

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 80
5448996

BETWEEN MOHAMMED IRFAN ALI
Applicant

A N D ABHISEK QUALITY FOODS
LIMITED trading as BOMBAY
PALACE INDIAN RESTAURANT
WANAKA
Respondent

Member of Authority: David Appleton

Representatives: Robert M Thompson, Advocate for the Applicant
No appearance for the Respondent

Investigation Meeting: 3 June 2015 at Christchurch

Submissions Received: 3 June 2015 from the Applicant
No submissions from the Respondent

Date of Determination: 15 June 2015

DETERMINATION OF THE AUTHORITY

- A. The respondent failed to comply with its obligations to Mr Ali under the Minimum Wage Act 1983 and the respondent is ordered to pay to Mr Ali the net sum of \$21,305.29 in respect thereof.**
- B. The respondent failed to comply with its obligations to Mr Ali under the Holidays Act 2003, and is ordered to pay Mr Ali the net sum of \$5,920.69 in respect thereof.**
- C. Mr Ali suffered an unjustified disadvantage in his employment and is awarded the compensatory sum of \$5,000 under s.123(1)(c)(i) of the Employment Relations Act 2000.**

- D. The respondent is ordered to pay penalties to the Crown in the total sum of \$10,000.**
- E. The respondent's counterclaim is dismissed.**
- F. Costs are reserved.**

Employment relationship problem

[1] Mr Ali claims arrears of wages that he says are due to him pursuant to an individual employment agreement together with unpaid accommodation allowance, holiday pay and public holiday pay. Mr Ali also claims that the amount of hours he was required to work resulted in him being significantly underpaid by reference to the requirements of the Minimum Wage Act 1983 and the Minimum Wage Orders that were in force at the material time.

[2] Mr Ali also claims that, as a result, he was unjustifiably disadvantaged in his employment. He also asks that several penalties be imposed against the respondent.

[3] The respondent was represented by Mr Paul McBride until 8 April 2015. Mr McBride had served and lodged a statement in reply to Mr Ali's original statement of problem which denied that Mr Ali was due the sums claimed and also counterclaimed that Mr Ali had misappropriated money from the respondent and had acknowledged and agreed to make repayment of it. This allegation by the respondent is strenuously denied by Mr Ali.

[4] Mr McBride came off the record with the consent of the Authority because, he stated, the respondent company had ceased trading with effect from 31 March 2015. As a result of this, whilst the Authority had the benefit of the statement in reply, no briefs of evidence were served or lodged, no sworn evidence presented by the respondent's witnesses at the Investigation Meeting and no time and wage or holiday and leave records were disclosed by the respondent.

[5] I am satisfied that the respondent was aware, or ought reasonably to have been aware, of the date, time and venue of the Authority's investigation meeting as these details were sent to Mr McBride before he ceased to represent the respondent. Notwithstanding this, no-one from the respondent appeared to represent it and I therefore proceeded with the investigation meeting in the absence of any representation from the respondent company in reliance upon the notification stated

on the notice of investigation meeting that, if the respondent did not attend the investigation meeting, the Authority may, without hearing evidence from the respondent, issue a determination in favour of the applicant.

A brief account of the events leading to Mr Ali's application

[6] The following account is based upon the brief of evidence of Mr Ali and his sworn oral evidence, all of which I accept as credible, save where indicated.

[7] Mr Ali is a trained tandoori chef and was offered, and accepted, employment with the respondent around October 2011. He had previously been working as a chef in the Cook Islands. Mr Ali was granted a restricted work visa by Immigration New Zealand and arrived in Queenstown on 29 December 2011. He was driven to Wanaka by one of the directors of the respondent, Ramesh Rajagopal, and started work in the restaurant that afternoon.

[8] Prior to this date Mr Ali had been sent a copy of an individual employment agreement, signed by Mr Rajagopal on 28 October 2011 and signed by Mr Ali on 3 November 2011. The material terms of this individual employment agreement were:

1. *Your Individual Employment is comprised of these individual terms. The Standard Terms and your job description.*
2. *Position: Tandoor/Curry Chef.*
3. *Type of Employment: Full Time.*
4. *The parties to this agreement acknowledge that flexibility is essential to providing staff to cover variable demands. You will be required to work as set out in the roster on any day Monday to Sunday guaranteed at least 35 hours to 42 hours per week.*
5. *Your annual wage is \$30,048 per annum excluding your 8% holiday pay. This sum is subject to appropriate income tax at source. Hours worked over your normal hours will be paid at your usual wage rate. There will be no different wage rate for overtime. In addition to the above, a sum of \$100 per week will be given as accommodation allowance and this also will be subject to usual income tax at source.*

STANDARD TERMS

Hours and Days of Work and Rosters

Your hours and days of work will be displayed on a roster.

You consent to work on the days and times rostered.

It is your responsibility to find out in advance the contents of the roster.

As the industry may work up to 365 days per year you may be rostered on any of the 7 days in a week.

....

Public Holiday

The following days are public holidays:

[The usual public holidays are then listed]

You will be required to work on a public holiday either where you are rostered to do so or where we have an additional work requirement.

We can both agree that any public holiday can be observed by you on another day.

If a public holiday falls on a day that would otherwise be a working day for you and you do not work it you will be paid the amount of pay that you would have received had you worked on that day.

If you work on a public holiday that would otherwise be a working day for you, you will be paid time and a half and receive an alternative holiday paid at ordinary rates.

You can take your alternative holiday on a day that is agreed between us. If you cannot agree, and it is 12 months of your entitlement arising, you may give us 14 days notice of the day you will take. You must first consider our view on whether that day is convenient.

...

Annual Leave

You will be entitled to four weeks' annual leave per annum paid at average earnings at the completion of 12 months continuous service. This accrues proportionally throughout the year.

...

You may take at least two weeks of your annual leave in one continuous period. Casual employees' holiday entitlement is calculated at 8 per cent of gross earnings and will be paid fortnightly as part of the employees' wage.

...

Completeness and Variations

The terms and conditions set out in this agreement are deemed to be a complete record of the agreement between the parties and may only be varied by mutual consent. Any variations will be recorded in writing.

Where any provision of the Standard terms is inconsistent with the Individual Terms, the Individual terms will prevail.

You acknowledge that a successful business requires you to be flexible and cooperative to meet the needs of the business. You must carry out all of the functions described in your job description and any other functions required. Your job description may be amended from time to time following consultation with you.

Terms of Agreement

Wages or salary to be paid under this agreement will be paid from the first day of the first pay week following the signing of this agreement.

[9] It is Mr Ali's evidence that he was told by Mr Rajagopal that he could stay in Mr Rajagopal's house but that he would have to share a room with the other chef. Mr Ali says that he was never told that he had to pay Mr Rajagopal rent money or pay for utilities and he never told Mr Rajagopal that he could use Mr Ali's accommodation allowance for staying in the room. Mr Ali said that he had to pay a share of the monthly internet bill.

[10] Mr Ali's evidence is that he had to work both lunch and dinner shifts almost every day because the restaurant was so busy but that, in addition to cooking, Mr Ali and the other chef had to help with all the cleaning and to set up the tables for the following day. He said that this would including cleaning the toilets.

[11] Mr Ali stated that his work day usually started at 11am and the lunch shift would end around 2pm although this would sometimes be later. The dinner shift would usually start at 5pm and the earliest he would finish would be around 10pm. However, he said, sometimes he would not finish until 11.30pm.

[12] It is Mr Ali's evidence that in January 2012 he was given \$180 for working three days in December 2011. He also says that, at the end of January 2012, he was paid \$1,800. He did not get a pay slip and this money was deposited directly into Mr Ali's bank account. From time to time, Mr Ali would be given \$200 which was described as Mr Ali's share of the tips, although he did not get this payment every month.

[13] Mr Ali says that, in early February 2012, Mr Rajagopal said that he was going to go on holiday and that Mr Ali was to do the cash deposits while he was away.

[14] By March 2012 Mr Ali says that he was also waiting on customers, taking their orders and working on the till as well as doing all the other duties of cleaning, food buying, food preparation and preparing meals. However, he was still getting only \$1,800 a month into his bank account. Mr Ali says that he would ask Mr Rajagopal for more money and that this would be promised to him, but that he never received any more money.

[15] Mr Ali says that, at the end of February 2013 he went on holiday to India and returned around mid-June 2013. During the period of his holiday, he received no holiday pay or, indeed, any pay at all.

[16] When Mr Ali returned to Wanaka on 18 June 2013 Mr Rajagopal effectively blamed Mr Ali for a shortfall in the till takings that had occurred while Mr Rajagopal had been on holiday. Mr Ali says that Mr Rajagopal accused him of not charging for some wine and beer. However, Mr Rajagopal did not tell Mr Ali how much was missing and then effectively said that Mr Ali should not worry about it and the matter was over.

[17] Mr Ali asked Mr Rajagopal for his holiday pay and Mr Rajagopal replied that neither of them was going anywhere and he should just wait.

[18] Around the end of July 2013 Mr Ali was told to move into another one of Mr Rajagopal's houses but Mr Rajagopal again made him stay in a single room with the other chef. There was no reference to the accommodation allowance being used to pay for his use of this room, although Mr Rajagopal told Mr Ali that he had to pay for his share of the monthly electricity and internet bill.

[19] Mr Ali again asked for his outstanding wages and holiday pay and again was effectively brushed off. Eventually Mr Ali stopped believing Mr Rajagopal, wrote out a resignation letter and handed to Mr Rajagopal. Mr Ali says that Mr Rajagopal got very angry and verbally abusive and threatened to hurt his family back in India. Eventually Mr Rajagopal agreed that Mr Ali's last working day would be 16 December 2013.

[20] On 17 December 2013, the day after Mr Ali's last day of employment with the respondent, Mr Rajagopal gave Mr Ali a letter and asked him to sign it saying he would pay him after he had done so. This letter was in English which Mr Ali found difficult to understand. The text of the letter, which was shown to the Authority was as follows:

*BOMBAY PALACE
Wanaka
(Abhishek [sic] Quality Foods Limited)
Dated 17.12.2013*

*TO
Ali Mohammed Irfan*

This is to inform you that during my trip to India last November and December, there was some discrepancy in sales at the till to the tune of \$1920 and you have acknowledged that you were responsible for that. This has been discussed with you in the presence of our chef Tilaram on 18th June 2013 when you returned from your trip to India.

By signing this letter you acknowledge that the money has not been repaid to Abhisek Quality Foods Limited nor adjusted against your wages. Your holiday wages has [sic] been calculated at \$4006.40 gross, out of which \$200 a month each has been paid from Jan12 to 28Feb 2013 totalling \$2800, and from 16 June 13 to Oct13 a \$900.00. The remaining sum of \$306.40 is attached in the cheque 100123 and \$960.00 for the todate wages of November is by a cheque no 100124.

Wishing you all the best for the future.

Bank cheque enclosed:

No: 10023

No: 10024

Yours faithfully

Rameshanand

[21] Mr Ali says that he asked for a copy of the letter so that he could have someone explain it to him before he signed it, but Mr Rajagopal refused, saying that \$1,920 worth of wine and beer had not been charged for. Effectively, Mr Ali and Mr Rajagopal reached a stalemate as Mr Ali would not sign the letter until he had a copy of it and Mr Rajagopal would not give him his money or give him a copy of the letter until it had been signed. Discussions about this carried on for some days.

[22] Around 22 December 2013 Mr Ali went to the house where he had been staying and found that Mr Rajagopal had changed the lock and put most of his clothes and personal items outside, but not everything. Mr Ali managed to find accommodation with a friend.

[23] Mr Ali thereafter found new employment and on 8 February 2014 was visited by the Police with respect to the alleged missing money, but after Mr Ali had explained the situation the Police left saying that it was a matter that Mr Ali and Mr Rajagopal should settle between them. The police eventually closed its file according to Mr Ali.

[24] Mr Ali then obtained legal advice from Mr Thompson who wrote a letter dated 16 January 2014 to Mr Rajagopal seeking payment of outstanding wages and holiday pay. By way of a letter dated 25 January 2014, Mr Thompson requested a copy of wage and time records from Mr Rajagopal. By 13 February 2014 the respondent had engaged Mr McBride to represent them. Mr Thompson wrote a letter raising a personal grievance for unjustified disadvantage on behalf of Mr Ali on 14 February 2014.

The issues

[25] The Authority must determine the following issues:

- (a) What was Mr Ali entitled to be paid pursuant to his individual employment agreement?
- (b) What were Mr Ali's entitlements with respect to annual leave and public holiday pay?
- (c) What hours did Mr Ali work?
- (d) Did Mr Ali's hours of work cause him to receive less remuneration than he was entitled to under the Minimum Wage Act 1983 and the relevant Minimum Wage Orders?
- (e) What effect on his entitlements under the Minimum Wage Act does the provision of accommodation have?
- (f) The treatment of PAYE on Mr Ali's earnings;
- (g) Should interest be awarded?
- (h) Was Mr Ali unjustifiably disadvantaged in his employment?
- (i) Is Mr Ali entitled to damages for his loss of property?
- (j) Should penalties be imposed upon the respondent?
- (k) Does the counterclaim succeed?

What was Mr Ali entitled to be paid pursuant to his individual employment agreement?

[26] Mr Ali's annual salary was expressed in the individual terms to be \$30,048 per annum. That was expressed to be *excluding your 8% holiday pay*. However, Mr Ali's standard terms of employment also provided that he was entitled to four weeks' annual leave per annum, paid at average earnings at the completion of 12 months' continuous service.

[27] Section 28 of the Holidays Act 2003 sets out the circumstances when an employer may regularly pay annual holiday pay with an employee's pay. These are where the employee:

- (a) Is employed in accordance with s.66 of the Employment Relations Act 2000 (the Act) on a fixed term agreement to work for less than 12 months; or
- (b) Works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with four weeks' annual holidays under s.16 of the Holidays Act.

[28] This makes clear that, in Mr Ali's case, notwithstanding the reference to 8% holiday pay in the individual terms of this employment agreement, the respondent was not entitled to pay him holiday pay on this basis. Although the employment agreement states that the individual terms would prevail over the standard terms, the Holidays Act will prevail over the individual terms in this respect.

[29] Section 28(4) of the Holidays Act provides as follows:

If an employer has incorrectly paid annual holiday pay with an employee's pay in circumstances where subsection (1) does not apply, and the employee's employment has continued for 12 months or more, then, despite those payments, the employee becomes entitled to annual holidays in accordance with section 16 and paid in accordance with this subpart.

[30] Sub-sections 16(1) and (4) of the Holidays Act provide:

16 Entitlement to annual holidays

(1) After the end of each completed 12 months of continuous employment, an employee is entitled to not less than 4 weeks' paid annual holidays.

...

(4) An employee's entitlement to annual holidays remains in force until the employee has—

- (a) taken all of the entitlement as paid holidays; or*
- (b) been paid out under section 28B for the entitlement in the entitlement year.*

[31] Section 21(2) of the Holidays Act provides that annual holiday pay must be:

- (1) *For the agreed portion of annual holidays entitlements; and*
- (2) *At a rate that is based on the greater of:*

- (a) *the employee's ordinary weekly pay as at the beginning of the annual holiday; or*
- (b) *the employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.*

[32] This means that, when in calculating what Mr Ali's annual salary was, it is necessary to ignore the reference to 8% holiday pay being paid with his pay, but to account for four weeks' annual holiday pay as and when it arose in 2013.

[33] Accordingly, Mr Ali was contractually entitled to be paid an annual salary of \$30,048, which equates to a gross sum of \$2,504 per month. He was also contractually entitled to a further \$100 per week as an accommodation allowance. This equates to \$433.33 per month which gives a total entitlement of \$2,937.33 gross per month. This equates to \$2,462.40 net per month.

[34] Mr Ali provided for the Authority copies of his bank statements. This showed deposits into his account every month of \$1,800. This produces a monthly shortfall of \$662.40 net, save where Mr Ali was given extra money on occasions in respect of tips. It is Mr Ali's evidence that these tips started to be paid in July 2012 and that he received \$200 cash in hand every month save for the months of March, April, May, June, July, August and December 2013. This equates to a total gross of \$2,200 received over Mr Ali's employment.

What entitlement did Mr Ali have to holiday pay and public holiday pay?

[35] I have partly answered this in the section above in which I have determined that Mr Ali was entitled to be paid holiday pay in accordance with ss.16(1) and 21 of the Holidays Act. With respect to public holiday pay, his rights as provided for in the individual employment agreement are no more advantageous than that provided by the Holidays Act and therefore I determine that he was entitled to be paid in respect of public holidays worked pursuant to s.50 of the Holidays Act.

[36] Mr Ali was also entitled to the provision of alternative holidays in respect of public holidays he worked pursuant to s.56 of the Holidays Act.

[37] It was Mr Ali's evidence that he worked on New Year's Day, 2 January, Waitangi Day and Otago Anniversary Day in the period from 29 December 2011 to 31 March 2012. For the period 1 April 2012 to 31 March 2013 Mr Ali says that he

worked on all ten public holidays. For the period 1 April 2013 to 16 December 2013 he says that he worked on one public holiday; namely, Labour Day.

What hours did Mr Ali work?

[38] Mr Ali provided to the Authority a copy of calendar sheets for the period December 2011 to December 2013 on which he had written the precise hours that he said he worked on each day throughout that period, save where he took leave.

[39] When questioned about how accurate these records were, Mr Ali stated that he had completed these records around January 2014, when he first met Mr Thompson. Therefore, in respect of the hours that he said he worked in December 2011 and early 2012, he was relying on his memory of the exact hours he worked for each day two years before.

[40] Under my questioning, Mr Ali conceded that he could not be one hundred per cent certain that these hours were accurate. However, he said that he was confident that they were broadly accurate and explained how, for example, he would work longer hours on Friday and Saturday, for example, as compared to Monday and Tuesday. He also explained how, in Wanaka, there is both a summer and winter season and that also caused him to work longer hours, compared to the other seasons.

[41] Mr Ali is asking the Authority to order the respondent to pay money to him which he says he is due because of breaches of the Minimum Wage Act. In order to calculate those sums due, it is necessary to be sure of the hours that Mr Ali says he worked. Examining the hours claimed in respect of each month from December 2011 through to December 2013, I cannot be certain that, for example, on Friday 6 January 2012 Mr Ali worked 12.5 hours, whereas, for example, on Wednesday 8 February 2012 he worked 9 hours.

[42] Section 132 of the Act provides:

132 Failure to keep or produce records

(1) Where any claim is brought before the Authority under section 131 to recover wages or other money payable to an employee, the employee may call evidence to show that—

(a) the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and
(b) that failure prejudiced the employee's ability to bring an accurate claim under section 131.

(2) Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are

incorrect, accept as proved all claims made by the employee in respect of—
(a) the wages actually paid to the employee;
(b) the hours, days, and time worked by the employee.
(3) A defendant may not use as evidence any wages and time record that would be inadmissible under section 232(3).

[43] Pursuant to this section of the Act the Authority may, but is not obliged, to accept as proven all claims made by the employee in respect of the hours, days, and time worked by the employee. Therefore, the Authority is not obliged to accept these assertions.

[44] However, I am prepared to accept that Mr Ali worked significantly long hours every day, save for the occasional day or half day off, throughout his employment with the respondent except when he went on his extended annual leave in 2013. However, rather than accept the specific hours recreated by Mr Ali from his memory, which are no more than estimations, albeit based on a certain broad logic, my approach will be to smooth out the variations claimed to have been worked from week to week.

[45] This approach results in the following.

- a. For the period of Mr Ali's employment ending on 31 March 2012, when the adult minimum wage rate was \$13 per hour, I will treat him as having worked 60 hours each week, save for the first week, in which I accept that Mr Ali worked 30 hours.
- b. For the period 1 April 2012 to 31 March 2013, when the adult minimum wage rate was \$13.50 per hour, I shall treat Mr Ali as having worked 60 hours each week, save where he was on extended leave, or where this is clearly not appropriate.
- c. For the final period of Mr Ali's employment, from 1 April 2013 to 16 December 2013, when the adult minimum wage rate was \$13.75 per hour, I shall treat Mr Ali as having worked 53 hours each week, save where he was on extended leave, or where this is clearly not appropriate.

Did the hours that Mr Ali worked cause him to earn less than he was entitled to under the Minimum Wage Act?

[46] Section 6 of the Minimum Wage Act 1983 provides as follows:

6 Payment of minimum wages

Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[47] Section 11 of the Minimum Wage Act provides:

11 Recovery of wages

Without affecting any other remedies for the recovery of wages or other money payable by an employer to any worker whose wages are prescribed under this Act, where there has been any default in payment of any such wages or other money or where any payment of any such wages or other money has been made at a rate lower than that prescribed under this Act or otherwise legally payable to the worker, the whole or any part, as the case may require, of any such wages or other money may be recovered by the worker or by a Labour Inspector to the use of the worker by action commenced in the Employment Relations Authority in the same manner as an action under section 131 of the Employment Relations Act 2000, notwithstanding the acceptance by the worker of any payment at a lower rate or any express or implied agreement to the contrary, and subsection (2) of that section shall apply accordingly.

[48] It is now accepted law that the receipt of a salary by an employee does not exempt an employer from complying with the requirement of the Minimum Wage Act and the relevant minimum Wage Orders in respect of that employee.¹

[49] With respect to the period 31 December 2011 to 31 March 2012, Mr Ali should have earned \$390 gross for the first three days of his employment together with a further \$780 gross per week pursuant to the Minimum Wage Act.²

[50] During this first period of Mr Ali's employment, in accordance with the hours that I have accepted that he worked, he should have earned the gross sum of \$10,530. This would have been taxed at the rate of 10.5% which equates to tax of \$1,105.65, leaving net earnings for this period of \$9,424.35. During this period, in accordance with Mr Ali's bank statements, he only received from the respondent the sum of

¹ *Law & Ors v. Board of Trustees of Woodford House* [2014] NZEmpC 25

² Pursuant to *Law*, it is not permissible to average out earnings. The correct approach to assess the hours worked each week, then assess whether the minimum weekly wage payment due under the relevant minimum wage orders have been met in practice.

\$5,580 net. Therefore he was underpaid by reference to the Minimum Wage Act during that period by the net sum of \$3,844.35.

[51] With respect to the next period, from 1 April 2012 to 31 March 2013, Mr Ali should have earned \$810 per week gross by reference to the Minimum Wage Act, together with a further \$108 for the 8 hours he worked in the week ending 2 March 2013, just prior to him commencing his annual leave. This results in the total gross sum of \$38,178. After tax, this amounts to the net sum of \$32,387.75. During this period Mr Ali received from the respondent a net pay of \$19,800 together with tips totalling \$1,600. Whilst the tips do not appear to have been taxed, for reasons that I explain below, I shall treat them as net payments. Therefore, Mr Ali was underpaid by a total of \$10,987.75 during this period, net of tax.

[52] For the final period of Mr Ali's employment, from 1 April 2013 to 16 December 2013, during which the minimum wage for adults was \$13.75 per hour, Mr Ali's hours, to the extent I have accepted them, would have entitled him to be paid the gross sum of \$19,167.50, including 16 hours worked in the last week of his employment. After tax, this results in him being entitled to the net sum of \$16,793.19 during this period. Mr Ali received a net payment of \$9,720 during this period together with a further \$600 in tips which, although ostensibly not taxed, I have treated as a net payment for the reasons I explain below. This results in a net shortfall owed to Mr Ali for this period of \$6,473.19.

[53] With respect to Mr Ali's entitlement under his employment agreement, for each period, his contractual entitlement fell short of his entitlement under the Minimum Wage Act as I have assessed it. In other words, for the first period of his employment, ending 31 March 2012, he was contractually entitled to the gross sum of \$8,811.99 but was entitled under the Minimum Wage Act to \$10,530 gross. In the second period, he was entitled to \$32,310.63 gross under his contract, but should have been paid \$38,178 gross under the Minimum Wage Act. In the final period, he was contractually entitled to the gross sum of \$17,398.17, but should actually have been paid \$19,167.50 gross by reference to the Minimum Wage Act in accordance with my assessment.

[54] In other words, because of the hours worked by Mr Ali, insofar as I have accepted them, I shall not make any orders under the Wages Protection Act 1983 as

Mr Ali's entitlements under that Act are exceeded by his entitlements under the Minimum Wage Act.

What effect on his entitlements under the Minimum Wage Act does the provision of accommodation have?

[55] Section 7 of the Minimum Wage Act provides as follows:

7 Deductions for board or lodging or time lost

(1) In any case where a worker is provided with board or lodging by his employer, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wage calculated at the appropriate minimum rate by more than the cash value thereof as fixed by or under any Act, determination, or agreement relating to the worker's employment, or, if it is not so fixed, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wages (as so calculated) by more than 15% for board or by more than 5% for lodging.

[56] Mr Ali was not provided with any board by the respondent. There was no agreement between the parties as to how the provision of the room in which Mr Ali stayed was to be paid for. I am satisfied on a balance of probabilities that it was not the respondent which provided lodging to Mr Ali, but Mr Rajagopal personally. As Mr Rajagopal was not Mr Ali's employer, s.7 of the Minimum Wage Act is not engaged. Therefore, no deduction is required in respect of the fact that Mr Ali stayed in a room in Mr Rajagopal's houses.

[57] It is my conclusion that Mr Ali is owed the net total sum from the respondent company of \$21,305.29, which is recoverable under s11 of the Minimum Wage Act.

Mr Ali's entitlements under the Holidays Act

[58] During the 12 month period commencing 29 December 2012, the anniversary of Mr Ali's start day, Mr Ali was entitled to four weeks' paid annual leave. He took more than that, but should have received four weeks' pay calculated in accordance with s.21 of the Holidays Act. The correct approach, therefore, was to work out Mr Ali's average weekly earnings for the 12 months immediately before the end of the last pay period before the holiday taken. This calculation results in average gross weekly earnings of \$806.54 which equates to holiday pay owed to Mr Ali for the period in question of \$3,226.15 gross. That equates to \$2,661.57 net.

[59] With respect to holiday pay owed to Mr Ali in his final period of employment ending on 16 December 2013, s.25 of the Holidays Act applies as Mr Ali had not worked for the whole of a second or subsequent 12 months for the purposes of s.16 of the Holidays Act. Therefore, the respondent had to pay Mr Ali 8% of his gross earnings, less any amount paid to him for annual holidays taken in advance or paid in accordance with s.28.

[60] Mr Ali was not paid for any holidays taken in advance or, it seems, in accordance with s.28. Therefore, he is entitled to be paid 8% of his gross earnings for the period from 29 December 2012 to 16 December 2013. During this period Mr Ali was entitled to gross earnings in the sum of \$25,755.50. 8% of this sum equates to \$2,060.44 gross. Net of tax, this equates to \$1,690.86.

[61] With respect to the days on which Mr Ali worked on public holidays, he should be paid in accordance with s.50 of the Holidays Act. In his particular case, it is possible to work out his relevant daily pay which I do by reference to his employment agreement, ignoring the accommodation allowance. Therefore, his gross daily pay was \$82.55.

[62] Mr Thompson asserts that Mr Ali is owed an extra half day in respect of each public holiday that he worked. As he worked a total of 15 public holidays throughout his employment, and his relevant daily pay did not change, he would be entitled to an additional \$616.13 gross in respect of money due under s.50 of the Holidays Act. Calculating the net sums due to Mr Ali for the three periods of his employment, he was entitled to the net sum of \$147.76 for the first period; \$340.63 for the second period; and \$34.03 for the third period.

[63] With respect to what he was due for alternative days, I calculate that Mr Ali was due the sum of \$295.52 net in respect of the first period of his employment; \$681.26 net in respect of the second period; and \$68.06 net in respect of the final period of his employment.

[64] Mr Ali is owed the total net sum of \$5,920.69 under the Holidays Act.

PAYE paid on behalf of Mr Ali

[65] During the disclosure part of the proceedings while Mr McBride was still acting for the respondent, the respondent disclosed a single sheet which was headed

up *Payroll Record* and which purported to show the tax paid by Mr Ali by way of PAYE deductions. These records tally with Inland Revenue Department records that Mr Ali produced for the same period.

[66] However, it is clear from Mr Ali's bank records that the sums upon which the PAYE deductions were calculated, (which deductions were apparently rendered to the Inland Revenue Department), were not the sums upon which Mr Ali's actual net pay was calculated. In other words, it would appear that more tax was rendered on behalf of Mr Ali to Inland Revenue than actually should have been rendered by reference to the pay he actually received. It is for this reason that I am treating the \$2,200 worth of tips that Mr Ali says that he received as net receipts rather than gross receipts, given that Mr Ali appeared to have paid a total of \$10,893.82 in tax, based on purported earnings of \$56,134. However, I am satisfied on the balance of probabilities that Mr Ali's gross receipts from the respondent in actuality only amounted to \$37,300.

[67] It would appear, therefore, that Mr Ali's purported gross earnings have been overstated to the Inland Revenue Department by the respondent in the amount of \$18,834.

Interest

[68] Clause 11, Schedule 2 of the Act provides as follows:

11 Power to award interest

(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.

(2) Without limiting the Authority's discretion under subclause (1), in deciding whether to order the inclusion of interest, the Authority must consider whether there has been long-standing and repeated non-compliance with a demand notice.

(3) Subclause (1) does not authorise the giving of interest upon interest.

[69] Section 87(3) of the Judicature Act 1908 provides that the term *the prescribed rate* means the rate of 7.5% per annum, or such other rate as may from time to time be

prescribed for the purposes of this section by the Governor-General by Order-in-Council. Clause 4 of the Judicature (Prescribed Rate of Interest) Order 2011 prescribes for the purposes of s.87 of the Judicature Act 1908 the rate of 5% per annum.

[70] Section 84 of the Holiday Act provides as follows:

84 Power to award interest on unpaid holiday pay or leave pay

(1) Subsection (2) applies if—

(a) the Authority gives judgment for an employee in an action to recover holiday pay or leave pay; or

(b) the Authority makes a determination under section 226 of the Employment Relations Act 2000 in favour of the employee.

(2) The Authority may include, in the sum for which judgment is given or the determination is made, interest for the whole or any part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment or determination.

(3) Interest included in a judgment or determination must not exceed interest at the rate calculated under clause 11 of Schedule 2 of the Employment Relations Act 2000.

(4) This section does not authorise the giving of interest upon interest.

[71] I accept that Mr Ali has incurred loss of the use of the money that has been owed to him for several months. Clause 11, Schedule 2 of the Act does not restrict the award of interest that is recovered only under the Act, and so I am satisfied that I may order the payment of interest on the entirety of the sums ordered to be paid to Mr Ali, including that due pursuant to the Minimum Wages Act.

[72] The respondent is to pay interest to Mr Ali calculated at the rate of 5% per annum on the whole of the sum of \$27,225.98 (the Arrears) the accrual of interest commencing from Tuesday 17 December 2013, and continuing to accrue on the Arrears (or any balance remaining unpaid) until the Arrears have been paid in full.

Was Mr Ali unjustifiably disadvantaged in his employment?

[73] Section 103(1)(b) of the Act provides as follows;

103 Personal grievance

(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—

...

(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was

(during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[74] Section 103A of the Act provides as follows:

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[75] I am satisfied that Mr Ali suffered a personal grievance by not being paid all of the wages and holiday pay that he was lawfully entitled to, pursuant to his contractual and statutory rights. The failure to pay him clearly caused him a disadvantage in his employment. Furthermore, I am satisfied that no fair and reasonable employer could have failed to have paid Mr Ali what was lawfully due to him in all the circumstances at the time the failure occurred. Accordingly, I find that Mr Ali was unjustifiably disadvantaged in his employment by the actions of the respondent.

[76] I am also satisfied that Mr Ali's evidence of the effect upon him of the continued failure to pay him what was due is credible, and that he is entitled to receive compensation for humiliation, loss of dignity and injury to his feelings. His evidence to the Authority was that he is brought to tears that he could not provide for his wife and family the way he should because he was not paid his *halal* (good) money for working hard for the respondent's business. He also said that he has felt like a fool because he believed what he was told by Mr Rajagopal.

[77] Mr Ali, through Mr Thompson, seeks compensation in the sum of \$5,000. The failure to pay Mr Ali was sustained, and the effect on him was certainly not trivial or minor, and I would have been prepared to have awarded close to twice this sum. However, I limit compensation to the sum of \$5,000 as requested.

[78] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal

grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[79] I am satisfied that Mr Ali did not contribute in any way to the respondent's failure to pay Mr Ali his contractual and statutory entitlements. Therefore, I do not reduce the compensatory award to him.

Is Mr Ali entitled to damages for his loss of property?

[80] Whilst I believe Mr Ali's evidence that he suffered a loss of personal property when he was locked out of the house he had been staying in, and that the property was worth around \$500, I decline to award anything in respect of this as I do not accept that the Authority has the jurisdiction to consider the claim.

[81] In order to accept the claim, I must be satisfied that it relates to an employment relationship problem. An employment relationship problem is defined in s.5 of the Act as a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment.

[82] It appears to me that the accommodation arrangement between Mr Ali and Mr Rajagopal was a private one. The provision of the accommodation was not necessary for Mr Ali to perform his duties and there was no reference to the provision of accommodation in Mr Ali's employment agreement.

[83] I therefore conclude that Mr Ali was a private lodger of Mr Rajagopal and that the dispute about Mr Ali's lost personal property is a matter between them, not relating to or arising out of an employment relationship. I therefore decline to accept this claim.

Penalties

[84] Mr Ali seeks that a penalty be imposed under ss.130, 4A, and 134 of the Act and under s.75 of the Holidays Act.

Section 130 of the Act

[85] This section provides for the requirement of every employer to keep a wages and time record showing certain defined information. Section 130(2) provides as follows:

Every employer must, upon request by an employee or by a person authorised under section 236 to represent an employee, provide that employee or person immediately with access to or a copy of or an extract from any part or all of the wages and time record relating to the employment of the employee by the employer at any time in the preceding 6 years at which the employer was obliged to keep such a record.

[86] Section 130(4) provides that every employer who fails to comply with any requirement of the section is liable to a penalty imposed by the Authority.

[87] Mr Thompson wrote on 16 January 2014 to Mr Rajagopal seeking production of Mr Ali's wage and time records, but none have been forthcoming. Therefore, the respondent is clearly in breach of s.130(2) of the Act and so liability to the imposition of a penalty is warranted. I fix that penalty at \$5,000, the entirety of which is payable to the Crown. I decline to order payment of the penalty to Mr Ali as compensation under s123(1)(c)(i) of the Act has been ordered to be paid to him.

Section 4A of the Act

[88] Section 4A of the Act provides as follows:

4A Penalty for certain breaches of duty of good faith

A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—

(a) the failure was deliberate, serious, and sustained; or

(b) the failure was intended to undermine—

(i) bargaining for an individual employment agreement or a collective agreement; or

(ii) an individual employment agreement or a collective agreement;

or

(iii) an employment relationship; or

(c) the failure was a breach of section 59B or section 59C.

[89] The duty of good faith in s.4(1) of the Act is stated as follows (omitting s.4(1)(c):

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)—

- (a) must deal with each other in good faith; and*
(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
(i) to mislead or deceive each other; or
(ii) that is likely to mislead or deceive each other.
(1A) The duty of good faith in subsection (1)—
(a) is wider in scope than the implied mutual obligations of trust and confidence; and
(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative

[90] I am satisfied that the respondent did not deal with Mr Ali in good faith by continually failing to pay him what he was contractually and statutorily entitled to. I am also satisfied that this failure was:

- a. deliberate, as the respondent must have known that it was paying Mr Ali significantly below his contractual and statutory entitlements;
- b. serious, as the underpayments were significant; and
- c. sustained, as the underpayments lasted the entirety of Mr Ali's employment.

[91] Therefore, I am satisfied that the imposition of a penalty is warranted, and I fix that sum at \$5,000, the entirety of which is to be paid to the Crown. I decline to order payment of the penalty to Mr Ali as compensation under s123(1)(c)(i) of the Act has been ordered to be paid to him.

Section 134 of the Act

[92] Section 134(1) of the Act provides:

- 134 Penalties for breach of employment agreement***
(1) Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.

[93] Whilst I am satisfied that the respondent has acted in breach of the employment agreement between it and Mr Ali by not paying him his entitlements under it, I have already imposed a penalty in respect of that failure under s4A of the Act. I therefore decline to impose a further penalty.

Section 75 of the Holidays Act

[94] This provides as follows;

75 Penalty for non-compliance

(1) An employer who fails to comply with any of the provisions listed in subsection (2) is liable,—

(a) if the employer is an individual, to a penalty not exceeding \$10,000:

(b) if the employer is a company or other body corporate, to a penalty not exceeding \$20,000.

(2) The provisions are—

(a) section 16 and sections 21 to 28 (which relate to an employee's entitlement to, and payment for, annual holidays):

(b) section 40(3) (which relates to an employee's entitlement to be paid for a public holiday that would have occurred during the employee's annual holidays):

(ba) sections 28A and 28B (which relate to a request by an employee for a portion of his or her annual holidays to be paid out and payment for that portion):

(c) section 46, sections 49 to 56, section 60, and section 61(3) (which relate to an employee's entitlement to, and payment for, public holidays and alternative holidays):

(d) section 63, section 65, and sections 69 to 72 (which relate to an employee's entitlement to, and payment for, sick leave and bereavement leave):

(e) section 83 (which relates to the failure to keep or provide access to a holiday and leave record).

[95] It would appear that the relevant provisions that have not been complied with by the respondent are those listed in s.75(2)(a), (c) and possibly (e). However, as I have already imposed a penalty under s 4A of the Act in respect of actions that include non-compliance with the Holidays Act, and as I have already imposed a penalty under s130 of the Act in respect of the non-provision of wages and time records, it would not be just to impose a further penalty in respect of the same or similar issues. I therefore decline to impose a penalty under s75 of the Holidays Act.

Does the counterclaim succeed?

[96] No evidence was adduced on behalf of the respondent in relation to the alleged missing money, and Mr Ali's responsibility for it. I therefore accept Mr Ali's evidence in respect of that allegation, and dismiss the counterclaim.

Orders

[97] I order the respondent to pay to Mr Ali the following sums:

- a. The net sum of \$21,305.29 recoverable under s.11 of the Minimum Wage Act;
- b. The net sum of \$5,920.69 recoverable under s.74 of the Holidays Act;
- c. Interest calculated at the rate of 5% per annum on the whole of the net sum of \$27,225.98 (the Arrears), the accrual of interest commencing from Tuesday 17 December 2013, and continuing to accrue on the Arrears (or any balance remaining unpaid) until the Arrears have been paid in full;
- d. Compensation under s.123(1)(c)(i) of the Act in the sum of \$5,000.

[98] I further order the respondent to pay penalties in the total sum of \$10,000. This sum is to be paid into the Authority, which will then be paid by the Authority into a Crown Bank Account.

Costs

[99] Costs are reserved. If the parties are unable to agree how costs are to be dealt with between them within 28 days of the date of this determination, then Mr Ali shall have a further 14 days within which to serve and lodge a memorandum setting out what contribution towards his costs is sought, and the basis for that, and the respondent shall have a further 14 days within which to serve and lodge its response.

David Appleton
Member of the Employment Relations Authority