pardeep Kumar is entitled to \$2,861.60 annual holiday pay.

#### *Summary of wage arrears*

[90] I find that Mr Pardeep Kumar is owed \$27,086.15 wage arrears made up as follows:

- (a) \$18,154.55 as unpaid wages as per amended appendix M of Mr Pardeep Kumar's evidence;
- (b) \$787.50 as unpaid statutory holiday pay for the three public holidays he worked;
- (c) \$1,414.50 for unpaid alternative day holidays he earned by working on three public holidays;
- (d) \$3,868 for wages over the Christmas and New Year closedown;
- (e) \$2,861.60 for unpaid annual holiday pay.

**Dismissal**

[91] I find that Mr Pardeep Kumar was unjustifiably dismissed by Jays Kitchens when he turned up for work and found that the premises were locked. I accept Mr Pardeep Kumar's evidence that he attempted to contact Mr Vijay Kumar by phone, but his calls were not answered and his phone messages asking what was happening, were not responded to.

[92] I accept that Mr Pardeep Kumar waited half a day at the business premises on 14 February 2011 for Mr Vijay Kumar to come and advise him what was happening. I also accept that Mr Pardeep Kumar attended work and waited for 2 or 3 hours on 15 and 16 February 2011 in the hope Mr Vijay Kumar would come and tell him what was going on.

[93] After no contact from Mr Vijay Kumar for three days on 17 February 2011 (four days after the business premises had been locked) Mr Pardeep Kumar went to Mr Vijay Kumar's house. It was only then that Mr Vijay Kumar told Mr Pardeep Kumar that the landlord had locked the premises because of rent arrears and that it could not reopen until the arrears had been paid.

[94] I find that Mr Pardeep Kumar was summarily dismissed on 14 February 2011. The termination of Mr Pardeep Kumar's employment was not justified because Jays Kitchens' actions and how it acted were not what a fair and reasonable employer would have done in all of the circumstances.<sup>2</sup>

**Disadvantage**

[95] I find that Mr Pardeep Kumar has been subjected to the following unjustified disadvantages:

- (a) He was not paid his full wages for the hours he worked;
- (b) He was induced to take no action over his persistent wages shortfall because Mr Vijay Kumar had said he would support him with a permanent residency application. Mr Pardeep Kumar was disadvantaged because he was deprived of the benefit of his full wages for the whole time since his employment started;

---

<sup>2</sup> Old s103A ERA justification test

- (c) Mr Vijay Kumar strung Mr Pardeep Kumar along regarding his support for the permanent residency application and then withdrew support at the last minute. This disadvantaged Mr Pardeep Kumar because he incurred (via a loan from his brother) the significant cost of the residency application. He would not have applied if he had known his employer would not confirm he held skilled employment because that was a prerequisite for his application under the skilled migrant category. Mr Pardeep Kumar was induced by Vijay Kumar to incur unnecessary expenses he could ill afford;
- (d) Mr Pardeep Kumar was locked out of the business over the Christmas and New Year period. Mr Pardeep Kumar was disadvantaged because he was not paid anything over this period and he was not forewarned the business would be closing, which meant he had been unable to plan or budget for it.

[96] I find that Mr Pardeep Kumar's employment and one or more of the conditions were affected to his disadvantage by Jays Kitchens' unjustified actions towards him. Jays Kitchens' actions and how it acted, in respect of the matters identified above, were not what a fair and reasonable employer would have done in all of the circumstances.

## **Remedies**

### *Mitigation*

[97] I am satisfied that Mr Pardeep Kumar took appropriate steps to mitigate his loss. He gave me a long list of potential employers he had personally approached. Many of the employers said they would not offer him employment unless he had a valid work permit. His industry has also been badly affected by the economic downturn, so employment opportunities are not as available as they were when he first got his work permit.

[98] I accept Mr Pardeep Kumar's evidence that he was told by several of the companies he approached that Mr Vijay Kumar had already been in touch with them to say they should not offer him any work because he was a trouble maker who was taking Jays Kitchens to Court. Mr Pardeep Kumar said this had ruined his reputation

in the kitchen/cabinet making industry. I consider it likely that Mr Vijay Kumar has deliberately hampered Mr Pardeep Kumar in finding new skilled employment.

*Lost remuneration*

[99] I consider that in light of the financial difficulties Jays Kitchens were obviously experiencing it is unlikely that Mr Pardeep Kumar's employment would have continued for more than three months after his dismissal. I therefore decline to award in excess of three months' lost remuneration.

[100] Jays Kitchens is ordered to pay Mr Pardeep Kumar lost remuneration under s.128(2) of the Act of \$9,360 ( $\$18 \times 40 \text{ hours} = \$720.00 \times 52 \div 12 = \$3,120 \text{ per month} \times 3 \text{ months}$ ).

*Distress compensation*

[101] Mr Pardeep Kumar claimed \$10,000 as distress compensation.

[102] I consider a global award of distress compensation for the dismissal and disadvantage grievances is appropriate as they arise out of a similar set of circumstances which occurred around the same time so it would be artificial to separate out Mr Pardeep Kumar's distress.

[103] I am satisfied from the evidence before me that if Mr Pardeep Kumar had not been dismissed then his work permit would have been extended and he would have obtained permanent residency because he had the required number of points to enable him to do so. However, once he lost his job he no longer qualified for permanent residency and he was unable to get his work permit extended without an offer of permanent skilled employment.

[104] The fact his permanent residency application was declined because of his unjustified dismissal is a matter which is to be reflected in the level of compensation awarded.

[105] I consider there was compelling evidence in support of a high award of distress compensation. I heard from Mr Pardeep Kumar and his wife. Mr Pardeep Kumar has exhausted all of his savings both here and in Fiji on ordinary daily living expenses. His family has been threatened with eviction from his rental

accommodation, which was only averted at the last minute when his brother paid his rent arrears.

[106] He has borrowed heavily from family members (around \$15,000) in order to be able to pay bills. Mr Pardeep Kumar said he was very stressed about that because he does not know how or when he will be able to repay them.

[107] Because Mr Pardeep Kumar is unable to work in New Zealand and he is not entitled to any assistance in the way of benefits, after his savings ran out he became reliant on the charity of his cousin and brother to buy food for the family and to pay their other living expenses. Mr Pardeep Kumar and his wife told me their situation is dire. They both cried when they spoke about the effect Mr Pardeep Kumar's dismissal had on them and in particular their children.

[108] Some days Mr Pardeep Kumar and his wife are unable to eat if they do not have any food left in the house because they have no money to buy any. On the day of the Authority hearing neither of them had eaten.

[109] Mr Pardeep Kumar and his wife explained their ongoing worry about having enough food for their two young children. They also explained they cannot afford to pay for pre school activities and cannot visit a doctor if any of them get sick. Mr Pardeep Kumar described his extreme embarrassment and shame by having to beg for food from relatives. He was also distressed he had been unable to support his parents in Fiji.

[110] Mr Pardeep Kumar said he has been severely depressed about what has happened and he has many sleepless nights but has not been able to afford to see a doctor. He says that his job loss and lack of income has had a very bad effect on his relationship with his wife. Mr Pardeep Kumar expressed his distress and bewilderment at how things had turned out for the family when at the beginning of last year he had been in stable employment and the family had been in a position where he had been able to pay their bills and also save.

[111] I consider that Mr Pardeep Kumar's humiliation and distress has been considerable. He has lost his work permit which has severely impacted on his ability to find new employment. His reputation has no doubt been damaged by Mr Vijay Kumar's representations to other employers in the industry.

[112] Mr Pardeep Kumar has lost the opportunity to apply for permanent residency, despite having incurred more than \$3,000 in application fees. He is not entitled to a benefit or support from the government in the way that New Zealanders or others with permanent residency who have lost their jobs are. He is entirely reliant on the goodwill and charity of others to support his family, for even basic items like food and accommodation.

[113] I consider that an award in excess of \$10,000 would have been appropriate, but because Mr Pardeep Kumar has only sought \$10,000 I am limited to awarding him that amount.

[114] Jays Kitchens is ordered to pay Mr Pardeep Kumar \$10,000 pursuant to s.123(1)(c)(i) of the Act for humiliation, loss of dignity, and injury to feelings.

#### *Contribution*

[115] I find that Mr Pardeep Kumar did not contribute to the situations which gave rise to his dismissal and disadvantage grievances.

#### **Penalty**

[116] The Authority's direction of 14 and 26 July 2011 put Jays Kitchens on notice that a penalty of up to \$20,000<sup>3</sup> may be imposed if it failed to provide Mr Pardeep Kumar's wage and time records as requested on 14, 20, and 26 July 2011.

[117] At the hearing on 2 August 2011 Mr Vijay Kumar confirmed he had wage and time records and would provide them to the Authority the following day. He did not do so and his explanation for not doing so was that he could no longer find them.

[118] Jays Kitchens is required under s.130 of the Act to keep wage and time records and to produce those or provide a copy of them upon request.<sup>4</sup> The Authority requested Jays Kitchens to provide it with a copy of the wage and time records four times.<sup>5</sup> A penalty may be imposed on an employer that fails to comply with any requirement of s.130 of the Act.<sup>6</sup>

---

<sup>3</sup> S.135(2)(b) ERA

<sup>4</sup> S.130(2) ERA

<sup>5</sup> Directions 14,20,26 July 2011 and at the hearing on 2 August 2011

<sup>6</sup> S.130(4) ERA.

[119] The Authority has the power to impose a penalty on Jays Kitchens for its failure to provide it with Mr Pardeep Kumar's wage and time records.<sup>7</sup> I consider a penalty is appropriate because Jays Kitchens' breach of s.130 of the Act was serious, deliberate, and ongoing.

[120] Jays Kitchens knew it was at risk of a penalty so it must have decided to run that risk. A penalty is necessary to signal disapproval of Jays Kitchens' failure to provide Mr Pardeep Kumar's wage and time records upon request. A penalty will also signal to other employers that they will be at risk of a penalty if they breach their obligations under s.130 of the Act.

[121] I consider a penalty of \$4,000 is appropriate, \$3,000 of which is to be paid to Mr Pardeep Kumar under section 136(2) of the Act. The other \$1,000 of the penalty is to be paid to the Crown Bank Account.

### **Outcome**

[122] Jays Kitchens is ordered to pay Mr Pardeep Kumar, within 14 days from the date of this determination, the following sums:

- (a) \$3,000 penalty;
- (b) \$27,086.15 arrears of wages;
- (c) \$9,360 lost remuneration pursuant to section 128(2) of the Act;
- (d) \$10,000 without deduction as distress compensation under s123(1)(c)(i) of the Act.

### **Costs**

[123] Mr Pardeep Kumar was represented by a Community Law Centre so he will not be charged for his legal costs. He has however incurred the \$71.56 for the filing fee, and he is entitled to be reimbursed for that.

---

<sup>7</sup>

S.133(1)(b) ERA

Rachel Larmer  
Member of the Employment Relations Authority