

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 62  
3015115

BETWEEN

MANDEEP SINGH  
Applicant

A N D

BEN SINGH HOLDINGS  
LIMITED trading as FRESH  
VIBE CAFÉ  
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person  
Payal Kumar, former employee of Respondent

Investigation Meeting: 19 February 2018, at Auckland

Date of Determination: 26 February 2018

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1] Ben Singh Holdings Limited trading as Fresh Vibe Café (“*Fresh Vibe Café*”) employed Mr Mandeep Singh<sup>1</sup> to work in its Dargaville café.

[2] The Mr Singh who is the sole director and shareholder of the Fresh Vibe Café is based in Auckland. Ms Payal Kumar and her family lived in Dargaville and she worked in the Fresh Vibe Café.

[3] Ms Kumar effectively had sole responsibility for all staffing and payroll issues and it appears that she was mainly left to her own devices in terms of running and managing the Fresh Vibe Café.

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<sup>1</sup> Mandeep Singh is not related to Mr Singh who is the director and shareholders of the respondent.

[4] Nevertheless Fresh Vibe Café as Mr Mandeep Singh's employer has liability for Ms Kumar's employment related acts and omissions because she was acting as Fresh Vibe Café's authorised agent in relation to all employment matters involving Mr Mandeep Singh's hours of work, duties and payment of wages.

[5] The parties do not agree on the dates on which Mr Singh was employed. Mr Singh says he started work on 02 December 2015 while Fresh Vibe Café says that he did not start work until 09 December 2015.

[6] Mr Singh claims that his employment ended on 31 March 2016 while Fresh Vibe Café says that Mr Singh's last day of work was 22 March 2016.

[7] Mr Singh claims he is owed wage arrears consisting of a failure to pay him for all of the hours he worked, failure to pay any annual holiday pay, and failure to pay him any public holiday entitlements for the two public holidays he says he worked while employed.

[8] Fresh Vibe Café denies that it owes Mr Singh any money. Fresh Vibe Café says it paid Mr Singh for all of the hours he worked and that it paid him his holiday pay on 31 March 2016.

[9] Mr Singh is also claiming that Fresh Vibe Café unlawfully deducted \$150 per week from his wages.

[10] Mr Singh alleges that Ms Payal Kumar automatically took \$150 out of his wages every week without his permission, agreement or consent and kept it for herself as a contribution towards Mr Singh's room and board that she and her husband were providing to him.

[11] Ms Kumar denies deducting any money from Mr Singh's wages or directly paying herself from his wages for his board. Ms Kumar says she paid Mr Singh his wages in cash each week and he would then hand over \$150 cash as the board payment to her. Mr Singh denies that.

[12] Mr Singh also seeks to recover from Fresh Vibe Café a \$10,000 loan that he gave to his friend Sarabjit Singh<sup>2</sup> who was also employed by Fresh Vibe Café and who also boarded at Ms Kumar's home while Mr Mandeep Singh was there.

[13] Mr Mandeep Singh says that he loaned Mr Sarabjit Singh \$10,000 so that Mr Sarabjit Singh could buy-in to a business opportunity which had been proposed to him by Ms Kumar and her husband for a new business they intended to start in Dargaville.

[14] That business opportunity did not eventuate. Both Mr Singhs allege that Ms Kumar and her husband kept and used the money that they had received from Mr Sarabjit Singh for their personal spending.

[15] Mr Mandeep Singh says that Fresh Vibe Café is responsible for repaying the money to him because it knew about the loan that had been made and about Ms Kumar's business proposition.

[16] Ms Kumar says that the loan Mr Sarabjit Singh gave her and her husband had nothing to do with Fresh Vibe Café.

## **Issues**

[17] The following issues are to be determined:

- (a) Does the Authority have jurisdiction to investigate the loan repayment claim?
- (b) If so, can Mr Singh recover from Fresh Vibe Café the loan he made to Sarabjit Singh?
- (c) Is Mr Singh owed wages arrears for:
  - (i) hours worked but not paid;
  - (ii) annual holiday pay;
  - (iii) public holiday entitlements?
- (d) Did Fresh Vibe Café make unlawful deductions from Mr Singh's wages?
- (e) If so, what is he owed?

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<sup>2</sup> Also no relation to Mandeep Singh or the Mr Singh who is the director and shareholder of the respondent.

(f) What if any costs should be awarded?

**Does the Authority have jurisdiction to investigate the loan repayment issue?**

[18] Mr Mandeep Singh says he made the loan to Mr Sarabjit Singh so that they could invest in a business proposal put forward by Ms Kumar and her husband. Mr Mandeep Singh admitted to the Authority that the loan did not involve Fresh Vibe Café. I therefore find that the Authority does not have jurisdiction to investigate this claim.

[19] The loan repayment is an issue between the two Mr Singhs and because they were never in an employment relationship the Authority does not have jurisdiction over that matter, which would need to be dealt with in the civil jurisdiction.

[20] Even if Mr Mandeep Singh's evidence to the Authority that Fresh Vibe Café knew about the loan is correct that does still not make his former employer legally liable for a loan that Mr Singh made to one of his friends to invest in a business in which Fresh Vibe Café had no legal interest or participation.

[21] Fresh Vibe Café was not party to this loan so Mr Singh's claim to recover the \$10,000 loan from Fresh Vibe Café does not succeed.

**Is Mr Singh owed wage arrears?**

*Was Mr Singh paid for all of the hours he worked?*

A Dates of employment

[22] I have resolved the conflict over Mr Singh's actual dates of employment by concluding that it is more likely than not that he started work on 09 December 2015 and his employment ended on 31 March 2016 when his student work visa expired.

[23] Mr Singh's first employment agreement was signed by the parties on 09 December 2015.

[24] The 09 December 2015 date is recorded in the Employers Monthly Schedule (EMS) which was sent to IRD in December. Mr Mandeep Singh's friend and work colleague Mr Sarabjit Sing had signed the EMS which declared in two separate places that the information in the EMS was true and correct.

[25] Ms Kumar also gave evidence that Mr Singh moved into her house on the day of her birthday and celebrated it with Ms Kumar and her family. Mr Mandeep Singh admitted during questioning that it was possible he was mistaken about his start date and that it could have been 09 December 2015.

[26] I have relied on s.132(2) of the Employment Relations Act 2000 (“the Act”) to accept Mr Mandeep Singh’s evidence about his last day of employment being 31 and not 22 March 2016.

[27] Mr Singh says that he needed the money so would have worked right up until his student work visa expired. Because Fresh Vibe Café did not prove to the required standard of proof that Mr Singh’s evidence about the date his employment ended is incorrect, I have accepted it.

[28] I therefore find that Mr Singh’s period of employment was from 09 December 2015 until 31 March 2016.

B What should Mr Singh have been paid?

[29] There is a conflict between the parties over what hours Mr Singh actually worked and how much he was paid while employed.

[30] Mr Singh initially started work under the individual employment agreement that was signed by the parties on 09 December 2015.

[31] This employment agreement stated that Mr Singh was employed in a Customer Service/Front of House role for “20 to 30 hours per week, Monday to Sunday” at \$14.75 per hour. His wages were stated to be paid weekly on Thursday into his nominated bank account, or in cash.

[32] Ms Kumar says that Mr Singh worked for 25 hours for the first two weeks he was employed and then for 20 hours per week for most weeks other than two weeks during which he only worked 15 hours per week.

[33] Mr Singh disputes that and says he worked in excess of 40 hours per week in December 2015 and up until 17 January 2016. Mr Singh was clear that he worked more than 40 hours a week during this period but he was unclear about how many hours he had worked on any given day or in any given week.

[34] Mr Singh says that he was legally entitled under the terms of his student work visa from Immigration New Zealand (INZ) to work full time during his student holidays which ended on 17 January 2016. He then said his hours reduced to 20 hours per week from 18 January 2016 until his employment ended to align with the maximum number of hours his student work visa allowed him to work during term time.

[35] Fresh Vibe Café has failed to keep and therefore failed to produce accurate time and wage records in accordance with the requirements under s.130 of the Act. Ms Kumar presented a document which she had prepared to the Authority which recorded the hours set out in the EMS which was sent to IRD each month that Mr Singh was employed.

[36] The December 2015 and January 2016 EMS's were signed by Mr Singh's friend Mr Sarabjit Singh. The February and March EMS's were signed by Ms Kumar.

[37] I find that Fresh Vibe Café did not satisfy me to the required standard of proof that Mr Singh's evidence about the wages he was actually paid and the hours, days and times he worked was incorrect.

[38] I therefore rely on s.132(2) of the Act to accept Mr Singh's evidence about these matters to resolve the conflict between the parties about that evidence.

[39] In terms of the actual hours worked between 09 December 2015 and 17 January 2016 I find it more likely than not that Mr Singh worked full time hours.

[40] I have adopted 40 hours as the likely number of hours for calculating his hours of work because that is the minimum number of full time hours the parties agreed to in their second employment agreement, which I discuss later.

[41] Although Mr Singh says he worked more than 40 hours each week I consider his evidence about that was not clear enough to adopt because he had not keep a record of the days and times he worked so could only provide a very general guesstimate.

[42] My finding means that Mr Singh should have been paid \$3,540 (being 40 hours per week at \$14.75 per hour for six weeks) for the period 09 December 2015 to 17 January 2016.

[43] Under the terms of Mr Singh's student work visa he was only entitled to work 20 hours per week from 18 January 2016 until 31 March 2016. Mr Singh was therefore entitled to be paid \$590 (being 20 hours per week x \$14.75 per hour for two weeks) for the period 18 January – 02 February 2016.

[44] On 02 February 2016 Mr Singh received a promotion in order to support his INZ work visa application which was being supported by his employer.

[45] The parties entered into a second individual employment agreement which they both signed on 02 February 2016.

[46] The second employment agreement provided that Mr Singh was to be employed by Fresh Vibe Café as the Assistant Manager for 40 hours per week at an increased hourly rate of \$16.50 per hour.

[47] Although the employment agreement provided for Mr Singh to work as a full time employee for at least 40 hours per week he was still only legally entitled to work for 20 hours per week under the terms of his then student work permit.

[48] Mr Singh was therefore entitled to be paid \$1,320 (being 20 hours per week x \$16.50 per hour for four weeks) for the period 02 February – 31 March 2016.

C What was Mr Singh actually paid?

[49] I rely on s.132(2) of the Act to accept Mr Singh's evidence that he only received \$700 for the entire time was employed. Mr Singh says he received \$550 paid directly into his bank account during January 2016 plus one \$150 cash payment which he deposited himself into his bank account that month.

[50] I further reply on s.132(2) of the Act to accept Mr Singh's evidence that he did not receive any cash wages (other than the \$150 referred to in his evidence) contrary to Mr Kumar's allegation that she handed wages to him in cash every week, supposedly at his request.

[51] Fresh Vibe Café was unable to present any documentary evidence that Mr Singh had asked for his wages to be paid in cash. Nor could it produce any records that cash payments had been made to Mr Singh.

[52] I did not find Ms Kumar's evidence that the café had had a break-in which resulted in the notebook she recorded the cash payments in being stolen convincing. It seems odd that someone who was burgling a café chose to remove a notebook about wage payments.

[53] Fresh Vibe Café was therefore unable to convince me to the required standard that Mr Singh's evidence about the wages he was actually paid was incorrect.

[54] Mr Singh should have been paid \$5,870<sup>3</sup> for the work he did from 09 December 2015 until 31 March 2016. However he only received \$700 for this entire period so there has been in a shortfall in the wages he has been paid of \$5,170.

D What wage arrears if Mr Singh owed?

[55] Mr Singh has been underpaid wages of \$5,170. Accordingly, Fresh Vibe Café is ordered to pay Mr Singh \$5,170 arrears to reflect the shortfall between the wages he received and the wages he should have been paid in accordance with the terms of his two employment agreements.

*Is Mr Singh owed public holiday entitlement arrears?*

[56] Mr Singh says that he worked 7.5 hours on Boxing Day, 26 December 2015 and 7.5 hours on Waitangi Day 6 February 2016.

[57] Ms Kumar accepts that the café was open on Boxing Day but said that Mr Singh only worked until 12.00 pm that day because he then helped set up for a party later that evening. Mr Singh says that the café was open all day and he worked a full day as normal.

[58] Ms Kumar couldn't recall whether the café opened on Waitangi Day and if so whether or not Mr Singh worked that public holiday.

[59] I again rely on s.132(2) of the Act to accept Mr Singh's evidence because the Fresh Vibe Café has not been able to prove to the required standard that his evidence about working on public holidays was incorrect.

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<sup>3</sup> \$3,960 from 09 December 2015 to 17 January 2016; \$590 from 18 January to 01 February 2016; \$1,320 from 02 February to 31 March 2016.

[60] I therefore find that Mr Singh worked 7.5 hours on two public holidays but did not receive time and a half on alternative day holiday for working on these two public holidays.

[61] I consider that Mr Singh's successful wage arrears claim has covered the normal wages he would have received for working on a public holiday. That leaves the time and a half component of his public holiday entitlements to be calculated.

[62] He worked fourteen hours (being 2 x 7.5 hours each day) which is to be paid at 0.5% of his then applicable hourly rate.

(a) The Boxing Day public holiday is to be paid based on an hourly rate of \$14.75 so 0.5 of that is \$7.38 times 7.5 hours amounts to \$55.31.

(b) Mr Singh was entitled to be paid \$16.50 for the Waitangi Day holiday so 0.5 of that is 8.25 times 7.5 hours he worked is \$61.88.

[63] Mr Singh is owed unpaid time and a half of \$117.19 for the time he actually worked on these two public holidays.

[64] In addition Mr Singh was entitled to receive two alternative day holidays. No alternative day holidays were paid to him upon termination.

[65] Fresh Vibe Café is therefore ordered to pay Mr Singh \$247.50 for the alternative holidays (15 hours \$16.50 per hour) for his alternative day holiday entitlement arrears.

*Is Mr Singh owed annual holiday pay arrears?*

[66] The parties agree that Mr Singh did not take any paid annual holiday while employed. Because Mr Singh worked for less than twelve months he is entitled to receive 8% of his total gross earnings as annual holiday pay upon termination.

[67] Mr Singh says he did not receive any holiday pay and he supplied text messages to the Authority sent after his employment had ended asking to be paid his holiday entitlements. Ms Kumar says she on behalf of Fresh Vibe Care paid Mr Singh \$375 annual holiday pay in cash on 31 March 2016.

[68] I reply on s.132(2) of the Act to resolve this conflict in Mr Singh's favour because I am not satisfied that his evidence about not being paid holiday pay is incorrect.

[69] I therefore find that Fresh Vibe Café did not pay Mr Singh any annual holiday pay.

[70] Fresh Vibe Café is ordered to pay Mr Singh \$498.78 (being \$5,870 wages plus \$364.69 public holiday entitlements x 8%) holiday pay arrears.

**Did Fresh Vibe Café make unlawful deductions from Mr Singh's wages?**

[71] Mr Singh boarded with Ms Kumar for the entire period that he was employed by Fresh Vibe Café. In addition to working together as colleagues Mr Singh and Ms Kumar also considered themselves to be friends as well as landlord and boarder.

[72] Ms Kumar and Mr Singh do not agree on what the arrangements were made regarding his board. Mr Singh claims it was a flexible arrangement that varied depending on the number of hours he worked, the cost of the weekly food bill and the total cost of the utilities incurred per month.

[73] Ms Kumar disputes that. She said they agreed that Mr Singh could board with her and her family for an all-inclusive payment to cover room, food, all utilities and other outgoing expenses including internet.

[74] Regardless of these conflicting views I find that the boarding arrangement between Mr Singh and Ms Kumar had nothing to do with Fresh Vibe Café. It was not a term or condition of his employment so board did not form part of his remuneration.

[75] I rely on s.132(2) of the Act to accept Mr Singh's evidence about the wages he was actually paid.

[76] I therefore accept Mr Singh's evidence that he received a total of \$700 from Fresh Vibe Café for the entire time he was employed. I consider that the wage arrears he has been awarded ensures that he has been paid his correct wages for the entire period he was employed.

[77] If Ms Kumar did take money from Fresh Vibe Café and keep it herself to cover Mr Singh's board then that is a matter between her and Fresh Vibe Café.

[78] I rely on s.132(2) of the Act to prefer Mr Singh's evidence that he did not receive any cash wages except on one occasion in January, which he then deposited himself into his bank account. That means that Ms Kumar's evidence that she paid Mr Singh his wages in cash each week at his request is not accepted.

[79] I do not consider this is a matter where the employer Fresh Vibe Café has made unlawful deductions from Mr Singh's wages because it is an under payment or short payment of wages issue which has been addressed already in this determination.

**What if any costs should be awarded?**

[80] Mr Singh represented himself so there is no issue as to legal costs. However the successful party is entitled to have his filing fee reimbursed.

[81] Fresh Vibe Café is therefore ordered to pay Mr Singh \$71.56 to reimburse his filing fee.

**Orders**

[82] Within 28 days of the date of this determination Fresh Vibe Café is ordered to pay Mr Singh \$6,105.03:

- (a) \$5,170 underpaid wages;
- (b) \$364.69 (being \$117.17 time and a half arrears plus \$247.5 alternative day holiday) public holiday entitlement arrears;
- (c) \$498.78 (being 8% of total gross earnings of \$6,234.69) in annual holiday arrears; and
- (d) \$71.56 to reimburse his filing fee.

**Rachel Larmer**  
**Member of the Employment Relations Authority**