

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2019] NZERA 208
3025073

BETWEEN A LABOUR INSPECTOR
Applicant

AND EMA BAKERY AND
ESPRESSO LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Joseph Perrott and Shona Carr, Counsel for the
Applicant
Michael Smyth, Counsel for the Respondent

Investigation Meeting: 1 and 3 October and 16 November 2018

Further information: 27 November 2018 from the Respondent

Determination: 10 April 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Labour Inspector Weiran Liu sought orders requiring EMA Bakery and Espresso Limited to pay wage arrears and holiday pay, to repay a premium and to pay penalties. EMA operates a bakery and café in Parakai. At the request of the parties this determination resolves only the questions of liability for the wage arrears, holiday pay and the premium and some resulting orders. The matters of penalties and costs are reserved for later determination.

[2] The Inspector's application concerned EMA's employment of Pavneet Singh from December 2011 to February 2017. The penalties were sought for failure to pay holiday pay owed to Mr Singh at the end of his employment and for what was said to be a premium paid in return for getting the job and support for his work visa applications. The Inspector said EMA's director Chhieng Mean Hok required Mr

Singh to return part of the weekly wages EMA paid by direct credit to Mr Singh's bank account. Mr Singh's bank records showed there were weekly transfers back to Mr Hok's personal bank account of \$190, later increasing to \$200. In Mr Singh's bank records those transactions were labelled as "rent".

[3] EMA accepted holiday pay was due to Mr Singh but did not agree with the Inspector's calculation of what was owed. The amount due was disputed, in part, because EMA denied Mr Singh's claim that he had worked up to 70 hours a week for a large part of his employment and that he had worked on public holidays without getting any additional pay. EMA also denied the weekly transfers from Mr Singh's account to Mr Hok's personal account were a premium charged for his job. Mr Hok initially told the Inspector those payments were for rent. He later changed his story and said the payments were a weekly refund from Mr Singh because Mr Hok paid him some of his wages in cash. Mr Hok had said the cash payments were made because Mr Singh did not have his own transport at the time and lacked ready access in the Parakai area to an ATM from which he could withdraw money.

[4] EMA also criticised the *bona fides* of Mr Singh's complaint about employment issues that had led to inquiries by the Labour Inspectorate and the Inspector's eventual application to the Authority. Mr Singh ended his employment at the bakery in February 2017. More than three months later, on 2 June, he was arrested in Henderson on three charges of assault and one charge of a threat to kill. A psychiatric assessment made at the time referred to his admitted regular use of cannabis and at least one recent session of smoking methamphetamine. The assessment concluded Mr Singh had experienced a psychotic episode. He was committed to a mental health services facility under the Mental Health (Compulsory Assessment and Treatment) Act 1992. He was released from that facility on 27 June 2017 and soon after granted bail awaiting hearing on the criminal charges. At hearing he was sentenced to ten weeks in prison. Mr Singh said he later spent five weeks in Mount Eden prison serving that sentence and was released on 17 July 2018.

[5] Following Mr Singh's arrest Immigration New Zealand began steps to deport him. Notice of liability to deportation was served at his last known address in early June 2017. Mr Singh did not see that notice until after he was released from the mental health facility on 27 June. On 28 he rang the Ministry of Business employment services contact centre on 28 June. Notes taken of that call record that

he said Immigration had cancelled his visa. He reported being paid \$700 a week for working 10 hours a day for six days a week and paying \$200 a week back to his employer for help with his immigration applications.

[6] Labour Inspector Jim Denyer was initially responsible for investigation of Mr Singh's complaint. On Mr Denyer's retirement in July 2018 Ms Liu was assigned the file and continued the present proceedings.

The Authority's investigation

[7] For the Authority's investigation written witness statements were lodged from Mr Singh, Mr Hok, Mr Denyer, Ms Liu and the following people:

- Suhkjinder Singh and Prince Sharma, flatmates of Mr Singh at some relevant times;
- Dalu Daya, an officer of Immigration New Zealand who dealt with Mr Singh's file;
- Kym Y Sao, Mr Hok's wife;
- Navdeep Grewal, another employee of EMA; and
- Geoff Bilkey, a lawyer who had provided some advice to Mr Hok at relevant times.

[8] Those ten witnesses were interviewed, under oath or affirmation, during the investigation meeting. Gubinder Aulakh, a lawyer who acted for Mr Singh on immigration and deportation matters, also attended in response to a witness summons and answered questions. The parties' representatives also gave closing submissions.

[9] After the investigation meeting EMA, through counsel, advised the Authority of a payment of \$9,303.05 made to the Inspector for the benefit of Mr Singh. The amount, paid on 27 November 2018, was what EMA's accountant had calculated was owed as holiday pay to Mr Singh. It was eight per cent of what EMA said were Mr Singh's gross earnings as its employee for the period from January 2013 to February 2017. The payment was a gross amount, made on the understanding the Ministry of Business would account to IRD for whatever tax was due on that sum.

[10] 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. It has not recorded all

evidence and submissions received. This point is particularly relevant in this case where there were more than 450 pages of background documents, along with written witness statements and the parties' submissions to consider. All that material, along with oral evidence given, has been carefully reviewed in preparing this determination.

[11] Under s 174C(3) and (4) of the Act the Chief of the Authority decided exceptional circumstances existed so this written determination was permitted to be provided outside the three month period after which the last information was received from the parties.

Issues

[12] Because the issue of penalties was reserved for determination after any finding of liability, the issues for resolution in this determination were:

- (i) Did EMA fail to pay Mr Singh amounts due to him as wages and holiday pay (for annual leave, public holidays and alternative holidays)?
- (ii) Did EMA fail to keep required time and wage and holiday and leave records?
- (iii) Did EMA charge Mr Singh an illegal premium for his employment?
- (iv) Depending on the findings made on issues (i), (ii) and (iii), what orders (if any) should be made for EMA to pay the Inspector, for Mr Singh's benefit:
 - (a) arrears of wages and holiday pay;
 - (b) money paid as a premium;
 - (c) interest on any arrears of wages and holiday pay due and the amount of a premium; and

Credibility, corroboration and the assessment of evidence

[13] The Authority applies the balance of probabilities as its general standard of proof in assessing evidence and reaching conclusions about the facts of any case. It considers what is more likely than not to have happened. In turn this exercise includes some assessment of the credibility of witnesses, and therefore the reliability of their evidence. This is assisted by whatever other evidence may, reliably, corroborate a witness' account of what was said or done. Such corroboration may come from the evidence of other witnesses, which similarly must clear its own hurdles of credibility and corroboration, and from whatever can be gleaned from any records

made at or around the time. Those records may include pay records or other documentation kept by the employer and less formal material, such as emails, texts and photos taken on mobile phones that may help verify dates, times, places, words and actions. For reasons explained later, the existence or absence of such corroborating documentation has proved central to findings of facts made in this case about the claims for wages arrears and repayment of a premium.

[14] The investigation of the Inspector's application in this case included a considerable contest about the credibility of the evidence given by both Mr Singh and Mr Hok. Counsel for the Inspector, in oral closing submissions, submitted this case was "classic migrant exploitation" of a visa-dependent worker being used to provide cheap labour. However Mr Singh's role in preparing and, bluntly put, manipulating the content of his employment documents as part of his visa applications in 2012, 2014 and 2016 showed the context was not so straightforward.

[15] The circumstances in which he made his complaint to the Labour Inspector, well after leaving EMA's employment and only after being advised of liability to deportation due to criminal activity, cast doubt on the reliability of Mr Singh's evidence. Attempts Mr Singh and his lawyer Gubinder Aulakh made during February 2018 to extract a payment from Mr Hok, in return for a promise Mr Singh that would "withdraw" his complaint to the Inspector, further damaged the credibility of Mr Singh's evidence about other matters, such as his hours of work.

[16] Some of Mr Hok's evidence also faced credibility hurdles. He had contacted Mr Singh's lawyer in February 2018 and then got involved in exchanges about the prospect of making a deal to pay Mr Singh in return for not giving evidence in any case brought by the Inspector. This undermined Mr Hok's evidence that he was simply a naïve person who had got caught up in events he did not really understand. Mr Hok's own lawyer, Geoff Bilkey, had assisted (although not necessarily encouraged) Mr Hok in engaging in those negotiations with Mr Aulakh.

[17] In his oral evidence Mr Bilkey aptly described those exchanges as "a dodgy situation".

[18] Although no deal was struck Mr Hok said he had, in response to a request from Mr Aulakh, initially offered the \$9000 that he accepted Mr Singh was owed as holiday pay. He then increased his offer to \$17,000 and finally \$20,000. Those offers

indicated that Mr Hok understood, and wished to avoid, EMA's potential liability for greater amounts identified by the Inspector's assessment of wage arrears and a premium paid by Mr Singh to Mr Hok.

[19] Mr Hok denied understanding the details of Mr Singh's immigration applications, and the employment agreements submitted with them. He said he simply signed whatever Mr Singh put in front of him without checking details such as pay rates or position descriptions.

[20] There was no doubt Mr Singh was responsible for arranging the employment documentation used to support his immigration applications in 2012, 2014 and 2016. He did so in 2012 and 2014 with help from an immigration advisor or a lawyer. In 2016 he prepared all the material himself, with help from his flatmate Mr Sharma, in order to avoid lawyers' fees of around \$3,000 he had paid for his previous applications.

[21] On each occasion Mr Singh, with assistance from whoever was helping him at the time, included job position descriptions and pay rates that met immigration work skill and salary requirements but did not reflect the reality of his work. The 2012 agreement described his work as a store manager on \$15 an hour; in 2014 his position was stated to be as a retail bakery manager on \$20 an hour; and in 2016, his position was given as a baker on \$16.50 an hour. In reality he was a baker, not a manager, for all of his employment by EMA. He was never paid \$20 an hour.

[22] Mr Hok signed all the agreements. This involved, on one occasion, travelling with Mr Singh to his lawyer's office in central Auckland to complete the paperwork. On another occasion, in 2014, Mr Singh arranged for the publication of an advertisement for his job at the bakery, as this was part of the process to meet Immigration New Zealand requirements to test whether local labour could fill the position. Mr Singh then arranged for Mr Hok to interview two applicants for that job, including by providing him with a list of questions to ask. On the balance of probabilities Mr Hok participated in that process knowing that it was a bogus exercise, merely carried out to make it appear that immigration requirements had been met and to ensure Mr Singh could keep working for EMA.

[23] The reality of the relationship, assessed in light of all of the evidence and on the balance of probabilities, was that Mr Singh and Mr Hok had made a bargain in

2012. Mr Hok met Mr Singh, by chance, at a restaurant in 2011 and heard he had been working elsewhere and not being paid for his work. Mr Hok said he suggested Mr Singh could “come and help me”. Mr Singh first worked on a cash basis and then, around July 2012, asked Mr Hok to support his work visa application. This included having a job offer and an employment agreement.

[24] The nature of the deal they struck and continued throughout the employment was captured by this description Mr Hok gave in his oral evidence: “He asked me give me visa, I signed and said not give me trouble”.

[25] This arrangement continued until Mr Singh left the employment in February 2017. Although he said this was because Mr Hok would not approve a week’s leave, the real reason Mr Singh left the job was, most likely, that immigration rules changed in late 2016. Mr Singh found out that he would have to leave the Auckland area to qualify for further visas. A job at EMA no longer fitted with what he needed to do to achieve his eventual goal of permanent residency.

[26] There was clearly an element throughout the employment when both Mr Singh and Mr Hok were less than candid in what was declared to Immigration New Zealand. However whatever issues are raised by that situation and by their dealings (with the involvement of their lawyers) in February 2018 are not in the Authority’s jurisdiction to resolve now.

[27] For the matters that are within its jurisdiction, the Authority’s concern is with compliance with employment law. While the character of party or a witness, and any unlawful actions committed by them, may be relevant to assessing the credibility of what they say happened, it is not relevant to whether a worker is entitled to the protection of employment standards or whether an employer must comply with those standards. Workers are still entitled to their wages, holiday pay and the other protections of employment law even if they have, in other parts of their life, committed a crime or got an immigration visa on inaccurate grounds. To hold otherwise would amount to a licence for exploitation and corrupt practices.

The wage arrears claim

[28] The Inspector calculated Mr Singh was owed wage arrears of \$100,455.25 gross. Her calculations were made on the basis Mr Singh worked 11 hours a day, six

days a week for the period between December 2011 and 26 February 2017, except for a period between 8 November 2015 and 3 July 2016 when he was said to have worked 20 hours a week on unspecified days. The latter period was when Mr Singh was studying and his visa conditions restricted him to working no more than 20 hours a week during term time.

[29] The sum of wage arrears claimed was the difference between \$132,157.50 identified as paid to him from December 2011 to February 2017 and the total wages of \$232,612.75 he was said to be owed if he had worked all the hours claimed.

[30] The Inspector's calculations, based on the assumed hours and days worked, also identified arrears of \$3,554.60 due for work on public holidays and \$6,877.75 due for alternative holidays. She also calculated \$23,370.93 was due for annual holiday entitlements of 20 weeks. Her tally for all those holiday pay arrears was \$33,803.28.

[31] Taking the wage arrears amount of \$100,455.25 and the holiday pay arrears amount of \$33,803.28, the total arrears assessed by the Inspector as due to be paid by EMA to Mr Singh were \$134,258.53.

[32] The fundamental difficulty with this claim was the notion Mr Singh, for the larger part of his employment, had worked 11 hours a day, six days a week. This figure emerged from Mr Denyer's first interview of Mr Singh. Mr Singh told Mr Denyer he had worked between 10 and 12 hours a day and worked up to 70 hours a week. In preparing his investigation report Mr Denyer, in his oral evidence, said he had then taken an average and "made it 66".

[33] Ultimately there was not enough evidence to support or corroborate the claim made at that level. Mr Singh himself, in his first call to the Ministry of Business employment contact centre, had referred to working 60 hours a week. It was not until he was involved in a mediation meeting between the Inspector and EMA that Mr Singh also referred to a period when he was studying and had, according to him, only worked 20 hours a week during those months.

[34] The evidence of other witnesses confirmed some details about his working arrangements. For instance, his flatmates Mr Sukhjinder Singh and Mr Sharma confirmed Mr Singh regularly started his working day at 5am or 5.30am, as might be

expected for a baker preparing products for the day's sale. However their evidence did not confirm Mr Singh was then required to work as long or as late as would be necessary to amount to 11 hours a day for six days a week. They could not compellingly negate the contrary evidence of Mr Hok, Ms Sao and Ms Grewal that Mr Singh finished much earlier each day but often then stayed at the shop texting and calling friends.

[35] Such conflicts of evidence can sometimes be resolved by referring to material such as texts, emails or information about phone calls exchanged that give some indication of working hours and work arrangements. In this case there was nothing of that sort that was of assistance.

[36] EMA kept no timesheets for Mr Singh's work. It did provide wage record spreadsheets kept for the period from January 2013 to February 2017. Those records showed payments made, tax deducted and KiwiSaver contributions. This may have satisfied IRD requirements but did not conclusively establish those were the actual hours he worked.

[37] If those records were inadequate, prejudicing the Inspector's ability to accurately calculate a wage claim, the Authority could nevertheless accept the claims made about hours, days and time worked by the employee.¹ If that approach were taken the onus then fell on EMA to prove such claims were incorrect.

[38] The evidence of Mr Hok, Ms Sao and Ms Grewal, and the limited documentary evidence provided by EMA, did not go so far as proving Mr Singh was incorrect in claiming he worked such long days throughout his employment. However it did cast some real doubt on it. Use of the statutory discretion to nevertheless accept Mr Singh's claim had to be tempered by the concerns about the credibility of his evidence noted earlier in this determination. There was simply too much doubt that his essentially unsupported allegations were more likely than not to reflect the reality. As likely was that, while starting early, he did complete his work within the 40 hours he was paid for each week. If there were more hours worked than that, but less than the 66 hours given in the claim, there was insufficient evidence to conclude with any confidence what those hours might have been.

¹ Employment Relations Act 2000, s 132.

[39] Having not established the basis on which the arrears claim was made, the application for orders for wage arrears is declined.

Holiday pay

[40] EMA's statement in reply to the Inspector's application admitted it failed to observe the Holidays Act requirement to pay Mr Singh his annual leave entitlements at the termination of his employment.² After the Authority investigation meeting EMA made a payment of holiday pay to the Inspector, for Mr Singh's benefit. The amount was less than the Inspector calculated was due but the larger amount claimed appears to have been a consequence of the size of the whole wage arrears claim. It may be that the amount belatedly paid by EMA, given the conclusion reached in this determination on the wage arrears claim, is correct.

[41] EMA nevertheless is liable to a penalty for its initial breach of the statutory requirement to pay the holiday pay to Mr Singh once it was clear his employment was at an end. Mr Hok, in his evidence, suggested Mr Singh had asked him to hold on to that money until Mr Singh requested it. That was not a sufficient excuse. Whatever currency that explanation may have had ended when the Inspector's inquiries in 2017 made it clear that the money had to be paid.

[42] The Inspector's claim regarding payment for the public holidays said to have been worked, and for payment of resulting alternative days in lieu, encountered the same evidential difficulty encountered with the wider arrears claim. Mr Singh said he worked every public holiday during his employment, except those falling in the Christmas summer break. This was not corroborated by the evidence of his flatmate, Mr Sukhjinder Singh, whose written statement said Mr Singh only "sometimes" worked public holidays. Mr Hok's evidence was that only he and his wife worked at the bakery on public holidays as he could not afford to pay Mr Singh time and a half. On balance there was insufficient corroboration of the Inspector's claim for payment for 41 public holidays said to have been worked by Mr Singh from 2012 to 2017. Neither was the evidence sufficient to accept, on the balance of probabilities, that only a smaller portion of those days had been worked.

² Holidays Act 2003, s 24.

Failure to keep adequate wage, time, holiday and leave records

[43] The Inspector sought penalties against EMA for failing to keep the wage and time records for Mr Singh's work required under s 130 of the Act and failing to keep a holiday and leave record as required by s 81 of the Holidays Act.

[44] EMA is liable to a penalty on both accounts.

[45] It admitted the failure regarding holiday and leave records so nothing more need be said about its liability to a penalty for that reason.

[46] EMA also admitted it failed to keep a wage and time record for the period Mr Singh worked at the bakery from late 2011 until January 2013. For the rest of his employment, however, it relied on the pay records prepared by its accountant and a provision in s 130(1B) of the Act to resist liability to a penalty.

[47] That subsection says the requirement to record hours worked each day is complied with sufficiently if the employee worked only whatever "usual hours" were stated in her or his employment agreement or a work roster. EMA said its employment agreements with Mr Singh provided for 40 hours and he worked no more than those usual hours.

[48] However Mr Hok's own evidence indicated there was some variation in the hours Mr Singh worked. This took him outside the notion of just working "usual hours" sufficiently recorded by the reference to hours in his employment agreement.

[49] The period in contemplation is just the statutorily-limited six-year period before the Inspector's application was lodged in July 2018, that is back to July 2012. Before July 2012 Mr Hok's witness statement indicated Mr Singh had worked irregular hours and was paid in cash. However the first employment agreement, signed in July 2012, did not introduce a work regime that was within the description of usual hours given in s 130(1B). The agreement referred to ordinary hours of work as from 7.30am to 4pm or as requested. Mr Hok's witness statement said the true position was that Mr Singh's hours from then on were "about 25 hours per week". He said Mr Singh came to the store at 5.30am and left by lunchtime. However Mr Hok also referred to Mr Singh "starting to build up his hours" by the end of 2012. On what Mr Hok himself said there was clearly variation in hours. And if Mr Hok's evidence

about Mr Singh not working public holidays was correct, there were weeks when some days were not worked that then differed from “usual hours”.

[50] Each of those examples, from Mr Hok’s own evidence, fell into the s 130 requirement to keep a record of “the number of hours worked each day” but did not fit within the exemption allowed at s 130(1B) for “usual hours”.

[51] EMA therefore failed to keep the wage and time record required by s 130 of the Act. It was liable to a penalty for that failure.

Premium

[52] Section 12A of the Wages Protection Act 1983 prohibits an employer seeking or receiving a premium for the employment of anyone. The section allows a Labour Inspector to recover any such money paid as a premium as a debt due to the person who paid it.

[53] The Inspector said weekly payments made by Mr Singh to Mr Hok were a premium. The payments began in March 2013, at \$190 a week, increased from April 2014 to \$200 a week, and continued until October 2016. The Inspector calculated the total value of those payments was \$33,886.

[54] Labelled as “rent” in Mr Singh bank accounts, those payments were really a clawback from his wages. It was a device so Mr Singh appeared to get an income level that met the requirements for his visa and, as far as records prepared by EMA’s accountant for tax purposes showed, appeared to be paid at least the minimum wage.

[55] Mr Hok accepted the first explanation he gave to the Labour Inspector was entirely untrue. Mr Singh never resided in the bakery premises and he never paid rent to do so. Further, renting a room was entirely unnecessary as Mr Singh lived, for most of his employment, in a flat within a few minutes’ walk from the bakery. He had no need to pay any rent to Mr Hok.

[56] Mr Hok’s second explanation, about refunding cash provided because of Mr Singh having difficulty in accessing an ATM, lacked credibility. Even if that had been true early in Mr Singh’s employment, it was less likely over the following years. In the period from November 2015 to July 2016 Mr Singh was studying, travelling regularly to his bakery course in South Auckland, providing ready access to ATM

machines. He could also withdraw cash from outlets in Helensville, around five minutes' drive from his flat and the bakery in Parakai.

[57] On the balance of probabilities it was more likely than not that Mr Hok required the payments as part of his deal with Mr Singh to support his immigration applications but to not actually pay him the amounts shown on the employment agreements submitted with those applications. Unlike other aspects of the Inspector's claim, made in reliance only Mr Singh's say-so, Mr Singh's bank statements provided documentary evidence of those payments. There was no credible reason for them to be labelled as "rent". There was no reliable evidence Mr Hok had, in fact, given Mr Singh cash every week that then needed to be paid back to Mr Hok once his wages were credited to Mr Singh's bank account.

[58] The money Mr Singh paid Mr Hok, as a clawback from the wages paid to him by EMA, was a premium. The premium was illegally sought and received by Mr Hok for EMA's employment of Mr Singh. The Inspector is entitled to recover the amount of \$33,886 from EMA as a debt due to Mr Singh.³

[59] EMA is also liable to a penalty for breach of the Wages Protections Act for Mr Hok's actions in seeking and receiving a penalty.

Orders

[60] For the reasons given in this determination EMA must pay \$33,886 to the Inspector as a debt due to Mr Singh.

[61] The illegal charging of a premium deprived Mr Singh of wages of which he was entitled to have full and free use from the date they were paid. An order for interest on that amount was fit, from the date of the last payment made on 11 October 2016 to the date of this determination. Calculated on the Ministry of Justice civil debt interest calculator the interest of that amount for that period was \$2,969.49.

[62] Both the debt and the interest must be paid within 28 days of the date of this determination. On receipt of those amounts the Inspector is to make arrangements for their transfer to Mr Singh.

³ Wages Protection Act 1983, s 12A(2).

Next step

[63] Leave is reserved for the Inspector to ask the Authority to proceed to determine the penalties on matters for which liability has been found in this determination. On receipt of such a request a case management conference will be convened to set a timetable for doing so.

Costs

[64] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority