

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 290
3023143

BETWEEN SANJAY KUMAR
Applicant

AND KENNY OMEN LIMITED
FORMERLY KNOWN AS
PUNJABI DHABA LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Maurice Austin, advocate for the Applicant
Hardeep Singh, advocate for the Respondent

Investigation Meeting: 12 December 2018 in Christchurch

Submissions and further On the day and from applicant 11 February 2019
information received : Further information provided January 2019

Determination: 16 May 2019

DETERMINATION OF THE AUTHORITY

- A Within 28 days of the date of this determination Kenny Omen Limited formerly Punjabi Dhaba Limited is to pay to Sanjay Kumar:**
- (i) The sum of \$10,394.28 gross or \$8,864.09 net being unpaid wages.**
 - (ii) The sum of \$3,633 gross for working on public holidays and alternative days.**
 - (iii) The sum of \$7,361.40 gross for holiday pay.**
- B Interest is ordered to be paid on the gross amount owing of \$21,388.68 assessed under s87(3) of the Judicature Act 1908 at 5%. Proceedings were lodged before the commencement of the Interest on Money Claims Act 2016. Interest to the date of this determination is \$1,620.60 and will continue to accrue at a daily rate of \$2.92 until payment.**

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

Employment Relationship Problem

[1] The proceedings were commenced against Punjabi Dhaba Limited, a company duly incorporated on 8 June 1999. A search of the companies register showed a name change for Punjabi Dhaba Limited to Kenny Omen Limited on 7 January 2019. The intituling has been changed to reflect that name change.

[2] Sanjay Kumar commenced his employment with Kenny Omen Limited, formerly known as Punjabi Dhaba Limited (Punjabi Dhaba) on 7 December 2002 as a Chef in Auckland. His employment ended with Punjabi Dhaba on 15 June 2014. He claims that he is owed outstanding money for wages, holiday pay and payments for working on public holidays and alternative days for a period of his employment between 1 January 2012 and 15 June 2014. Mr Kumar says that he is owed a net sum of \$20,370 in total.

[3] Mr Kumar was party to an individual employment agreement dated 5 March 2011. The employment agreement provided that his salary was \$36,000 per year to be paid monthly and that he was to be employed for a minimum of 45 hours per week with work to be carried out on any day, Monday through Sunday. In his evidence to the Authority, Mr Kumar confirmed that he worked six days a week with Tuesdays being his day off.

[4] Hardeep Singh is a director of Punjabi Dhaba. Mr Singh says that the amounts that were deposited into Mr Kumar's account over the period 1 January 2012 until 15 June 2014 were supplemented by cash payments. He says that statutory holidays Mr Kumar has claimed were not days that the restaurant opened. Mr Singh says that Mr Kumar is an "opportunist" and he does not believe there is further money owing to Mr Kumar.

[5] Although Mr Kumar's employment was undertaken in Auckland, his advocate and Mr Singh agreed that the suitable location for an investigation meeting was Christchurch.

[6] 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 s 174C(4) of the Employment Relations Act 2000 (the Act) to do, that exceptional circumstances existed

for providing the written determination of the Authority's findings later than the latest date specified in s 174C(3)(b) of the Act.

The issues

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

- (a) Was Mr Kumar paid his full entitlements for wages between 1 January 2012 and 15 June 2014?
- (b) Did Mr Kumar work public holidays between 1 January 2012 and 15 June 2014?
- (c) If so, was he paid his entitlements for doing so under the Holidays Act 2003?
- (d) Was Mr Kumar paid holiday pay due and owing to him from 1 January 2012 to 15 June 2014 when his employment ended?

Was Mr Kumar paid his contractual entitlements for wages between 1 January 2012 and 15 June 2014?

The claim advanced for Mr Kumar for unpaid wages

[8] The Authority heard evidence from Mr Kumar and from Mr Singh. I have used the contents of a letter from Mr Kumar's then advocate dated 7 November 2017 as a starting point to assess the claim.

Claim for 2012

[9] The amount claimed for 2012 for unpaid wages is \$4,256 net. This is on the basis that Mr Kumar was not paid \$36,000 gross or the net equivalent of \$30,420 for that year. Mr Kumar has provided all of his bank statements for 2012 showing deposits of wages from Punjabi Dhaba and says that he only received net wages of \$26,163.72 instead of \$30,420.

Claim for 2013

[10] The amount claimed for 2013 for unpaid wages is \$5,520 net. This is on the basis again that Mr Kumar was not paid \$36,000 gross or the net equivalent of \$30,420 for that year. Mr Kumar has provided all his bank accounts showing deposits of wages from Punjabi Dhaba and he says that he only received \$24,900 net instead of \$30,420.

Claim for 2014

[11] The amount claimed for 2014 is \$1,101 net. This is on the basis that from 1 January 2014 to 15 June 2014 when Mr Kumar ceased working for Punjabi Dhaba is 28 weeks. A weekly amount of \$692 gross can be derived from the salary of \$36,000. When multiplied by 28 weeks this would mean that Mr Kumar should have been paid a gross amount for that period of \$19,376. Mr Kumar has provided all of his bank accounts for that period showing deposits of wages from Punjabi Dhaba and he says that he should have been paid \$16,373 net but received \$15,272.51 net.

Punjabi Dhaba's view of the claim for unpaid wages

[12] Mr Singh's evidence was that Mr Kumar was paid some additional amounts in cash. He accepted that he did not have any receipts for the amounts paid to Mr Kumar other than by way of direct credit into his bank account for the material period. Mr Singh requested details of transactions of money transferred to India during that period by Mr Kumar. These were subsequently provided.

[13] Mr Kumar was adamant that he did not receive any payments in cash from Punjabi Dhaba 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 account and that the transfers of money made to India were made by friends using his account to send money overseas. The Authority received some written information from his friends along those lines. There was some evidence to support Mr Kumar transferring money to India using his own money as well from credits in his bank account.

Conclusions about unpaid wages

[14] The Authority is unable to conclude with any degree of certainty that other payments made into Mr Kumar's bank accounts or money transferred to India were payments from Punjabi Dhaba. There are no signed receipts for cash payments during that period and Mr Kumar explained some of the amounts deposited to his account being from friends or casino winnings. Payments made from Punjabi Dhaba are clearly identifiable in the account. Much of the documentation provided by Mr Singh about Mr Kumar and payments made related to earlier periods of employment for which there is no claim. It was accepted by Mr Kumar that there were some cash payments at earlier times but he was very clear in his evidence that he was not paid any cash amounts from 1 January 2012.

[15] Mr Singh is an experienced businessman and it is difficult to reconcile that with the absence of clear records of any payments to Mr Kumar other than by direct credit. Payments in 2012 made to Mr Kumar's bank account by direct credit were somewhat random and of irregular amounts. The payments became very regular in 2013 and 2014 and I find it less likely that there would be some other method of payment that was not clearly recorded.

[16] I find there is a basis to assess a claim for a shortfall in wages. I have undertaken my own calculations using a PAYE income tax calculator as at 2019 to verify amounts as there appeared no accounting for the ACC levy in the calculations provided on behalf of Mr Kumar in arriving at a net figure.

2012 wages

[17] In 2012 Mr Kumar was to be paid a gross salary of \$36,000. Using the PAYE tax calculator to take into account both PAYE and the ACC levy, I have assessed the take home or net pay for Mr Kumar on a gross amount of \$36,000 is \$30,699.60.

[18] My assessment of payments in 2012 differs in some aspects from the calculation provided on behalf of Mr Kumar.

[19] There was a payment of \$1,200 on 5 March 2012 included in the payment schedule that showed payments made to Mr Kumar by Punjabi Dhaba. That payment is not shown on Mr Kumar's bank account statements. The Authority had asked in advance of the Authority investigation meeting that Mr Kumar confirm that he had disclosed all of his bank accounts.

It was confirmed in writing that the only bank with which Mr Kumar had an account initially in his own name and then a joint account with his wife was ASB.

[20] I am of the view that the amount paid to Mr Kumar of \$1,200 was included by error as the bank name referred to is ANZ. There is no evidence that Mr Kumar held an account with the ANZ. There was no payment of \$1,200 shown on the ASB account on 5 March 2012 or close to that date. I have therefore not included that amount.

[21] I have, however, included some other small and irregular amounts paid into Mr Kumar's account by Punjabi Dhaba. There was no explanation as to why they were not included. I cannot conclude that the following payments were somewhat other than wage payments such as reimbursement for purchases:

2/04/2012	\$ 218.99
12/05/2012	\$ 300.00
5/06/2012	\$ 250.00
7/07/2012	\$ 347.50
15/08/2012	\$ 279.26
7/12/2012	\$ 200.00

[22] I have calculated that the total net payments received by Mr Kumar from Punjabi Dhaba by way of direct credit into his bank account were \$26,128.60. The difference between \$30,699.60 and \$26,128.60 is \$4,571 net.

[23] Mr Kumar is owed the sum of \$4,571 net for unpaid wages for 2012.

2013 wages

[24] Until 4 September 2013 there were regular payments each week of \$430.93 into Mr Kumar's bank account. On 6 November there was a one off payment of \$500. I have made an adjustment to the figures advanced on Mr Kumar's behalf because instead of \$500 there is reference to \$430.93. I have also made an adjustment for 12 September 2013 to account for

the amount actually received of \$568.29 rather than the amount of \$430.93 that the figures advanced by Mr Kumar set out.

[25] Taking into account those minor adjustments to the net amount received by Mr Kumar in 2013 I arrive at a final figure received of \$25,106.12 net and a shortfall of \$5,593.48 net.

[26] Mr Kumar is owed the sum of \$5,593.48 net for unpaid wages for 2013.

2014 wages

[27] Mr Kumar has claimed wages for this period based on the period from 1 January 2014 to 15 June 2014 being 28 weeks. It is in fact a period of 23 weeks and four days. A weekly figure assessed from gross annual wages of \$36,000 is \$692.30 gross. I have divided that by six to arrive at a daily rate of \$115.54. \$692.30 multiplied by 23 weeks is \$15,923 gross and \$115.38 multiplied by four is \$461.53. Mr Kumar was entitled to gross payments of \$15,923 plus \$461.53 which equals \$16,384.53 gross.

[28] I have calculated the net amount paid should have been \$590.38 per week multiplied by 23 weeks which is \$13,578.74 net plus four days which is \$393.38 net. \$13,578.74 plus \$393.38 net is \$13,972.12. I agree with the figures advanced on Mr Kumar's behalf for net payments received of \$15,272.51. There is on the figures provided an overpayment for this period of \$1,300.39 net or \$1,524.59 gross.

Total net and gross amounts owing for unpaid wages

[29] I find that Mr Kumar is owed outstanding wages for 2012 and 2013 in the sums of \$4,571 net and \$5,593.48 net. He is not owed outstanding wages for 2014 but Punjabi Dhaba is entitled to a credit for the overpaid amount to be set off against the amounts found owing. The total wages owed is \$10,164.48 net or \$11,918.87 gross. Such sum to be reduced by the overpayment in 2014 of \$1,300.39 net or \$1,524.59 gross.

[30] I order Kenny Omen Limited formerly known as Punjabi Dhaba Limited to pay to Mr Kumar the sum of \$8,864.09 net or \$10,394.28 gross being unpaid wages.

Public holidays and alternative days

[31] Mr Kumar says that he worked statutory holidays in 2012, 2013, and 2014. In 2012 he says that he worked the day after Christmas, 2 January, Auckland Anniversary Day being Monday, 30 January, Waitangi Day, Good Friday, Easter Monday, ANZAC Day and Labour Day. The claim for statutory holidays worked in 2012 is based on payment at time-and-a-half, calculated on the basis of \$15.38 per hour for 45 hours per week which is \$57.65 together with an alternative day, making a total of \$173 for payment at time-and-a-half together with an alternative day for each of those days.

[32] Mr Singh says that the restaurant was closed for those days and has provided emails from some other staff that he says support his position. Mr Kumar was adamant that the restaurant was open on public holidays and that he worked the days that he is claiming entitlements for. Mr Kumar said that except for Christmas and New Year, the restaurant was always open and that he worked six days a week. In fact, when it was put to him through an interpreter that Mr Singh said the restaurant was closed on statutory days, he appeared somewhat incredulous. I find on the balance of probabilities it is more likely than not that Mr Kumar worked the statutory days that he claims he did.

Conclusions for public holiday entitlements for 2012, 2013 and 2014

[33] For 2012 the claim that I have accepted is that six public holidays were worked. Payment at time and a half means an additional \$57.67 should have been paid for each day. There should also have been an alternative day paid or provided but there is no evidence of that. A daily rate is properly assessed at \$115.35 for an alternative day. \$115.35 plus \$57.65 is \$173. Multiplied by six that is a total figure of \$1,038 gross owing for public holiday entitlements and alternative days for 2012.

[34] For 2013 the claim I have accepted is that eight public holidays were worked. \$173 multiplied by eight days is \$1,384 gross.

[35] For 2014 the claim I have accepted is that seven public holidays were worked. \$173 multiplied by seven days is \$1,211 gross.

[36] The total amount owing for public holiday entitlements for the years 2012, 2013 and 2014 is \$3,633 gross.

[37] I order Kenny Omen Limited formerly known as Punjabi Dhaba Limited to pay to Mr Kumar the sum of \$3,633 gross being payment for working on public holidays and alternative days.

Holiday Pay

Assessment for holiday pay 2012

[38] No holiday and leave record was produced. Mr Kumar took a trip to India in 2012 as confirmed by his passport entries provided to the Authority and was absent between 28 September and 30 October 2012. Having assessed his bank account records there were no payments made to him by Punjabi Dhaba for that period.

[39] I cannot be satisfied that Mr Kumar took paid leave for 2012. There are no records or evidence to support that he did.

[40] I find that he is entitled to 8% of what he should have received for gross earnings for 2012 and for public holiday entitlements.

[41] I calculate holiday pay owing for 2012 as 8% of \$36,000 which is \$2,880 and 8% of \$1,038 which is \$83.04 gross. That is a total of \$2,963.04 gross.

Assessment for holiday pay 2013

[42] Mr Kumar said that he did not take any holiday leave in 2013. There are no records or evidence to support that he did. I cannot be satisfied that Mr Kumar took paid leave for 2013.

[43] I find that he is entitled to 8% of what he should have received for gross earnings for 2013 and for public holiday entitlements.

[44] I calculate holiday pay owing for 2013 as 8% of \$36,000 which is \$2,880 and 8% of \$1,384 which is \$110.72 gross. That is a total of \$2,990.72 gross.

Assessment for holiday pay 2014

[45] Mr Kumar said that he did not take any leave in 2014. There are no records or evidence to satisfy the Authority that he did.

[46] I find that he is entitled to 8% of what he should have received for gross earnings for 2013 and for public holiday entitlements.

[47] I calculate holiday pay owing for 2014 as 8% of \$16,384.53 which is \$1,310.76 and 8% of \$1,211 which is \$96.88 gross. That is a total of \$1,407.64 gross.

Total holiday pay owing

[48] The total amount owing for holiday pay for 2012, 2013 and 2014 is the sum of \$7,361.40 gross.

[49] I order Kenny Omen Limited formerly known as Punjabi Dhaba Limited to pay to Sanjay Kumar the sum of \$7,361.40 gross being holiday pay.

Interest

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

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

[52] I find it appropriate to order interest payable from the date that the claim for Mr Kumar was quantified in his advocate's letter of 7 November 2017.

[53] I have assessed interest on gross figures that I have found owing to Mr Kumar for unpaid wages, public holiday entitlements and holiday pay. I have added together the gross sums of \$10,394.28 for unpaid wages, \$3,633 for public holiday entitlements and \$7,361.40 for holiday pay.

[54] I arrive at a total of \$21,388.68 gross. \$21,388.68 multiplied by 5% is \$1,069.43 per annum. A daily rate is achieved by dividing that amount by 365 to arrive at a figure of \$2.92.

[55] The period between 7 November 2017 and 16 May 2019 is 555 days. 555 day multiplied by \$2.92 is \$1,620.60.

[56] Interest is ordered to be paid on the gross amount of \$21,388.68 and will continue to accrue at a daily rate of \$2.92 until payment.

Costs

[57] I reserve the issue of costs.

[58] Mr Austin has until 30 May 2019 to lodge and serve submissions as to costs and Mr Hardeep Singh has until 13 June 2019 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority

