

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 208  
3020951

BETWEEN PRABHJOT SINGH  
Applicant

AND SS CORPORATION LIMITED  
TRADING AS GAS STATION  
ROAD  
Respondent

Member of Authority: Nicola Craig

Representatives: David Prisk for Applicant  
Satendra Raj Singh for Respondent

Investigation Meeting: 3 April 2018

Determination: 29 June 2018

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**DETERMINATION OF THE AUTHORITY**

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- A. Prabhjot Singh was subject to an unjustified action by SS Corporation Limited to his disadvantage when he was suspended without pay.**
- B. Mr Singh was unjustifiably dismissed by SS Corporation Ltd.**
- C. Within 28 days of the date of this determination SS Corporation Ltd is to pay Mr Singh the following remedies:**
- (i) Lost wages of \$4244.63 gross; and**
  - (ii) Compensation for humiliation, loss of dignity and injury to feelings of \$2,800.00.**
- D. Within 28 days of the date of this determination SS Corporation Limited is to pay Mr Singh the sum of \$2888.87 gross as holiday**

pay.

- E. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.**

### **Employment relationship problem**

[1] On 15 August 2016 Prabhjot Singh began working as a petrol station attendant at Gas Station Road in Penrose, Auckland. The station is operated by SS Corporation Limited (SS or the company). Satendra Raj Prasad (known as Raj) is the sole director and shareholder of SS and ran the petrol station.

[2] On 14 September 2017 Mr Prasad spoke to Mr Singh and the other attendant about a drop in sales. Mr Prasad made an accusation that the attendants were saying things to customers to drive them away. Mr Prasad warned that if he found out who had done that, he would terminate their employment.

[3] On 15 September 2017 a regular customer told Mr Singh that he was moving away from the area and they had a discussion about whether he would still come in for petrol. The customer said that he would always come to that station for his petrol. Mr Singh asked him to pass that on to Mr Prasad, as he thought Mr Prasad would be pleased. Instead, there seemed to be some misunderstanding, Mr Prasad got upset about Mr Singh's discussion with the customer and told Mr Singh to leave work.

[4] On 19 September 2017 Mr Prasad emailed Mr Singh a letter terminating his employment for serious or repeated failure to follow a reasonable instruction and actions which seriously damage the Employer's reputation.

[5] Mr Singh claims that he was unjustifiably dismissed by SS, that he was paid less than the minimum wage at the start of his employment, and that he is owed holiday pay by it. SS denies the unjustifiable dismissal claim and says that Mr Singh was paid holiday pay with his fortnightly pay. SS's position on the minimum wage claim is set out below.

[6] On 3 April 2018 an investigation meeting was held and I heard from Mr Singh and Mr Prasad.

[7] In accordance with s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the parties' evidence and submissions but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **Minimum wage issue**

[8] Mr Singh claims that SS had not paid him the minimum wage for the first three months of his employment. The wages and time records provided by SS to the Authority shortly before the investigation meeting show that for that period Mr Singh was paid at \$12.20 an hour, which was the applicable starting out or training minimum wage at the time.

[9] At the investigation meeting Mr Prasad acknowledged that, while he thought he was able to use that training rate for Mr Singh, he now realises that he could not. He therefore paid Mr Singh the arrears of wages on the morning of the investigation meeting. That claim therefore did not need to be investigated.

### **Issues for determination**

[10] The remaining issues for determination are:

- (a) Was Mr Singh unjustifiably dismissed by SS, and if so, what remedies should he receive, if any?
- (b) Is Mr Singh owed holiday pay by SS and if so, how much?

### **Employment agreement**

[11] Although Mr Singh started employment in August 2016, the parties agree that no written employment agreement was in place until they signed one on 4 May 2017. The pay rate under that agreement was \$15.75 per hour, which at that time was the minimum wage.

### **Change in employment relationship**

[12] Both parties agree that the initial few months of the employment relationship went well but that things later changed.

[13] Mr Singh maintains that his behaviour did not change but acknowledges that there started to be issues between himself and Mr Prasad. They had frequent arguments, to the point where Mr Singh describes it as an unhealthy environment. He also raised concerns about things like the quality of safety equipment and staff not getting lunch breaks. He describes Mr Prasad as going from nice in the beginning to becoming unnecessarily strict. Mr Singh believes that Mr Prasad favoured the other attendant.

[14] Mr Prasad's view is that Mr Singh was initially well presented, hard-working and ready to acknowledge his errors but that this changed once Mr Singh obtained a work visa which was dependent on the SS job. Mr Prasad became irritated when he did not see Mr Singh's ability to fulfil the role improving after Mr Singh had worked at Gas Station Road for some time.

[15] An example of a disagreement involved Mr Singh's work pants. Mr Prasad criticised Mr Singh for not buying new work pants until he was told to do so. Mr Singh complains that he was not provided with uniform pants and did not have a lot of money being on the minimum wage. He says that when asked, he replaced the pants. Mr Prasad expected that Mr Singh would know that his pants had reached a stage that they needed replacing, but he did not do so, and so Mr Prasad had to raise it.

[16] The two men seemed to be unable to see each other's perspective or reach a ready resolution on issues. Mr Singh would speak up about concerns whereas Mr Prasad appeared to expect someone more compliant or cooperative. Mr Prasad's wife also became involved at times in criticising Mr Singh, despite having no formal role in the running of the petrol station.

### **Concerns from customers**

[17] In his written statement Mr Prasad emphasises that several complaints were received from customers about Mr Singh. These were all verbal, rather than written, complaints. In some instances the issues appear to be more in the nature of comments rather than complaints as such. However, not surprisingly, Mr Prasad was very concerned to keep customers happy.

[18] SS provided no documentation of customer concerns or of Mr Prasad's discussions with Mr Singh about the issues. Not surprisingly this led to some uncertainties about when particular events occurred or what they involved.

[19] I accept that Mr Prasad raised a number of these customer issues with Mr Singh. However, Mr Prasad did not want to pass on the customers' names or identifying details and so dealt with the concerns in more general manner. He did not investigate, even where, for example, this would involve talking to the other attendant about whether he had given Mr Singh a particular instruction. Mr Singh sometimes denied the suggestions or allegations put to him and effectively asked Mr Prasad for proof. Mr Prasad then chose not to pursue these matters further. There was therefore no decision on behalf of SS that Mr Singh had been at fault.

[20] I am not satisfied that Mr Prasad took any disciplinary action against Mr Singh prior to September 2017. There were discussions but these were done in a relatively informal way which did not result in Mr Singh being given a warning.

#### **Discussion with Mr Prasad's wife**

[21] A discussion Mr Singh claims had an important role in his dismissal occurred in early September 2017.

[22] By way of background, Mr Prasad and his wife made samosas at the Gas Station Road site, to sell to customers. Mr Singh had some involvement with this operation, as on occasions he picked up potatoes for the business on his way into work. Mr Prasad's wife is not a director or shareholder in SS and had no role in managing the petrol station. However, she did on occasions raise issues with Mr Singh about his performance or conduct.

[23] Around the start of September 2017 Mr Prasad's wife initiated a discussion with Mr Singh about aspects of his work and commitment to the business. She told Mr Singh that he was not loyal to the business because he did not assist with dough kneading for the samosas and did not work hard enough. She also thought that Mr Singh had told customers that the couple had a dog on the premises. It was unclear why she thought this. Mr Singh denied having told customers that.

[24] Mr Prasad's wife then said that Mr Singh told customers that she and her husband lived on the premises. Mr Singh denied that to her.

[25] Mr Prasad's wife then proceeded to make other allegations about Mr Singh telling customers things about the couple. Mr Singh denied to me that he had told these things to customers. However, at the time, in order to stop Mr Prasad's wife from continuing to question him, he told her that he had told customers one of the things alleged.<sup>1</sup> Mr Prasad's wife then told Mr Singh he had ruined their business and she did not know how they could overcome this. Mr Singh then tried to calm her down by saying nothing had happened.

[26] It was apparent from Mr Prasad's evidence that he and his wife were suspicious that Mr Singh was doing a number of things to harm them and their business. In the absence of more formal disciplinary processes and given Mr Prasad's reluctance to name customers, it is difficult to determine that there was any sound basis for these concerns.

#### **14 September meeting**

[27] On 14 September 2017 Mr Prasad called Mr Singh and the other attendant into the stock room to say that sales were down. Mr Prasad told the men to focus on their work rather than talking to customers. Mr Singh considers that a new Gull petrol station which had opened in a neighbouring suburb might be the cause for the downturn in business. However, Mr Prasad said at the meeting that he thought one of the attendants was saying something to customers to drive them away and if he found out who it was he would terminate their employment.

#### **Telling customers to go elsewhere**

[28] Although this was not spelled out by Mr Prasad at the 14 September 2017 meeting, he alleges that it was Mr Singh who told customers to go elsewhere for their petrol. This view was based it seems, largely or entirely, on an occasion in August 2017 when a regular customer was seen elsewhere at another nearby petrol station. A member of Mr Prasad's family saw the customer.

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<sup>1</sup> Mr Prasad sought not to have the details of this matter specified in the determination and there was no objection to that on Mr Singh's behalf

[29] Later Mr Prasad happened to meet this customer socially and asked him why he was buying petrol at a different petrol station. The customer said that he had been told by a staff member that there was another petrol station on a particular street that was cheaper. Mr Prasad asked which staff member and the customer gave a description which matched Mr Singh.

[30] Despite seeming to have an identification of Mr Singh at that point, Mr Prasad did not proceed to take disciplinary action on 14 September 2017, rather saying that if either of the men had been saying something to customers, he should stop it.

[31] Mr Singh denied having told customers to go elsewhere for their petrol. It seems improbable that Mr Singh would have deliberately undermined the business which he worked for, and which his visa and ultimately his right to stay in New Zealand, was dependent on. When he was asked why Mr Singh would do this, Mr Prasad said that Mr Singh should be asked, but did eventually suggest that Mr Singh could have been telling members of his own ethnic community that they could get a better price for petrol at the other station. I do not accept that Mr Singh told customers to go elsewhere.

#### **Mr Singh's discussion with a customer**

[32] On 15 September 2017 a customer told Mr Singh that despite moving away he would still come to this Gas Station Road for his petrol. In light of Mr Prasad's concerns raised the previous day, Mr Singh thought that it would be helpful if the customer passed on his views to Mr Prasad. Mr Singh asked him to do that.

[33] Somehow the message got confused or misunderstood. The customer told Mr Prasad that Mr Singh asked him to tell Mr Prasad that he would not be coming to the petrol station anymore. I accept that Mr Singh would not have referred the customer to Mr Prasad had he thought that was what was going to be passed on.

#### **Mr Prasad's reaction**

[34] When the customer left Mr Prasad asked Mr Singh if he had told the customer not to come back here again. Mr Singh was shocked and denied it. Mr Prasad was angry and upset. He told Mr Singh that he should not have asked the customer to speak to him. He said that he had had enough of Mr Singh and told him to leave

before he spoiled any more customers. Mr Singh says that Mr Prasad did not give him a chance to reply. Mr Singh went back to his work.

[35] When it quietened down Mr Prasad spoke to Mr Singh over the walkie talkie and asked him if he had heard what Mr Prasad said. He told Mr Singh to go home and then gave him the timesheet to sign off, as he was being required to leave before the end of his shift. Mr Singh began to leave but realised that he had money in his pocket to buy potatoes for the samosas, so went back in to give the money back.

### **Return to Gas Station Road on 16 September 2017**

[36] Mr Singh was rostered to have the next day off. However, he went back into the petrol station to talk to Mr Prasad. Mr Prasad was surprised to see him. As he wanted to keep his job, Mr Singh apologised and said that he was sorry about what happened yesterday and it was his fault. Mr Prasad took that to mean that Mr Singh knew he had done something wrong, as why would Mr Singh apologise if he had not done something wrong? Neither man attempted to clarify exactly what Mr Singh was saying he had done wrong.

[37] Mr Prasad said that that he had already told Mr Singh before that he talked to customers too much and he had given him too many chances. Mr Singh asked for one more chance and if he could come into work the next day. Mr Prasad said no, he would tell Mr Singh when. This suggested that Mr Singh was or at least might be allowed to return to work.

### **Contact on 19 September 2017**

[38] As Mr Singh had not heard from Mr Prasad, he texted asking if he should come to work. As there was no reply, he phoned Mr Prasad, and asked if he should come into work. Mr Prasad replied that he had not thought about it and would email Mr Singh.

[39] Mr Prasad then emailed Mr Singh a letter terminating his employment.

## **Suspension**

[40] Before dealing with the dismissal I look at Mr Singh's suspension from work. Although no claim was raised regarding Mr Singh being sent home and not being permitted to return to work, I am able to find a different type of personal grievance to that alleged.<sup>2</sup>

[41] Mr Singh was effectively suspended without pay, as the last day he received payment for was 15 September 2017 and that was only about half a day's payment, as he was required to finish earlier than usual. Mr Singh's employment agreement provided for suspension but only on pay.<sup>3</sup> It also provided for suspension to occur only after discussion of a proposal of suspension with him and consideration of his views. Mr Prasad did not discuss the possibility of suspension with Mr Singh and thus did not consider his views.

[42] Mr Singh was subject to an unjustified action by SS to his disadvantage when he suspended. I will consider the issue of remedies with the unjustified dismissal claim below.

## **Dismissal letter**

[43] The 19 September 2017 letter stated that Mr Singh's employment with SS was terminated effective 15 September 2017. This was on the basis of clause 13.2 of the employment agreement, which allows summary dismissal for serious misconduct. The letter identifies two sub-clauses from the list of serious misconduct matters:

- (iv) serious or repeated failure to follow a reasonable instruction; ...
- (vi) actions which seriously damage the Employer's reputation.

[44] The letter then sets out three matters which were "observed recently and also last week":

1. Despite having a meeting with you and the other employee on ... 14th September 2017 regarding your behaviour and your attitude towards customers, you still acted in manner (*sic*) on 15th September 2017 that cannot be accepted by the management.

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<sup>2</sup> S 122 of the Act

<sup>3</sup> Clause 13.3 of the employment agreement

2. Despite working from 15<sup>th</sup> of August 2016 you have been always reminded about your duties and how it needed to be done. There is always work that were not attended by you during your shift.
3. You always had problems of presenting yourself in a professional way to the customers, and some customers did not prefer your assistance while you were on the forecourt which resulted in loss of these regular customers.

[45] Other than the reference to 15 September in the first paragraph, there are no particular instances referred to in these items.

[46] At the investigation meeting Mr Prasad said that he felt like he had no other choice, considering Mr Singh's actions and the company. When asked about serious misconduct he identified that Mr Singh was sharing Mr Prasad and his wife's personal information with customers, which could damage their business.

### **Unjustified dismissal claim**

[47] Was Mr Singh's dismissal by SS justified? What I am required to do under s 103A of the Act is determine whether on an objective basis, the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances. In doing so I must consider under s 103A(3) whether SS:

- (a) Having regard to the resources available, sufficiently investigated the allegations against the employee before dismissing;
- (b) Raised the concerns with the employee before dismissing;
- (c) Gave the employee a reasonable opportunity to respond to the employer's concerns; and
- (d) Genuinely considered the employee's explanation (if any).

[48] This was a summary dismissal as Mr Singh was not invited to work out a notice period, and was not paid in lieu.

## **Substantive justification for dismissal**

[49] Looking at the reasons for dismissal in the 19 September 2017 letter, there are a number of areas of concern stated, although largely without specifics being provided. Given the limited discussion between Mr Prasad and Mr Singh on 15 and 16 September, there was little more said regarding the reasons for the dismissal in the lead up to the dismissal letter being provided.

### *First item*

[50] The first item concerns the event on 15 September 2017.

[51] I found Mr Prasad's concerns regarding talking to customers somewhat hard to follow. There seems to have been a blurring by him between Mr Singh having too many, too friendly or too long conversations with customers, the suggestion that Mr Singh was telling customers to go elsewhere for their petrol and the concern about Mr Singh passing on information about the Prasads to customers. These are substantially different matters. The first is essentially a performance issue.

[52] Had Mr Singh told customers to go elsewhere for their petrol that would have been a serious matter. However, on 14 September 2017 Mr Singh denied to Mr Prasad that he had done that. Mr Singh's apology on 16 September 2017 did not specifically admit that he had told customers to go elsewhere, but was more in the nature of a general taking of responsibility and expression of sorrow. Given the lack of clarity about whether Mr Prasad's concern on 15 September 2017 was Mr Singh asking the customer to speak to him or what Mr Singh had said to the customer, Mr Prasad should have clarified what Mr Singh was apologising for.

[53] In any event, I was left uncertain at the investigation that the events on 15 September 2017 were the real reason for the dismissal. When asked what serious misconduct the dismissal was for Mr Prasad spoke about Mr Singh making comments about the Prasads' situation to customers, unrelated to the issue of where they should buy their petrol. These were the issues which Mr Prasad's wife had spoken to Mr Singh about, which had not been discussed between Mr Prasad and Mr Singh.

### *Second item*

[54] The second item in the list in the dismissal letter appears to relate to performance concerns. It is impossible from the letter to determine which duties are

being referred to as not being undertaken by Mr Singh. They were not discussed on 15 or 16 September 2017. While these issues may have been raised previously, there were no warnings given, as outlined above.

*Third item*

[55] It is not entirely clear what the reference in the third item in the letter to Mr Singh's presentation is to. It may be to his appearance which Mr Prasad had previously had concerns about. This would be a matter of performance. There was no evidence to suggest that anything has occurred around 15 September 2017 of this nature. It appears that Mr Prasad was referring to earlier events.

[56] There is no identification of or other evidence given by Mr Prasad regarding any regular customers who allegedly preferred not to receive Mr Singh's assistance on the forecourt due to his presentation.

**Procedure**

[57] This was a small employer and I take that into account in considering whether the process was what a fair and reasonable employer could have undertaken.

[58] It is clear that a very informal process was used. Such discussions as there did occur on 15 and 16 September, happened in public areas of the petrol station. Mr Singh was not invited, even verbally, to a meeting to discuss identified concerns. He was not told that his dismissal was a possibility.

[59] There was a failure to provide Mr Singh with a proper opportunity to know of and respond to the concerns which Mr Prasad had. Mr Prasad's approach was not to identify details of concerns, such as names and dates, which would allow Mr Singh to properly respond. Some of the issues in the dismissal letter, such as matters apparently observed the week before, were not raised with Mr Singh at all. Although aspects of informality may be understandable, there was a significant failure to meet the elements of s 103A(3) of the Act and these were not minor. There was a significant lack of process, even for a small employer.

[60] In addition Mr Singh had to chase Mr Prasad to find out what was happening. I also note that the dismissal letter attempted to backdate the dismissal four days to 15 September 2015 despite neither party giving evidence that that Mr Singh was told of his dismissal on 15 September.

## **Conclusion on dismissal**

[61] I am not satisfied that SS has established that there was substantive justification to justify Mr Singh's summary dismissal on 19 September 2017 nor that a fair process was used in carrying out that dismissal. SS Corporation did not act as a fair and reasonable employer could have and it unjustifiably dismissed Mr Singh.

## **Remedies**

[62] Mr Singh seeks lost wages for the 11 weeks which he was unable to get a job for. He claims this at the rate of the 35 hour minimum in his employment agreement, at \$15.75 per hour, totalling \$551.25 gross per week. Under s 128 (2) of the Act where the employee has lost remuneration as the result of a personal grievance, I must order payment of the lesser of the lost remuneration or three months' ordinary time remuneration.

[63] Mr Singh had to sort out a new visa as his previous visa was tied to SS. This delayed his finding of employment. He attempted to find work with his previous employer and through friends. Mr Singh started his next job on 1 December 2017. Subject to the consideration of contribution, I consider that Mr Singh is entitled to lost wages totalling \$6063.75 gross, being 11 weeks at \$551.25 per week.

[64] Mr Singh also seeks \$8,000 for compensation for humiliation, loss of dignity and injury to feelings. I consider that a global figure should cover both the suspension and the dismissal grievances. Mr Singh suffered uncertainty about what was happening when he was sent home from work. When he received the 19 September 2017 email from Mr Prasad he thought it would be a warning and the termination was a big shock to him. As Mr Singh was on a work permit linked to SS he suffered stress and worry as he thought that he might have to leave New Zealand.

[65] I accept that Mr Singh was shocked to have his employment terminated and worried about his future as a result. However, balanced against those factors are his thought that he might initiate a change in job because of the work environment at SS. This was not a workplace in which he was happy. I consider that compensation of \$4,000 would be appropriate subject to consider contribution.

## **Contribution**

[66] Mr Prasad says that Mr Singh was effectively the cause of his own misfortune as regards dismissal and resulting lost wages. I take this as a submission that Mr Singh contributed to his dismissal.

[67] I am required under s 124 of the Act to consider the extent to which the actions of Mr Singh have contributed to the situation that gave rise to the personal grievance. If his actions are to be taken into account they must be both causative of the outcome and blameworthy.<sup>4</sup>

[68] I focus on Mr Singh's seeming tendency to accept responsibility and apologise when he did not actually agree that he was at fault. I consider that a reduction should be made for Mr Singh's approach when dealing with Mr Prasad and his wife. Mr Singh accepted an accusation Mrs Prasad made, in order to end the conversation. From Mr Prasad's evidence the concerns raised in that conversation between Mr Singh and Mrs Prasad were the serious misconduct the dismissal was based on. Mr Singh admitted one of the things Mr Prasad's wife raised although later adding that nothing had happened.

[69] Mr Singh also apologised to Mr Prasad, taking responsibility for what had happened on 15 September 2017, without making it clear what he was admitting to have done wrong. He does not accept that he did wrong on that date.

[70] In some ways Mr Singh's approach was understandable. However, it also put him at risk of SS taking action as a result. Mr Singh's approach was causative of Mr Prasad's belief that Mr Singh admitted wrongdoing, and this was causative of the dismissal.

[71] I consider that a reduction of 30% to be appropriate. I therefore order SS Corporation Ltd to pay within 28 days of the date of this determination the following sums to Mr Singh:

(iii) Lost wages of \$4244.63 gross; and

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<sup>4</sup> *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178], *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 Full Court [175]

- (iv) Compensation for humiliation, loss of dignity and injury to feelings of \$2,800.00.

### **Annual leave**

[72] Mr Singh says that he did not take any holidays during his period of employment and that his final pay did not include any holiday payment. SS does not dispute that Mr Singh took no holidays but says that his 8% holiday pay was included with his pay during his time with SS.

[73] I am satisfied that Mr Singh took no annual holidays whilst working for SS.

[74] I will deal firstly with whether Mr Singh could be given what is sometimes referred to as pay as you go holiday pay.

[75] Under the Holidays Act 2003, section 28 sets out when an employee may be paid annual holiday pay with their pay. The first requirement in subs (1) is that the employee must either be:

- (i) Employed on a fixed term agreement to work for less than 12 months;  
or
- (ii) Work so intermittently or irregularly that is impracticable for the employer to provide four weeks annual leave.

[76] The written employment between Mr Singh and SS contains no reference to it being fixed term. Rather it says that it is for ongoing and indefinite duration.<sup>5</sup> Although Mr Singh's shift times did change he regularly worked five or six days a week. His work for SS was not intermittent or irregular.

[77] For the sake of completeness, I record that I am also not satisfied that SS can establish that the other requirements of s 28 of the Holidays Act are met. The second requirement is that the employee must agree in his or her employment agreement.<sup>6</sup> Although Mr Prasad suggested that there was discussion on this issue, Mr Singh disagreed. In any event Mr Singh's employment agreement refers to him being entitled to four weeks' annual leave but does not refer to holiday pay being paid with his pay.<sup>7</sup>

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<sup>5</sup> Cl 3.1 of the employment agreement

<sup>6</sup> S 28(1)(b) of the Holidays Act 2003

<sup>7</sup> Cl 8.1 of the employment agreement

[78] The third requirement under s 28(1) of the Holidays Act is that the annual holiday pay must be paid as an identifiable component of the employee's pay.<sup>8</sup> SS produced handwritten wage records which showed a payment of 8% holiday pay on top of the hourly rate.

[79] However, Mr Singh received no pay slips. He worked a variable number of hours, usually between 70 and 95 per fortnight meaning that his fortnightly pay was changeable.

[80] His employment agreement specifies the hourly rate of \$15.75 per hour without any reference to a portion of that being holiday pay or that 8% would be paid on top of that.<sup>9</sup>

[81] SS has not met the requirements of s 28(1) of the Holidays Act and cannot establish that Mr Singh was paid holiday pay with his pay. The consequence under s 28(4) is that despite the payments made, the employee becomes entitled to annual holidays and to be paid for them. Mr Singh is therefore entitled to payment under ss 24 and 25 of the Holidays Act.

### **Calculation of holiday pay**

[82] Mr Singh claims holiday pay based on 8 % of his total earnings in the year preceding his dismissal. However, the calculation is more complex than that as Mr Singh worked for a little over a year. For the full year entitlement the calculation is made under s 24 of the Holidays Act, and for the remainder of his service after the one year anniversary, there is an 8% calculation in accordance with s 25 of that Act.

[83] Under s 24 (2) of the Holidays Act the employee must be paid the greater of their:

- (a) ordinary weekly pay at the date of the end of their employment; or
- (b) average weekly pay on the 12 months immediately before the end of the last pay period before the end of the employment.

[84] Ordinary weekly pay is defined as the amount received under the employment for an ordinary working week.<sup>10</sup> Mr Singh's agreement recognises that his hours will

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<sup>8</sup> S 28(1)(c) of the Holidays Act

<sup>9</sup> Cl 7.1 of the Holiday Act

<sup>10</sup> S 8(1)(a) of the Holidays Act

be set by a roster with a minimum of 35 per week. Using the formula in s 8 (2) of the Holidays Act I have calculated Mr Singh's ordinary weekly pay<sup>11</sup> to be \$661.50 gross.

[85] The wage records produced by SS showed Mr Singh earning \$35,726.45 gross pay between 15 September 2016 and 15 September 2017. However, that includes payment for holiday pay of \$2568.82. For some reason which was not apparent that figure was around \$300 less than the 8% of the total pay which it appears to have been calculated on. In any event, I consider that my calculation should be based on the total earnings less what SS added for holiday pay. This takes the total to \$33,157.83, with an average weekly pay of \$637.65.

[86] The ordinary weekly pay is higher and so I use \$661.50, to determine that Mr Singh's full year of annual leave is worth \$2646.00. On top of that he is entitled to 8% on the earnings since he became entitled to annual leave.

[87] Mr Singh's anniversary of employment was 15 August 2017. He was paid for 192.75 work hours from then on, totalling \$3035.81. Eight percent of that is \$242.87.

[88] Adding \$2646.00 and \$242.87 together I order SS to pay Mr Singh the sum of \$2888.87, within 28 days of the date of this determination.

### **Costs**

[89] Costs are reserved and the parties are invited to resolve the costs issue. If they are unable to do so Mr Singh shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. SS Corporation Ltd shall have a further 14 days in which to file and serve a memorandum in reply. All submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. The Authority usually determines costs on its usual 'daily tariff' basis unless particular circumstances require an adjustment.

Nicola Craig  
Member of the Employment Relations Authority

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<sup>11</sup> Without the 8% added