

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 168
3025631

BETWEEN	BALJEET SINGH Applicant
AND	BEN SINGH HOLDINGS LIMITED First Respondent
AND	ASA RAO LIMITED Second Respondent

Member of Authority:	Rachel Larmer
Representatives:	Applicant in person Payal Kumar, Manager of the First Respondent Ashish Rao, Sole director of Second Respondent
Investigation Meeting:	12 February 2019 at Auckland
Further Information Received:	28 February 2019 from Immigration New Zealand
Date of Determination:	21 March 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The First Respondent Ben Singh Holdings Limited (Ben Singh) owned the “*Fresh Vibe Café*” (the café) in Dargaville until the Second Respondent, Asa Rao Limited took over the café on 16 June 2016.

[2] Mr Singh is not related to the directors or shareholders of Ben Singh. Mr Singh was granted a work visa by Immigration New Zealand (INZ) to work as the café Manager for each of the respondents, for defined periods of time.

[3] Although there was some conflict and a lack of clarity over the actual dates Mr Singh was employed, based on all of the evidence that has been reviewed, the Authority has determined it more likely than not that Mr Singh was employed by:

- (a) Ben Singh from 19 April 2016 until 15 June 2016;¹ and
- (b) Asa Rao from 28 June 2016 to 26 November 2016.

[4] Mr Singh claims wage arrears from Ben Singh and Asa Rao. He says he was not paid his public holiday entitlements for the public holidays he worked for each employer and that neither employer paid him any annual holiday entitlements.

[5] Mr Singh says he paid \$1,515.62 of his own PAYE on behalf of Asa Rao. He also seeks to recover the money he loaned to Ben Singh's manager, Ms Payal Kumar, to meet some of her family's expenses.

[6] Mr Singh claims that both employers had him 'rotate' his pay, meaning he was paid his wages but then repaid all but \$150 of his wages to his employer.

[7] Mr Singh said he did that so that INZ would not become concerned about the genuineness of his employment. That was important to Mr Singh because he was applying for residency. His residency application expired on 4 December 2016 so he said he could not risk there being any employment or tax problems before then. He told the Authority that any such problems were likely to have adversely affected his residency application.

[8] Ben Singh and Asa Rao both deny all of Mr Singh's claims.

Attendance of Asa Rao at the investigation meeting

[9] The afternoon before the Authority's investigation meeting, Mr Ashish Rao, the sole director of the Aso Rao, emailed the Authority saying he was overseas so would not be attending the investigation meeting. No explanation was given as to why his absence from New Zealand was raised for the first time at such a late stage.

¹ Mr Singh insisted he did not start work until after Ms Kumar's birthday in April despite the Employer's Monthly Schedule (EMS) having an earlier start date of 23 March 2016.

[10] Although that late notice was unsatisfactory, the Authority offered Mr Rao the opportunity to attend the investigation meeting by telephone conference to ensure he could participate in the investigation.

[11] Mr Rao accepted that offer and was affirmed as a witness at the beginning of the Authority's investigation meeting. However after about ten minutes the phone call was disconnected. The Authority called Mr Rao back multiple times during the remainder of the investigation meeting but he did not answer any of the Authority's telephone calls.

[12] No subsequent communication was received from Mr Rao.

[13] Ms Kumar and Mr Rao were previously married and at the time these claims arose were still living together. Up until recently Ms Kumar was representing both respondents in respect of this matter. However on 11 February 2019, Mr Rao emailed the Authority advising that he would be representing the second respondent Asa Rao Limited.

[14] As a result of her involvement in these matters, Ms Kumar has a very good understanding of the facts associated with the claims Mr Singh has made against both respondents.

[15] When Mr Rao was no longer available by telephone, Ms Kumar helpfully provided information and clarification of issues that arose during the Authority's investigation meeting on behalf of Asa Rao's interests.

[16] Accordingly, the Authority was satisfied that Asa Rao has had an opportunity to be heard and that information relevant to its defence of Mr Singh's claims has been put before the Authority for consideration, even though Mr Rao was not physically present.

Separate legal entities

[17] It is important to recognise that Ben Singh and Asa Rao are two entirely separate legal entities. Although Mr Singh presented his claims in a global way, the Authority has taken care to ensure that each claim has been individually investigated and determined for each respondent separately.

Relevant documents

[18] The Authority notes that Ms Kumar produced copies of the Employer's Monthly Schedule (EMS) that had been provided to Inland Revenue Department (IRD) by Ben Singh and Asa Rao.

[19] The EMS information has been accepted as correct because the employer is required to sign each EMS before submitting it to Inland Revenue Department (IRD) to confirm that the information in each EMS was true and correct. Providing false information to the IRD is a very serious matter.

[20] Mr Singh also produced his bank records and text messages. These were accepted by the Authority as accurately reflecting the information they contained. They also supported Mr Singh's claims.

[21] The Authority also sought and obtained information from INZ, which was shared with the parties.

[22] The Authority ordered Ben Singh and Asa Rao to provide copies of Mr Singh's:

- (a) Wage and time records; and
- (b) Holiday and leave records.

[23] However none of this information was provided.

[24] Ms Kumar claimed that Mr Singh had taken all of Ben Singh's and Asa Rao's employment records when he left work. Mr Singh denied that.

[25] There was no evidence of a Police complaint ever being made about the alleged theft of employment documentation by Mr Singh from these two businesses.

[26] The Authority considered the explanation given by the respondents for the absence of employment records was unlikely to be correct.

Absence of employment records

[27] The Authority finds it more likely than not that neither Ben Singh nor Asa Rao kept the appropriate statutory employment records for Mr Singh.

[28] Accordingly, the Authority find under s132 of the Employment Relations Act 2000 (the Act) that Ben Singh's and Asa Rao's failures to keep or produce wage and time records for Mr Singh has prejudiced his ability to bring an accurate wage arrears claim against each of those entities.

[29] The Authority therefore relies on s132(2) to accept as proved all claims Mr Singh has made about the wages he was paid and the hours, days, and time he worked for Ben Singh and Asa Rao, except for those that were proven by the respondents to have been incorrect.

Issues

[30] The following issues need to be determined in respect of the claims Mr Singh has made against Ben Singh:

- (a) Does Ben Singh owe Mr Singh wage arrears?
- (b) Did Ben Singh make unlawful deductions made from Mr Singh's wages?
- (c) If so, what is he owed?

[31] The following issues need to be determined in respect of the claims Mr Singh has made against Asa Rao:

- (a) Does Asa Rao owe Mr Singh wage arrears?
- (b) Did Asa Rao make Mr Singh pay some of his own PAYE?
- (c) If so, can Mr Singh recover the PAYE he paid from Asa Rao?
- (d) Did Asa Rao make unlawful deductions made from Mr Singh's wages?

[32] Other issues to be determined include:

- (a) Does the Authority have jurisdiction over the loan Mr Singh gave Ms Kumar?
- (b) If so, can Mr Singh recover the outstanding loan amount from Ms Kumar?
- (c) What if any costs should be awarded?

Does the Authority have jurisdiction to investigate loan issue?

[33] Mr Singh's evidence was that he gave Ms Kumar money to pay for expenses her sister had which she could not pay.

[34] Mr Singh believes that this was a loan to one or both respondents. The Authority does not agree.

[35] The Authority does not have jurisdiction to determine the loan repayment issue because Mr Singh and Ms Kumar were friends, co-workers and landlord/boarder. They were never in an employment relationship with each other.

[36] There was no evidence that either of his two employers were involved with this loan Mr Singh made to Ms Kumar. The money Mr Singh loaned Ms Kumar was a personal/private arrangement between him and Ms Kumar.

[37] Although Ms Kumar was Mr Singh's manager for both of his employment relationships that did not in itself create an employment relationship between them. Therefore any loan arrangements were necessarily private matters that did not involve either respondent.

[38] If Mr Singh wants to pursue the recovery of an unpaid loan to Ms Kumar, then that is a civil matter that he will need to pursue in another jurisdiction.

Does Ben Singh owe Mr Singh wage arrears?

[39] Mr Singh worked for Ben Singh for 8 weeks and one day.²

[40] Under his employment agreement Mr Singh was to be paid \$18 per hour for 40 hours per week, in cash or into his bank account. That amounts to \$720 per week.

[41] Ms Kumar said the café was open from 9am to 3pm weekdays and from 9am until 1pm-2pm on weekends, depending on how busy the café was. That means Mr Singh's daily pay would have been up to \$108, depending on what time the café closed and if he took an unpaid lunch break.

[42] The Authority finds that Ben Singh should have paid Ben Singh total gross earnings of \$6,648.48, consisting of:

- (a) \$5,868 ordinary pay being \$5,760 - 8 weeks x \$720 + \$108 for one day – 6 hours x \$18 per hour;

² From 19 April to 15 June 2016.

- (b) \$72 as the additional time and a half payment for the four hours (9am to 1pm) Mr Singh worked on the two public holidays he worked (being Anzac Day (25 April) and 6 June (Queen's Birthday)).
- (c) \$216 as the payment upon termination for the two paid 'alternative day holidays' he did not use while employed but which he had received for working on two public holidays;
- (d) \$492.48 being 8% of his total gross earnings while employed.

[43] The EMSs provided to the Authority by Ben Singh recorded that Mr Singh had been paid a total of \$7,122.50 during the period he was employed.

[44] Based on the information that has currently been put before the Authority, Ben Singh has overpaid Mr Singh \$474.02. Accordingly Mr Singh's wage arrears claim does not succeed.

Did Ben Singh make unlawful deductions from Mr Singh's wages?

[45] Mr Singh says he entered into a 'wages rotation arrangement' with Ben Singh whereby his wages would be paid to him and he would immediately repay all but \$150 per week of his wages back to Ms Kumar (for Ben Singh) so it could use the money to cover its own business expenses.

[46] Ms Kumar denied that had occurred.

[47] Ms Kumar's response to Mr Singh's bank statements that showed the deposits and withdrawals was unconvincing. Ms Kumar claimed that Mr Singh would improperly deposit the café's cash into his own personal bank account and then when challenged about that would then repay it. That scenario doesn't align with the regularity of the payments of the consistency of the amounts paid into and withdrawn from Mr Singh's bank account.

[48] Mr Singh told the Authority he deposited all cash sales into Ben Singh's business bank account every day he worked. He said that Ben Singh's bank accounts would show that if they were produced. However they were not provided to the Authority.

[49] Mr Singh provided his bank statements and evidence about this arrangement from the outset of these proceedings. Ben Singh was clearly on notice about that, but did not provide

its own bank account statements or till receipts from the café to show that there were cash sales missing or what missing cash sales it claimed had simply been repaid by Mr Singh.

[50] It also seems very odd that if Mr Singh was continually improperly taking home cash payments from the café that this would not have been raised with him as a disciplinary issue and/or even as a potential criminal matter with the Police while he was employed. Particularly when the café apparently did not have enough money to cover its own operating expenses.

[51] Ms Kumar's explanation that the amounts deposited and withdrawn by Mr Singh was provided to the Authority for the first time during the Authority's investigation meeting. It was not mentioned in the Statement in Reply of the other evidence the parties provided to the Authority before the investigation meeting.

[52] The Authority did not find Ms Kumar's response to Mr Singh's bank statements to be credible and it was not supported by any documentation (such as Ben Singh bank statements or till receipts).

[53] Furthermore text messages produced by Mr Singh showed that Ms Kumar was asking him to give Ben Singh money or it could not pay its expenses. These texts clearly supported Mr Singh's evidence and fundamentally undermined Ms Kumar's account of what had apparently occurred.

[54] The Authority therefore considers it more likely than not that after receiving his wages Mr Singh did then repay all but \$150 of them each week to Ms Kumar, on behalf of Ben Singh, to mask the reality of his employment situation from INZ.

[55] Mr Singh candidly admitted that he repaid most of his wages to Ben Singh each week in order to mask the company's true financial situation and the reality of his employment situation from INZ. He did that to avoid jeopardising his residency application.

[56] The Authority has preferred Mr Singh's evidence about this arrangement over that of Ms Kumar's, on the basis that Mr Singh's explanation is more likely to be correct.

[57] However the arrangement Mr Singh described was not an unlawful deduction by Ben Singh from his wages because Mr Singh was paid his full wages. Mr Singh, after receiving

his wages, then elected to repay all but \$150 of his pay back to his employer, because it was having financial difficulties and he didn't want INZ to find out about that.

[58] That was his choice, so it was not an unlawful deduction.

[59] Mr Singh could have retained his wages in his bank account. He could have declined Ben Singh's request to give it money. He could have elected to loan money to Ben Singh, under a formal loan document if he wanted to be able to recover it.

[60] The Authority finds that Mr Singh received his wages without deduction and then elected to use those wages in a way that resulted in him eventually losing that money. He took that risk in the hope he could hide the true situation from INZ, thereby not jeopardising his residency application.

[61] Mr Singh's unlawful deduction from wages claim does not succeed.

Does Asa Rao owe Mr Singh wage arrears?

[62] Mr Singh was employed by Asa Rao for 22 weeks.³

[63] Under the terms of his employment agreement Mr Singh was to be paid \$18.50 per hour for 35-40 hours per week. The Authority has relied on s 132(2) of the Act to accept Mr Singh's evidence that he actually worked at least 40 hours per week for the entire time he was employed.

[64] Mr Singh was entitled to be paid \$17,752.23 total gross earnings while employed by Asa Rao, consisting of:

- (a) \$16,280 ordinary time pay for hours worked while employed (\$740 per week x 22 weeks);
- (b) \$46.25 as the additional time and a half for the five hours he worked on the public holiday on 24 October 2016 (Labour Day);
- (c) \$111 for the paid alternative day holiday he was entitled to for working on Labour Day, but which he did not use while he was employed;
- (d) \$1,314.98 unpaid holiday pay entitlements, being total gross earnings of \$16,437.25 x 8% holiday pay.

³ 28 June to 26 November 2016.

[65] The EMSs presented by Asa Rao to the Authority showed that Mr Singh was paid a total of \$14,892.50 by Asa Rao over the period July – December 2016.

[66] The Authority has accepted the accuracy of the EMSs information regarding what had been paid to Mr Singh because the employer had to sign them to declare that the information they contained was true and correct.

[67] Asa Rao owes Mr Singh wage arrears of \$2,859.73 (being \$17,752.23 he should have been paid less the \$14,892.50 he was actually paid).

Did Asa Rao make unlawful deductions from Mr Singh's wages?

[68] Mr Singh said that the same 'wage rotation arrangement' that applied to his employment with Ben Singh also applied to his employment with Asa Rao. Ms Kumar also gave the same explanation for it.

[69] Mr Singh's evidence about the wage rotation was accepted and Ms Kumar's explanation for it was not accepted by the Authority, for the same reasons already explained in relation to the Ben Singh claims.

[70] While it is clear that Mr Singh did rotate his wages to keep the true circumstances of his employment from INZ, that occurred after he had received his wages.

[71] Accordingly Mr Singh's claim that Asa Rao made unlawful deductions from his wages does not succeed.

Did Mr Singh pay some of his own PAYE on Asa Rao's behalf?

[72] Mr Singh provided evidence of making two payments totalling \$1,515.62 to the IRD for Asa Rao (\$683.63 + \$831.99). He did that because Asa Rao told him it did not have enough money to pay his correct amount of PAYE to IRD.

[73] Mr Singh's payment of part of his own PAYE directly to IRD was an attempt by him to avoid any possible PAYE/IRD problems, as that would have adversely affected his residency application that was to have been completed by 4 December 2016.

[74] PAYE was Asa Rao's responsibility. It is therefore ordered to reimburse Mr Singh the \$1,515.62 he paid on Asa Rao's behalf.

Discrepancy in IRD records produced to the Authority by the parties

[75] The Authority notes that there was a discrepancy in the IRD information presented to the Authority.

[76] Mr Singh's own IRD records show that he was paid \$12,301 by Asa Rao over the period 15 June – 31 October 2016 while Asa Rao's IRD records show it had paid him \$14,892.50.

[77] Mr Singh's IRD records show he was paid \$10,360 by "*Fresh Vibe Café*" – which is a trading name and not a legal entity, but which presumably refers to Ben Singh. However, Ben Singh's EMSs show it paid Mr Singh \$7,122.50.

[78] The resolution of these discrepancies requires the involvement of IRD to explain why these different figures appear on the parties IRD records. The parties should therefore raise this discrepancy with IRD, so it can be investigated and resolved.

[79] If that identified that some of the IRD and/or EMS information the Authority has relied on in this determination is inaccurate then any of the parties may apply to the Authority to reopen this investigation so that the correct IRD information can be considered.

[80] The Authority has decided against placing the determination of this matter on hold because it is a long standing matter that has involved many delays. It is undesirable for there to be further delays, particularly when an IRD investigation could take months or years.

[81] The parties need finality. This matter has therefore been determined based on the Authority's best assessment of currently available facts, in what has been a somewhat challenging factual and documentary situation.

[82] It if turns out that incorrect IRD records have resulted in miscalculations by the Authority, then a potential reopening application would seem to be the best way of addressing that. Any party therefore has leave to make that application if it becomes necessary.

What if any costs should be awarded?

[83] Ben Singh was the successful party in terms of the claims Mr Singh made against it. However because it was not legally represented, there was no issue as to costs.

[84] Although Mr Singh was the successful party in terms of his claims against Asa Rao, there is no costs issue because Mr Singh represented himself.

[85] Asa Rao is however required to reimburse its half share of Mr Singh's filing fee being \$35.78. Mr Singh was responsible for the other half of his filing fee because his claims against Ben Singh did not succeed.

Authority's orders

[86] Within 28 days of the date of this determination, Asa Rao is ordered to pay Mr Singh \$4,411.13 being:

- (a) \$2,859.73 wage arrears;
- (b) \$1,515.62 PAYE reimbursement; and
- (c) \$35.78 to reimburse half of his filing fee.

Other

[87] The Chief of the Authority has been asked to send a copy of this determination to INZ and to IRD so those organisations can consider what, if any, action involving these parties should be taken by them.

Rachel Larmer
Member of the Employment Relations Authority