

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 457
3060473

BETWEEN	LOVEPREET KHANNA Applicant
AND	NZ YARL RESTAURANT & BAR LIMITED Respondent

Member of Authority:	Michele Ryan
Representatives:	Applicant in person No appearance by the respondent
Investigation Meeting:	31 July 2019 at Wellington
Oral determination:	31 July 2019
Written Record of Oral Determination:	2 August 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Lovepreet Khanna claims he is owed four weeks wages and payment of holiday entitlements by his previous employer, NZ Yarl Restaurant and Bar Ltd (“NZ Yarl”).

The Authority’s investigation

[2] The Authority received Mr Khanna’s statement of problem on 7 May 2019. A copy of that document was sent by courier to the director (sole) of NZ Yarl, Mr Pratheeban Neruraja, at the company’s registered address on 10 May 2019.

[3] NZ Yarl has not provided a statement of reply. Nor has it responded to any of the Authority’s correspondence including a Notice of Investigation and additional information

advising that if it intended to defend the claim it was required to produce full wage and time records, evidence of payment of PAYE, and any other information it considered relevant, by 22 July 2019.

[4] The Authority's investigation into Mr Khanna's claims was scheduled to begin at 9.30 am on 31 July 2019. Neither Mr Neruraja nor anyone on NZ Yarl's behalf attended the Authority's meeting.

[5] Support staff sought to contact Mr Neruraja on his mobile phone 10 minutes after the meeting was due to commence. The call went unanswered. A voice message was left asking Mr Neruraja to contact the Authority but no response was received.

[6] There appears to be no good cause for NZ Yarl's failure to attend the Authority's meeting.

[7] Pursuant to clause 12 of Schedule 2 of the Act, I have proceeded with the investigation as if NZ Yarl had attended or been represented.

The issue

[8] The Authority is required to determine whether NZ Yarl owes Mr Khanna wages, and holiday pay entitlements, and if so, the quantum of these.

Relevant information

[9] Mr Khanna began working for NZ Yarl as a Bar Manager on 13 September 2018 pursuant to an individual employment agreement.

[10] Amongst other things, the agreement recorded Mr Khanna's employment as "*a casual "as requested" employment relationship*"; the rate of pay was "*\$20.95 per hour inclusive of holiday pay*"; he would be provided "*a minimum of 32 hours of work per week*" and, wages would be paid fortnightly. The employment agreement was not signed by either party but I am satisfied it governed their employment relationship.

[11] Mr Khanna went on leave on 5 January 2018.

[12] At some point later in January Mr Neruraja informed Mr Khanna that the restaurant/bar had closed and Mr Khanna did not return to work. NZ Yarl however remains listed on the NZ Companies Register.

Is Mr Khanna owed wages?

[13] Section 132 of the Employment Relations Act states that where any claim is brought before the Authority for the recovery of wages (or other money payable to the employee), in the absence of clear records, the Authority may, unless the employer proves the claims are incorrect, accept the claims as proved.

Are wages due?

[14] Mr Khanna provided payslips received during his employment, photos of the employer's diary entries recording hours of work, and his personal bank statements for the period 10 September 2018 to 6 March 2019.

[15] The payslips reveal Mr Khanna's hours of work ranged between 38 and 55 (or thereabouts) per week. Wage payments were irregular and often did not occur until well after payments were due in accordance with the employment agreement.

[16] I was able to match each of the provided payslips with net wage payments credited to Mr Khanna's bank account for work prior to 10 December 2019 (albeit several payments were made after this date). However, no wage payments appear to have been deposited to Mr Khanna's bank account that would match the hours of work (recorded in the employer's diary) after 9 December 2018. Nor does Mr Neruraja appear to dispute Mr Khanna's repeated assertions, contained in subsequent text messages, that four weeks' wages were owed.

[17] On balance I accept Mr Khanna's claim that he was not paid for work he performed from 11 December 2018 until he finished work on 5 January 2019. Taking into account the hours recorded and that Mr Khanna was entitled to be paid time and a half for the work he performed of 2 January 2019,¹ and to payment for an alternative holiday² I calculate he is owed unpaid wages of \$3,585.08 (gross).³

[18] I am also satisfied that Mr Khanna's work pattern – a matter I shall return to – encompassed the public holidays of 25 and 26 December 2018 and 1 January 2019 as days he

¹ Holidays Act 2003, s 50

² Above at s 60(2)(b)

³ 148 hrs and 40 minutes at \$20.95 per hour = \$3,113.17 (gross); - plus \$283.15 (gross) for 2 January 2019 (calculated by applying Mr Khanna's average daily pay of \$188.76 (assessed by dividing gross earnings over the 80 days he worked) x 1.5; - plus \$188.76 as payment for an alternative holiday (again calculated by applying average daily pay).

would have otherwise worked, but for the public holiday.⁴ Mr Khanna is entitled to be paid for the three public holidays identified and I assess this sum as \$566.28 (gross).⁵

Is holiday pay owed?

[19] Section 28(1)(a)(i) and (ii) of the Holidays Act 2003 sets out limited circumstances in which an employer may regularly pay annual holiday pay with the employee's pay. The first relates to fixed term employment of less than a year, and is not relevant to this case. The second applies to employment relationships that are truly casual in nature where the employees work is "*so intermittent or irregular that it is impracticable for the employer to provide the employee with annual holidays*".

[20] The Holidays Act 2003 also requires the employee agree in his or her employment agreement to have holiday pay paid in this manner,⁶ and that the holiday pay is paid as an identifiable component of the employees pay.⁷

[21] Notwithstanding that Mr Khanna's employment agreement characterises the employment relationship as casual, that description is not necessarily determinative.⁸ Whether his employment was casual (or permanent) must be assessed by examining how the relationship operated in practice.

[22] On the evidence provided I have not been persuaded that Mr Khanna's employment was casual in nature.

[23] Firstly, a critical feature of casual employment is that each period of work is a separate and distinct employment. Between each engagement there is no expectation on the employer to provide the employee with further work, nor on the employee to accept it. NZ Yarl's written agreement (as set out in the employment agreement) to provide Mr Khanna with a minimum of 32 hours of work per week undermines any suggestion that there were no obligation on the employer to provide ongoing work.

⁴ Above n1, s 49

⁵ 3 x public holidays calculated according to average daily pay of \$188.76

⁶ s 28(1)(b)

⁷ s 28(1)(c)

⁸ *Jenkinson v Oceana Gold (NZ Ltd)* [2009] ERNZ 225 at [37]

[24] Next, in *Rush Security Services Ltd t/a Darrien Rush Security v Samoa* the Employment Court noted that regularity of work and continuity of the employment relationship may be indicative of ongoing as opposed to casual employment.⁹

[25] Although Mr Khanna's daily hours of work were variable, he worked Tuesday to Sunday (inclusive) every week - in effect almost every day the restaurant was open for the duration of his employment. I am unwilling to find his work was intermittent or irregular. I am satisfied his work pattern was predictable, regular and continuous.

[26] I further note there is nothing in Mr Khanna's payslips that identifies holiday pay as a component of the wages he did receive. In fact quite the opposite. As the length of Mr Khanna's employment progressed the payslips appear to record an increasing annual leave entitlement.

[27] NZ Yarl has not met the requirements of s 28 of the Holiday Act which would have permitted it to routinely include annual holiday pay in Mr Khanna's wages. It follows Mr Khanna is entitled to payment of annual holidays.

[28] Mr Khanna's total gross earnings were \$15,101.56. Section 28(1)(d) of the Holidays Act provides annual holiday pay must be paid at a rate not less than 8% of the employee's gross earnings. Mr Khanna's total gross earnings were \$15,101.56. He is entitled to \$1,208.12 as annual holiday pay.

Summary of Orders

[29] NZ Yarl Restaurant and Bar Ltd is ordered to pay Lovepreet Khanna:

- (a) Arrears of wages and holiday entitlements amounting to the total sum of \$5,359.48 (gross) comprising as follows;
 - (i) \$3,585.08 (gross) in unpaid wages; and
 - (ii) \$566.28 (gross) as payment for unworked public holidays;
 - (iii) \$1,208.12 as annual holiday pay; and

⁹ *Rush Security Services Ltd t/a Darrien Rush Security v Samoa* [2011] NZEmpC 76 at [25]

(b) \$71.56; the cost of the filing fee Mr Khanna paid to progress his claim in the Authority.

Costs

[30] Mr Khanna represented himself throughout his application before the Authority and it is unnecessary to make an order for costs.

Michele Ryan
Member of the Employment Relations Authority