

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 130  
5603783

BETWEEN                    A LABOUR INSPECTOR WITH  
                                     THE MINISTRY OF BUSINESS  
                                     INNOVATION AND  
                                     EMPLOYMENT  
                                     Applicant

A N D                        ALPINE MOTOR INN & CAFÉ  
                                     (2008) LIMITED  
                                     Respondent

Member of Authority:     David Appleton

Representatives:         Aaron McIlroy, Counsel for Applicant  
                                     Jeanette Richardson, Advocate for Respondent

Investigation Meeting:    14 July 2016 at Christchurch

Submissions Received:    14 July and 1 August 2016 for Applicant  
                                     26 July 2016 for the Respondent

Date of Determination:    4 August 2016

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**DETERMINATION OF THE AUTHORITY**

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- A.     The respondent breached the Minimum Wage Act 1983, the Holidays Act 2003 and the Employment Relations Act 2000.**
  
- B.     The respondent is ordered to pay arrears of pay and holiday pay, and penalties are imposed upon it.**
  
- C.     Costs are reserved.**

**Employment relationship problem**

[1] The Labour Inspector (Richard Lewis) seeks a penalty to be imposed upon the respondent for breaches of s.8A and s.6 of the Minimum Wage Act 1983 in respect of a former employee, Kamaljeet Kaur. The Labour Inspector also seeks the payment of arrears of wages under s.11 of the Minimum Wage Act and recovery of arrears of holiday pay under s.77 of the Holidays Act 2003 for the period during which he says Ms Kaur worked, but was not paid; namely, between 17 November 2014 and 15 February 2015 inclusive (the material period).

[2] The respondent denies that Ms Kaur was an employee prior to 16 February 2015, and asserts that she was a volunteer. Therefore, the respondent asserts that there has been no breach of minimum employment legislation.

**Background**

[3] The respondent operates a motor inn and café at Springs Junction, Lewis Pass. On 24 March 2015, the Labour Inspectorate received a complaint from Ms Kaur. She alleged that she had been employed at the respondent's premises between 17 November 2014 and 23 March 2015, and had been significantly underpaid during that period.

[4] The Labour Inspectorate commenced an investigation and interviewed the complainant, as well as three other employees, and a director of the respondent, Mr Jerry Hohneck.

[5] The complaint from Ms Kaur was that she had commenced work on 17 November 2014, but had received no pay at all until 1 March 2015, when she received \$1,289.39. She subsequently received \$875.00 on 15 March and \$286.64 on 22 March. Furthermore, Ms Kaur told the Labour Inspector that she had not received an individual employment agreement until 16 February 2015.

[6] Ms Kaur told the Labour Inspector that she had worked 39 hours in her first week and four to five hours a day for the following two weeks, followed by eight to nine hours a day for working a six day week. Mr Lewis says that the respondent kept

no time and wage records in relation to Ms Kaur for the period between 17 November 2014 and 16 February 2015.

[7] Ms Kaur lived at the Alpine Motor Inn from 16 November 2014 until she resigned on 23 March 2015. Her accommodation and food were provided for free, although assertions have been made which challenge that position, which will be examined below.

[8] The Labour Inspector provided the Authority with a copy of his investigation report. Mr Lewis said in his oral evidence that the investigation report contained some errors, and outlined them. The respondent has submitted that this constitutes Mr Lewis changing his evidence, and also says that the investigation report is the “mainstay” of the Labour Inspectorate’s case, but that it is “faulty in the extreme”. First, I do not regard Mr Lewis signalling that the report contained errors as him changing his evidence. The report was, as Mr McIlroy submitted, an analytical tool, not a brief of evidence.

[9] Second, the investigation report is a useful record of what Mr Lewis was told by the people he interviewed, but it is just one part of the overall, multi-part body of evidence from both parties that the Authority considers when deciding the likely factual matrix. The report is not the “mainstay” by any means.

[10] Finally, I do not accept that there is any evidence to support the contention that the investigation report was “faulty in the extreme”. Insofar as the respondent is suggesting that the Authority ignore the report, I decline to do so.

[11] In the investigation report, Mr Lewis includes the following passage:

Jerry Hohneck claims that he was unaware that [Ms Kaur] was due to arrive and start work, and that he did not have enough work for her to do. He claims that she pleaded with him for a job, and that she worked without his agreement in order to “help out” her friend Sandeep. He also claimed that Sandeep had lent Kamaljeet money, and that Kamaljeet was working for Sandeep in order to pay back her debt. He accepts that Kamaljeet was living on the premises from November 2014, but says he allowed this out of goodwill.

Jerry Hohneck claims that once he did formally employ Kamaljeet Kaur, he did so on the basis that she and Parveen Kumari effectively shared a job, with both being paid for 20 hours, irrespective of how those hours were shared between them.

[12] It may be the case that Ms Kaur and Ms Kumari were underpaid for the period when they job shared, but the Labour Inspector does not seek any orders in respect of that period as the evidence is too uncertain.

[13] According to the investigation report, Ms Kaur told Mr Lewis that she had answered a Facebook advertisement for the job and flew to Christchurch on 16 November 2015 where she was picked up by Mr Hohneck and taken to Springs Junction. However, in his oral evidence Mr Lewis indicated that this was an error, based on his assumption. Ms Kaur's oral evidence was that her friend had told her about the job, which she knew was in a café.

[14] The investigation report refers to Mr Lewis having then interviewed an employee, Sandeep Kaur Sidhu. The report says that Ms Sidhu told Mr Lewis that Ms Kaur had been told not to sign in or out, and that Mr Hohneck had told Ms Sidhu that this was a "private matter". Ms Sidhu also told Mr Lewis that Mr Hohneck claimed that Ms Kaur was learning the job during the first three months, whereas Ms Sidhu believed that it was a simple job that could be learned in a very short time. Mr Lewis' investigation report also states that Ms Sidhu did not know Ms Kaur before she arrived at Springs Junction, so there was no friendship or sense of obligation to help one another. Ms Sidhu also told Mr Lewis that Ms Kaur did not owe her any money and denied that there was an arrangement to pay any kind of debt.

[15] In the statement in reply lodged by Mr Hohneck, Mr Hohneck said that, as they were approaching the busy Christmas period of 2014, his manager, Yogesh Bhargava, advertised for a full time employee but that, when Ms Kaur arrived, it was clear that she did not hold the requisite visa clearance to allow her to take up the full time position that they had available. Apparently, she held a student visa with a stipulation that she could only work 20 hours per week. Mr Hohneck stated in the statement in reply that:

I was very clear that there could be no position for her and additionally I needed to abide by immigration rules.

[16] Mr Hohneck said that he thought it would be kind to provide Ms Kaur with temporary accommodation and food, as she was adamant that she did not want to go back to Auckland or India. He said that he was extremely clear with her that she could not work for him and that she needed to look for a suitable and compliant

position elsewhere, where 20 hours was the norm, and that she needed to get medical clearance prior to doing any work (to qualify for a full visa). Mr Hohneck says that he tried to assist Ms Kaur, and drove her to the doctor himself on two different occasions, but she failed both times to get medical clearance.

[17] Mr Hohneck stated the following in the statement in reply:

She apparently volunteered via the subordinate manager (Yogesh) to do some tasks and I was very clear that this was not okay, she was not and could not be employed and if she persisted with it, then Yogesh would assume this was being done this [sic] off her own bat and the position remained unfilled.

[18] Mr Hohneck said that he then managed to fill the role by employing Parveen Kumari. Ms Kaur finally obtained a full visa in early February 2015, but the only job offer that he could make by that time was a job share with Ms Kumari, which Ms Kumari agreed to. By then, the busy season had ended and he did not have the work available. He said that he did not require Ms Kaur to work more than the stipulated hours once she was employed by him.

[19] Mr Hohneck also stated in the statement in reply that he was unhappy with the work performance of Ms Kaur and he held a disciplinary hearing, in which she was told to urgently improve.

[20] Mr Hohneck takes issue with the investigation report by Mr Lewis, which he says is one-sided, and also objects to the Labour Inspectorate relying upon an audio recording of the disciplinary investigation with Ms Kaur which Mr Hohneck did not know she was recording. I deal with the admissibility of the audio recording below.

[21] Ms Kaur submitted a written brief of evidence to the Authority in which she said she was originally hired as a chef's assistant but that the duties included cleaning motel rooms and customer service duties in the café and the motel. She says in her statement that Mr Hohneck told her that, as she only had a student visa, she could only be paid for 20 hours work per week as a casual, but when she asked for her 20 hours pay, he said that she would not get paid because she was casual. Ms Kaur says that Mr Hohneck told her that she would only be paid once she had a full work visa and that, in the meantime, she was just working for food and accommodation. She said that she had never agreed just to work for food and accommodation as that was supposed to be free.

[22] Ms Kaur says that Mr Hohneck gave her \$500.00 cash at Christmas but he told her that this was a gift, and not wages. She says that Mr Hohneck also lent her \$1,000.00 to go to Auckland for medical reasons.

[23] Ms Kaur says that, on 5 February 2015, she got her “graduate job search visa” (now known as a “post study work visa”) and Mr Hohneck agreed to start paying her. In her first week, Ms Kaur earned \$736.00, but Mr Hohneck kept all of this as part payment of the \$1,000.00 loan. When she left his employment in March 2015, Mr Hohneck took the other \$324.00 off her final pay.

[24] Ms Kaur said that she did not get her employment agreement until 16 February 2016, which she was made to sign in the café in front of Mr Hohneck, and of which she did not receive a copy, although Mr Hohneck said that she had declined a copy when she was told that the original was kept in the safe.

[25] Ms Kaur said in her statement that she had resigned on 23 March 2015 because she was sick of not being paid properly. She also said that she did not owe Ms Sidhu any money, apart from what she had borrowed to pay for her visa, which she gave back. She did not work to pay off a debt.

[26] In his statement of evidence, Mr Hohneck states that he paid for Ms Kaur’s accommodation and food because it appeared that Ms Kaur had nowhere else to go. He says that Ms Kaur said that she badly wanted to work, and learn the job, but that, if she chose to help out, that was an entirely voluntary undertaking and that he could not and did not agree to her working as an employee.

### **The issues**

[27] The issues are as follows;

- a. Should the audio recording be admitted into evidence?
- b. Did the respondent breach s6 of the Minimum Wages Act 1983?
- c. Did the respondent breach s8A of the Minimum Wages Act 1983?
- d. Did the respondent breach the Holidays Act 2003?
- e. Should penalties be imposed upon the respondent?

[28] In order to determine whether the respondent has been in breach of minimum employment standards, it is necessary to determine the status of Ms Kaur's relationship with the respondent between 17 November 2014 and 16 February 2015.

***Should the audio recording be admitted into evidence?***

[29] Before considering the issues, I will address the respondent's objection to the adducing into evidence by the Labour Inspectorate of the audio recording that was made during a disciplinary meeting between Mr Hohneck, Ms Kaur and Ms Kumari. The respondent objects to this as the recording was made covertly, without Mr Hohneck's knowledge.

[30] Section 160 of the Act states, at subsection (2):

The Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[31] Reviewing relevant case law<sup>1</sup>, the following principles may be discerned in respect to the admissibility of secretly obtained recordings:

- (a) The overriding principle must be fairness to both sides;
- (b) Of relevance is whether there was an expectation of a confidential or off the record discussion;
- (c) A secret recording is admissible in respect of proceedings at which the complainant was in attendance, but not in respect of the part which was recorded after the complainant had withdrawn to enable the panel to deliberate in private; and
- (d) Admissibility or otherwise needs to be assessed in the exercise of the Authority's jurisdiction under s.160(2) in the light of all relevant and admissible evidence and s.103A.

[32] The recording was of a conversation between Mr Hohneck, Ms Kaur and Ms Kumari. The conversation took place over two hours 42 minutes and Mr Hohneck

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<sup>1</sup> *Talbot v Air New Zealand Ltd* [1996] 1 NZLR 414, [1995] 2 ERNZ 356 (CA); *Simms v. Santos Mount Eden Ltd* ERA Auckland AA254/03, 21 August 2003; *Chairman and Governors of Amwell View School v Dogherty* [2007] ICR135 (UK EAT); *Ravnjak v Wellington International Airport Ltd* [2011] NZEmpC 31

was speaking during the vast majority of that time. Ms Kaur said that neither, Mr Hohneck or Ms Kumari knew that the meeting was being recorded.

[33] It appears that Ms Kaur left the recording going while she left the room to use the toilet, but otherwise she was present throughout. The transcript indicates that Ms Kaur was out of the room for 2 minutes and 7 seconds. The only conversation recorded while Ms Kaur was out of the room was Mr Hohneck asking Ms Kumari if she had water and saying “I don’t know if that makes sense or not”. The transcript also indicates “a lengthy pause” while Ms Kaur was out of the room.

[34] It is clear from the transcript that Mr Hohneck was using his position as the owner of the respondent to direct and discipline one of its employees (Ms Kaur). Whilst another employee, Ms Kumari, was present, she was not there in the capacity of Ms Kaur’s support person, but rather as another employee who also needed to be encouraged to perform. Ms Kaur was recording the meeting to protect herself in the absence of an independent support person.

[35] Ms Kaur did not capture on her recording any private information which she would not have been entitled to have heard. If she had captured private information on the recording while she was out of the room, then that may have rendered the recording, or that part of the recording, inadmissible. However, she did not.

[36] In addition, Mr Hohneck made a number of observations during the conversation which are potentially very relevant in assisting the Authority in discerning the true nature of the relationship between the parties during the period of 17 November 2014 to 16 February 2015.

[37] Finally, I do not believe that the recording was an “entrapment” as has been submitted on behalf of the respondent. First, it was Mr Hohneck who called the meeting, and second, Ms Kaur hardly speaks throughout the 2 hour, 42 minute meeting.

[38] For all of these reasons, although Mr Hohneck was not aware that his conversation was being recorded, I will admit this recording and its transcript into evidence. As for the accuracy of the transcript, which was prepared by or on behalf of the Labour Inspectorate; Ms Richardson said that there were some inaccuracies in it as it mixed up speakers and because there were gaps. I agree with this, although the bulk of the transcript is readily comprehensible, and it is easy to see who was meant to be

speaking by the context. The respondent did not object to any other aspect of the transcript, and indeed, Ms Richardson objected to the recording being played during the Authority's investigation meeting. I therefore accept that the transcript is substantially accurate.

### **Did the respondent breach s6 of the Minimum Wages Act 1983?**

[39] To qualify for the minimum wage, a person must be an employee. As the respondent argues that Ms Kaur was a volunteer during the material period, I must examine the evidence to determine whether that assertion is correct or not.

#### ***The key legal principles***

[40] I first set out the key legal principles in relation to the status of Ms Kaur during the material period, and her entitlements if she were an employee.

[41] The starting point is s.6 of the Employment Relations Act 2000 (the Act), which provides as follows:

#### **6 Meaning of employee**

- (1) In this Act, unless the context otherwise requires, employee—
- (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
  - (b) includes—
    - (i) a homemaker; or
    - (ii) a person intending to work; but
  - (c) excludes a volunteer who—
    - (i) does not expect to be rewarded for work to be performed as a volunteer; and
    - (ii) receives no reward for work performed as a volunteer;
- ...
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2), the court or the Authority—
- (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
  - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[42] Section 6 of the Minimum Wage Act provides:

**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.

[43] The term “worker” has the same meaning as “employee” in section 6 of the Act.

***What was the status of Ms Kaur during the material period?***

[44] It appears that, at different times<sup>2</sup>, various propositions have been made by Mr Hohneck about Ms Kaur’s status during the material period, and her right to be paid. These are as follows:

- (a) That Ms Kaur worked purely as a volunteer, because she was bored;
- (b) That Ms Kaur worked as a volunteer in order to learn how to do the job;
- (c) That Ms Kaur worked to pay off a debt owed to Ms Sidhu;
- (d) That Ms Kaur worked in return for accommodation and food;
- (e) That Ms Kaur was not entitled to be paid because she was a casual employee; and
- (f) That Ms Kaur was not entitled to be paid because she did not have a full time visa.

***Was Ms Kaur a volunteer?***

[45] This question requires an analysis of whether Ms Kaur expected to be rewarded for her work, and whether she did receive any reward for the work she performed. In the Employment Court case of *John Kirby v New Zealand China*

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<sup>2</sup> During his interviews with the Labour Inspectorate, his conversation with Ms Kaur which was recorded, in the statement in reply and in his evidence to the Authority.

*Friendship Society*<sup>3</sup>, His Honour Judge Corkill stated that the analysis of whether a person does or does not expect to be rewarded for work to be performed as a volunteer must be carried out objectively<sup>4</sup>. Judge Corkill stated that it is necessary to consider the natural and ordinary meaning of the language used by the parties in any relevant oral or written agreement in determining whether an individual is a volunteer.

[46] In *Brook v Macown*<sup>5</sup>, at [18], Her Honour Judge Inglis said:

If the requirement of section 6(1)(c)(i) and (ii) are met it follows that they are not an employee. However it does not follow that they are an employee if these requirements are not met. That is because subsection (2) and (3) require a more expansive inquiry. The assessment is an intensely factual one, requiring consideration of all relevant matters, including material from which the intention of the parties can be gleaned.

[47] What this means, in effect, is that the Authority must inquire into the real nature of the relationship between the parties.

[48] It was Ms Kaur's evidence that she expected to be paid when she started working, and that she started working on the next day after she arrived at Springs Junction, Monday 17 November 2014. She had flown to Christchurch from Auckland on the basis that she had believed there was a job available in which she would be paid minimum wage, and receive free food and accommodation. I therefore believe that, at the point when she arrived at the Inn, she did expect to be paid for doing work in the Café.

[49] It is my understanding that Mr Hohneck's case is as follows:

- a. Ms Kaur was desperate not to have to go back to Auckland or India, and effectively begged to be able to stay at Springs Junction while she applied to get a full work visa.
- b. Mr Hohneck allowed her to do so, and hoped she would be able to get the full work visa and then start work full time for the busy season (which he said was from Boxing Day until the end of the school holidays in early February).

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<sup>3</sup> [2015] NZEmpC 188

<sup>4</sup> At para.[14]

<sup>5</sup> [2014] NZEmpC 79

- c. Mr Hohneck told Ms Kaur not to work, and if she did, it was “off her own bat” (i.e., she would be doing so as a volunteer, and was not employed).
- d. When Ms Kaur failed her medical twice, he decided to employ someone who could work full time. This was Palveen Kumari.
- e. By the time Ms Kaur got her full work visa, the busy season was over and the business could not employ her full time. He therefore allowed her to job share with Ms Kumari.

[50] During the Authority’s investigation meeting, Mr Hohneck said that Ms Kaur did not work at all during the first month, and that she was in Auckland “for weeks” later, trying to get fit so as to pass the medical, so as to obtain her full work visa. Mr Bhargava said the same about Ms Kaur not working during the first month in his oral evidence.

[51] When I stand back and consider the evidence as a whole, I prefer the evidence of Ms Kaur to that of Mr Hohneck and Mr Bhaghari. This is for the following reasons.

- a. The proposition that Ms Kaur had not worked for the first month had never been stated before by Mr Hohneck, either to the Labour Inspector, or in the statement in reply or his brief of evidence. This is surprising, given that it would have been a significant response to the allegation of the Labour Inspector that \$8,495.28 was owed to Ms Kaur in respect of the material period.
- b. The written report by the Labour Inspector, Ms Kim Baldwin, who interviewed Mr Hohneck on 15 July 2015, suggests that Mr Hohneck told her that Ms Kaur worked in the Café during November 2014 because she was bored.
- c. Similarly, Mr Bhargava’s statement of evidence does not refer to this apparent period of non-work by Ms Kaur.
- d. Furthermore, it is inherently unlikely that Ms Kaur simply sat around doing nothing for a whole month after her arrival. Mr Hohneck said

that she had been trying to arrange her visa, and was often on the phone, but Ms Kaur's evidence that she was unable to start the visa application process until after she had obtained her college certificate(s) is more plausible.

- e. Ms Kaur said in evidence that, on 16 November 2014, when he was interviewing her, Mr Hohneck asked her whether she had black shoes, suggesting he was thinking about what she would wear while working.
- f. It is also unlikely that Ms Kaur spent weeks in Auckland during the material period, given that she had flown there to receive an injection from a GP whom she had consulted previously, and given that both she and Mr Hohneck said she had no money and was having to borrow it from him and her co-workers. It is much more likely that she would have wanted to have returned to her free accommodation as soon as possible.
- g. Perhaps the biggest inconsistency is the evidence that the respondent was not prepared to employ Ms Kaur even for 20 hours a week, when she could legally have been employed for that length of time<sup>6</sup>. Both Mr Bhagava and Mr Hohneck said that there was not enough work for her to work 20 hours a week in November, and yet they had purportedly agreed to employ her for a full time position, on the basis that they believed she had a full work visa. This simply does not stack up.
- h. There are also a number of comments made by Mr Hohneck during the meeting with Ms Kaur and Ms Kumari which are evident in the transcript, which suggest strongly that Mr Hohneck was willingly employing Ms Kaur on no pay during the material time. These are as follows (where "JH" is Mr Hohneck, "KK" is Ms Kaur and "PK" is Ms Kumari):

"00:32:12

PK Everything else on work Visa.

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<sup>6</sup> Possibly full time if she had completed her course of study by then, provided she was not employed as a permanent employee. It appears that she had done so, given that she was waiting for her "certificate" from the college, and she did obtain a full work visa from INZ once she was medically fit.

JH Yeah, she could only work 20 hours.

PK But she was allowed to work 30 hours.

JH Yes

00:35:42

...

JH For all ... so I stuck my neck out. What I'm saying is I stuck my neck out in good faith.

PK Yeah

JH Thinking that Kamal [Ms Kaur] would come down, she would see what the job would entail. I came to a solution where if she stayed here until we've got her Visa she would do some work to pay for accommodation and food. Do you think its fair?

PK Yeah it is.

...

00:37:25

...

KK I know. Just tell me one thing when I work 39 hours and you said its allowed for 20 hours, then you burn the file. Jerry, what ...

JH Well, its simple. It was because it was casual, I thought I could get you through casually.

....

00:38:37

JH I rang Immigration and they said no way. You can't employ her, you can't sponsor her until she has a new Visa which is called Open Work Visa.

PK Open work visa.

JH That's what I told her. I told them straight away, and this is what I'm trying to finish – I said to her you can work to help pay for your accommodation, Kamal. That was the 39 hours.

...

00:42:40

KK Yes. It's not ... but I work.

JH To pay your board and to pay your – what?

KK Accommodation and food.

JH Correct. Well is that fair?

KK Yes.

02:18:29

...

JH So again we're getting into this area of where you feel aggrieved when in good faith again I gave you some money to help you out. I gave you some money to go to Auckland. I said you can pay me back when you started work, when you had a proper visa. Because I couldn't pay you any money legally whilst you never had a legal visa that gave you a full time position. But in good faith again I helped you out. Did I? Or was that nothing.

[52] I believe that the true situation is that Ms Kaur arrived at Springs Junction with the knowledge and approval of Mr Hohneck, but that he believed that she had a full work visa. When he discovered that she did not, he then believed that she would be able to get a full visa reasonably quickly.

[53] Mr Hohneck therefore allowed Ms Kaur to stay, as he hoped she would be able to start working full time reasonably quickly. In the meantime, Ms Kaur started working for the respondent, with the knowledge and agreement of Mr Hohneck. I believe that Ms Kaur understood that she would receive pay for the work she was doing during the material time after she obtained her full work visa.

[54] Even if I am wrong, and Ms Kaur did not expect to receive pay for that work, she was working, according to what Mr Hohneck said on the audio recording, as consideration for accommodation and food<sup>7</sup> while she was waiting for her full work visa to be processed. Such a scenario precludes her status as a volunteer. A volunteer is someone who gives their time and skills for free, without obligation, sometimes with out-of-pocket expenses being paid. To work in return for accommodation and food is quite different, and denotes a legally binding contractual arrangement.

[55] Volunteer work is usually for the benefit of a community, charity or some other social group, such as a sports organisation. It is not usually for a private enterprise. That arrangement would be more like an internship, for which it is strongly arguable that payment should be made.<sup>8</sup>

[56] I also reject the notion that Ms Kaur was working voluntarily to learn the job. She already had skills in housekeeping, for her previous work, and although she was learning to work in the café, I do not accept that was the main reason for her

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<sup>7</sup> Although Ms Kaur said in evidence that she and the others had to pay for food. I suspect that she paid for certain food, but not all.

<sup>8</sup> I refer to the comments made by His Honour Chief Judge Colgan in *Salad Bowl Ltd v Howe-Thornley*, [2013] NZEmpC 152.

remaining at the respondent's premises. She could have learned to work in a café in Auckland, where she had been living.

[57] In conclusion, I reject the argument that Ms Kaur did not work for significant parts of the material period, and that she was a volunteer when she did work.

### **Working to repay Ms Sidhu?**

[58] There is also no evidence that Ms Kaur was working to repay Ms Sidhu. That would imply that Ms Sidhu was Ms Kaur's employer, or Ms Kaur was Ms Sidhu's sub-contractor, which is not supported by comments made by Mr Hohneck which are recorded in the transcript.

### **No entitlement to pay as Ms Kaur was a "casual"?**

[59] With respect to the statement made by Mr Hohneck to Ms Kaur, recorded in the transcript, that Ms Kaur was not entitled to be paid because she was a "casual", that is clearly wrong in law, as Mr Hohneck would almost certainly know. First, Ms Kaur was not a casual employee, as she appears to have worked according to a reasonably predictable pattern<sup>9</sup>. Second, casual workers have just as much right to be paid for their work as non-casual workers.

[60] It is worrying that Mr Hohneck made another statement to Ms Kaur, which was recorded in the transcript, which is also incorrect. This is that when he said "Well, listen, you can't get employed without a trial period by law in New Zealand". Again, that is plainly wrong.

### **Not entitled to pay as Ms Kaur did not have the correct visa?**

[61] This was another statement made to Ms Kaur by Mr Hohneck which was recorded in the transcript. First, it is possible that Ms Kaur was actually entitled to work over 20 hours per week when she got to Spring Junction because she may have finished her course by then.

[62] In any event, there is nothing in the Minimum Wage Act 1983 that stipulates that a worker is only entitled to payment for his or her work if they are in possession of a work visa that allows that work. Indeed, s.6 of the Act makes clear that the right

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<sup>9</sup> I refer to *Jinkinson v. Oceana Gold (NZ) Ltd* [2009] ERNZ 225, which expounds the main indicia of casual and non-casual employment.

to be paid for work stands notwithstanding anything to the contrary in any enactment, award, collective agreement, determination or contract of service.

## **Conclusion**

[63] I conclude that Ms Kaur did work as an employee during the material times, and so was entitled to receive minimum wages and holiday pay in respect of that work.

## **What wages and holiday is Ms Kaur owed?**

[64] No time and wage records or leave and holiday records have been kept by the respondent in respect of Ms Kaur's work during the material period. The Labour Inspector has relied upon the hours that Ms Kaur says she worked. Section 132 of the Act provides as follows:

### **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).

[65] It must be said that there were some discrepancies between the hours that Ms Kaur said in her oral evidence that she worked and what she had told the Labour Inspector. It appears that the hours that she told the Labour Inspector are more modest, and so I take them as correct, pursuant to s.132 of the Act, as the respondent has not proved on a balance of probabilities that Ms Kaur's estimates are incorrect.

[66] The adult minimum wage rate at the time of the material period was \$14.25 per hour.<sup>10</sup> The total amount of hours that Ms Kaur says she worked during the material period was 552 hours. As she was entitled to be paid at least \$14.25 for each hour worked, she was therefore entitled to be paid \$7,866.00.

[67] The Labour Inspector has not taken into account the accommodation and food that Ms Kaur received during the material time. Section 7(1) 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.

[68] There does not appear to have been any express agreement between the parties as to the cash value of the accommodation and food provided. Mr McIlroy appears to submit that no deductions can be made even under the formula in s 7 if there has not been an agreement to make deductions. He cites *Allison v Roller, trading as Kingston Corner*<sup>11</sup> as authority for this proposition. It may be that I have misunderstood his submission, but if that is what he suggests, I do not agree that *Allison* supports such a conclusion. Indeed, I conclude it supports the opposite conclusion; namely, that the statutory formula applies where there has been no agreement.

[69] I therefore adopt the aggregate percentage deduction of 20% provided for in the legislation. This reduces the sum due in arrears by \$1,573.20, leaving a gross sum of \$6,292.80.

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<sup>10</sup> Minimum Wage Order 2014

<sup>11</sup> CT116/93, 1 September 1993, at [22].

## Holiday pay

[70] Section 23 of the Holidays Act provides as follows:

### **23 Calculation of annual holiday pay if employment ends within 12 months**

- (1) Subsection (2) applies if—
- (a) the employment of an employee comes to an end; and
  - (b) the employee is not entitled to annual holidays because he or she has worked for less than 12 months for the purposes of [section 16](#).
- (2) An employer must pay the employee 8% of the employee's gross earnings since the commencement of employment, less any amount—
- (a) paid to the employee for annual holidays taken in advance; or
  - (b) paid in accordance with [section 28](#).

[71] Therefore, Ms Kaur is entitled to holiday pay at the rate of 8% on top of the arrears of minimum wages of \$6,292.80 that she is owed. This amounts to \$503.42 gross.

## **Should penalties be imposed upon the respondent?**

[72] Section 8A of the Minimum Wage Act provides as follows<sup>12</sup>:

### **8A Wages and time records**

- (1) Every employer who employs any worker whose wages or rates of wages are prescribed or paid pursuant to this Act shall keep a record (called the wages and time record) showing, in the case of each such worker,—
- (a) the name of the worker:
  - (b) the worker's age, if under 20 years of age:
  - (c) the worker's postal address:
  - (d) the kind of work on which the worker is usually employed:
  - (e) the contract of service under which the worker is employed:
  - (f) the classification or designation of the worker according to which the worker is paid:
  - (g) the hours between which the worker is employed on each day, and the days of the worker's employment during each week:
  - (h) the wages paid to the worker each week and the method of calculation:

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<sup>12</sup> This section was repealed, on 1 April 2016, by [section 5](#) of the Minimum Wage Amendment Act 2016, but the amendments made by the 2016 Act do not apply to conduct that occurred before the commencement of that Act.

(i) such other particulars as are prescribed.

(2) Every employer shall, upon request made at any reasonable time by a Labour Inspector, produce forthwith for inspection by that Labour Inspector every wages and time record that is, or at any time during the preceding 6 years was, in use under this Act in respect of any worker employed by that employer at any time in those 6 years.

(3) Where an employer keeps a wages and time record in accordance with the [Employment Relations Act 2000](#), the employer is not required to keep a wages and time record under this Act in respect of the same matters.

[73] Section 10 of the Minimum Wage Act provides as follows<sup>13</sup>:

### **10 Penalties and jurisdiction**

Every person who makes default in the full payment of any wages payable by that person under this Act and every person who fails to otherwise comply with the requirements of this Act is liable to a penalty recoverable by a Labour Inspector, and imposed by the Employment Relations Authority, under the Employment Relations Act 2000.

[74] Section 135 of the Act provides as follows:

### **135 Recovery of penalties**

(1) Any action for the recovery of a penalty may be brought,—

- (a) in the case of a breach of an employment agreement, at the suit of any party to the employment agreement who is affected by the breach; or
- (b) in the case of a breach of this Act, at the suit of any person in relation to whom the breach is alleged to have taken place; or
- (c) if permitted in the particular penalty provision, by a Labour Inspector.

(2) Every person who is liable to a penalty under this Act is liable,—

- (a) in the case of an individual, to a penalty not exceeding \$10,000;
- (b) in the case of a company or other corporation, to a penalty not exceeding \$20,000.

(3) A claim for 2 or more penalties against the same person may be joined in the same action.

(4) In any claim for a penalty the Authority or the court may give judgment for the total amount claimed, or any amount, not

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<sup>13</sup> This is the wording of s10 that was in force prior to the amendments introduced by section 6 of the Minimum Wage Amendment Act 2016, as the amendments made by the 2016 Act do not apply to conduct that occurred before the commencement of that Act.

exceeding the maximum specified in subsection (2), or the Authority or the court may dismiss the action.

(4A) The Authority or the court may order payment of a penalty by instalments, but only if the financial position of the person paying the penalty requires it.

[75] Section 136 of the Act provides:

### **136 Application of penalties recovered**

(1) Subject to any order made under subsection (2), every penalty recovered in any penalty action, whether before the Authority or the court, must be paid into the Authority or the court, as the case requires, and not to the plaintiff, and must then be paid by the Authority or the court into a Crown Bank Account.

(2) The Authority or the court may order that the whole or any part of any penalty recovered must be paid to any person.

[76] The Employment Court has given guidance as to what factors are relevant when considering penalty issues. In *Xu v. McIntosh*<sup>14</sup> Chief Judge Goddard said the following:

[47] The Authority has been given this jurisdiction without any guidance other than a statement of the maximum penalty that may be imposed. It may help if I offer the following observations which are intended to focus my mind as much as to guide the Authority. A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

[48] The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach. Here, the defendant was harmed to a significant degree by the withholding of her pay and she was disadvantaged by the breach of s 164 which the first plaintiff later used to obstruct her pursuit of justice. At the time, however, the breach of s 164 of the Employment Relations Act 2000 was more inadvertent than malicious. The deduction from wages was deliberate but, while such actions are to be discouraged, it did comparatively little harm as the amount deducted was only \$80. Generally, employers are punctilious to comply with the Wages Protection Act 1983 and the first plaintiff will be sufficiently deterred by the totality of the remedies against him.

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<sup>14</sup>

[2004] 2 ERNZ 448

[77] In *Tan v. Yang & Xhang*<sup>15</sup> Judge Inglis suggested that the following non-exhaustive list of factors could be relevant when considering penalty issues:

- The seriousness of the breach;
- Whether the breach is one off or repeated;
- The impact, if any, on the employee/prospective employee;
- The vulnerability of the employee/prospective employee;
- The need for deterrence;
- Remorse shown by the party in breach; and
- The range of penalties imposed in other comparable cases.

[78] I do not believe, as Mr McIlroy suggested to Mr Hohneck in his cross examination, that the respondent brought Ms Kaur to Springs Junction with the intention of exploiting her. I believe that Mr Hohneck genuinely was surprised to find that she did not have a full visa, and then genuinely expected her to obtain one quickly. Why he did not agree to employ her in the meantime for 20 hours a week in accordance with the terms of the student visa she did have is not clear.

[79] The problem started, however, when Mr Hohneck came up with the idea of allowing Ms Kaur to work in order to “pay” for her food and accommodation while she was waiting for the full visa. Mr Hohneck may have had genuine intentions in doing this, but I believe he did also realise that Ms Kaur’s work entitled her to being paid. It may be that Mr Hohneck believed that he was not allowed to pay her for her work, but in such a case, he should not have allowed her to have worked.

[80] Ms Kaur did work, and she was entitled to have been paid for that. The fact that Mr Hohneck gave many differing accounts of why she was not entitled to be paid (see paragraph 44 above) suggests that he knew his actions were in breach of the Minimum Wage Act. A deliberate failure to pay an employee wages for work carried out is exploitation, and is serious.

[81] I impose a penalty of \$7,500.00. \$5,000.00 of which is to be paid to Ms Kaur pursuant to s.136 of the Act, the balance to the Crown. I order that \$5,000.00 be paid to Ms Kaur on the basis that she was a vulnerable worker, especially during the material period when she received no pay, and had to borrow money from Mr Hohneck and her colleagues, due to not having been paid for several weeks.

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<sup>15</sup> [2014] NZEmpC 65 at [32]

[82] The failure to keep records during the material period is also serious, as it allows the wrongdoing to be hidden. For this, I impose a further penalty of \$5,000.00, all of which is to be paid to the Crown.

### **Orders**

[83] I order the respondent to make the following payments:

- (a) The sum of \$7,500.00, being the total of a penalties payable to the Crown;
- (b) The sum of \$5,000.00, being a penalty payable to Ms Kaur;
- (c) The sum of \$6,292.80 gross, being arrears of pay due to Ms Kaur in respect of the material period; and
- (d) The sum of \$503.42 gross, being arrears of holiday pay due to Ms Kaur in respect of the material period.

[84] The respondent is to liaise with Mr Lewis, or with such other person in the Labour Inspectorate as is appropriate, to determine the most appropriate way of paying to Ms Kaur the sums owe to her by virtue of this determination.

[85] The penalties due to the Crown are to be paid into the Authority by the respondent, and will then be paid by the Authority into a Crown bank account.

### **Costs**

[86] I reserve costs. If the Labour Inspectorate seeks a contribution towards its legal costs it should first seek to agree those costs with the respondent. If they are unable to reach agreement within 14 days of the date of this determination, then Mr McIlroy may, within a further 14 days, lodge and serve a memorandum of counsel setting out the contribution towards costs that the Labour Inspectorate seeks. The respondent will then have a further 14 days within which to lodge and serve a reply.

David Appleton  
Member of the Employment Relations Authority