

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 615  
3049172

BETWEEN	HARPREET SINGH First Applicant
AND	JASWINDER SINGH Second Applicant
AND	SRI GURU SINGH SABHA AUCKLAND INCORPORATED Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	May Moncur, for the Applicant Arunjeev Singh, for the Respondent
Investigation Meeting:	1 & 2 July and 18 & 19 September 2019
Submissions and further Information received:	None from the Applicant 23 & 24 September 2019 from the Respondent
Date of Determination:	29 October 2019

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Harpreet and Jaswinder Singh were employed by Sri Guru Singh Sabha Auckland Incorporated from 27 October 2017 until 7 May 2018. During that period Harpreet was only paid \$2,000 and Jaswinder was paid \$1,000. They claim wage arrears and holiday pay, allege they were unjustifiably disadvantaged, and seek penalties for the Respondent's breaches of the Minimum Wage Act 1983, the Holidays Act 2003 and its breaches of their individual employment agreement.

[2] Aside from acknowledging some wages and holiday pay are owing to Harpreet and Jaswinder, the Respondent otherwise denies their claims. It has lodged a counterclaim against the Applicants in which it alleges they breached their individual

employment agreement by disclosing confidential information to third parties and abandoning their employment. It also alleges they breached their duty of good faith.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

### **The Issues**

[4] The issues for determination in relation to the Applicants' claims are:

- a. What monies are owed to the Applicants for wage arrears, holiday pay and payment for working on public holidays?
- b. Did the Applicants suffer an unjustified disadvantage to their employment?
- c. If the Applicants suffered an unjustifiable disadvantage, what remedies should be awarded?
- d. If any remedies are awarded, should they be reduced for blameworthy conduct by the Applicants that contributed to the situation giving rise to their grievance?
- e. Should the Authority order the Respondent to pay a penalty for its breaches of the individual employment agreement (IEA) and minimum entitlements?
- f. Should either party contribute to the costs of representation of the other party?

[5] The issues for determination in relation to the Respondent's claim are:

- a. Did the Applicants breach the IEA by:
  - i. Abandoning their employment without providing the required notice period?
  - ii. Disclosing confidential information to third parties?
- b. Did the Applicants breach the duty of good faith?

## **Background**

[6] The Applicants are both Indian citizens. They are each qualified “Raagi Jatha” - a religious role that many in the Sikh religion describe as akin to being the Temple priest or preacher. To become a Raagi Jatha the Applicants have each undertaken many years of training. This training involved learning to sing, play musical instruments, and recite the Kirtan (religious songs/hymns).

[7] The Applicants worked as a group of three with Harjit Singh. Harjit was the leader of the group while the parties were in New Zealand. His role was to sing the Kirtan while Jaswinder played the tabla (Indian Drums) and Harpreet played the harmonium and provided back-up singing. All three were involved with the delivery of prayers.

[8] In or about July 2017 Harjit spoke to Harpreet and Jaswinder about a possible role in New Zealand with the Respondent. Thereafter, with their agreement, he negotiated the group’s individual terms of employment with the Respondent. The terms and conditions of employment were accepted by the Applicants and thereafter they travelled to New Zealand, arriving on 27 October 2017. The group commenced work that same day.

[9] Following the Group’s arrival in New Zealand they were shown their accommodations at the Gurdwara/Sikh Temple (the Temple). Both Applicants said they were unhappy with the accommodation provided and expressed this at various times to the Respondent. I shall return to address the issues with the accommodation later in this determination. At or about this time the Respondent required the Applicants to provide it with their passports, which they did.

[10] On 7 May 2018 an altercation took place at the Temple. A group of about 70-100 people from several other Sikh Temples entered the Temple and stole its Holy books and other religious materials. Following the theft Harnek Singh, a committee member, visited the Temple and met with the Applicants. He advised that, without the Holy Books, no service was possible and asked if they wanted to go back to India. They told him that they did not want to do this as they had nothing to go back to.

[11] On 8 May 2018 Harnek spoke with the Applicants again. He told them that they were to do the morning and evening prayers using on-line versions of the Holy Books. The Applicants advised him that their religion did not permit them to do this. Harpreet

said that they felt that Harnek did not believe in the Holy Book and therefore there was no purpose in them remaining at the Temple. Later that day the Applicants left the Temple without notification to the Respondent of their departure.

**Issue One: What monies are owed to the Applicants for wage arrears?**

[12] The Applicants claim they worked 70 hours per week for the duration of their employment. This time accrued through their undertaking the morning and evening prayers, teaching the children, making and distributing the Prashaad, preparing Langer (food for lunch and dinner) for devotees, preparing flatbread on Sundays, and monitoring the CCTV cameras.

[13] The Respondent disputes the Applicants' claims. It maintains that the Applicants only worked 20 hours each per week made up of two hours each morning, two hours each evening, three hours on a Saturday afternoon teaching the children and three hours for the Sunday service.

***The individual employment agreement***

[14] The material terms of the Applicants' individual employment agreement (IEA) were as follows:

1 Term of employment

The employee shall commence part time employment on September 2017 for a period of approx. 09 months until May 2018 at which time this agreement shall cease, unless the parties agree to extend the term in writing.

The nature of this agreement is one of a fixed-term contract. The use of a fixed term is for legitimate mutual reasons, the reason being:

- a) Employee is non-resident and has a valid work permit until May 2018
- b) Employee is unable to work legally beyond that period in New Zealand
- c) Employer is a religious organisation and wishes to alternate the preachers and the religious programmes it provides to its congregation.

The employee acknowledges that nothing in this agreement shall be interpreted or understood to give them any expectation that this agreement will be renewed, or a subsequent agreement will be entered into.

2 Duties of positions of an employee

The duties to be undertaken are set out in the Schedule First to this contract together with the other duties which may be agreed between the parties from time to time. It is expected that those duties will be performed according to the employer's instructions and that the employee will devote all their ordinary working hours and best endeavours to performing the duties outlined.

3 Hours of work

Employment is on an "as required" basis. However, the daily duty is to Prakash Guru Granth Sahib (Holy Scripture book) and morning prayers between 4 am and 6 am and evening prayers, Rehras and Kirtan between 6.30 pm and 8.30 pm. In addition, two hours daily devoted to teach Punjabi and Gurbani to the children.

5 Wages

The employer will meet the economy airfare and reasonable travel expenses from India to New Zealand; this has a value of \$3000

The employee will be provided with accommodation and meals plus any medical expenses total value of which equates to \$15,000 p.a. In addition, he will be paid a salary of \$1000 per month inclusive of any holiday pay.

On top of this, the employee will be provided with a vehicle plus fuel card for travelling during the stay which equivalent to \$7,000 p.a.

7 Termination

This agreement may be terminated by either party giving one months' notice, with wages being paid up to date of termination only. In instances of serious misconduct the employer may terminate the contract without notice. The employer shall observe the rules of procedural fairness which apply to termination of employment.

[15] The "Schedule First" set out the job responsibilities as follows:

- Attending to daily Prakash of Sri Guru Granth Sahib
- Reciting Rehras path and Kirtans in the evening
- Distribution of "prashad" to the worshipers
- Teaching Punjabi and Gurbani Kirtan to the children
- Attend all Diwan at the Gurudwara and at people's homes
- Preparing "kadah prashad"
- Assist with cleanliness of the premises
- Maintaining good relations with the Committee and the public.

***What duties did the Applicants perform and what time was spent doing so?***

[16] The Respondent failed to keep a wages and time record. This failure has prejudiced the Applicants' ability to bring an accurate claim under s 131. However, having heard the evidence I am not satisfied that the Applicants worked 70 hours per week. Taking into account the inconsistencies between the evidence of the witnesses

as to the duties that were undertaken by the Applicants, and the length of time they spent doing these duties, I make the following findings in terms of the duties performed by the Applicants and the time taken to perform those duties.

*Morning Prayers and singing*

[17] Aside from the Applicants, each witness that appeared before the Authority provided different evidence as to the length of time the morning prayers and singing took to complete. In submissions filed on behalf of the Respondent it conceded a period of two hours per day should be allocated to this duty in accordance with the Applicants' IEA. I accept this submission.

*Evening Prayers and singing*

[18] The evening service started around 5.30 pm or 6 pm depending on the time of sunset. The length of the service varied. In submissions filed on behalf of the Respondent it conceded a period of two hours per day should be allocated to this duty in accordance with the Applicants' IEA. I accept this submission.

*Sunday lunch time service*

[19] The parties' evidence of the duration of the Sunday Service was largely consistent under questioning. I find the length of the Sunday Service was 3.5 hours not 3 hours as submitted by the Respondent.

*Making of Parshaad and distribution*

[20] Harpreet's oral evidence as to how often he made Parshaad was vague and uncertain. He has failed to establish that this was a duty he performed.

[21] Jaswinder said he helped the third member of their group, Harjit, prepare the Parshaad in the morning. I am satisfied he did this. All witnesses agreed it would take approximately 30 minutes each day to make the Parshaad including washing the utensils.

[22] I find, on balance that the devotees served the Parshaad to themselves and this was not distributed by the Applicants.

### *Teaching the children*

[23] Although the IEA stated that the Applicants were to teach the children each day for 2 hours, all parties agree that the teaching only occurred on a Saturday afternoon. The Respondent now agrees with the Applicants' evidence that they spent 3 hours of time attending to this duty each week.

### *Cleaning*

[24] The IEA provided that the Applicants would "assist with cleanliness of the premises". Under questioning Harpreet accepted that only 1 person from the Group would be required to clean for two hours each Friday. He said this meant he only undertook cleaning every third week. I am satisfied that the Applicants have proven, on balance, that they did do some cleaning as part of their duties. This equates to 40 minutes each per week.

### *Langer Service - the lunch and evening meals and making of the flatbread*

[25] The Applicants said they spent 2 hours preparing the Langer, i.e. the lunch/dinner food, on Monday to Saturdays and 1.5 hours on a Sunday. They spent a further 3 hours every weekday distributing the Langer, and washing the utensils and 1 hour on a Saturday and 3.5 hours on a Sunday attending to these duties. This is disputed by the Respondent who maintained that it did not offer a Langer service on weekdays and on weekends and special occasions it engaged a Chef to undertake this work.

[26] I find the Applicants' weekly duties did not involve preparation or distribution of Langer to devotees. Any Langer that they prepared was for their personal use. However, I do accept that on some special occasions they assisted with the distribution of the Langer and cleaning up. Any attendances in that regard have been taken into account when fixing the times set out for their attendances in relation to ceremonies.

[27] For completeness, I acknowledge the Applicant's support person's evidence that he viewed Langer being served at the Temple on weekdays. However, this was before the Applicants were employed. It is also noteworthy that, unlike the other duties the Applicants said they performed, the Langer service was not a duty that was specified in the IEA.

### *Attending ceremonies at the Temple and at people's homes*

[28] The witnesses agree that part of the Applicants' duties involved attending ceremonies at the Temple and at people's homes. At the Authority's request a diary was presented by Kewal Singh, the person responsible for the Temple's bookings, which showed the ceremonies and special events that took place during the Applicants' employment and which they were involved with.

[29] The diary showed that eight Sukhmani Path, two Anand Karaj (wedding ceremonies) and two Akhand Path (48 hour ceremony) were conducted at the Temple. In addition, eight Sukhmani Path and two Akhand Path (48 hour ceremony) were conducted in Devotees' homes.

[30] Aside from the Akhand Path ceremony, that takes place over a 48 hour period, it appears from the diary notes that the time spent by the Applicants undertaking the other ceremonies fluctuated. One entry for the Sukhmani Path shows it took place over 2 hours and 15 minutes. Other entries show that this ceremony was conducted as well as the serving of Langer and/or singing of the Kirtan which would suggest a longer period of time.

[31] Doing the best that I can in the circumstances I allocate:

- a. 2.5 hours for each Sukhmani Path ceremony, aside from the occasion where an express start and finish time was noted. 13 ceremonies took place prior to 1 April 2018 (2.5 hours multiplied by 13 ceremonies equals 32.5 hours) plus the additional 2 hour and 15 minute ceremony. 2 further ceremonies took place in the period from 1 April 2018 onwards equating to 5 hours.
- b. 2.5 hours to each Anand Karaj ceremony. 2.5 hours multiplied by 2 ceremonies equals 5 hours. Both ceremonies occurred prior to 1 April 2018.
- c. 48 hours to each Akhand Path ceremony less the hours already taken into account for the morning and evening services over the 48 hours (8 hours). 40 hours multiplied by 4 ceremonies equals 160 hours. All ceremonies occurred prior to 1 April 2018.

#### *CCTV monitoring*

[32] The Applicants each said that it was part of their role to manage the CCTV cameras to ensure the Temple was secure. As a group they took turns to monitor the

CCTV cameras while the others attended to other duties. The Respondent said that this was untrue. They said the CCTV was not monitored. It was simply there to record events so that they would have evidence should it be needed.

[33] The Applicants have not established, on balance, that monitoring the CCTV cameras was part of their duties.

***Calculation of wage arrears owed to the Applicants for the duties performed***

*Morning and evening prayers and teaching the children*

[34] I am satisfied that payment for the time spent undertaking the morning and evening prayer duties, and teaching the children on a Saturday, was included in the entitlements expressly provided for in Clause 5 of the IEA. No additional payment beyond the amount specified in Clause 5 is required.

[35] The Applicants worked from 27 October 2017 to 7 May 2018. A total of 27.5 weeks. Pursuant to Clause 5 of the IEA they were each entitled to receive \$1,000 per month (\$230.77 per week). Multiplying 27.5 weeks by \$230.77 I reach a figure of \$6,346.17 gross.

[36] During the investigation the Respondent agreed that it had only paid Harpreet \$2,000 towards his outstanding wages. This was paid in two cash instalments of \$1,000. The first was around the end of November 2017 and the second was paid on 5 April 2018. In January 2018 Jaswinder was paid a sum of \$1,000 in cash.

[37] Taking into account the foregoing figures the Respondent is ordered to pay Harpreet a sum of \$4,346.17 gross for wage arrears and Jaswinder a sum of \$5,346.17 gross within 14 days of the date of this determination.

*Sunday lunch time service, the making of the Prashaad and the Applicants' attendances in relation to ceremonies*

[38] I am satisfied that the entitlements listed in Clause 5 did not include payment for any of the additional duties that the Applicants were required to undertake i.e. the Sunday lunch time service, the making of the Prashaad by Jaswinder and the Applicants' attendances in relation to the various ceremonies.

[39] I am fortified in this finding by the evidence provided by Kewal Singh. As well as being responsible for bookings, the evidence was that Kewal was also responsible for payment of the Applicants' wages. Under questioning, he said that payment for the various ceremonies attended by the Applicants was over and above the salary specified in the Applicants' IEA. He said it was agreed that the Respondent would pay each Applicant \$150 for each special occasion and \$400-\$500 for each Akhand Path ceremony.

[40] I was not persuaded that an agreement that the Applicants would be paid these sums of money was ever reached. Certainly, no payment of these sums was ever made to the Applicants by the Respondent although they acknowledge they were paid a combined sum amongst the three members of the group of \$2,800 by devotees when they attended the ceremonies. The Respondent accepted under questioning that the donations the Applicants and the third member of their group received were not part of their remuneration.

[41] In the circumstances, and in the absence of wage records, I calculate the Applicants' entitlements for the additional duties they undertook by using the minimum wage payable at the time of their employment. For the avoidance of doubt, minimum wage payable for the period 27 October 2017 to 31 March 2017 was \$15.75 and for the period from 1 April 2018 to 7 May 2018 was \$16.50.

[42] During Harpreet's employment I have found he attended to the following additional duties during the period 27 October 2017 to 31 March 2017 for which he was not paid:

- a. Sunday lunch time services – 3.5 hours multiplied by 22 weeks equals 77 hours. Multiplied by \$15.75 equals \$1,212.75.
- b. Attendance at ceremonies - 199 hours and 45 minutes multiplied by \$15.75 equals \$3,146.06.

[43] For the period 1 April to 7 May 2018 Harpreet attended to the following duties for which he was not paid:

- a. Attended to Sunday lunch time services – 3.5 hours multiplied by 5.5 weeks equals 19 hours and 15 minutes. Multiplied by \$16.50 equals \$317.62.

- b. Attendance at ceremonies - 5 hours multiplied by \$16.50 equals \$82.50.

[44] Adding the combined amounts for the additional duties I reach a figure of \$4,758.93. The Respondent is ordered to pay Harpreet the sum of \$4,758.93 gross within 14 days of the date of this determination.

[45] During Jaswinder's employment I have found he attended to the following additional duties during the period 27 October 2017 to 31 March 2017 for which he was not paid:

- a. Sunday lunch time services – 3.5 hours multiplied by 22 weeks equals 77 hours. Multiplied by \$15.75 equals \$1,212.75.
- b. Attendance at ceremonies - 199 hours and 45 minutes multiplied by \$15.75 equals \$3,146.06.
- c. Making the Parshaad - 2.5 hours preparing the Parshaad each week multiplied by 22 weeks equals 55 hours. 55 hours multiplied by \$15.75 equals \$866.25.

[46] For the period 1 April to 7 May 2018 Jaswinder attended to the following duties for which he was not paid:

- a. Sunday lunch time services – 3.5 hours multiplied by 5.5 weeks equals 19 hours and 15 minutes. Multiplied by \$16.50 equals \$317.62.
- b. Attendance at ceremonies - 5 hours multiplied by \$16.50 equals \$82.50.
- c. Making the Parshaad - 2.5 hours preparing the Parshaad each week multiplied by 5 weeks equals 12.5 hours. 12.5 hours multiplied by \$16.50 equals \$206.25.

[47] Adding the combined amounts for the additional duties I reach a figure of \$5,831.43. The Respondent is ordered to pay Jaswinder the sum of \$5,831.43 gross within 14 days of the date of this determination.

**What monies are owed to the Applicants for public holidays and alternative holidays?**

*Public Holidays worked*

[48] The Statement of Problem pleads that the Applicants worked on nine public holidays for a total of 90 hours for which they were not paid. While acknowledging the Applicants worked on 9 public holidays, the Respondent maintains that the Applicants only worked 1 hour on each of these days.

[49] The Applicants' oral evidence was that they worked the same hours on public holidays as on any other day they worked as the public holidays were not celebrated in the Temple. Taking this evidence into account, as well as photographs showing the Applicants were away from the Temple for parts of some public holidays and the absence of holiday and leave records, I find Harpreet worked 4 hours on each public holiday undertaking the morning and evening prayers and Jaswinder worked 4 hours and 30 minutes undertaking the morning and evening prayers and making the Prashaad. No ceremonies were undertaken on the public holidays at issue.

[50] The Applicants were entitled to receive time and a half for the hours that they worked on each public holiday.<sup>1</sup> I have already taken into account payment of the ordinary hours they worked in the calculations that I have undertaken for wage arrears. However, I have not taken into account half that amount again.

[51] Multiplying the hours Harpreet worked (4 hours) by the number of public holidays (9) I reach a total of 36 hours. Multiplying 36 hours by half of Harpreet's hourly rate (\$8.25) I come to \$297 gross. The Respondent is ordered to pay to Harpreet the sum of \$297 gross under s 50 of the Holidays Act within 14 days of the date of this determination.

[52] Multiplying the hours Jaswinder ordinarily worked (4.5 hours) by the number of public holidays (9) I reach a total of 40.5 hours. Multiplying 40.5 hours by half of Jaswinder's hourly rate \$8.25 I come to \$334.12 gross. The Respondent is ordered to pay to Jaswinder the sum of \$334.12 gross under s 50 of the Holidays Act within 14 days of the date of this determination.

#### *Payment for Alternative Holidays*

---

<sup>1</sup> Holidays Act 2003, s 50.

[53] The Applicants did not receive alternative holidays for any of the 9 public holidays that they worked prior to their termination. They are therefore entitled to receive payment for these days at the rate of their relevant daily pay or their average daily pay for their last day of employment.<sup>2</sup>

[54] As it is not possible or practicable to determine the Applicants' relevant daily pay under s 9(1) of the Holidays Act, I have used the formula set out in s 9A of that Act.

[55] Harpreet's gross earnings, taking into account the matters set out in s 14 of the Act, were \$15,472.10. Dividing those earnings by the number of days he earned those gross earnings (193 days) I reach an average daily pay of \$80.16 gross. Multiplying \$80.16 gross by 9 days comes to a sum of \$721.44. The Respondent is ordered to pay Harpreet the sum of \$721.44 gross under s 60 of the Holidays Act. Payment of this sum must be made within 14 days of the date of this determination.

[56] Jaswinder's gross earnings, taking into account the matters set out in s 14 of the Act, were \$16,581.72. Dividing those earnings by the number of days he earned those gross earnings (193 days) I reach an average daily pay of \$85.91 gross. Multiplying \$85.91 gross by 9 days comes to a sum of \$773.19. The Respondent is ordered to pay Jaswinder the sum of \$773.19 gross under s 60 of the Holidays Act. Payment of this sum must be made within 14 days of the date of this determination.

### **What monies are owed to the Applicants for holiday pay?**

[57] Calculation of the Applicants' annual leave entitlements must be made in accordance with s 23 of the Holidays Act 2003. This section applies where the employment of an employee comes to an end and the employee is not entitled to annual holidays because he or she has worked for less than 12 months. In such a case an employer must pay the employee 8% of the employee's gross earnings since the commencement of employment, less any amount paid to the employee for annual holidays taken in advance.

[58] Harpreet's gross earnings total \$15,472.10. 8% of this sum is \$1,237.76 gross. The Respondent is ordered to pay Harpreet the sum of \$1,237.76 gross for unpaid

---

<sup>2</sup> Holidays Act 2003, s 60(2).

holiday pay. Payment of this sum must be made within 14 days of the date of this determination.

[59] Jaswinder's gross earnings total \$16,581.72. 8% of this sum is \$1,326.53 gross. The Respondent is ordered to pay Jaswinder the sum of \$1,326.53 gross for unpaid holiday pay. Payment of this sum must be made within 14 days of the date of this determination.

### **Issue Two: Unjustified disadvantage**

[60] Under s 103(1)(b) an employee may commence a personal grievance claim while still employed or after the employment has terminated. This is if one or more of the employee's conditions of the employment have been affected to the employee's disadvantage by an unjustifiable action by the employer.

[61] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[62] The Statement of Problem pleads a number of disadvantages. I shall address each in turn.

*Failure to pay wages, pay for statutory holidays and failure to pay holiday pay on termination*

[63] The Applicants worked for the Respondent for 27.5 weeks for very little financial reward. I was not persuaded by the Respondent's evidence that the Applicants requested it to hold on to their earnings. Such a request was at odds with their desperate need to provide financial assistance to their families in India. The Applicants were entitled to be paid monthly for their services. The Respondent's failure to do so created an unjustified disadvantage to their employment.

*Breach of Minimum wage requirements*

[64] Harpreet was only paid \$2,000 for the work he performed. Jaswinder was paid \$1,000. Taking into account the hours that I have found they worked, it is clear they were paid below minimum wage. The Respondent's failure to pay minimum wage created an unjustified disadvantage to the Applicants' employment.

*Failure to pay travel expenses*

[65] Pursuant to the IEA the Respondent agreed to pay to the Applicants \$3,000 for their travel expenses. The Respondent did not do this.

[66] The Respondent's failure to meet its contractual obligations created a disadvantage to the Applicants' employment that was unjustified. It resulted in the Applicants being unable to repay loans that they had taken out through family members to pay for their travel leading to them suffering additional costs, anxiety, stress and humiliation.

*Failure to provide vehicle and fuel card*

[67] Pursuant to the IEA the Respondent agreed to provide the Applicants with a vehicle and a fuel card. This was said to have a value of \$7,000. The Respondent did not do this.

[68] The Respondent tried to justify its breach to the Authority by saying that the Applicants did not have a licence to drive in NZ. However, this was not the case. Had the Respondent asked the Applicants it could have ascertained this. The Respondent's breach of the IEA created a disadvantage to the Applicant's employment that was unjustified. A failure to provide the agreed vehicle led to the Applicants being unable to leave the Temple without the assistance of a Committee Member or Devotee.

*Failure to provide accommodation to the standard agreed*

[69] The IEA provides that the Applicants would be provided with accommodation and meals plus any medical expenses. This was said to have a value of \$15,000 per annum. The Respondent breached this term.

[70] In terms of their accommodation, the Applicants said they shared one room between the two of them. There was no furniture, only 2 mattresses and a mirror on a

wall. There were two windows. One had a curtain and the other had newspapers covering it. The room had a leaky roof that leaked water onto Jaswinder's mattress. Despite complaints being made, the holes in the roof were not fixed although both men were provided with new mattresses.

[71] The water leak led to the Applicants' bedding becoming wet and the room becoming very damp. The dampness led to bug infestations in the Applicants' mattresses that resulted in Jaswinder developing an infection in his legs. I viewed the scars from this infection. Both men also suffered from colds and sore throats.

[72] Jaswinder said that his requests for medication to relieve the infection in his legs were declined. Both men spoke of being unwell on their arrival into New Zealand and being refused medication other than paracetamol. Neither was allowed to take time off work despite their sickness.

[73] The Respondent's breaches of the IEA clearly unjustifiably disadvantaged the Applicants.

### **Remedy for unjustified disadvantage**

#### *Loss of benefits*

##### *Travel Expenses*

[74] The evidence was that the Applicants each paid 79,500 Rupees (NZ \$1765) for a return flight to India. I have viewed the receipts. No other documentary evidence of travel related expenses were provided but having heard from the Applicants I am satisfied, on balance, that they incurred additional travel expenses including for the cost of a taxi from their home to the Airport in India and for their New Zealand visas. They also incurred interest costs on the monies they had borrowed to fund their travel expenses.

[75] The Respondent expressly agreed in the IEA to pay the Applicants \$3,000 towards their travel expenses. They were not paid this benefit. The Respondent is ordered to pay each Applicant the sum of \$3,000 for travel expenses within 14 days of the date of this determination.

##### *Accommodation*

[76] The Statement of Problem pleads that the accommodation provided to the Applicants was only worth \$140 per week and no medical expenses were provided.

[77] This claim was consistent with the evidence provided by the Respondent's witnesses. Harnek Singh said he thought the Applicants' accommodation was worth about \$150 per week (\$75 each). Jaswinder Singh said he thought the accommodation was worth at least \$100 per week (\$50 each).

[78] Taking into account food I accept, on balance, that \$140 per week each was the value of the accommodation, and food, provided. No medical expenses were paid.

[79] The Respondent expressly agreed in the IEA to provide the Applicants with accommodation and medical expenses that had a value of \$15,000 per annum (\$288 per week) each. The Applicants received a benefit worth \$140 per week each, a difference of \$148. Multiplying \$148 by 27.5 weeks I reach a figure of \$4,070.

[80] The Respondent is ordered to pay each Applicant the sum of \$4,070 as reimbursement of this lost benefit within 14 days of the date of this determination.

#### *Vehicle and fuel card*

[81] The Respondent expressly agreed in the IEA to provide the Applicants with the use of a vehicle and a fuel card for the duration of their stay. This was said to have a value of \$7,000 per annum (\$134.62 per week). They did not receive this benefit. Multiplying \$134.62 by 27.5 weeks I reach a figure of \$3,702.05.

[82] The Respondent is ordered to pay each Applicant the sum of \$3,702.05 within 14 days of the date of this determination.

#### ***Section 123(1)(c)(i) Compensation***

[83] The Applicants each claim compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) in the sum of \$10,000. For the reasons that follow I am satisfied that the evidence warrants a global award of this sum in favour of each Applicant for the unjustified disadvantages that they endured.

[84] The Respondent's failure to pay the Applicants their wages on time, reimburse their travel expenses, pay for medical assistance, and provide them with a vehicle, led to both men feeling stressed and anxious. They had each borrowed money from family

and friends to fund their travel and felt embarrassed being unable to repay these loans. Demands for repayment led to them avoiding calling their family in India for fear of being asked to repay the money. Jaswinder also said he was being charged interest for the money he had borrowed. He said he has still not repaid this debt.

[85] The men also spoke of being scarred of the consequences of continuing to demand payment from the Respondent. The Respondent had taken their passports on their arrival and they were concerned it would cancel their visas and send them back to India. They both also endured issues with their health due to the Respondent's failure to provide them with medical assistance.

[86] The Respondent is ordered to make payment to each Applicant in the sum claimed of \$10,000 pursuant to s 123(1)(c)(i). Payment must be made within 14 days of the date of this determination.

### **Contribution**

[87] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.<sup>3</sup>

[88] I am satisfied the Applicants did not contribute towards their personal grievances. I make no deduction to the remedies I have awarded.

### **Penalty**

#### *Applicable law*

[89] The legal framework for assessing and fixing a penalty, having regard to the statutory requirements in s 133A of the Act and the full Court's judgment in *Borsboom v Preet*, was recently summarised by the Court in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Limited*.<sup>4</sup>

---

<sup>3</sup> Employment Relations Act 2000, s 124.

<sup>4</sup> *Nicholson v Ford* [2018] NZEmpC 132 at [18]; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19]; *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143.

[90] The Court in those cases confirmed the considerations as:

- a. The object of the Act as stated in s 3 of the Act (statutory consideration 1)
- b. The nature and extent of the breach (statutory consideration 2)
- c. Whether the breach was intentional, inadvertent, or negligent (statutory consideration 3)
- d. The nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach (statutory consideration 4)
- e. Whether the person or entity in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (statutory consideration 5)
- f. The circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (statutory consideration 6)
- g. Previous conduct (statutory consideration 7)
- h. Deterrence, both particular and general (*Preet* additional consideration 1)
- i. Degree of Culpability (*Preet* additional consideration 2)
- j. Consistency of penalty awards in similar cases (*Preet* additional consideration 3)
- k. Ability to pay (*Preet* additional consideration 4)
- l. Proportionality of outcome to breach (*Preet* additional consideration 5)

***Statutory consideration 1 – the object of the Act***

[91] The objects of the Act are set out in Section 3.

[92] Of relevance to the current investigation is the objective to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and the employment relationship. The Respondent failed to advance these objectives.

- a. Its actions undermined any prospect of mutual obligations of trust and confidence existing in the employment relationship.
- b. There was clearly an inequality of power. The Applicants were both migrant workers from India. They spoke no English and their work visas were tied to the Respondent. They were in a particularly vulnerable position not only because their employment was linked to their work visas with the Respondent but also because they were unfamiliar with New Zealand laws and regulations. In addition, the Respondent had taken both of their passports upon their arrival in New Zealand and refused to provide them with a vehicle as promised in their IEA.
- c. The failures to pay minimum wage and holiday pay undermined employment standards.

***Statutory consideration 2 – the nature and extent of the breach***

[93] An analysis under this step involves four sub-steps – identify the number of breaches; identify the nature of each breach; identify the maximum penalty for each of the identified breaches; and consider whether global penalties should apply.<sup>5</sup>

[94] To determine the number of breaches, I have applied the approach taken by the Court in *Nicholson*, applying *Preet*, and *Daleson*.<sup>6</sup> Applying this approach I find there were 8 breaches, namely:

- a. Two breaches of the IEA – the Respondent breached Clause 5 of the IEA on multiple occasions in relation to each Applicant. However, I consider it appropriate to globalise the multiple breaches into one breach for each Applicant.
- b. Two breaches of s 6 of the Minimum Wage Act - the Respondent's breaches were of a regularly repeated nature and therefore I globalise these to a single penalty in respect of each employee.

---

<sup>5</sup> *Daleson*, above n 4, at [20].

<sup>6</sup> *Nicholson*, above n 1, at [153]-[155] and [157] and *Daleson Investment Limited*, above n 1, at [23].

- c. Two breaches of s 50 and s 60 of the Holidays Act - The breaches of s 50 and s 60 were of a regularly repeated nature and therefore give rise to a single globalised penalty in respect of each employee.
- d. Two breaches of s 23 of the Holidays Act - The breaches of s 23 are not sufficiently interrelated with the s 50 and s 60 breaches so as to deal with them under one head.

[95] The maximum total penalty available in respect of the 8 breaches is \$20,000 per breach.<sup>7</sup> The maximum total penalties are \$160,000.

***Statutory consideration 3 – Whether the breach was intentional, inadvertent, or negligent***

[96] There could really be no other inference to be drawn in this case than that the breaches were intentional. The Respondent deliberately and knowingly underpaid each Applicant and intentionally breached the IEA.

[97] It was apparent from the Authority's questioning of Harnek Singh that the Respondent never intended to comply with all terms contained in the IEA. Harnek confirmed that the terms contained in the IEA in relation to payment and hours were drafted by the Respondent to comply with Immigration requirements.

[98] The Respondent has been operating for a number of years and during that time has regularly employed migrant workers. It is hardly tenable that they did not know the minimum standards of employment required for their employees. Indeed, it appears they tried to conceal the breaches by filing false returns with IRD that advised they were paying the Applicants. A failure to keep wage and time and holiday and leave records appeared to be a further attempt to cover the abuse.

[99] In addition, even after the Respondent received correspondence from the Applicants' representatives raising concerns about the non-payment of wages in May 2018, and after a Statement of Problem was filed with the Authority in December 2018, it failed to rectify its breaches. These matters add to the seriousness of the breaches.

***Statutory consideration 4 – The nature and extent of any loss or gain***

---

<sup>7</sup> Minimum Wage Act 1983, s 10; Employment Relations Act 2000, s 135(2)(b), Holidays Act 2003, s 75.

[100] Neither Applicant has received any payment towards the outstanding monies that are owed to them. Each has lost the use of the money they were entitled to at the time it became due. In comparison, the Respondent gained financially by retaining use of these monies since that time. Through its breaches the Respondent was able to reduce its expenses.

***Statutory consideration 5 – Steps to mitigate effects of the breach***

[101] At the investigation meeting the Respondent accepted responsibility for the breaches and was remorseful.

***Statutory consideration 6 – Circumstances of the breach and any vulnerability***

[102] I have already considered the circumstances of the breach and any vulnerability under statutory heads 1 and 2.

***Statutory consideration 7 – Previous conduct***

[103] I am aware of no other previous conduct by the Respondent.

***Preet additional consideration 1 - Deterrence***

[104] Six of the breaches in this case are minimum standards. As such it is important that a penalty is set at a level where it deters employers from delaying payment of minimum entitlements to a time that suits the employer. However, it would not be appropriate to penalise the Respondent so heavily that it is unable to continue to operate.

***Preet additional consideration 2 – Degree of culpability***

[105] This consideration involves a consideration of the severity of the breach to establish a provisional starting point for the penalty. This includes an adjustment for aggravating and mitigating factors in relation to the breaches.

***Aggravating factors***

[106] There are several factors that increase the Respondent's culpability that I have already considered under the statutory considerations. For example, the duration of the breaches, the intentional nature of the breaches, the Applicants' loss of use of the money

they were entitled to at the time it became due, the Respondent's financial gain by retaining the funds, and the Applicants' vulnerability.

[107] These aggravating features, while serious, are not the most serious conceivable breaches so the starting point for deductions or credits should not be the maximum penalty.<sup>8</sup>

[108] I assess the overall seriousness of the IEA and Holidays Act breaches to be less than for the breaches of the Minimum Wage Act. This is because the arrears not paid to the employees for working on public holidays, at the end of their employment, and for the fixed sum entitlements under the IEA, were not as consistent and significant as the substantial underpayments of regular wages.

[109] For the IEA and Holidays Act breaches I take a starting provisional point of 60% of the maximum for each of the breaches identified. This comes to a figure of \$72,000. For the breaches of the Minimum Wage Act I take a starting point of 70% which comes to a figure of \$28,000.

[110] The combined provisional starting point total is \$100,000.

#### *Ameliorating factors*

[111] From this sum I must consider any ameliorating factors. A discussion of these matters is set out at statutory consideration five. I allow a discount of 20%. This discount applies to all breaches and takes into account the ongoing need for deterrence.

[112] The foregoing calculations lead to a potential penalty of \$80,000.

#### ***Preet additional consideration 3 – Consistency***

[113] A review of Court and Authority imposed penalties show a number of significant orders where breaches of minimum wage and holiday pay have occurred.

[114] *Preet* involved two breaches of the Minimum Wage Act, four breaches of the Holidays Act and two other breaches. The Court ordered the employers of the five employees to pay a combined penalty of \$100,000.

---

<sup>8</sup> *Preet*, above n 4, at [167].

[115] In *A Labour Inspector v Prabht Limited & Anor* – Prabht was ordered to pay \$100,000 for, inter alia, two breaches of minimum entitlement provisions contained in the Minimum Wage Act and the Holidays Act relating to its three employees. The breaches involved a sum of around \$67,000 that was unpaid over a period of two or so years.<sup>9</sup>

[116] In *Daleson* combined penalties of \$40,000 were awarded in circumstances where there were two breaches under the Minimum Wage Act, four under the Holidays Act and one breach for the failure to provide a written employment agreement. However, the Court noted that a “penalty in excess of this figure would not be inappropriate and \$40,000 might be regarded as generous”.

[117] In two recent Authority decisions, each involving 2 migrant works, the Authority awarded \$120,000 in penalties in one instance involving breaches of the Minimum Wage Act, Holidays Act and Wages Protection Act.<sup>10</sup> In another case it awarded \$30,000 where the employer was a sole trader and therefore only liable for half the maximum amount compared to a company.<sup>11</sup>

[118] In *A Labour Inspector v Paramjeet Singh Parihar in partnership with Kuldip Kaur Parihar trading as Super Liquor Flagstaff and Super Liquor Hillcrest*, a case that involved similar breaches as in *Prabht*., but double the employees, the Court ordered the partners (who were treated as individuals) to pay a combined sum of \$200,000.<sup>12</sup>

[119] Taking into account these cases, and distinguishing these from the present case in terms of the duration of the breaches, the quantum of the breaches, and the number of employees involved, I reduce the potential penalties under this head to \$50,000.

#### ***Preet additional consideration 4 – Ability to pay***

[120] No financial or other information was provided by the Respondent to support an inability to pay a penalty. In answer to questions from the Authority as to its ability

---

<sup>9</sup> *A Labour Inspector v Prabht Limited & Anor* [2018] NZEmpC 110.

<sup>10</sup> *A Labour Inspector & Ors v Pegasus Energy Limited & Anor* [2018] NZERA Wellington 26.

<sup>11</sup> *A Labour Inspector v Xu t/a Golden Spring Takeaway* [2019] NZERA Wellington 22.

<sup>12</sup> *A Labour Inspector v Paramjeet Singh Parihar in partnership with Kuldip Kaur Parihar trading as Super Liquor Flagstaff and Super Liquor Hillcrest* [2019] NZEmpC 145.

to pay a penalty, the Respondent advised it had the ability to do so. I therefore make no reduction under this head.

***Preet additional consideration 5 – Proportionality of outcome***

[121] This final step involves the proportionality or totality test, in which the Authority must consider whether the provisional penalty reached is proportionate to the seriousness of the breaches, and harm occasioned by them. This step is to ensure that the imposition of a penalty and the amount of it is just in all the circumstances.

[122] Standing back, and assessing the figure proposed to be imposed on the Respondent, I conclude that an appropriate penalty is \$40,000. In doing so I have considered the two factors that the Court has suggested are of particular relevance in the proportionality exercise, namely, the proportionality of the final penalty to the amount originally at issue and whether there is any real prospect that the final amount will be repaid.<sup>13</sup> I have also considered the need for deterrence.

[123] I order the Respondent to pay a sum of \$40,000 by way of penalty for its 2 breaches of the IEA, its 2 breaches of the Minimum Wage Act and its 4 breaches of the Holidays Act. This sum is to be paid to the Employment Relations Authority within 28 days of the date of this determination. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

**Counterclaim**

*The claim*

[124] The Respondent claims the Applicants breached their IEA, and their duty of good faith, by abandoning their employment on 7 May 2018 without providing any notice and by disclosing confidential information belonging to the Respondent to a competitor. In terms of the later it pleaded that the Applicants leaked information to third parties that led to the theft of five holy books and other items of Sikh faith belonging to it.

---

<sup>13</sup> *Preet*, above at n4, at [190] and *Daleson*, above at n 4, at [60].

[125] The Respondent claims recovery of various amounts for the cost of replacement of the holy books and other items of Sikh faith, the cost involved in having people bring new holy books from India, loss of income and various other claims.

[126] For completeness I record that the Respondent provided no evidence of any of the losses it claimed. In addition, despite its pleading, the evidence was that the Respondent recovered the stolen holy books and other items of Sikh faith from the thieves. Pending recovery of the stolen items, the Respondent used online versions of the Holy Books. No evidence of any loss of earnings was provided and Harjit Singh said he was not paid more than his contractual entitlement of \$1,000 per month.

### *Analysis*

[127] For the reasons that follow I find that the Respondent has not established that it has a claim against the Applicants.

[128] First, I was not persuaded that the Respondent's claim for breach of confidentiality had any merit. The oral evidence provided by the Respondent's witnesses was based on suspicions not backed by any actual evidence including the CCTV footage of the incident that I viewed.

[129] There was no evidence (as opposed to suspicion) that the Applicants provided any information, confidential or otherwise, to the thieves that undermined the Respondent's interests or caused it damage or loss. Nor was there any evidence that they encouraged the thieves to steal the Holy Books or that they assisted the thieves either before or during the theft. It is also noteworthy that, following the theft, the Respondent reported the incident to the Police. No allegation was made that the Applicants were in anyway connected with the theft.

[130] Second, I was not satisfied there was any breach of good faith. During the course of the investigation meeting there was a suggestion that the Applicants breached their duty of good faith by not doing more to stop the thieves. However, under questioning from the Authority, Harnek Singh sensibly conceded that there was nothing more the Applicants could have done. He said the Applicants, through their leader Harjit Singh, had called him a couple of times as well as another committee member. He said he told everyone, including the Secretary who was present when the thieves arrived, not to say anything and to stay away. He said this advice was consistent with that provided to him by the Police.

[131] Third, the Respondent claimed it was unjustifiably disadvantaged by the actions of the Applicants and claimed compensation under s 123(1)(c)(i). This is not a remedy available to an employer.

[132] Fourth, while it is clear that the Applicants did not provide notice of termination to the Respondent, given the fixed nature of the IEA, they were not required to do so. Pursuant to Clause 1 of the IEA the agreement came to an end in May 2018. Neither party agreed to an extension of this term in writing.

### **Costs**

[133] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[134] If they are not able to do so and an Authority determination on costs is needed the Applicants may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Respondent will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[135] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>14</sup>

### **Outcome**

[136] The overall outcome that I have reached is:

- A. The Applicants suffered unjustified disadvantages to their employment.
- B. The Respondent is ordered to pay to Harpreet Singh the following amounts within 14 days of the date of this determination:
  - a. The combined sum of \$9,105.10 gross for wage arrears under s 131 of the Employment Relations Act.

---

<sup>14</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

- b. The sum of \$297 gross under s 50 of the Holidays Act.
  - c. The sum of \$721.44 gross under s 60 of the Holidays Act.
  - d. The sum of \$1,237.76 gross under s 23 of the Holidays Act.
  - e. The combined sum of \$10,772.05 under s 123(1)(b) of the Employment Relations Act.
  - f. The sum of \$10,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.
- C. The Respondent is ordered to pay to Jaswinder Singh the following amounts within 14 days of the date of this determination:
- a. The combined sum of \$11,177.60 gross for wage arrears under s 131 of the Employment Relations Act.
  - b. The sum of \$334.12 gross under s 50 of the Holidays Act.
  - c. The sum of \$773.19 gross under s 60 of the Holidays Act.
  - d. The sum of \$1,326.53 gross under s 23 of the Holidays Act.
  - e. The combined sum of \$10,772.05 under s 123(1)(b) of the Employment Relations Act.
  - f. The sum of \$10,000 under s 123(1)(c)(i) of the Employment Relations Act.
- D. The Respondent must pay a sum of \$40,000 by way of penalty for its 2 breaches of the IEA, its 2 breaches of the Minimum Wage Act and its 4 breaches of the Holidays Act. This sum is to be paid to the Employment Relations Authority within 28 days of the date of this determination. The Employment Relations Authority will then pay this sum into a Crown Bank Account.
- E. The Respondent's counterclaim is dismissed.
- F. Costs are reserved.

**Direction**

[137] During the course of the investigation meeting it became clear that the Respondent had provided IRD with monthly earning schedules during the Applicants' employment that were inconsistent with the amounts the parties acknowledged had been paid to the Applicants. I therefore direct that a copy of my determination be provided to the IRD.

Jenni-Maree Trotman  
Member of the Employment Relations Authority