

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 394
3015091

BETWEEN SARABJIT SINGH
 Applicant

A N D BEN SINGH HOLDINGS
 LIMITED TRADING AS FRESH
 VIBE CAFE
 Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
 Payal Kumar for Respondent

Investigation Meeting: 04 October 2017 at Whangarei

Additional Information: 25 October 2017 from Applicant
 13 November 2017 from Respondent
 13 November 2017 from Applicant

Date of Determination: 21 December 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Ben Singh Holdings Limited traded as the Fresh Vibe Café in Dargaville. Fresh Vibe Café employed Mr Sarabjit Singh¹ to work in the café in 2015 and 2016.

[2] The parties do not agree on the dates Mr Singh was employed. Mr Singh says that he started work on 19 July 2015. Fresh Vibe says he didn't start work until 28 July 2015.

¹ No relation of the directors or shareholders of the Respondent.

[3] I have resolved that conflict by adopting the date of 28 July 2015 as Mr Singh's first day of work because that is the date recorded on the Employer Monthly Schedule which was sent to Inland Revenue Department in August 2015.

[4] There is also a dispute between the parties as to when Mr Singh's employment ended. Fresh Vibe Café says that Mr Singh's employment ended on 16 February 2016 and that he received his final pay in March 2016. Ms Kumar says that a new manager was employed to take over Mr Singh's role on 23 March 2016.

[5] Mr Singh disputes that. He is not clear on what date was his last day of work but believes he worked past the end of April 2016, because he managed the café when Fresh Vibe Cafe's then manager Ms Payal Kumar and her husband, Mr Ashish Rao, were overseas in April. They returned from overseas on 26 April 2016.

[6] I have resolved the conflict over the date Mr Singh's employment ended by adopting the date of 30 April 2016. I arrived at that decision based on what I considered to be the credible evidence of a neutral third party, Mrs Sharon George.

[7] Mrs George knew the parties because she was a Dargaville Bank Manager who frequented the café and who considered herself and her husband to be friends with both parties. Mrs George found it difficult giving evidence that contradicted Ms Kumar because Mrs George considered herself to be like a mentor to Ms Kumar and her husband.

[8] Mrs George was very clear that she saw Mr Singh working on a daily basis in the café working during its opening hours in April 2016. Mrs George was adamant that Mr Singh was not just "*hanging out*" in the café and was not present as a customer in the café. Mrs George described the café manager duties she observed Mr Singh doing while Ms Kumar and her husband were overseas during April 2016.

[9] Mr Singh's wage arrears claim is based on him only being paid \$150 cash each week despite working in excess of 40 hours per week, and no annual holiday pay or public holiday entitlements for working on public holidays.

[10] Mr Singh also claims that Ms Kumar unlawfully deducted board from his wages. Mr Singh further seeks to recover a \$15,000 loan he says he gave Ms Kumar and her husband so they could start a new business.

[11] Ms Kumar and her husband are neither shareholders nor directors of Fresh Vibe Café.

[12] Fresh Vibe Café employed Ms Kumar who is based in Dargaville to oversee the café which meant she dealt with all staff and payroll issues. Because the owners of the business were based in Auckland and the café was in Dargaville Ms Kumar appears to have been mainly left to her own devices in terms of managing the café.

[13] Nevertheless Fresh Vibe Café has vicarious liability for Ms Kumar's acts and omissions because she was acting as Fresh Vibe's authorised agent in relation to all employment matters involving Mr Singh.

[14] Fresh Vibe Café disputes all of Mr Singh's claims.

[15] Mr Singh's employment agreement was signed by Ms Kumar on behalf of Fresh Vibe Café and by Mr Singh on 05 June 2015.

[16] It recorded that Mr Singh was employed as the manager of the Fresh Vibe Café to work for 40 hours a week from Monday to Sunday. Mr Singh was to be paid \$18 per hour, which was to be paid weekly on Thursdays either into his nominated bank account or in cash.

[17] Ms Kumar says that she paid Mr Singh his full wages² each week in cash. Ms Kumar claims Mr Singh signed for his wages but he disputes that.

[18] Ms Kumar acknowledges there are no records of the cash payments having been made because she says the café had a break in during which the ledger which apparently recorded the payments was allegedly stolen.

[19] Mr Singh's partner, Ms Jamie Lee Baker also worked for Fresh Vibe Café. She was employed by Fresh Vibe Café before Mr Singh started work there. Ms Baker confirmed Mr Singh's evidence that he was only being paid \$150 per week for all of the hours that he worked.

Issues

[20] The following issues are to be determined:

² Meaning the amount recorded in the Employer Monthly Schedule.

- a. Does Authority have jurisdiction to investigate the loan issue?
- b. If so, can Mr Singh recover the loan he made?
- c. Is Mr Singh owed wage arrears for?
 - i. Hours worked but not paid;
 - ii. Unpaid Annual holiday pay;
 - iii. Unpaid Public holiday entitlements?
- d. Were unlawful deductions made from Mr Singh's wages?
- e. If so, what is he owed?
- f. What if any costs should be awarded?

Does the Authority have jurisdiction to investigate the loan issue?

[21] The Authority only has jurisdiction over issues that occur between parties who are in an employment relationship or in relation to a claim under s.134A(2) of the Employment Relations Act 2000 (the Act).

[22] There is no dispute that Fresh Vibe Café employed Mr Singh, Ms Kumar and her husband Mr Ashish Rao to work in the café. Because Fresh Vibe Café was the employer, Mr Singh's employment relationship was with Fresh Vibe Café.

[23] Although Ms Kumar was Mr Singh's overall manager, that in itself did not create an employment relationship between them, because they were both Fresh Vibe Café employees.

[24] Mr Singh worked with Ms Kumar and Mr Rao at the same café. Because they were friends they also socialised together both at work and outside work. Mr Singh also boarded with Ms Kumar and Mr Rao at their family home. So in addition to being friends and work colleagues there was also a landlord/tenant aspect to the relationship between Mr Singh and Ms Kumar.

[25] None of these circumstances I have described involving Ms Kumar or Mr Rao created an employment relationship between them and Mr Singh as defined by s4(2) of the Act. Nor is there a s.134A(2) penalty claim before the Authority.

[26] Mr Singh was working under a work visa which restricted him to working as a manager for Fresh Vibe Café. If Mr Singh had entered into any other employment relationship then he would have been in breach of his work visa.

[27] I find that I do not have jurisdiction to investigate the loan repayment issue because there was no employment relationship between Mr Singh and Ms Kumar and/or Mr Rao.

[28] Mr Singh will need to pursue that as a civil matter if he wants to take it further.

Is Mr Singh owed wage arrears?

[29] The evidence provided by both parties about the actual days and hours Mr Singh worked was somewhat unsatisfactory. Had Fresh Vibe Café properly complied with its record keeping obligations then this situation would not be so unclear.

[30] I have determined the wage arrears claim based on what is more likely to be correct, with particular regard being had to the Employer Monthly Schedule forms Mr Singh signed in his capacity as the Café Manager.

[31] Given the legal significance of the EMS, which includes two declarations that the information in the EMS is true and correct, I consider the EMS forms provide objective evidence about what the parties believed was correct at the time these forms were signed.

[32] There are three aspects to Mr Singh's wage arrears claim. He claims that:

- a. He was under paid for the hours he worked because he only received \$150 cash per week;
- b. He did not receive any annual holiday pay;
- c. He worked every public holiday but did not receive any public holiday entitlements.

Wage arrears issue a - Was Mr Singh under paid?

[33] Ms Kumar disputes Mr Singh's claim that he was only ever paid \$150 cash per week regardless of how many hours he worked. Ms Kumar says that Mr Singh was

paid the amounts recorded in the Employer Monthly Schedule (EMS) based on the number of hours Mr Singh actually worked each week.

[34] Although Mr Singh was contractually entitled to be paid for 40 hours a week Ms Kumar acknowledges that he was not. Ms Kumar incorrectly believed that Mr Singh only had to be paid for the hours he worked so she would send him home without pay if the café was quiet.

[35] Mr Singh was not a casual or 'as required' employee. His work visa was based on full time employment for at least 40 hours per week. Contractually he was entitled to be paid for at least 40 hours per week provided he was ready and available to work, which I am satisfied he was. His employer could send him home early but it could not deduct his pay without his agreement.

[36] Mr Singh claimed he worked on average 48 hours per week but acknowledges he did not keep a record of that. Mr Singh's claim he worked at least 48 hours is disputed by Ms Kumar who says she kept a record each week of the total hours Mr Singh had worked.

[37] Mr Singh should have been paid for at least 40 hours per week in accordance with clause 6.1 of his employment agreement. Clause 6.1 states that Mr Singh's hours of work "*shall be 40 hours per week on Monday to Sunday*".

[38] It was on the basis of this employment agreement with a specified minimum number of 40 hours work per week that Immigration New Zealand granted Mr Singh a work permit.

[39] There is nothing in the employment agreement which allows Fresh Vibes Café to reduce or vary Mr Singh's hours of work without his agreement. I find that Mr Singh did not agree to work less than 40 hour or to be paid less than his contractual entitlements.

[40] I am therefore satisfied on the balance of probabilities that Mr Singh is owed wage arrears because he was not paid for at least 40 hours for every week he worked.

[41] Although there was a dispute between the parties over the dates Mr Singh was employed I have proceeded on the basis he was employed for 40 weeks being the

period 28 July 2015 until 30 April 2016. This is based on the start date in the EMS and Mrs George's evidence about the end date.

[42] The parties gave conflicting evidence about what Mr Singh was paid while employed. I had adopted the calculations recorded in Mr Singh's online Inland Revenue Department (IRD) account as that information was based on the EMSs that were filed.

[43] The information provided by Ms Kumar shows that Mr Singh was only paid for 40 hours per week for five of the 40 weeks he was employed. The time record that Ms Kumar provided shows that for some weeks Mr Singh was not paid at all, and for other weeks he was paid for as little as ten hours per week.

[44] Fresh Vibe Café was ordered to disclose Mr Singh's wage and time records and holiday and leave records but that did not occur. The information Ms Kumar provided under the heading "*Sarabjit's time record*" does not meet the requirements of s.130 of the Act or s.81 of the Holidays Act 2003.

[45] I find that the failure by Fresh Vibe Café to produce Mr Singh's wage and time records showing his days and hours of work prejudiced his ability to bring an accurate wage arrears claim.

[46] Accordingly, under s.132(2) of the Act unless Fresh Vibe Café proves that Mr Singh's wage arrears claims are incorrect the Authority can accept as proven all of his claims about the wages actually paid to him and the hours, days and time he worked.

[47] I consider that Mr Singh's evidence is not reliable enough for me to adopt as a basis for calculating his under paid weekly wages for three main reasons;

- a. First, Mr Singh was vague about exactly what days, times and total hours he worked in each period. He provided a rough guesstimate of "*at least 48 hours per week*" but that did not make sense in light of his acknowledgment that on occasion he would be sent home early if there wasn't work to do;
- b. Second, as the Café Manager Mr Singh signed the Employer Monthly Schedule (EMS) which records his total gross earnings each month. This required him to declare that the information in the EMS he signed

was correct. The hours recorded in the EMS contradict his evidence that he worked at least 48 hours per week;

- c. Third, I did not find Mr Singh's evidence that he signed the EMSs when they were blank (meaning he did not see the wage information recorded on them) to be credible. Mr Singh's handwritten correction on one of the EMSs he signed which undermines his evidence that he only signed blank EMS forms.

[48] For the purposes of calculating the under paid wages claim I have used the information recorded in the EMS as the basis for calculating the number of hours Mr Singh worked and was paid for each month.

[49] Only the EMS for the period ending 31 March 2016 was signed by Ms Kumar. With the exception of the EMS for the period ending 31 March 2016, all of the EMSs were signed by Mr Singh. The declaration that he signed says "*I declare that the information given in this return is true and correct*". He was required to sign this declaration in two separate places on the EMS form.

[50] I do not accept Mr Singh's evidence that he signed blank EMS forms. Ms Kumar says that she and Mr Singh completed the EMS together. Mr Singh had to sign two declarations stating that the information given in the EMS was true and correct. He could not have given those declarations if the EMS form was blank when he signed it.

[51] Mr Singh's evidence about the EMS forms being blank was also undermined by the fact that he had corrected and signed the correction on an EMS form for the period ending 30 September 2015.

[52] Given that Mr Singh had personally signed these forms as having been correct, and given the serious consequences associated with providing false information to the IRD, I do not consider it credible that Mr Singh (despite advising IRD via the EMS forms that he had received the specified amounts) then did not receive that specified amounts but also did not do anything about that alleged discrepancy at the time.

[53] Mr Singh should have been paid at least \$28,800 (being \$720 per week x 40 weeks) over the period he was employed. However his IRD records show he received \$13,554 from Fresh Vibe Café over that period.

[54] Fresh Vibe Café is therefore ordered, within 28 days of the date of this determination, to pay Mr Singh underpaid wages of \$15,246.

Wage arrears issue b – Unpaid public holiday entitlements

[55] Mr Singh says that he worked every public holiday that occurred over the period he was employed but was not paid time and a half for the hours he actually worked and did not receive an alternative day's holiday for having worked on a public holiday.

[56] Ms Kumar says Mr Singh did not work any public holidays. She says he was only at the café on public holidays "*hanging out*" so did not work.

[57] Fresh Vibe Café has not been able to satisfy me that Mr Singh's evidence about working on every public holiday is incorrect so I have relied on s132(2) of the Act to adopt Mr Singh's evidence about the days and hours he worked.

[58] Mr Singh says he worked from 8am until 4pm on ten public holidays that occurred while he was employed.

[59] Under his wage arrears claim Mr Singh has been compensated for the normal hours he worked on public holidays. That leaves his time and a half and alternative holiday entitlements outstanding.

[60] According to Mr Singh he worked 7 ½ hours (he had a 30 minute unpaid lunch break) on ten public holidays. His outstanding time and a half entitlement is therefore \$675 (he worked 75 hours in total on all public holidays (7.5 hours x 10 public holidays) so half of that is 37.5 hours which is to be paid at the rate of \$18 per hour).

[61] Mr Singh's alternative holiday entitlement is ten alternative day holidays which are to be paid at the rate normal rate of \$18 per hour for 7.5 hours per day. This amounts to \$1,350.

[62] Fresh Vibe Café is ordered within 28 days of the date of this determination to pay Mr Singh \$2,025 in public holiday entitlement arrears (being \$675 time and a half arrears plus \$1,350 alternative day holiday arrears).

Wage arrears issue c — annual holiday arrears

[63] I have relied on s132(2) to accept Mr Singh's evidence that he did not take any paid annual holiday while employed and was not paid any annual holiday entitlements upon termination.

[64] Because Mr Singh had been employed for less than 12 months he was entitled to be paid 8% of his total gross earnings as holiday pay upon termination. Based on total gross earnings of \$30,825 (being \$28,800 wages plus \$2,025 public holiday entitlement arrears) his 8% holiday pay is \$2,466.

[65] Fresh Vibe Café is ordered, within 28 days of the date of this determination, to pay Mr Singh \$2,466 holiday pay arrears.

Were unlawful deductions made from Mr Singh's wages?

[66] Mr Singh claims that Ms Kumar made unlawful deductions from his wages for board. She disputes that and says that Mr Singh passed her cash each week to cover his board which covered his room in her family home, interne, food and all utilities.

[67] Mr Singh told the Authority he did not agree to pay Ms Kumar any board so as far as he was concerned he was living there free of charge.

[68] I consider it highly unlikely that Ms Kumar and her husband agreed to use their family's resources to fund Mr Singh's living expenses. Ms Kumar and Mr Singh were friends and work colleagues. They were not related.

[69] Ms Kumar had her own children and husband living with her that she had to support so it does not make sense that she would have agreed to have financially supported a non related adult male who had his own income.

[70] I further find that whatever arrangements may have been made regarding board were between Mr Singh and Ms Kumar as individuals and friends.

[71] The boarding arrangement had nothing to do with Mr Singh's employer Fresh Vibe Café. It was not a contractual term of his employment and there was no record that Fresh Vibe Café had made unlawful deductions from his wages for board.

[72] Mr Singh's unlawful deduction from wages claim does not succeed.

What, if any, costs should be awarded?

[73] Mr Singh represented himself so he did not actually incur any legal costs. Costs are therefore not payable by Fresh Vibe Café. Mr Singh is entitled to recover his filing fee.

[74] Within 28 days of the date of this determination Fresh Vibe Café is ordered to pay Mr Singh \$71.56 to reimburse his filing fee.

Orders

[75] Within 28 days of the date of this determination Ben Singh Holdings Ltd trading as Fresh Vibe Cafe is ordered to pay Mr Singh \$19,808.56 consisting of:

- a. \$15,246 wage arrears;
- b. \$2,025 public holiday entitlement arrears;
- c. \$2,466 annual holiday entitlement arrears;
- d. \$71.56 filing fee.

Rachel Larmer
Member of the Employment Relations Authority