

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 286
3023260

BETWEEN MAHABIR SINGH
Applicant

AND KENNY OMEN LIMITED
FORMERLY KNOWN AS
PUNJABI DHABA LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Maurice Austin, Advocate for Applicant
Hardeep Singh, Advocate for Respondent

Investigation Meeting: 11 December 2018

Submissions and further information received: On the day from both parties and 11 February 2019 from Applicant
Further information January 2019

Determination: 14 May 2019

DETERMINATION OF THE AUTHORITY

- A Within 28 days of the date of this determination Kenny Omen Limited formerly known as Punjabi Dhaba Limited is to pay to Mahabir Singh:**
- (i) The sum of \$14,432.91 gross or \$12,308.47 net for unpaid wages.**
 - (ii) The sum of \$1384.12 gross for working on public holidays and alternative days.**
 - (iii) The sum of \$5331.67 gross for holiday pay.**
- B Interest is ordered to be paid at 5% per annum on the gross amount owing of \$21,148.71 assessed under s87 (3) of the Judicature Act 1908. Proceedings were lodged before the commencement of the Interest on Money Claims Act 2016. Interest to the date of this determination is \$1615.30 and will continue to accrue at a daily rate of \$2.90 until payment.**

C Costs are reserved and a timetable for an exchange of submissions set.

Employment Relationship Problem

[1] Mahabir Singh commenced his employment with the respondent company formerly known as Punjabi Dhaba Limited (Punjabi Dhaba) on 23 December 2003 as a Chef. The proceedings were commenced against Punjabi Dhaba Limited which was incorporated on 8 June 1999.

[2] A search of the company register showed a name change for Punjabi Dhaba to Kenny Omen Limited on 7 January 2019 and the intituling has been changed to reflect the name change.

[3] Mr Singh's employment ended with Punjabi Dhaba on 6 October 2014. He claims that he is owed outstanding money for wages, holiday pay and payments for working on public holidays.

[4] Mr Singh's claim against Punjabi Dhaba clarified at the time of the Authority investigation meeting is for a total sum of \$19,840 net which was amended from the amount sought in the statement of problem of \$20,902 net. The claim is for part of his period of employment from 2012 to 2014.

[5] Mr Singh was until August 2014 to be paid an annual salary of \$36,000 gross as provided in his individual employment agreement with a minimum of 45 hours to be worked each week between Monday and Sunday. Mr Singh said in his evidence that he worked six days a week with Mondays being his day off.

[6] In early August 2014 Mr Singh entered into another employment agreement with Punjabi Dhaba which coincided with the time he was asked to shift from the Christchurch restaurant he was working in and work in the Auckland restaurant also owned and operated by Punjabi Dhaba. He was then paid \$18 per hour with a minimum of 40 hours to be paid. For that period rosters were provided with the hours worked.

[7] Hardeep Singh is a director of Punjabi Dhaba. Mr Hardeep Singh says that the amounts deposited into Mr Singh's account were supplemented by cash payments. Mr Hardeep Singh accepted that he had no receipts for these cash amounts however requested

details of all transactions of money transferred to India by Mr Singh during the claim period as he said this would “illuminate the payments that he has made.”

[8] Further, Mr Hardeep Singh said that the statutory holidays claimed were not days on which the restaurant opened and that he believed Mr Singh had been paid all money due and was being an “opportunist”.

[9] Both parties agreed that although some employment was undertaken in Auckland the suitable location for an investigation meeting was Christchurch.

[10] My determination has been issued outside of the statutory period of three months after receiving the last submission from one of the parties. I record that when I advised the Chief Delegate of the Authority that this would likely occur she decided as permitted by s174C(4) of the Employment Relations Act 2000 (the Act) that exceptional circumstances existed for providing the written determination of the Authority’s findings later than the latest date specified in s174C(3)(b) of the Act.

The Issues

[11] The Authority needs to determine the following issues in this case:

- (a) Was Mr Singh paid his contractual entitlements for wages between 1 January 2012 and 6 October 2014?
- (b) Did Mr Singh work public holidays between 1 January 2012 and 6 October 2014?
- (c) If so, was he paid his entitlements for doing so under the Holidays Act 2003?
- (d) Was Mr Singh paid holiday pay that was due and owing to him between 1 January 2012 and 6 October 2014 as at the date of termination of his employment?

Was Mr Singh paid his contractual entitlements for wages between 1 January 2012 and 6 October 2014?

[12] The Authority heard from Mr Singh and from Mr Hardeep Singh. The claim was set out initially by Mr Singh's then advocate in a letter dated 3 November 2017 to Mr Hardeep Singh. I have used the contents of that letter as a starting point for the wage claim.

Mr Singh's claim as presented by his advocate

For the 2012 year

[13] The amount claimed for 2012 is on the basis that Mr Singh should have received gross wages of \$36,000 and that he received a net amount of \$23,000 and there is therefore a shortfall. It was set out in the 3 November 2017 letter that Mr Singh should have received for the period 1 January 2012 to 31 December 2012 a net of \$30,420 based on a tax rate of 15.5%. A shortfall of \$7,420 net was claimed for the 2012 year.

[14] In preparation for the Authority's investigation meeting Mr Singh said that he discovered three other payments made to his bank account by Punjabi Dhaba that were not included in the original calculations for 2012. I subsequently assessed the bank accounts for that period and ascertained that whilst the first two of these payments were made during 2012 the third was in fact made in 2013 and will need to be accounted for during that period. On that basis the claim for 2012 is reduced by the further payments made into Mr Singh's bank account by Punjabi Dhaba that were not included in the letter of 3 November 2017 of \$370 on 13 February 2012 and \$114 on 6 May 2012.

For the 2013 year

[15] In 2013 Mr Singh claims that should have received gross wages of \$36,000 and a net on the basis of 15.5% tax of \$30,420. He says that in fact he received \$26,053 leaving a balance outstanding for wages for 2013 of \$4,367 net.

[16] The additional amount that was not taken into account for that year was the payment of \$478 on 1 July 2013.

For the 2014 part year

[17] Mr Singh left his employment on 6 October 2014. He says that based on an entitlement of \$36,000 from 1 January 2014 to 3 August 2014 he should have received gross wages of \$21,452.

[18] On 4 August 2014 he entered into a new employment agreement with an hourly rate of \$18 per hour. Mr Singh relied on rosters to support the hours that he was working and set out the hours he worked and the total shortfall as set out below:

Week ending 10 August 2014 – 49 hours at \$18 per hour	\$882.00
Week ending 17 August 2014 – 50.30 hours at \$18 per hour	\$905.00
Week ending 24 August 2014 – 49.45 hours at \$18 per hour	\$890.00
Week ending 31 August 2014 – 51.30 hours at \$18 per hour	\$923.40
Week ending 7 September 2014 – 51 hours at \$18 per hour	\$918.00
Week ending 14 September 2014 – 49.45 hours at \$18 per hour	\$890.00
Week ending 21 September 2014 – 50.30 hours at \$18 per hour	\$905.00
Week ending 28 September 2014 – 51 hours at \$18 per hour	\$918.00
Week ending 5 October 2014 – 44.45 hours at \$18 per hour	\$800.00
Total hours worked for this period 446.25	
Gross amount of	\$8,031.00
Less tax 15.5% \$1,045.00	\$6,786.00
Net amount payable for 2014	\$18,127.00
Plus for period to 6 October 2014	\$6,786.00
Total net amount	\$24,913.00
Net received from bank statements	\$23,917.00

[19] The claim for 2014 for unpaid wages is \$996.00 net.

Punjabi Dhaba's view of the claim for unpaid wages

[20] Mr Hardeep Singh's evidence was that Mr Singh was paid amounts in cash and that the company treated Mr Singh as part of a second family. Mr Hardeep Singh accepted that he did not have any receipts for any amounts that he had given to Mr Singh for payments not made other than by way of direct credit into his bank account that are readily identifiable. Mr Hardeep Singh was quite persistent that he needed details of all transactions of money transferred to India during that period by Mr Singh as he says that would support the fact that there were payments other than those paid by Punjabi Dhaba into Mr Singh's account.

[21] Mr Singh was equally adamant that he had not received any payments in cash since 2012 although accepted that there had been some payments in cash prior to that time. His evidence was that from 2012 all payments were made by way of direct credit to his bank accounts and that the transfers of money made to India were made by him from money that had been deposited into his bank account. He provided some documentary evidence to support that. There was information for example from his bank statements that show money being paid through Lotus Foreign Exchange using credits in his bank account.

Conclusions about unpaid wages

[22] The Authority is in a position where it is unable to conclude with any degree of certainty that other payments made into Mr Singh's bank accounts or money Mr Singh transferred to India were from Punjabi Dhaba. There are no signed receipts for cash payments for the period. Much of the documentation provided by Mr Hardeep Singh relates to earlier periods of employment for which there is no claim although Mr Singh accepts during the earlier part of his employment there were some cash payments.

[23] Mr Hardeep Singh is an experienced businessman. It is difficult to reconcile that experience with the absence of clear records for payment of wages to Mr Singh by cash. I am unable to conclude in a satisfactory manner that the foreign exchange remittance receipts bear some form of correlation with payments being made by Punjabi Dhaba.

[24] I accept that a \$3000 payment in June 2012 relied on in further material provided to the Authority by Mr Hardeep Singh was in fact accounted for by Mr Singh as having been paid.

[25] I find that there is a basis to assess a claim for a shortfall in wages.

[26] I have undertaken my own calculations using a PAYE income tax calculator as at 2019 to verify the amount that should have been received. There appeared no accounting for the ACC levy in the calculations provided on behalf of Mr Singh in arriving at a net figure.

2012 wages

[27] In 2012 Mr Singh was to be paid a gross salary of \$36,000. Based on identifiable deposits into his bank account from Punjabi Dhaba including the two deposits identified after the claim was lodged with the Authority I have arrived at net payments made in 2012 of \$23,584.

[28] Using the PAYE tax calculator to take into account PAYE and the ACC levy I have assessed the take home pay for Mr Singh on a gross amount of \$36,000 is \$30,699.60. There is therefore a shortfall of \$7115.60 net for 2012 owing to Mr Singh because he only received \$23,584 net into his bank account.

[29] Mr Singh is owed the sum of \$7115.60 net for unpaid wages for 2012.

2013 wages

[30] In 2013 there are again deposits into Mr Singh's bank account from Punjabi Dhaba. During this year Mr Singh also had a second bank account with the ANZ and deposits from Punjabi Dhaba for wages were paid into both accounts. In addition to the figures provided for this period from the bank accounts Mr Singh identified as earlier set out a payment missed on 1 July for \$478.

[31] I have identified a further payment on 1 August 2013 from Punjabi Dhaba into Mr Singh's ASB account for \$119.80 as being in likelihood reimbursement for purchases rather than wages. That is consistent with Punjabi Dhaba's transaction details from its own business account that was supplied by Mr Hardeep Singh after the investigation meeting. It describes the payment of \$119.80 as "Mahabir Purchase". That is different from how wage payments are described when they were made to Mr Singh's bank accounts. I place some weight on the fact that payment for reimbursement of purchases was made by way of automatic payment as further support for a conclusion that payments from 2012 to Mr Singh were less likely to be made in cash.

[32] I have calculated the payments made in 2013 to Mr Singh's bank accounts are \$26,531.27. From an expected take home pay or net pay of \$30,699.60 there is a shortfall of \$4168.33 net.

[33] Mr Singh is owed the sum of \$4168.33 net for unpaid wages for 2013.

2014 wages

[34] In 2014 there are two separate contractual provisions for payment for wages. Up to 3 August 2013 the wages were paid on the basis of a salary of \$36,000. Thereafter wages were paid on an hourly basis.

[35] For the first period from 1 January 2014 to 3 August 2014 Mr Singh has assessed gross wages that should have been paid for 31 weeks as \$21,452.00. The period is actually 30 weeks and four days. Based on a salary of \$36,000 the weekly wage is \$692.31. \$692.31 multiplied by 30 weeks is \$20,769.30. For the remaining four days a daily rate is achieved by dividing \$692.31 by six because of Mr Singh's working week of six days. The figure arrived at for a daily rate is \$115.38 which multiplied by four is \$461.54. Gross wages for this period should have been \$20,769.30 plus \$461.54 which equals \$21,230.84.

[36] I have calculated using the PAYE calculator the net pay should have been \$590.38 per week which multiplied by 30 weeks is \$17,711.40 plus 4 days which is \$393.59. \$17,711.40 plus \$393.59 is \$18,104.99 net.

[37] For the period after 3 August 2014 Mr Singh was paid an hourly rate of \$18.00 and his hours are supported by provided rosters for that period. I agree with Mr Singh's calculations for that period that he worked 446.25 hours over 9 weeks and should have received \$8031 gross on the basis of \$18 per hour. Using the PAYE calculator the take home pay on \$18 per hour would be \$15.32 which multiplied by 446.25 hours is \$6,836.55 net.

[38] For 2014 Mr Singh should have received net payments of \$18,104.99 plus \$6836.55 which total \$24,941.54. He received \$23,917 and there is therefore a shortfall of \$1024.54.

[39] Mr Singh is owed the sum of \$1024.54 net for unpaid wages for 2014.

Total net amount owing for unpaid wages

[40] In total I find that Mr Singh is owed outstanding wages for 2012, 2013 and 2014 in the sum of \$12,308.47 net or \$14,432.91 gross.

[41] I order Kenny Omen Limited formerly known as Punjabi Dhaba Limited to pay to Mahabir Singh the sum of \$12,308.47 net being unpaid wages.

Public holidays and alternative days

[42] Mr Singh says that he worked Good Friday and Anzac Day in 2012. He says that for 2013 and 2014 he worked Waitangi Day, Good Friday and Anzac Day. He seeks payment at time and a half and an alternative day for each day worked.

[43] Mr Hardeep Singh said in evidence that the restaurant was closed for those days. He was asked to provide the restaurant diary to confirm whether the restaurant was open or not on statutory days. The only pages provided were for Christmas and Boxing days which were both days that Mr Singh did not claim to have worked. There was also an email Mr Hardeep Singh provided dated 19 January 2017 from a previous employee who said he worked for Punjabi Dhaba in an Auckland Branch from August 2014 to March 2017. He said that he could confirm that the restaurant remained closed on almost all public holidays. The employee was not working for the period for which Mr Singh says he worked on the public holidays. There was a similar email about the Christchurch workplace.

[44] Mr Singh was adamant in his evidence that the restaurant was open on public holidays and that he worked for the days he is claiming entitlements for. The Authority put Mr Hardeep Singh's statement that the restaurants did not open on statutory days to Mr Singh. He responded as interpreted "100% restaurant opened on statutory days." The standard terms of both his employment agreements provided that he may be required to work on a public holiday. None of the days claimed fall on his usual day off that was a Monday.

[45] I find on the balance of probabilities it is more likely than not that Mr Singh worked the statutory days that he claims. He recalled being the only Chef on the holidays worked.

[46] I accept the calculation advanced on behalf of Mr Singh for entitlements is correct for each of the 8 days. That is \$57.67 for payment at time and a half based on a 7.5 hour day and payment for an alternative day at \$115.35.

Conclusions for public holiday entitlements for 2012, 2013 and 2014

[47] For 2012 there is a total of \$346 gross owing for payment for working on a public holiday and alternative days.

[48] For 2013 there is a total of \$519.06 gross owing for payment for working on a public holiday and alternative days.

[49] For 2014 there is a total of \$519.06 gross for working on a public holiday and alternative days.

[50] The total owing for public holiday entitlements for the years 2012, 2013 and 2014 is \$1384.12 gross.

[51] I order Kenny Omen Limited formerly known as Punjabi Dhaba Limited to pay to Mahabir Singh the sum of \$1384.12 gross being payment for working on public holidays and alternative days.

Holiday pay

2012 holiday pay assessment

[52] No holiday and leave record was produced. Mr Singh said that the only holiday he took in the material period was a trip to India in 2012. The Authority requested and was provided with the passport stamps confirming arrivals and departures from New Zealand within the material period because Mr Hardeep Singh said that Mr Singh had travelled to India during that period. Mr Singh arrived in New Delhi on 27 May 2012 and arrived back in New Zealand on 27 June 2012.

[53] Mr Singh said that he was not paid for that leave period and seeks 8% of his gross pay for holiday pay. There is a payment by Punjabi Dhaba into Mr Singh's account of \$3000 on 20 June 2012 which is during the period he was in India. I cannot conclude with any certainty that Mr Singh was not paid for the four weeks leave he took in India. There is one remaining issue for holiday pay for 2012. That is the payment I have found owing for working on public holiday and alternative days. 8% of \$346 equals \$27.68 gross.

2013 holiday pay assessment

[54] Mr Singh said that he did not take any holidays in 2013. There are no records or evidence to support that he did. I find that he is entitled to 8% of what he should have received for gross earnings for 2013 and for public holiday entitlements.

[55] I calculate holiday pay owing as 8% of \$36,000 which is \$2880 gross and 8% of \$519.06 which is \$41.52. That is a total of \$2921.52 gross.

2014 holiday pay assessment

[56] Mr Singh said that he did not take leave in 2014 and there is no evidence or a record to support leave was taken this year. He is therefore entitled to holiday pay.

[57] During 2014 gross earnings for the period to 4 August 2014 should have been \$21,230.82 and from 4 August to 5 October 2014 should have been \$8031. That is a total of \$29,261.82 gross. Holiday pay owing on gross earnings is \$2340.95 gross calculated on the basis of \$29,261.82 multiplied by 8%. Holiday pay on the public holiday entitlements of \$519.06 is \$41.52.

[58] That is a total holiday pay entitlement for 2014 owing of \$2382.47 gross.

Conclusions on holiday pay

[59] There is a total amount of holiday pay due and owing to Mr Singh for 2012, 2103 and 2014 in the sum of \$5331.67 gross being payment of holiday pay.

[60] I order Kenny Omen Limited formerly known as Punjabi Dhaba Limited to pay to Mahibir Singh the sum of \$5331.67 gross being holiday pay.

Interest

[61] Mr Singh seeks interest on the above sums for unpaid wages, public holiday entitlements and holiday pay under s 87(3) of the Judicature Act 1908 of 5%. The claim was lodged prior to the commencement of the Interest on Money Claims Act 2016 which is 1 January 2018.

[62] The Authority may order the inclusion in the sum for which judgment is given interest for the whole or part of the period between the date when the cause of action arose and the date of payment under clause 11 of schedule 2 of the Employment Relations Act 2000.

[63] I find it appropriate to order interest payable from the date that the claim for Mr Singh was quantified in his advocate's letter of 3 November 2017.

[64] I have assessed interest on gross figures. I have added together the gross sums of \$14,432.91 for unpaid wages, public holiday entitlements of \$1384.13 and holiday pay owing of \$5331.67. That is a total of \$21,148.71 gross.

[65] \$21,148.71 multiplied by 5% is \$1057.44 per annum. A daily rate is achieved by dividing \$1057.44 by 365 to arrive at \$2.90 per day.

[66] The period between 3 November 2017 and 14 May 2019 is 557 days. 557 days multiplied by \$2.90 is \$1615.30.

[67] Interest is ordered to be paid on the gross amount of \$21,148.71 and will continue to accrue at a daily rate of \$2.90 until payment.

Costs

[68] I reserve the issue of costs.

[69] Mr Austin has until 28 May 2019 to lodge and serve submissions as to costs and Mr Hardeep Singh has until 11 June to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority