

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 534  
3053413

BETWEEN                      A LABOUR INSPECTOR OF  
   THE MINISTRY OF  
   BUSINESS, INNOVATION  
   AND EMPLOYMENT  
   Applicant

AND                                BASRA & KHELLA  
   LIMITED  
   Respondent

Member of Authority:        Nicola Craig

Representatives:              Joseph Perrott, counsel for the applicant  
   Arunjeev Singh, counsel for the respondent

Investigation Meeting:        23 to 25 September 2019, 1 and 9 October 2019

Submissions Received:        18 October and 6 November 2019, and 10 February  
   2020 from the applicant  
   29 October 2019 and 31 January 2020 from the  
   respondent

Date of determination:        22 December 2020

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**DETERMINATION OF THE AUTHORITY**

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- A        Basra and Khella Limited is ordered to pay the Labour Inspector, for Mr Behgal, the following sums within 28 days of the date of this determination:**
- (a)        \$25,323.50 gross minimum wages;**
  - (b)        \$1,926.57 gross annual leave arrears;**
  - (c)        \$482.90 gross public holiday pay;**
  - (d)        \$743.28 gross for alternative holidays; and**
  - (e)        interest on those sums from 11 February 2018 until the date of payment.**

**B Basra and Khella Limited is ordered to, within 28 days of the date of this determination, pay the Labour Inspector for payment into the Crown account, the sum of \$18,000 as a penalty for its breaches of the Minimum Wage Act 1983, the Holidays Act 2003 and the Employment Relations Act 2000.**

**C Costs are reserved and a timetable set for submissions.**

### **Employment Relationship Problem**

[1] A Labour Inspector of the Ministry of Business, Innovation and Employment (MBIE), Thaherunissa Begum, brings a claim against Basra and Khella Limited (B&K or the company). The claim concerns former B&K employee Vijay Behgal.

[2] B&K operated the Super Liquor store in Papatoetoe, through its sole director Ravinder Basra.

[3] The Labour Inspector claims that Mr Behgal worked considerably more hours at the store than he was paid. She alleges breaches of the Minimum Wage Act 1983 (the MW Act), the Holidays Act 2003 (the H Act), the Employment Relations Act 2000 (the ER Act), and the Wages Protection Act 1983 (the WP Act).

[4] B&K says that Mr Behgal was paid for the hours he worked and denies breaching any legislation.

[5] The investigation meeting commenced on 23 September 2019 and continued to 25 September 2019. It was then resumed on 1 and 9 October 2019. I was assisted by two interpreters of the Punjabi language.

[6] Evidence was heard from Mr Behgal, Ms Begum, Mr Behgal's partner, a co-worker from the store, Mr Basra, two workers from nearby businesses (the bar worker and the mini mart worker), Lex Fitness (B&K's IT consultant) and Resham Singh (store worker, shareholder and Mr Basra's father-in-law). Mr Behgal was only available in Auckland on the first day of the meeting, but made himself available for later periods to attend by Skype to answer questions which arose during the investigation.

[7] A statement was filed on behalf of an additional witness but he was unable to be contacted by telephone, despite several attempts and so his statement was set aside.

[8] During the preparation of the determination, as set out in more detail below, I became aware of what appeared to be a pattern between apparent changes in the system

time of a store computer and photographs of a computer screen. As a result further submissions were sought and provided by the parties.

[9] This determination has been issued more than three months after the day on which the last information was received. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174C(4) of the ER Act was applicable.

[10] As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **Issues**

[11] The issues for investigation are:

- (a) Did Mr Behgal work at the Papatoetoe Super Liquor store for around 40 hours per week, as he was paid for, or did he work around 70 to 75 hours per week as he claims?
- (b) If Mr Behgal worked the longer hours, did B&K breach the MW Act and what arrears are owing?
- (c) Did B&K breach the H Act regarding holiday pay, public holiday pay and alternative holidays and if so, what sums does B&K owe Mr Behgal?
- (d) Did B&K breach the ER Act regarding wage and time records and the H Act regarding holiday and leave records?
- (e) Did B&K breach the WP Act by seeking and receiving premiums from Mr Behgal and if so, should the money be returned to him?
- (f) If B&K breached any statutes should it pay a penalty?

[12] I focus firstly on the hours of work question, the answer to which will largely determine the wages and holidays issues. I will then turn to the premium question, followed by the penalties discussion.

### **Mr Behgal's involvement with B&K**

[13] There was uncertainty about the start of Mr Behgal's work at the store. By letter of 5 December 2016, B&K offered Mr Behgal the position of store manager at the

Papatoetoe store and he signed the letter on the same date. The employment agreement is recorded as commencing on 12 December 2016, the date it was signed.

[14] There was some suggestion that Mr Behgal began to assist in the store in December 2016 on a voluntary part time basis and did not commence full time work until late March 2017. The Labour Inspector's claim however, starts from a later point given the uncertainty.

[15] Mr Basra emailed the Immigration Service on 17 March 2017 saying that he had been waiting over three months for Mr Behgal's visa to come through. Mr Basra said that was to start looking for a new manager "from today" and he could not support the application any more. He says that was to get things moving.

[16] The application was approved and Mr Behgal worked full time at the store until the date of his resignation, 10 February 2018.

### **Labour Inspectorate's involvement with B&K**

[17] From August 2017 the Inspectorate, as part of its retail strategy, conducted a proactive investigation into B&K. An infringement notice for \$1,000 was issued on 6 November 2017 due to non-compliant wage and time records. The company was found to have failed to record the number of hours worked each day in a pay period for an employee, as required by s 130 of the ER Act. Ms Begum completed a Pro-Active Investigation Report dated 19 December 2017. Mr Behgal had limited involvement with that investigation although he did speak to the Inspector without reporting concerns and took her business card.

[18] Then in February 2018 Mr Behgal contacted the Labour Inspector and the two met. Mr Behgal claimed to be under pressure to work more hours than were stipulated in his employment agreement, not to have been paid for all his work and to fear that his visa would be cancelled. He lodged a formal complaint which was initially handled by another inspector. The case was closed when Mr Behgal pursued his claims through a lawyer but was later re-opened.

### **Witness evidence**

[19] This case involved substantial areas of conflicting evidence, both from witnesses and in other forms. I will look at each witness's hours of work evidence

followed by other forms of evidence. Most of the witnesses had some fairly close connection with either Mr Behgal or Mr Basra, and so lack independence.

#### *Mr Behgal*

[20] Mr Behgal claims he was pressured by Mr Basra to work long hours to keep his job, with threats that his visa would be revoked. He says he usually worked 10 am to 10pm Tuesday, Wednesday and Sunday, and 10am to 11pm Thursday, Friday and Saturday. He usually had Monday off but occasionally had to work that day too. He worked 70 or 75 hours a week. Mr Behgal described the long hours as eventually getting too much for him, with his mental and physical health and his relationship suffering.

[21] Mr Behgal did not raise any issues with the representatives of the Labour Inspectorate when they visited the store in 2017, including during his interview. His explanation is that he was concerned about losing his visa and thus ability to stay in New Zealand if he was seen to be assisting the Inspectorate. When his visa status changed to a partnership visa, dependent on his partner, he felt able to complain. I found this explanation plausible.

[22] Mr Behgal provided a sheet of his work hours which I discuss in more detail below.

[23] Although sometimes a little over confident in his evidence I generally found Mr Behgal credible. There is however a significant issue regarding his photographic and computer evidence which I refer to below.

#### *Mr Behgal's partner*

[24] The partner confirmed having been told by Mr Behgal as well as having a sense from his absence from home, that he was working long hours at the store, having usually only one day off a week. Her understanding was that he worked 10 am to 10 or 11 pm. She described Mr Behgal as becoming unhappy and depressed, with her then seeking advice about immigration arrangements.

[25] Mr Behgal's partner also drove him all or part of the way, to or from, work on some occasions, including public holidays. She used to take him to the North Shore bus station around 8.30 or 9am when she was on her way to work. Sometimes she

would drive to Papatoetoe and pick him up after work around 11 or 11.30pm. She recalled Mr Behgal working on public holidays as she would be alone because she did not work those days.

[26] Obviously the partner could not be described as independent but I found her evidence credible. She spoke confidently about the transport and hours of work arrangements and of her anger at Mr Basra who she believes threatened Mr Behgal with withdrawal of support of his visa.

#### *The co-worker*

[27] The co-worker from the store was summonsed at the request of the Labour Inspector. He could be seen as a neutral witness as he was still employed by B&K and provided helpful evidence.

[28] When the co-worker was interviewed by the Labour Inspectorate over the phone, he indicated that he usually worked week days in the evenings. He said sometimes Mr Basra was around. There was one apparent inconsistency, with the co-worker saying he worked alone at night but also indicating that Mr Behgal worked most days except Monday, and usually opened and closed the shop. The co-worker reported asking Mr Behgal why he worked such long hours and Mr Behgal responding that was a deal (with Mr Basra) and he had to do it.

[29] The co-worker told the Authority he had seen Mr Behgal in the store occasionally if he had dropped in during the morning although this was once the shop was open. Mr Behgal told him that he opened the shop each day other than Monday. The co-worker reported working with Mr Behgal in the evenings. He also thought that Mr Behgal became stressed due to the long hours he worked. He again said Mr Behgal told him that he had to work such long hours.

#### *The Labour Inspector*

[30] I refer below to the Inspector's investigation.

[31] Of note in terms of contemporaneous observations is the Inspector's impression when she interviewed Mr Behgal towards the end of his time at the store, of him having negative thoughts. He looked very stressed and a bit shaky as well as expressing

negative thoughts. Mr Behgal reported having been sleepless. The Labour Inspector's impression was that he was very stressed and felt under tremendous pressure.

*Mr Basra*

[32] The liquor store was open from 10am, seven days a week. Mr Basra said that he mostly opened the store in the morning. The store was open in the evenings with different daily closing times, the latest being a 11pm finish on busier days (Thursday, Friday and Saturday). Mr Basra says he stayed at the store for most of the day and covered when others were off. In addition to Mr Basra, there were three staff members, including Mr Behgal.

[33] Mr Basra denied putting any pressure on Mr Behgal to work long hours. In his witness statement he set out Mr Behgal's usual hours as initially being:

Sunday	10am to 9pm
Monday & Tuesday	Days off
Wednesday	10am to 2pm
Thursday	10am to 5pm
Friday & Saturday	2pm to 11pm

[34] The statement continued that Mr Behgal's hours from 30 October 2017 until 9 February 2018 were:

Sunday & Monday	Days off
Tuesday	10am to 6pm
Wednesday	10am to 8pm
Thursday	10am to 6pm
Friday	2pm to 9pm

[35] Mr Basra said at the investigation meeting that Mr Behgal always worked a minimum of 40 hours as per the employment agreement. However, I put to him that the hours outlined above prior to 30 October 2017 amounted to 31 hours a week, even without deduction for breaks. He replied that a mistake had been made and he would check the rosters. However, he then accepted that he did not have any rosters for that period, other than from 31 July onwards. When asked how he knew that Mr Behgal's initial hours were the ones described in his statement, Mr Basra said he had checked the rosters but it had been a while. Mr Basra then asserted that the rosters from August 2017 were the normal hours.

[36] On checking B&K's proffered roster, for the fortnight starting 31 July 2017, Mr Behgal is shown working the 31 hour per week pattern described as his initial hours in

Mr Basra's witness statement. Mr Basra was unable to explain this except on the basis that it was a typo. When asked whether the mistake was on the roster or his witness statement he said both.

[37] I asked Mr Basra about whether the hours he describes in his statement as being from 30 October 2017 onwards would meet the minimum 40 hour test from the agreement. The total hours from that period are 40 per week but that is without allowance for unpaid breaks. Mr Basra suggested that the half hour breaks were paid.

[38] Mr Basra states categorically in his witness statements that Mr Behgal never worked on Mondays or public holidays and denies that Mr Behgal opened or closed the store daily.

[39] Mr Basra's evidence suggested that at times he or another staff member worked alone in the store. I found that unlikely for a liquor store at night.

[40] I found aspects of Mr Basra's evidence lacking in credibility. For example, he insistently denied knowing Mr Behgal got the train to work even though there was a text from Mr Behgal using the train as an excuse for lateness. Mr Basra replied without expressing any surprise "Ok see you shortly". He did make some appropriate concessions.

### *Mr Singh*

[41] Mr Singh says that Mr Basra always opened the shop and on a few days Mr Behgal would be there in the morning too. However, Mr Singh accepts that he was not always at the store in the morning and no one told him who opened up when he was not there. Mr Singh did not have strong recall.

[42] Mr Singh's evidence was not always in keeping with the rosters B&K filed. For example, there were periods when Mr Basra was shown as not being on duty first thing in the morning to open up. When questioned about whether he could read the rosters in English, Mr Singh responded that whatever the rosters said was correct.

[43] Mr Singh indicated his desire to help his son-in-law Mr Basra and emphasised the closeness of their connection. Also as a B&K shareholder he has a financial interest in the outcome of this proceeding.

### *The bar worker*

[44] The worker from the neighbouring bar went into the liquor store on occasions if the bar needed supplies. He describes being on good terms with Mr Behgal who never expressed dissatisfaction with his work. He did not notice Mr Behgal working long hours.

### *The mini mart worker*

[45] The minimart worker became friends with Mr Basra after the latter bought the liquor store. A birthday gathering for Mr Basra was held at the mini mart worker's house. On days he started early, he reports seeing Mr Basra opening the liquor store.

[46] Mr Behgal claims that the mini mart worker used to help out at the liquor store but he was not sure about payment. Although the co-worker also reported seeing the mini mart worker working at the liquor store, the minimart worker himself strongly denied it as did other B&K witnesses.

### *Mr Fitness*

[47] Mr Fitness has been an IT consultant to B&K and other businesses for some years, including a business previously managed by Mr Basra. He had a friendly relationship with Mr Basra. Although he is thus not independent and may well not in any event reach the standards to establish him as an expert witness on IT matters, I found him forthcoming and his evidence helpful.

[48] Mr Basra asked Mr Fitness to look for evidence of any alteration to the store's computer time clocks or any issues with the software for recording the time. Mr Fitness provided a brief letter and half page witness statement.

### *Conclusion on witnesses*

[49] When considered against the documents discussed in more detail below, neither Mr Behgal's nor Mr Basra's evidence was consistent with the documents, including those which they themselves created.

[50] The evidence from those working in other businesses nearby broadly supported B&K's position, but given the fact that when inside their work premises neither could see into the Super Liquor store, it was of limited assistance.

[51] Mr Behgal's co-worker supported Mr Behgal as having worked hours much more in the nature he claimed, rather than what Mr Basra claimed. Mr Singh made broad statements supportive of B&K's position but seemed unable to speak specifically or with much certainty.

### **Documentary and other evidence**

[52] A large quantity of documentary and other evidence was filed, particularly on behalf of Mr Behgal who, while still at the store, was collecting evidence to support his claim. B&K objected vigorously to some parts of that evidence.

[53] There were challenging IT issues which had to be resolved without the advantage of high level independent expert evidence.

#### *Employment agreement*

[54] The agreement specified 40 hours' weekly work in return for a salary of \$44,000. The 40 hours are once described as the ordinary hours but elsewhere as a minimum.<sup>1</sup> No more than 50 hours was to be worked without agreement.<sup>2</sup>

[55] The days of work were described in one place as being completed over no more than five days a week and in another as being spreadable over 6 or 7 days with agreement.<sup>3</sup> The pattern of work hours were described as being flexible as per a roster system.<sup>4</sup>

#### *"Timesheets" by Mr Behgal*

[56] Mr Behgal created a two page grid setting out his hours each day. Although there is the odd reference to "Closed" or the like, the grid almost entirely shows the same hours consistently worked on the same day of the week all through his employment. Mondays are almost always noted as off, Tuesdays as 10(am) to 10(pm), Wednesday 10 to 10, Thursday 10(am) to 11(pm), Friday 10 to 11, Saturday 10 to 11 and Sunday 10 to 10.

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<sup>1</sup> Clause 6.1 and Schedule A of the employment agreement.

<sup>2</sup> Clause 6.2 of the agreement.

<sup>3</sup> Clauses 6.1 and 6.2 of the agreement.

<sup>4</sup> Schedule A of the agreement.

[57] B&K is strongly critical of this document, pointing to its late creation and some established errors. It was submitted that the document should be completely disregarded due to those errors.

[58] It is perhaps unfortunate that these pages were referred to as “Timesheets”, although it is not clear that it was Mr Behgal who gave them that description. “Timesheets” suggests that they were created contemporaneously with the time being worked, when in fact Mr Behgal freely described them as being created after discussion with the Labour Inspector who sought information on his work hours, towards the end of his employment.

[59] Mr Behgal added highlighter over a 20 day period and then recorded at the bottom in relation to those days:

This is approximately the hours I have done in Superliquor. Sometimes if I take any day off I have to cover on Monday so I don't exactly write my day off but I am 100% sure the hours every week was not less than 75 hours per week.

[60] Mr Behgal accepted under cross examination that he did not start work until 17 March 2017, whereas the grid appears to show a start from 6 March. It also became evident during the investigation that he did not work after 9 February 2018 so the continuation of the timesheet for a week after that point is inaccurate.

[61] There was also some evidence of occasional other things not being correct. For example, Mr Behgal admitted when questioned that he did not work on Easter Sunday in 2017 and the store was closed for the whole day, but the grid shows him working 10 to 10.

[62] Mr Behgal accepted that he did not use any earlier notes of his own to assist with completing the grid. He did use information from his Auckland Transport Hop card records, which are discussed below.<sup>5</sup> I accept that it would be difficult to recall up to ten months later, with a high degree of accuracy, which exact days and hours were worked. However, I accept that the grid reflects Mr Behgal's sense of his general work pattern, with longer hours worked on Thursday, Friday and Saturday, as these were the busier days.

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<sup>5</sup> Electronic card to pay for bus, train and ferry transport.

### *Bank records*

[63] Mr Behgal's bank records show multiple entries of him purchasing minimart and food items in Papatoetoe on days when he was not supposed to be working according to B&K's rosters and timesheets. There are also a number of purchases from the liquor store itself on days Mr Behgal was not supposed to be working there according to the company's documents. I refer to this evidence in more detail below when discussing the premium claim.

### *Resignation letter*

[64] In his lengthy resignation letter Mr Behgal refers to being required to work 75 hours a week but only being paid for 40 and spells out his hours. He also writes that Mr Basra threatened to have Mr Behgal's visa cancelled to make him comply. This supports Mr Behgal's evidence although I accept B&K's point that by this time Mr Behgal was in the process of pursuing his claims against the company.

### *B&K's rosters and timesheets*

[65] Mr Basra says the company had rosters prior to July 2017 but he did not retain copies of them. None were provided to the Labour Inspector.

[66] The company filed rosters for the period from July 2017 to February 2018 along with timesheets for Mr Behgal from August 2017 to February 2018. The rosters and timesheets show 40 hours of work a week in matching patterns.

[67] The rosters and timesheets show different week patterns. The rosters are for Monday to Sunday and the timesheets for Saturday to Friday. This seems unusual and I consider it likely to have been noticed as inconvenient had the documents been used in practice.

[68] Mr Basra suggested that his accountant may have sent these documents to the Labour Inspectorate during the earlier proactive investigation. However, the Labour Inspectorate did not receive these rosters until they were filed in the Authority. Mr Basra accepted that they should have been sent in response to the Inspector's request for full wages and time records.

[69] Mr Behgal acknowledges that he had helped in the creation of these rosters after the Labour Inspectorate became involved but claims that they are fake. He says Mr

Basra forced his involvement by mentioning Mr Behgal's visa in a way which Mr Behgal found threatening.

[70] Also, Mr Behgal initialled the timesheets, he says because Mr Basra forced him to. He points to the same colour pen being used for long runs of timesheets. From 21 January 2018 he refused as he had received a partnership visa and so the last few timesheets are not initialled.

[71] Mr Behgal accepts that it was wrong to create false rosters and to initial inaccurate timesheets. He was criticised by B&K for failing to refer to being involved in any faking of rosters when he was interviewed by the Labour Inspectorate on 9 and 12 February 2018.

[72] Mr Basra is not mentioned in the B&K rosters from 31 July to 29 October 2017 even though he says he was working most days in that period. His response is that he did not need to be mentioned as he was the owner. However, in the rosters covering 30 October 2017 onwards he is listed.

[73] There is substantial witness and other evidence suggesting those rosters and timesheets are not accurate. For example, the rosters show Mr Behgal having Mondays and Tuesdays off work from late July to late October 2017. By contrast Mr Behgal's bank statements record multiple purchases in Papatoetoe, including at the minimart and the liquor store itself during the Monday and Tuesday block each week for that period. There are dozens of purchases made in the same shops that Mr Behgal made purchases at when he was working.

[74] Another example, is on 8 August 2017 when Mr Basra texted Mr Behgal asking why he was not there at 10am to open the shore. Mr Behgal replied that the train was late. According to B&K's rosters on 8 August Mr Behgal was supposed to have the day off.

[75] The co-worker's evidence was that he had not seen these rosters before even though he is listed as working in them. He said he worked off a roster that only covered him whereas the rosters B&K filed covered several people. This suggests that those rosters were not actually used at the time.

[76] Mr Singh's evidence was that he never worked later than 9pm, but the rosters have him working to 10 or 11pm some nights. He said that Mr Basra would direct staff about the hours required and that Mr Basra made his own hours as he was the boss.

*Employee Pay, Wages and Time record*

[77] B&K lodged a form headed Record Employee Pay, Wages and Time, for Mr Behgal. This is in a fairly standard format. It has handwritten entries and starts from the last week of October 2017, shortly after the Labour Inspector visited the store.

[78] I am not satisfied regarding the accuracy of that information. It is inconsistent even with the other records B&K supplied. For example, on 2 January 2018, a public holiday:

- (a) B&K's roster shows Mr Behgal having the day off;
- (b) The Daily Time Sheet somewhat ambiguously refers to "Public Holiday" in the start time column with "Off" in the finish column but eight hours in the Total Hours Worked column; and
- (c) The Employee Pay record shows Mr Behgal working eight hours, albeit with no extra pay that week.

[79] Earlier pay entries reflect payments received into Mr Behgal's bank account. However, after 8 December 2017 the payments indicated in the Employee Pay record are not shown in the bank statements, although a large payment from a different payer is made, albeit not reflecting exactly several of the pays shown in the B&K document.

**Audio evidence**

[80] The Labour Inspector provided four audio recordings which Mr Behgal says he made of his work discussions with Mr Basra as well as Mr Singh, without either of the latter being aware that they were recorded. B&K objected to the Authority accepting the recordings and transcripts, as well as arguing that the voice may not have belonged to Mr Basra or the recording may have been tampered with.

[81] It also points out that if the first recording was from 24 October 2017 as Mr Behgal states, that was the day before the Labour Inspector visited the store and Mr Behgal could have handed it over but failed to do so.

[82] The Authority is an investigative body which deals with matters on the substantive merits without regards to technicalities.<sup>6</sup> It has wide powers to receive evidence including what would not be regarded as admissible evidence in courts.<sup>7</sup>

[83] In *Talbot v Air New Zealand Ltd* the Court of Appeal noted that covert tape recordings of some conversations may be a breach of the duty of fair dealing. In that case there was no suggestion that the discussion was intended to be confidential or off the record. The Court concluded that the recording was admissible.<sup>8</sup>

[84] Covert recordings may on occasions be seen as a breach of the duty of good faith. However, I need to look at whether it is fair for the recordings to be admitted. On the assumption that Mr Basra is the other person involved, I have considered the possible unfairness to him (and Mr Singh) of being recorded without their knowledge.

[85] Weighed against that are a number of factors. There appears to have been no discussion that the conversation would be confidential or was off the record. Mr Behgal was a migrant worker whose employment and visa were dependent on B&K. The inherent power imbalance in the employment relationship is recognised in the ER Act and is more heavily weighted against workers in this situation.<sup>9</sup> The Labour Inspector received the recordings and gave the company notice of that as part of her investigation report, which B&K had the opportunity to respond to. No objection was received at that point. There was later objection in the Authority.

[86] I conclude that in these circumstances it is fair to admit the recordings. However, in considering the recordings I take into account that when only one party knows a conversation is being recorded, that party may set up discussions or create a more positive impression of themselves.

[87] Mr Basra disputed the recordings being of his voice. When asked whether he had any idea who might be speaking, Mr Basra said that the recordings could be tampered with or edited. I asked whether it was possible it was his voice but the conversation had been tampered with. He replied that yes, he thought so.

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<sup>6</sup> ER Act, s 157(1).

<sup>7</sup> ER Act, s 160(2).

<sup>8</sup> *Talbot v Air New Zealand Ltd* [1996] 1 NZLR 414.

<sup>9</sup> ER Act, s 3(a)(ii).

[88] I conclude that it is more likely than not Mr Basra's voice on the audio recording. While the recording was not subject to any professional evaluation, the transcript largely suggests that it was a flowing conversation.

[89] Mr Behgal in his evidence describes Mr Basra saying that there would be two sets of records for him, one recording 40 hours a week, the other 70-75 hours.

[90] There were some elements of the recording which could be taken to support Mr Behgal's evidence although they do tend to rely on his additional explanation. For example, there is a reference to "we have to sign here". Mr Behgal says this was about signing the fake rosters. Mr Behgal asks "my roster should I make a proper one with 70 hours or 40 hours?". Someone identified by Mr Behgal as Mr Basra says "That we will show together as 70 hours". Mr Behgal "Then I have to make 2 rosters one this one and another this one" Mr Basra asks why. Mr Behgal replies one for his own record.

[91] There are other entries which could be seen as providing support to B & K's position. For example, Mr Basra says that he is here (at the store) all the time.

[92] As B&K points out, there was no second set of rosters produced.

[93] Overall I conclude that the recording provides only a modest amount of support for the Labour Inspector's position over that of B&K.

### **Video evidence**

[94] A video taken at Mr Basra's birthday party shows Mr Behgal speaking positively about Mr Basra. He thanks Mr Basra for caring and providing him an opportunity to work. This seems contrary to his view that he was being exploited by B&K.

[95] Mr Behgal says the party was in July 2017, so relatively early in his employment. Everyone else had made positive comments about Mr Basra, so Mr Behgal felt he needed to as well. Plus he was concerned about his visa situation.

[96] I put little weight on the video evidence, particularly given the timing of the party.

## **Photographic evidence**

[97] Mr Behgal produced a large number of photos to support his claims that he worked long hours. A number of the photos show dates and/or times when, according to the B&K rosters, timesheets and Employee Pay records, Mr Behgal was not working. B & K strongly challenges the authenticity of the times in the photos.

[98] There are over 270 photos covering what appears to be a period from October 2017 to February 2018. The dates shown in the photos begin on 25 October 2017, the day the Labour Inspector visited. The photos include pictures of:

- (a) A screen showing the store's CCTV surveillance pictures, which include dates and times;
- (b) The store's computer screens, from the point of sale system and office computer. The pictures include some with the time on the bottom toolbar (system time) and Google searches for "NZ time" showing a date and time result on the screen; and
- (c) Wall clocks from the store.

[99] Although the photo series intersperses pictures of those different types, a closer examination reveals that the vast majority of the photos seemingly from the earlier period are of the CCTV screen, with only the odd one of other screens or the wall clock. From around the photographed date of 13 December 2017 the pattern changes with point of sale screen pictures added.

[100] The background in the pictures which show background, seem to show a consistent look over a series of photos. The background changes and then a series of photos has that new background. This suggests they reflect changes in time consistent with the dates on the photos although changes made for the purposes of the photos cannot be ruled out.

## **Changing computer time - point of sale system evidence**

[101] All staff used the same log-in for the point of sale system.

[102] Mr Fitness says that the time and date on a computer or other device can be changed so that what appears (on the screen's taskbar for example) is not the actual date and time. The computer time is sometimes referred to as system time.

[103] On B&K's request Mr Fitness undertook an analysis of the point of sale system. Windows operating systems save a record in the event log of a number of things which are done on or happen with the computer. This includes when the time or date on a computer is adjusted manually. Usually the computer will automatically update to a time server (ie to the correct time) but that function can be disabled. Mr Fitness described options for how to change the time and estimated that the time could be changed to one time and then back again in less than a minute.

[104] Mr Fitness examined the event log for some months at the end of Mr Behgal's employment, from at least September 2017 onwards. He did not check the records much after Mr Behgal left B&K. Mr Fitness found events where the time and date of the system time had been changed. Mr Fitness could not identify who made those entries or link them with Mr Behgal. Screen shots of the event log were provided as well as a copy of relevant entries in the event log in a raw data form.

[105] The time changes were done on 18 occasions, seemingly between 26 December 2017 and 6 February 2018. However, I noticed on a close examination of when the time was changed to and what time another change was made from, that the changes appeared to all be made within an hour on the same day, namely Boxing Day 26 December 2017.

[106] When I put this to Mr Fitness he agreed and noted that first change was back in time and the later changes were forward in time. He then confirmed that the changes were all made on 26 December 2017. Mr Fitness did not consider that these changes could be made by accident but he was unable to identify who made the changes.

[107] According to Mr Behgal's evidence he worked on Boxing Day 2017. B&K's documents present a mixed picture. The roster notes "Boxing Day" with no hours, suggesting Mr Behgal was not working. Its timesheet refers to "Off" but also refers to eight hours on the "Total Hours Worked" column. The Employee Pay record has eight in the "Number of Hours Worked" column.

[108] In the process of preparing this determination I compared the changes in system time to the photos. Only a little over 20 out of the 270 plus photos show a screen at the store counter, the point of sale computer.

[109] There is a strong correlation between the date and time the event log show the date and time being changed to and a photo of the point of sale screen being provided.

Often there are just seconds' difference. I counted 16 occasions of this occurring. There are around four instances where I was unable to match a photo with an event log record of a change. This evidence supports the possibility of the system time being changed to enable a photo of the point of sale computer's date and time to be taken. To be fair there are also a few instances where there is a point of sale screen photo but no related time change, although one of these is right at the end of Mr Behgal's employment.

[110] I gave the parties the opportunity to comment on the correlation. B&K supported the connection between the time changes and the photos, emphasising that only a small number of photos of the point of sale screen showing date and time were supplied by Mr Behgal.

[111] Submissions for the Labour Inspector accepted that there appear to be some similarity between the photos and the alterations in Mr Fitness' report, particularly as regards the dates concerned. It is submitted that the times are different, usually being 13 hours out, although are some different periods. That is not my reading of the evidence.

[112] Mr Behgal denied a good level of knowledge of IT, saying he had a basic level of computing knowledge. He denied having changed the time on a computer. When asked about Mr Fitness's evidence that the clock on the store computer had been altered, Mr Behgal denies it, asking why the time would not then have changed on his iPad, on which the photos were taken. Ultimately he admitted that the time could be changed on the computer.

[113] Given his lack of independence, I have considered the possibility that Mr Fitness could have created the event log documentation to fit the photos supplied by Mr Behgal albeit with some mistakes. However, that appears unlikely. At the investigation meeting it was not apparent that Mr Fitness had tracked the time over which the changes were made, although once he did so he agreed when asked with the Authority's statement that the changes were all made within an hour. Likewise Mr Fitness agreed when it was put to him that all the changes would have been done on 26 December 2017. Mr Fitness's report dated 24 July 2019 and witness statement both identify that there was a "pattern of the time being altered to a previous time and date" but he comments no further. There is no indication in his report and statement of a link being drawn between when the times were changed to and particular images or a group of images.

[114] I cannot rule out the possibility of the event log evidence being created but if that was done, no mileage was made of the correlation in anyone else's witness statements.

### **Photo metadata**

[115] A further complication arose regarding all the photos. In addition to the time on the screen shown in photos, Mr Behgal says that the each photo's own information supports the time's accuracy. This information is sometimes referred to as image metadata.

[116] Mr Behgal supplied his iPad to the Authority at the investigation meeting and was taken through examples of photos which showed the time in the metadata as matching the time shown in the photo of a computer screen. Mr Behgal says that this supports that the photographed time on the computer screen was accurate, as the photo was taken at that time and the time and location information cannot be changed. The location information on a number of photos were examined and showed the pictures were taken in Papatoetoe, where the store is.

[117] However, it appears that time metadata is set from the system time which the device taking the photo is set at. Mr Fitness provided a demonstration during the investigation meeting using his iPhone. He changed the date on his phone backwards to a 2018 date, took a photo using the phone and then showed counsel and the Authority that the image metadata showed the picture of the Authority meeting as having been taken on that 2018 date.

[118] Having seen that demonstration I conclude that the time could be changed on the device before taking the photo to make the metadata reflect the changed, and thus not accurate, time.

### **Wall clock photos**

[119] The photos of wall clocks added little as the clocks could easily be changed and also it was not evident whether a time such as 10.30 was in the morning or the evening.

### **Time searches**

[120] Mr Behgal filed a number of photos of the store screens showing dates from January 2018 where he had Google searched for the time in New Zealand. Mr Fitness

thought these should show the correct time, regardless of what the system time was set to.

[121] Some of the photos are consistent with the hours of work in B&K's rosters and timesheets documents but some are not. One day when B&K's documents show Mr Behgal finishing at 6pm, the time on the search is 10.15pm. Another day B&K's documents have him finishing at 9pm and the search time is 10.25pm. Another day he is shown on the roster and timesheets as being off work, whereas he has photos of the store's computer with time searches at 10.05am and 9.40pm.

[122] Even if it is suggested that roster changes were made, the B&K timesheets should reflect the work actually done but these photos suggest that they do not.

### **CCTV photos**

[123] Mr Behgal provided many photos of a store screen which showed CCTV images with a date and time on the screen. B&K also filed photos of the CCTV screen at a later period.

[124] B&K pointed to several things to suggest that Mr Behgal's photos were not accurate and/or the CCTV footage was tampered with. It submitted that the photos could show recorded footage being played back so the times may not be accurate, reflecting the playback time rather than the recording time.

[125] Some of Mr Behgal's CCTV photos show a 12 hour clock and some a 24 hour clock. This changes from 23 January 2018, the same time when an extra icon (seemingly indicating a camera) first appears. It is suggested that the clock settings on the DVR must have been changed for that to happen.

[126] Mr Behgal thought there may have been an upgrade around the time of these changes.

[127] B&K's pictures have "LIVE" at the bottom instead of "CAM". Mr Fitness thought "Live" meant it was live view of current footage although he accepted that the "Live" reference could be changed. However, Mr Basra thought that when a recording was played it still said "Live".

[128] B&K argued that the fact that a number of the CCTV photos show times before 9am when Mr Behgal said he started at 10 and has not claimed for time worked before

10, is contradictory. Examining the photos specified as examples, a substantial majority of them are from the few minutes before 10am, in some cases 9.59am. I do not find it unusual that Mr Behgal would go into the shop a few minutes before the store's opening time. There was also no evidence that Mr Behgal was allowed to claim extra time, with the B&K timesheets have him starting and finishing exactly on the hour.

[129] Although Mr Fitness offered some assistance, he was not closely familiar with the CCTV system and had not done any analysis of that system. He offered some explanations which overall indicated that changes could have been deliberate or occurred in other ways.

[130] Mr Behgal denied having played back recorded CCTV footage from which to take photos.

### **Conclusion on photos**

[131] The state of the photographic evidence is unsatisfactory. A large amount of it is subject to the possibilities of the alteration of point of sale computer's system time to show other dates and times, along with the iPad's time being altered to show photographs apparently having been taken at something other than was the actual time. The correlation between the point of sale system time changes and the photos of that screen is strong enough to suggest a plan but who carried out that plan is unclear. I must conclude that most of the photos are of little weight.

[132] There was also insufficient evidence to establish satisfactorily whether Mr Behgal's CCTV photos were of live or recorded footage.

[133] Remaining however, are the time search photos which appear to show the accurate time. However, there are only half a dozen or so of these photos and they are all from January 2018.

### **Alarm records**

[134] During the investigation meeting B&K obtained records from its security company showing the time that company recorded the store's alarm system going off. In some instances the security records were inconsistent with the CCTV times on Mr Behgal's photos.

[135] For example, the alarm would be recorded as being turned off in the morning some six or seven minutes after the CCTV time in the photo. These were relatively small discrepancies. However, in one instance the CCTV photo showed 8.56am, whereas the security reports showed the alarm being turned off at 10.01 am.

[136] There was uncertainty about aspects of the alarm records. In one instance for example, there were four entries several seconds apart. Mr Basra reported sensors sometimes going off for no apparent reason.

### **Transport evidence**

[137] A portion of evidence focused on how Mr Behgal got to work, with a swathe of Hop card records filed. This evidence potentially assisted with establishing when Mr Behgal started and finished work.

#### *Hop Card records*

[138] Records from late May 2017 to February 2018 were provided. In the period from late May to early September 2017 they showed frequent patterns of one or two way trips between the North Shore, where Mr Behgal lived and Papatoetoe. The trips from the North Shore begin with a bus into the central city, followed by a train trip from there to Papatoetoe. These usually ran over a period from around 8.50 to 9.50 am. The evening trips begin at around 10 or 11pm with the train being taken from Papatoetoe to Britomart in the CBD, then a bus from the CBD to the North Shore.

[139] B&K argues that the span of trips relied on is too short to support Mr Behgal's hours claim. I do not agree. They provide solid evidence, that for over three months of trips during the period when Behgal could not drive (see below), of a person arriving in the vicinity of Mr Behgal's work at around 10am, and leaving the area around 10 or 11pm, consistent with his claimed hours. There were periods when Mr Behgal did not use the Hop card but I found those to be satisfactorily explained.

[140] There were also text messages which showed Mr Behgal referring to being on the train in the context of work, including one mentioning Papatoetoe. The co-worker remembers that Mr Behgal got the train to work for a period and sometimes dropped him at the station after work. He also recalled Mr Basra sometimes giving Mr Behgal a lift to the station in time for the last train of the evening. Mr Basra denied this or knowing anything about Mr Behgal getting the train. However, there is a text from Mr

Behgal to him referring to lateness due to “train was stopped” with Mr Basra replying “Ok see u shortly”.

[141] It was suggested for B&K that Mr Behgal could have gone to Papatoetoe some time before he was due to start work and visited friends or spent time shopping, or done so after his shift finished. He denied that he undertook much shopping in the area and certainly it seems unlikely that he would have bought large quantities of goods so far from home only to have to take them on a train and bus after work. I also find the consistency of the start and finish times more likely to relate to work requirements, rather than socialising or shopping.

[142] B&K also raises unreliability shown by examples of when the card was not used at all on a day Mr Behgal said he worked or was used on the day his partner tended to pick him up. I do not accept that. Clearly Mr Behgal occasionally used other forms of transport but the pattern is sufficiently consistent to strongly support his claim.

#### *Car use*

[143] Some witnesses called by B&K gave evidence of seeing or knowing that Mr Behgal had a car and drove to work. Not surprisingly, they were unable to confirm that this was consistent during his entire period of work at the store. I do not find this inconsistent with Mr Behgal’s own evidence which was that he drove on occasions when he was able to or at times his partner would come and pick him up.

[144] Mr Behgal was without a licence for a period. While that obviously does not mean he could not physically have driven, it makes it less likely. Mr Behgal’s partner confirmed that he did not drive during that time.

[145] Mr Basra said in his witness statement that from the commencement of Mr Behgal’s employment the latter drove to work. However, during questioning he repeated that Mr Behgal was driving when he started work at Superliquor but then said he did not know how Mr Behgal was getting to work. He continued saying he had seen Mr Behgal driving all the time but did not know how he gets to work. I found this evidence confusing.

## **Labour Inspector investigation**

[146] Submissions on behalf of B&K make a serious accusation that the Inspector's investigation was unfair, biased and appeared to be a mere compilation of documents to support whatever right or wrong statements were made by the complainant, namely Mr Behgal. This argument is strongly rejected by the Labour Inspector's representative.

[147] The Labour Inspector's investigation was within the function in s 223A(a) of the ER Act; determining whether provisions of relevant Acts had been complied by B&K. The company was notified in writing of a Labour Inspector visit to the store in August 2018. Documents and information were sought from and provided by Mr Behgal and B&K. Mr Behgal was interviewed on three occasions. The co-worker was interviewed about Mr Behgal's claims. The only other employee appeared to be Mr Singh, who was not independent, being a shareholder as well as Mr Basra's father-in-law.

[148] B&K was provided with the report into Mr Behgal's complaint and given an opportunity to comment. No comment was made within the specified time although B&K's representative provided a response a few hours after the 5pm deadline.

[149] I cannot conclude that the bringing of this prosecution was an unreasonable step.

[150] In any event, in other cases where, for example, not all the employees concerned gave evidence, or breach of an improvement notice was involved, such claims could potentially be very damaging if substantiated.

[151] However, in this case Mr Behgal gave extensive evidence and a substantial amount of documentary and other evidence was available and was obtained on my direction. My findings do not need to rely on the Labour Inspector's view that Mr Behgal's claims were legitimate or worth prosecuting. Rather I had access to primary evidence on which to form my own views regarding witnesses and other evidence.

## **Mr Behgal's previous statements**

[152] B&K criticises Mr Behgal for meeting twice with the Labour Inspector before mentioning some time later that he had a concern about his own situation. Whilst it would have been advisable to raise his concerns with the Inspector earlier, I accept that

he felt that his job, visa and thus ability to remain in New Zealand could well have been jeopardised had he adopted that approach.

[153] B&K also says that Mr Behgal did not mention working 75 hours per week in his statements made to the Labour Inspector on 9 February and 22 June 2018, his formal complaint to the Inspectorate on 12 February 2018 nor in a personal grievance letter his lawyer sent in 23 February 2018.

[154] I do not consider the picture to be as persuasive as is suggested. Firstly, Mr Behgal's first call to MBIE does refer to Mr Behgal saying he worked 75 hours a week. In his statement of 9 February 2018 he refers to working more than 40 hours a week and working the whole day Tuesday to Sunday. The personal grievance letter refers to Mr Behgal working more than 70 hours per week. Mr Behgal's resignation letter also refers to him working 75 hours per week but being paid for 40.

#### **Other evidence on hours**

[155] Both Mr Basra and the co-worker were able to act as duty manager, along with Mr Behgal. It was suggested that with those two available to share the 12 hours of opening time, there was no need for Mr Behgal to work extended hours.

[156] Mr Basra texted Mr Behgal on 8 August 2017 asking why he was not there at 10am to open the shop. Mr Behgal replied that the train was late.

[157] On 10 February 2018 Mr Basra texted Mr Behgal:

Be there 10am I need to get the  
Ciggies & pick up car  
Plus bar delivery ...

[158] Of note is Mr Basra expecting Mr Behgal to come into work even though according to B&K's roster Mr Behgal is supposed to start work at 2pm that day.

[159] Mr Behgal reported to his doctor in February 2019 that he was suffering stress and exhaustion due to working very long hours.

[160] Mr Behgal gave evidence that a meeting sought by Mr Basra, Mr Basra had offered to pay Mr Behgal \$20,000 in return for receiving the hard evidence or proof for the claim, particularly the actual recordings. Mr Basra strongly denies this. The other person who had attended at least some of the meeting had been going to give evidence but was not contactable. There was no reference to this offer in the lawyer's personal

grievance letter written shortly afterwards. Given the somewhat unsatisfactory state of both men's evidence and the serious nature of the allegation I make no finding that this offer was made.

[161] B&K questioned witnesses, including in relation to various photos, about a wrist injury Mr Behgal had and who bandaged it. I did not find this line of enquiry of much assistance.

### **Conclusion on hours of work**

[162] There is evidence for and against Mr Behgal's claim of longer hours of work than he was paid. I am concerned about the photographic evidence but do not find that it was sufficient to make Mr Behgal's claim unsustainable.

[163] I found Mr Basra's evidence regarding hours of work and the roster documentation unconvincing. B&K's rosters were not consistent with other documents such as the Hop card records. Its Employee Pay record is inconsistent with its other records and with bank statements showing when Mr Behgal was paid.

[164] Having carefully considered all the evidence I conclude on balance that Mr Behgal did work substantially longer hours than he was paid. I found the following relatively independent evidence of particular assistance in reaching my conclusion:

- (a) The co-worker confirmed Mr Behgal's hours, so far as he was aware of them, to be more in keeping with Mr Behgal's claim than with that of Mr Basra;
- (b) The photos of time searches were likely to be an accurate reflection of the real time the photo was taken. There are several which show Mr Behgal being at work on days and/or at hours which B&K rosters and timesheets have him not working but are consistent with his claims;
- (c) the Hop card records, texts referring to trains and the co-worker's evidence on transport; and
- (d) Mr Behgal's bank statements showing multiple purchases in Papatoetoe on days he was rostered off work on B&K's rosters, in some cases on days he had taken buses and trains to and from Papatoetoe from the North Shore. For example, see 29 August 2017 where both B&K's roster and timesheet shows Mr Behgal not working but the Hop card records show bus and train

trips from the North Shore to Papatoetoe at around 9am and the return after 10pm, with purchases at the mini mart and a Papatoetoe pizza shop that day.

### **Arrears claim**

[165] Having accepted that Mr Behgal worked considerably longer hours than those he was paid for, I must decide how much he is owed for arrears of wages and other money.

[166] The amended claims at the end of the investigation meeting were:

- (a) \$25,232.50 minimum wages;
- (b) \$1,926.57 holiday pay; and
- (c) Public holidays, alternative days and unpaid hours unchanged.

### *Minimum wages*

[167] I accept that the Mr Behgal's "Timesheets" document does not always accurately reflect the hours actually worked. The Labour Inspector adjusted the amounts claimed, to take into account the different start and finish dates which became apparent during the investigation meeting, as well as days likely not worked due to shop trading hour restrictions.

[168] I have not accepted that the timesheets supplied by B&K to come close to being an acute record of Mr Behgal's hours. In addition, they only relate to the later part of his employment.

[169] Under s 132 of the ER Act I am satisfied that B&K did not keep or provide adequate wage and time records and that this prejudiced Mr Behgal's ability to bring an accurate claim for wage arrears.

[170] I do not accept that the company has sufficiently proved that his amended claims are incorrect and thus I accept that the amount claimed is proven. I accept the amended amount calculated by the Labour Inspector as owing by B&K to Mr Behgal.

### *Holiday pay*

[171] The same applies to the annual holiday arrears calculated by the Inspector. B&K did not provide an adequate holiday and leave record. Aside from the issues I outlined above about its reliability, the Employee Pay record does not record a start date for Mr Behgal, the current entitlements to annual holidays, sick leave entitlements or

the date of termination of his employment. The requirements of s 81 of the H Act are not met.

[172] B&K failed to establish that the amount of leave calculated by the Inspector was incorrect. I rely on s 83 of the H Act.

#### *Public holidays*

[173] As regards public holidays, the claim is based on Mr Behgal working six public holidays. Mr Behgal says that he worked most public holidays. The co-worker reported being told this by Mr Behgal when they worked together. Mr Behgal's partner reports him being at work on public holidays. There is no evidence of Mr Behgal receiving any extra pay or alternative days off for public holiday he worked on.

[174] The claim is that Mr Behgal worked on Easter Monday, Anzac Day, Boxing Day, New Year's Day, 2 January and Waitangi Day. Even B&K's wages and time records show him working on Boxing Day and 2 January without any additional pay.

[175] I accept that Mr Behgal worked on the public holidays claimed and that the amount of public holiday additional pay and alternative days are owing.

#### *Arrears orders*

[176] B & K is ordered to pay, within 28 days of the date of this determination, the Labour Inspector for payment to Mr Behgal the following sums:

- (a) \$25,323.50 gross minimum wages;
- (b) \$1,926.57 gross annual leave arrears;
- (c) \$482.90 gross public holiday pay;
- (d) \$743.28 gross for alternative holidays; and
- (e) interest on those sums from 11 February 2018 until the date of payment, calculated using the Civil Debt interest calculator.<sup>10</sup>

#### **Premium claim**

[177] Mr Behgal claims that Mr Basra put pressure on him to pay back part of his wages. This was required in order for him to keep his job and income. Mr Behgal says he withdrew money from the liquor store, a mini mart near work or a nearby ATM to give to Mr Basra. His bank statements show a number of withdrawals or payments of \$100 or slightly over. For some periods the withdrawals appear weekly but at other

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<sup>10</sup> <https://www.justice.govt.nz/fines/civil-debt-interest-calculator>.

periods there are several weeks or even a couple of months, with no payments of that type. Mr Behgal says the payments being made in cash enabled Mr Basra to keep the arrangement from his father-in-law.

[178] Mr Behgal does not mention paying money back to Mr Basra in his resignation letter. When he was interviewed by the Labour Inspector on 9 February 2018, made his formal complaint on 12 February 2018 and again when he spoke to the Inspector on 22 June 2018, Mr Behgal did not mention that he had paid money back to Mr Basra.

[179] The Labour Inspector prepared a schedule of amounts Mr Behgal said he paid back to Mr Basra on the basis of the bank statements accounts. She considered there was a pattern of payments, drawn weekly. Mr Behgal told her that there was \$4,000 paid back. However, based on the amounts of cash withdrawals she calculated around \$2,000.

[180] There are, even by B&K's count, at least 24 transactions of exactly \$100 or slightly over from the minimart, a local bar and Papatoetoe eftpos machine. That is supportive evidence but it could also have another explanation. There are also some withdrawals from an eftpos machine of larger amounts.

[181] However, as B&K points out, there are also 17 weeks in the period from May 2017 to early February 2018 when there are no withdrawals of that nature showing in the bank statements. In addition money was not always withdrawn on the same day each week.

[182] Mr Basra rejects the claim that he asked Mr Behgal to pay back some of his wages or that he received any such money.

[183] As indicated above I identified issues with both Mr Behgal and Mr Basra's evidence. There was some other evidence supporting or contradicting the premium claim. The co-worker recalled Mr Behgal telling him about having to pay wages back to Mr Basra every week. He did not know how much and had not seen payment being made. He thought it was done through Mr Behgal depositing money in the bank. However, that is inconsistent with Mr Behgal's account of getting cash out to give to Mr Basra.

[184] Mr Behgal's partner was not told about him having to pay any money back to Mr Basra, although she had a sense that he did not tell her too much as he knew she did not want him to work for B&K.

[185] The mini mart worker rejected Mr Behgal getting \$100 out via eftpos at the minimart. The shop's cash out limit was said to be lower than that, with the shop not keeping much cash and only giving out \$20 or \$40. The worker acknowledges that Mr Behgal came in frequently, would possibly get small amounts of cash out and would sometimes put things on credit then pay off an accumulated amount later. When asked about Mr Behgal often spending \$100 or more in the store, the worker explained that Mr Behgal used to buy lotto tickets and food. When questioned about two purchases of over \$100 about a week apart no very satisfactory explanation was offered although the worker did not recant.

[186] The explanation about paying off credit did not seem particularly consistent with the bank records which showed a number of small purchases of a few dollars from the mini mart around the same period as the larger transactions.

[187] The transcript of the audio recordings includes the voice described as Mr Basra saying "If you come in on your day off, I will pay you then you pay me back. Simple and you can say that my boss called me as there was an emergency. Understood".

[188] I am not satisfied to the balance of probabilities standard that a premium was sought and the WP Act thus breached.

### **B&K's breaches**

[189] Having failed to pay Mr Behgal the minimum wage for all the hours he worked B&K breached s 6 of the MW Act. Flowing from that finding is the holiday pay which should have been paid on those minimum wage arrears. Thus B&K failed to pay the correct holiday pay on termination of employment and therefore breached s 23 and 27 of the H Act.

[190] There were also breaches of ss 50 and 55 of the H Act for not paying time and a half for work on public holidays and s 60 for not providing alternative holidays.

[191] In terms of records, B&K breached s 81(2) of the H Act by not keeping an adequate holiday and leave record and s 130 of the ER Act by not keeping an accurate wage and time record.

[192] B&K admits that it did not keep any wages and time records or holiday and leave records prior to 31 July 2017. I have also found that records provided for after that time are not accurate.

### **Penalties**

[193] The Authority has a discretion as to whether to award any penalties. B&K says that even for the breach it accepts, namely no wage and time records kept until 26 August 2017, no penalty should be ordered, seemingly on the basis that it complied after that date. It also emphasises Mr Basra's business inexperience.

[194] I do not accept that the B&K records are accurate. The breaches are not of a modest or accidental nature. There is a substantial amount of money owing. This is a case where penalties should be awarded.

[195] In assessing the level of penalty, as well as looking at the statutory elements in s 133A of the ER Act, I am guided in my consideration of penalties by the Employment Court decisions in *Borsboom v Preet PVT Ltd and Warrington Discount Tobacco Limited*, *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.<sup>11</sup> A table setting out the steps is appended to this determination.

[196] *Statutory consideration 1 – the Object of the Act*: these include the effective enforcement of employment standards and addressing the inequality of bargaining power in the employment relationship. Mr Behgal was a temporary visa holding migrant whose employment and immigration status was dependent on B&K. B&K had a high level of power and required almost twice as many hours of work as he was paid for. The lack of adequate records also put Mr Behgal at a considerable disadvantage in enforcing his rights.

[197] B&K submits that Mr Behgal did not act in good faith by not raising any concerns he had sooner.

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<sup>11</sup> *Borsboom v Preet PVT Ltd and Warrington Discount Tobacco Limited* [2016] NZEmpC 143, *Nicholson v Ford* [2018] NZEmpC 132 and *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

[198] *Statutory Consideration 2 – the Nature and Extent of the breaches:* I globalise the individual instances of breaches into one, and the ss 23 and 27, of the H Act breaches into one. Similarly the ss 50 and 55 of the H Act breaches. This gives a total of six breaches each with a maximum penalty for a company of \$20,000. The total is \$120,000.

[199] *Statutory Consideration 3 – Intentional, inadvertent or negligent:* The failure to pay Mr Behgal the minimum wage for hours worked was clearly intentional. Mr Behgal worked around 75 hours per week but was only paid for 40. The failure to pay holiday pay on that amount likewise. Similarly intentional was the failure to keep adequate records as the records are not a true reflection of Mr Behgal's hours. I am prepared to regard the failure to pay time and a half on public holidays, provide alternative holidays and not keep accurate holiday and leave records as negligent. It was not clear that those payment and holiday record requirements were known to Mr Basra. The Pro-active Investigation focused on employment agreements and record keeping without an in-depth investigation into holiday obligations.

[200] *Severity of the breaches* – I assess as follows:

- a) Failure to pay minimum wage – 75%, considering the number of hours involved and the period it took place over;
- b) Failure to pay annual holidays – 50% due to the significant amount of arrears still outstanding and the length of time it has gone unpaid;
- c) Failure to pay time and a half on public holidays – 30%;
- d) Failure to pay for alternative days – 30%;
- e) Failure to keep wage and time records – 70% for the first part of Mr Behgal's employment, no records were kept. For the subsequent period the records were inaccurate and a false record, as outlined above. Both situations made it difficult for the Labour Inspector to investigate and ensure compliance with minimum standards legislation;
- f) Failure to keep compliant holiday and leave records – 30% as there was no record for the earlier part of Mr Behgal's employment and the later records did not include all the required elements.

[201] *Statutory Consideration 4 – Loss or Damage* – Mr Behgal was deprived of the use of money to which he was entitled at the time it became due.

[202] *Statutory Consideration 5 – Steps to mitigate effects of breach* – No steps have been taken and there is no indication of remorse or contrition.

[203] *Statutory Consideration 6 – Circumstances of the breach and vulnerability* – Mr Behgal was a migrant worker dependent on a visa tied to B&K and was therefore vulnerable. He was also a relatively young man, being 21 at the time he began work for the company in early 2017. There was evidence from Mr Behgal's partner and his co-worker, as well as a letter from his doctor, of him becoming depressed and physically unwell from the lengthy hours worked.

[204] B&K attempted to play down Mr Behgal's vulnerability and play up his plan to expose the employer while waiting for the right time to complain. I do not accept this characterisation. Mr Behgal was dependent until towards the end of his employment, on B&K for a visa. It is not at all uncommon for employees in such circumstances to wait until the end of their employment before raising a complaint with the Labour Inspectorate. I do accept that he became involved in signing records which set out incorrect information but accept that he felt he had no choice if he wanted to keep his job and visa.

[205] The Papatoetoe store was the first business Mr Basra owned, although he had previous experience as general manager of another Super Liquor store. Submissions on B&K's behalf refer to Mr Basra as a naïve person in respect of running his own business. He is said to have had no training or assistance from a person who could guide him to maintain proper records.

[206] Against this I balance that Mr Basra had an accountant and was a franchise holder with a national chain of liquor stores.

[207] *Statutory Consideration 7 – Previous Conduct* – B&K has not previously appeared before the Authority. The company was issued with an infringement notice previously for failure to keep adequate wage and time records. I conclude that considerations 6 and 7 justify a small reduction of 20%.

[208] *Additional Consideration 8 – Deterrence* – I accept the Labour Inspector's submission of a need to bring home to B&K that minimum standards must be met. Those standards must be complied with even if there is some financial inconvenience to the employer. In addition, parts of the liquor industry have had a particular issue

with not paying employees' minimum employment entitlements. So there is a need for wider deterrence.

[209] *Additional Consideration 9 – Culpability* – In this instance culpability is increased by the intentional nature of some breaches, the continuing denial, the provision of inaccurate records, Mr Behgal's migrant worker status and the absence of similar treatment to the co-worker who was not visa dependent.

[210] The Labour Inspector painted a rather gloomy picture of the circumstances of Mr Behgal's employment. However, given the difficulties with Mr Behgal's photographic and computer evidence, I could not be satisfied that the evidence of some features supporting a much more negative picture were established.

[211] *Additional Consideration 10 – Consistency* – I have considered other cases including:

- (a) *Labour Inspector v Sharmas and Sons (2009) Ltd and Sharmas and Sons Ltd* – a single employee, similar wage arrears and length of employment to the present case and similar breaches to this case.<sup>12</sup> A total penalty of \$21,000 was imposed on each consecutive employer;
- (b) *Labour Inspector v IXL Petroleum and Gas Ltd* – similar MW Act breaches against two employees and H Act breaches similar to the present case but involving three employees.<sup>13</sup> For the five breaches a total penalty of \$14,000 was awarded; and
- (c) *Labour Inspector v Dhanoa Transport Ltd and Dhanoa* – similar types of breaches albeit with a little smaller arrears owing to three employees.<sup>14</sup> A \$12,000 penalty was awarded against the company and \$4,000 against the individual.

[212] *Additional Consideration 11 – Ability to Pay* – The onus is on the employer to provide sufficient details and up-to-date information to establish that it is unable to meet a potential penalty award. B&K says that it is not making a significant profit even though Mr Basra took only a modest salary. The submissions refer to Mr Basra having

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<sup>12</sup> *Labour Inspector v Sharmas and Sons (2009) Ltd and Sharmas and Sons Ltd* [2016] NZERA Auckland 169.

<sup>13</sup> *Labour Inspector v IXL Petroleum and Gas Ltd* [2017] NZERA Auckland 128.

<sup>14</sup> *Labour Inspector v Dhanoa Transport Ltd and Dhanoa* [2018] NZERA Wellington 32.

no income other than through the store. However, no evidence is supplied regarding his assets. In any event no penalty is sought against Mr Basra personally.

[213] B&K's accounts were provided. These show only a small profit after a modest shareholder salary is paid, presumably for Mr Basra although Mr Singh is a shareholder as well.

[214] B&K argue that no penalty should be awarded on the basis of its financial position. I do not accept that. Firstly, the financial picture does not appear completely bleak. The company holds a considerable amount of inventory according to its accounts. Second it would send entirely the wrong impression to employers that effectively a 100% deduction was allowed for impecuniosity.

[215] The Labour Inspector accepted, prior to seeing the accounts, that a modest deduction at most could be justified. I agree and allow a 20% deduction for ability to pay.

[216] *Additional Consideration 12 – Proportionality of Outcome* – The Labour Inspector accepts that proportionality may suggest some reduction but noted that penalties should not be reduced so as to create a perverse incentive for employers and inadvertently encourage non-payment.<sup>15</sup> Considering the size of the underpayment, other decisions and the fact that only one employee is involved a substantial reduction of 50% is justified,

### **Penalty order**

[217] I conclude that B&K should pay a penalty of \$18,000. There is no order sought that some portion go to Mr Behgal. I order B&K to pay a penalty of \$18,000 to the Labour Inspector within 28 days of the date of this determination.

### **Costs**

[218] The Labour Inspector has been successful in most of her claims and seeks costs. Costs are reserved. The parties are encouraged to reach an agreement to resolve costs. If they are unable to do so the Labour Inspector shall have 21 days from the date of this determination to file a memorandum seeking costs. The respondents will then have 14 days from receipt to file a memorandum in response.

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<sup>15</sup> *Labour Inspector v Daleson Investment Ltd* above n 10.

[219] The Authority operates a notional daily tariff as regards costs which usually provides a starting point, with adjustments being considered upwards or downwards. The tariff for a one day investigation meeting is \$4,500 and \$3,500 for each day thereafter.

Nicola Craig  
Member of the Employment Relations Authority

## APPENDIX – PENALTIES

### Step 1 – Nature and Number of Breaches – Potential Maximum Penalties (globalised)

Failure to pay minimum wage		\$20,000
Failure to pay annual holiday pay entitlement		\$20,000
Failure to pay time and a half		\$20,000
Failure to pay alternative holidays		\$20,000
Failure to keep wage and time records		\$20,000
Failure to keep holiday and leave record		\$20,000
	<i>Subtotal</i>	\$120,000

### Step 2(A) - Aggravating factors as a proportion of maxima in Step 1

Failure to pay minimum wage	75%	\$15,000
Failure to pay annual holiday pay entitlement	50%	\$10,000
Failure to pay time and a half	30%	\$6,000
Failure to pay alternative holidays	30%	\$6,000
Failure to keep wage and time records	70%	\$14,000
Failure to keep holiday and leave record	30%	\$6,000
	<i>Subtotal</i>	\$57,000

### Step 2(B) – Ameliorating factors – mitigation

Less 20%	<i>Subtotal</i>	<b>\$45,600</b>
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### Step 3 – Respondent’s financial circumstances

Less 20 %	<i>Subtotal</i>	<b>\$36,480</b>
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### Step 4 – Proportionality

Reduce by 50% and round off	<b>Total</b>	<b>\$18,000</b>
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