

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 183
3117063

BETWEEN PUNEET PUNEET
Applicant

AND CENTRAL CARE AND
SETTLEMENT SERVICES
LIMITED
First Respondent

AND HARVINDER SIDHU
Second Respondent

Member of Authority: Nicola Craig

Representatives: Bryce Hamilton, Anu Kaloti and Matt McCarten,
advocates for the applicant
Harvinder Sidhu for the respondents

Investigation Meeting: 27 July and 9 August 2021 in person and 18 August 2021
by audio-visual link

Submissions and further information received: At the investigation meeting, 17 and 18 November 2021
and 17 January 2022 from the applicant
At the investigation meeting from the respondent

Date of determination: 6 May 2022

DETERMINATION OF THE AUTHORITY

- A. Central Care and Settlement Services Limited (CCSL) is to pay Puneet Puneet the following sums within 28 days of the date of this determination:**
- (a) \$10,437.00 gross wages;**
 - (b) \$1,108.88 gross holiday pay;**
 - (c) \$480.80 gross public holiday pay;**

- (d) \$961.60 gross for alternative holidays; and**
 - (e) \$5,682.39 reimbursement for travel costs.**
- B. CCSL failed to provide Mr Puneet with an employment agreement at the start of his employment.**
- C. For breaches, a penalty of \$10,000 is imposed on CCSL, to be paid within 28 days of the date of this determination, with \$2,000 to be paid to the Crown and \$8,000 to Mr Puneet.**
- D. Mr Puneet was constructively dismissed by CCSL. The dismissal was unjustified. CCSL is to pay him \$5,000 compensation within 28 days of the date of this determination.**
- E. Harvinder Sidhu is a person involved in breaches of employment standards. Leave is granted for recovery to be pursued against Mr Sidhu if CCSL is unable to pay the amounts due.**
- F. Within 28 days of the date of this determination:**
 - (a) CCSL is to pay Mr Puneet \$6,000 as a contribution to his costs;**
 - (b) Mr Sidhu is to pay Mr Puneet \$2,000 as a contribution to his costs; and**
 - (c) CCSL and Mr Sidhu are jointly and severally liable to pay Mr Puneet \$71.56 for the Authority's filing fee.**

What is the employment relationship problem?

[1] Puneet Puneet brings claims against his former employer Central Care and Settlement Limited (CCSL or the company) including regarding money owed and personal grievances.

[2] Mr Puneet was put in contact with Harvinder Sidhu, the sole director and shareholder of CCSL through a friend who had worked for the company. CCSL was involved in retail and security operations.

[3] An investigation meeting commenced in person on 27 July 2021. It recommenced on 9 August 2021 but due to Mr Sidhu's need to be elsewhere he participated by phone, rejecting the offer of an audio-visual link (AVL). Shortly after that Auckland went into a Covid-related lockdown and the meeting was completed by AVL on 18 August 2021. Evidence was heard from Mr Puneet and Mr Sidhu.

[4] The meeting took longer than would usually have been necessary. Mr Sidhu did not provide a witness statement as timetabled and he and CCSL did not supply all relevant documents, texts and the like prior to the meeting. Mr Sidhu attributed at least some of his difficulties to his former representative who had pulled out from representation.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

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

Issues

[7] The issues for determination in this case are:

- (a) What was the work arrangement between Mr Puneet and CCSL?
- (b) Which employment agreement was he covered by?
- (c) Did the agreement lack an availability provision, thus breaching s 67D of the Employment Relations Act?
- (d) What pay rate was agreed?
- (e) What hours did Mr Puneet work, are arrears owing and was there a breach of the Wages Protection Act 1983?
- (f) Did CCSL breach its obligations to provide reimbursement for car use and how much is owed?
- (g) Did CCSL breach the Holidays Act 2003 by failing to pay Mr Puneet for:
 - (i) annual leave or holiday pay on termination; and
 - (ii) time worked on public holidays and alternative holidays?
- (h) Did CCSL breach its good faith obligations under s 4 of the Act?
- (i) Should a penalty be ordered regarding any breaches of the statutory provisions identified above?
- (j) Was Mr Puneet subject to unjustified actions by CCSL to his disadvantage regarding failure to:
 - (i) provide an employment agreement;

- (ii) include an availability provision in the agreement;
 - (iii) pay wages; and
 - (iv) act in good faith.
- (k) Was Mr Puneet constructively dismissed by CCSL and if so, was that unjustified?
- (l) If Mr Puneet establishes any personal grievance claims what remedies, if any, should he receive?
- (m) Was Mr Singh a person involved in any breaches of employment standards?

[8] In closing submissions a penalty was mentioned regarding failure to provide wages and time records but given that that had not previously been identified as a basis of a penalty claim I do not consider that it should be added at that late stage.

What happened with the employment agreement?

[9] The state of the evidence regarding employment agreements is unsatisfactory with significant disagreements between the parties and several versions of unsigned, along with one signed, employment agreements provided. This is despite the employment only continuing for a few months.

What is Mr Puneet's version of events regarding agreements?

[10] In addition to the CCSL security business, Mr Sidhu operated two retail stores; Asian Food World in Mt Albert and Big John's Dairy in Pakuranga.

[11] Mr Puneet describes beginning work on 1 November 2019, after a discussion with Mr Sidhu a month or two earlier about the job. Mr Puneet understood it was an operations manager type job, particularly regarding the security work.

[12] Mr Puneet says Mr Sidhu told him he would send Mr Puneet the same contract as that of the friend who had introduced Mr Puneet to the business, as a sample. On 10 October 2019 an email was sent from CCSL to Mr Puneet. The body of the email contained what appears to be the majority of an employment agreement for a business operations manager role which was to come into force on 4 March 2019. The section identifying the parties was left blank. There is no commentary in the email about the agreement.

[13] Mr Puneet says that after that Mr Sidhu called at times, asking Mr Puneet if he had resigned from his previous job. Mr Puneet asked Mr Sidhu to send him another agreement, pointing out the mistakes.

[14] Mr Sidhu asked Mr Puneet to prepare a contract as a Microsoft Word document incorporating material from the previous manager's agreement. Mr Sidhu explained during the discussion that he did not have a printer or was having a computer issue.

[15] Mr Puneet reports a conversation before 31 October 2019 where Mr Sidhu talked about not being happy with the person currently in the role (Mr Puneet's friend) and offering good money if Mr Puneet was able to handle Mr Sidhu's security and retail business.

[16] Mr Puneet texted on 31 October, his last day in his former job, asking Mr Sidhu to meet so Mr Sidhu could sign the contract Mr Puneet was going to bring. Mr Sidhu indicated he was busy for a few days. A similar pattern continued once Mr Puneet started work in early November with Mr Sidhu asking Mr Puneet to add a date and print the agreement but whenever Mr Puneet approached Mr Sidhu he ignored the issue or said he was busy.

[17] There is an unsigned agreement dated 31 October 2019 and what is noted to be an offer date of 1 November 2019 at the top. This offers a salary of \$58,500 which Mr Puneet says was agreed. Mr Puneet's recall was that Mr Sidhu had emailed this to him. Mr Puneet says he took it to Mr Sidhu's Asian Food World shop but Mr Sidhu did not attend so Mr Puneet left it in the shop's office.

[18] Mr Puneet was concerned about the agreement not having been signed off but when he raised it Mr Sidhu said it would eventually be sorted.

[19] On about 8 December 2019 Mr Puneet and Mr Sidhu had an argument as a result of Mr Puneet having worked six or seven days without a break. Mr Puneet said he could not keep working 24 hours continuously as no security guards were available. Mr Sidhu emphasised the duties of an operations manager. Mr Puneet insisted that he could not keep working without a contract.

[20] On 10 December Mr Sidhu instructed Mr Puneet meet him in Manukau and to bring a hard copy of the offer letter/contract. The two met with Mr Sidhu signing the agreement and asking Mr Puneet to scan it and send it back to him. Mr Puneet recalled

the circumstances in which Mr Sidhu signed the agreement; waiting for Mr Sidhu's son to have a driving test at the Manukau AA Centre.

[21] Mr Sidhu asked Mr Puneet to sign with a 2 December 2019 start date. Mr Puneet objected as he had started work earlier than that. Mr Sidhu insisted but said he would pay Mr Puneet for the November work and then start making regular weekly payments.

[22] The signed agreement lodged with the Authority by Mr Puneet, has an offer date at the top of 2 December 2019 and same date appearing to be added twice by hand in the signature section. The salary contained is \$62,500.

[23] The agreement has a stamp or company logo on it near what appears to be Mr Sidhu's signature. It has the company's name around the outside of a circle and a large "C" in the centre. It is unclear if this was manually or electronically applied. Mr Puneet says Mr Sidhu applied the stamp when he signed the agreement. Mr Sidhu denies using such a stamp on company contracts. Mr Sidhu says it is his signature. The writing of the dates next to the signatures both have distinctive features which are not the same.

What is Mr Sidhu's version of events regarding agreements?

[24] Mr Sidhu agrees that Mr Puneet's work started at the beginning of November 2019 although the two had been having discussions for some months beforehand.

[25] Mr Sidhu says that CCSL and Mr Puneet signed a casual employment agreement in the second week of November 2019. He says that this agreement was not in the office at one of the stores where it should have been, when he looked for it after Mr Puneet left. He implies that Mr Puneet may have taken it.

[26] Mr Sidhu provides a sample agreement which has a significantly sized logo on the front page. This is not similar to the stamp or logo on the agreement Mr Puneet supplied to the Authority. The signed agreement Mr Puneet filed has no front page and does not feature a logo at the start.

[27] Mr Sidhu told the Authority that the other form of employment agreement without the logo on the front was for a different one of his companies, Central Transport System Limited. He says Mr Puneet's friend who had worked for that company, seemingly as well as for CCSL, must have sent Mr Puneet that agreement.

[28] CCSL had a manager at the Mt Albert store. Mr Sidhu provided her employment agreement to the Authority as an example of the sort of agreement he and Mr Puneet signed. He thought that her employment agreement was a casual agreement but both within the body and the schedule it is clear that it is a permanent agreement. It is not signed by Mr Sidhu although there is a signature for the manager.

[29] Oddly, with the agreement came in a signed resignation letter of the same date, seemingly not intended to be sent by Mr Sidhu. Mr Sidhu says she did not resign at that time. I was unable to follow his explanation for the signed resignation letter. I do not consider that the agreement assists.

Mr Sidhu's theory

[30] Mr Sidhu argues that the signed agreement filed by Mr Puneet was a fraud, created by Mr Puneet. Mr Sidhu says that he always initials every page of agreements he signs and that was not done for the signed agreement.

[31] Mr Sidhu suggested that Mr Puneet had sent himself the draft terms of appointment prior to him actually starting work. He said Mr Puneet was hanging around the office as a friend and it was in that capacity that he had sent himself the 17 October 2019 email which included the terms from his friend, passing them off as coming from Mr Sidhu. It seems unlikely that, as a friend of Mr Sidhu, Mr Puneet would have had access to a pin number for the computer and keys to enter the premises, as Mr Sidhu suggested. The more likely explanation is that it was Mr Sidhu who was sending through a sample from another agreement for Mr Puneet to consider.

[32] Mr Sidhu then claims that Mr Puneet must have used signed casual agreements previously requested by Mr Puneet and supplied by Mr Sidhu for security guards Mr Puneet was hiring. Mr Sidhu believes that Mr Puneet took the last page of one of the casual guard agreements which Mr Sidhu had signed and added it on to the front part of the agreement Mr Puneet got from his friend who had previously been the operations manager.

[33] I find that highly implausible. The signature sections in the casual agreements are quite different to that in the signed section of the agreement Mr Puneet says is his agreement. The dates lines are in different places and the wording regarding who is signing is different. The casual agreement has, in the footer on every page of the

agreement, a line and a document identification number. There are no such features at the bottom of the signature page in the signed agreement Mr Puneet has filed.

Payslips

[34] In support of his position that Mr Puneet was a casual and the signed employment agreement was therefore not legitimate, Mr Sidhu supplied payslips referring to Mr Puneet. These note “Casual Staff” in the top right corner. They have the payrate at \$17.70 gross which was the minimum wage. Mr Puneet says he never saw those payslips whilst he was employed.

[35] There are other grounds on which to seriously doubt the veracity of those documents:

- (a) The slips show weekly hours worked with the first two being 30.03 hours and 26.55 hours and the remainder recording 47.86 hours. The first slips appear to have been created to produce a rounded net figure, with the first being \$600 and the second \$550, after reimbursement (referred to below) is added;
- (b) The slips include an item of “Expense Reimbursement” of \$150 a week, which is not provided for in any of the employment agreements, including the one provided as the type of agreement Mr Sidhu says Mr Puneet signed. Mr Sidhu said this was three lots of fuel a week at \$50 a time;
- (c) Mr Puneet’s bank statement shows a \$550 payment in from Mr Sidhu but a transfer back to him the same day. The inwards payment is covered by a payslip but there is no explanation for the evidence that the amount was then paid back to Mr Sidhu; and
- (d) The payslips refer to payment by direct credit on “Wednesday” and then a date. None of the dates listed are Wednesday. They are for three other days of the week.

[36] Of particular significance is the hours of work entry. Both sides agree there was no formal time recording system. Mr Sidhu suggested that the unusual hours might be explained by split shifts. I did not find that particularly likely.

[37] Mr Sidhu said his accountant did the calculations on the payslips. The Authority sought the communications between Mr Sidhu and the accountants regarding the hours. Mr Sidhu indicated that he should be able to provide these, but none were provided. Mr Sidhu accepted that it was unlikely that he was verbally passing on to the accountant, for the wage payments, figures like 38.49 over the phone.

[38] Mr Puneet had never heard Mr Sidhu mention his accountant and Mr Sidhu told him that he used MYOB accounting software to pay the wages.

[39] Given these circumstances, I conclude that the payslips are not an accurate reflection of Mr Puneet's hours of work and pay rate and it seems more likely that these were created after the event to support or explain CCSL's case that wages had been properly paid.

What is the conclusion on the employment agreements?

[40] On 13 December 2019 Mr Puneet sent a scanned version of the signed agreement to Mr Sidhu. There was no response. There was no question raised by Mr Sidhu at the time as to why, for example, he was receiving an agreement he had not signed. It is highly unlikely there would be no response from an experienced employer on receiving a signed agreement which they say was not in the same format nor has the same front page as this company's usual agreements, was not initialled on every page in what they say is their usual manner and which they deny signing.

[41] I conclude that Mr Puneet was requested by Mr Sidhu to electronically complete the agreement based on the previous manager's agreement as well as on discussions between Mr Sidhu and Mr Puneet. It was verbally agreed before work started that Mr Puneet would receive pay for the first month at the \$58,500 per annum rate. Having not received a signed contract in the first month Mr Puneet sought a raise as part of the signing, which Mr Sidhu agreed to as he wanted someone to assist with a substantial variety of tasks and take managerial responsibility for the security work.

[42] I conclude that the signed agreement was actually agreed between the parties and was Mr Puneet's employment agreement.

What was Mr Puneet's work?

[43] Mr Sidhu's work seemed focused on the stores or on other matters. Mr Puneet was essentially looking after the security side of the business but in addition would be given other work including picking up groceries and other products for the stores and working in them particularly if they were short staffed.

[44] On occasions Mr Puneet would have to cover mobile security guard work if no one else was available.

[45] Mr Sidhu directed Mr Puneet with lists of instructions about tasks or locations he had to visit. Mr Sidhu had indicated there would be an office set up for Mr Puneet but it is not clear that that eventuated within the relevant period and so Mr Puneet did office work from his home, drove for work and worked at the stores, particularly the Mt Albert one, on occasions.

[46] From December 2019 Mr Sidhu instructed Mr Puneet to start providing a transport service for security guards. Mr Puneet was living in Mt Albert and would leave home around 4.30am. He would drive around guards' homes, particularly those who did not have their own cars, picking them up. He then dropped them to their worksites. This was particularly for several guards required at two worksites: Waimauku and near Muriwai. They started at 6am. Once the guards had been dropped off, Mr Puneet returned home in what was often heavy morning traffic. Mr Sidhu would often ring and ask him to pick up wholesale products for him and drop them at one of the stores. He was required to return to the guards' worksites to pick them up around 6pm, dropping them home and returning to his house around 7.30 or 8pm.

[47] Mr Sidhu agreed that after a point Mr Puneet's role included driving security guards to and from work.

[48] Usually the work routine applied six days a week but sometimes it was seven. Once when Mr Puneet declined to work on a Sunday there was an argument between he and Mr Sidhu. This is referred to in more detail below. Mr Sidhu told him that he had to be available to work and that he could not say no to work.

[49] Mr Puneet describes working a total of 12 to 14 hours a day when he was working at the retail stores and handling the security staff. Mr Sidhu did not accept that those hours were always worked.

[50] Mr Sidhu says that Mr Puneet did not work for a period in January 2020 as he had told Mr Puneet to take a break. There is text evidence to support there being some time away from work however, GPS records show Mr Puneet driving to the Mt Albert Store every day from 2 to 10 January.

Was Mr Puneet a casual employee?

[51] Mr Sidhu believes that Mr Puneet was appointed as a casual although seemed to accept that once the operations manager role was agreed Mr Puneet was not operating casually. Mr Sidhu asserts that CCSL only employed casuals although as noted above the agreement he provided for the Mt Albert store manager was permanent. The agreement I have found to be in place for Mr Puneet was not a casual agreement.

[52] Aside from the agreement, there is other evidence that Mr Puneet was not operating as a casual. Mr Sidhu told the Authority that he met with Mr Puneet every day or two. That is more than might be expected with a casual employee.

[53] Mr Sidhu accepts that as operations manager Mr Puneet was potentially doing everything “from A to Z”. Mr Sidhu agrees that Mr Puneet was responsible for the interviewing and hiring of other staff, namely the security guards. He describes Mr Puneet was responsible for pretty much all of the company’s compliance in the security area. Text messages show Mr Puneet as the liaison between another security company which needed extra guards and the CCSL guards.

[54] It seems unlikely that such tasks would be the responsibility of a casual staff member. Also, Mr Sidhu regarded there being a restraint of trade in place, which is more in keeping with a permanent employee than a casual one.

[55] Reinforcing this is a message from Mr Sidhu on 8 December 2019, when the two men fought after Mr Puneet expressed dissatisfaction at having to work so long:

Everyone should be handled by you and if I have to out my step in which means two manpower wasted.

Beating (*sic – presumably being*) an operations manager it is fully manager’s responsibility how to tackle clients.

24 hr availability as this is the nature of our business

Get more business

Make database

Need torches hi viz etc

Site demo

In time/punctuality etc

[56] I conclude that Mr Puneet was not a casual employee.

Did CCSL fail to provide an employment agreement?

[57] Even on Mr Sidhu's evidence there was no proof that an employment agreement was provided before Mr Puneet started work for CCSL. Mr Sidhu says that an agreement was provided in November but not signed by the parties until the second week of November. I am not satisfied that an agreement was provided to Mr Puneet before he started work.

[58] CCSL therefore breached s 63A(2)(a) of the Act.

What about availability?

[59] Mr Puneet's claim mentions the absence of an availability provision as specified in s 67D of the Act. This claim appears focused on the situation had I found that Mr Puneet was employed under an hourly rate and had to make himself available for extended hours for which he was not paid. The employment agreement which I have accepted was in place provides for a minimum of 40 hours work a week. It pays a salary which is well above the minimum wage, equating to an hourly rate of \$30.05.¹

Does CCSL owe Mr Puneet wages?

[60] Mr Puneet claims that he was not properly paid his salary. On behalf of CCSL, Mr Sidhu says Mr Puneet was paid for every hour he worked.

[61] Mr Puneet was initially employed under an agreement between the parties that he would be paid a salary of \$58,500. He was then covered by the written employment agreement which set the salary at \$62,500.

[62] I am satisfied that Mr Puneet made himself available to work each week. It seems there was a period in January 2020 when Mr Sidhu did not require him, either at all or at least for some of his usual work. However, as he was a permanent employee on a salary his entitlement to pay continued.

¹ Using a divisor of 2080 hours per year, equating to 40 hours a week.

[63] Mr Sidhu acknowledges that there are two or three days from later in January 2020 at the end of Mr Sidhu's time with the company that have not been paid for. He told the Authority that he was willing to pay but there is no indication of that having been done.

[64] There are some difficulties identifying how much Mr Puneet was actually paid for his own salary. The first payment into Mr Puneet's account he identifies as actually being intended by Mr Sidhu to be passed on to another worker. Mr Puneet had been pushing for payment for that security guard. There is evidence of Mr Puneet seeking his own wages after this the payment being forwarded by Mr Puneet to someone else.

[65] Other payment were for amounts Mr Puneet had spent, for example, when buying supplies for the stores. At times Mr Sidhu asked Mr Puneet to pay himself and Mr Sidhu would put the money into Mr Puneet's account.

[66] According to Mr Puneet's bank statements and based on his evidence which I accept, the only salary pays were 6 December 2019 (\$856.01 net) and the same amount in 13 and 20 December 2019 and 3 January 2020.

[67] Mr Puneet says he repeatedly asked for payment of his salary but received a multitude of excuses back from Mr Sidhu, such as he was busy, he was out of town or his accountant was unavailable.

[68] Mr Sidhu told the Authority that Mr Puneet passed on his hours verbally. He also suggested that Mr Puneet was supposed to fill out timesheets like all workers but he never gave any timesheets to Mr Sidhu. Mr Sidhu referred to sometimes getting texts about Mr Puneet's hours. However, the fairly extensive text history available to the Authority did not show texts including specific hours.

[69] Mr Puneet denied being asked to fill out time sheets. I have disregarded the purported payslips as proper contemporaneous records of pay.

Conclusion

[70] Mr Puneet worked for CCSL from 1 November 2019 until 22 January 2020. This amounts to eleven weeks and four days. The daily rate for the first period of four weeks and one day of \$225.04, gives a total of \$4,725.84 gross. The rate for the second

period of \$240.40, at seven week, three days gives a total of \$9,135.20 gross. Therefore \$13,861.04 gross was owed. It appears \$3,424.04 was paid, so \$10,437.00 remains.

[71] I order CCSL to pay Mr Puneet \$10,437.00 gross for wages within 28 days of the date of this determination.

[72] The failure to pay salary was a breach of s 4 of the Wages Protection Act, making CCSL liable under s 13 of that Act to have a penalty imposed on it.

Does CCSL owe Mr Puneet reimbursement for travel?

[73] It is agreed that Mr Puneet undertook driving in his own car for the CCSL role.

[74] Mr Puneet says he was driving around 200 kilometres each day. He has provided slips showing total amounts spent at petrol stations but not the individual items. Some of the receipts are in the Waimauku/Kumeu area where guards were dropped and picked up. Times on the slips appear to indicate a lot of late-night purchases but it seems these may well have been a processing time rather than a purchase time.

[75] GPS records of information from Mr Puneet's phone were provided. This was linked to information regarding venues visited. This evidence was in keeping with text messages regarding places Mr Sidhu required Mr Puneet to attend.

[76] Mr Puneet made deductions for some personal travel, particularly when took a trip out of town. He did not add travel for his days off. Travel is only claimed to 13 January 2020.

[77] The signed employment agreement provides that the employer shall reimburse the employee for all reasonable travel expenses properly incurred in the course of duty.² This includes where the employee's car is used, the current IRD scale of motor vehicle rates being paid.

[78] Although the amount of travel claimed seems very high, when looked at on the basis of picking up and dropping guards to their homes along with often twice daily trips out of the Auckland metropolitan area and daily or two-daily to Mr Sidhu's

² Employment agreement, clause 8.1.

Pakuranga store, along with other pick-ups, I accept that a large amount of driving was done on behalf of CCSL's business.

[79] Mr Puneet claims at the 79 cents per kilometre IRD rate for 7,192.9 kilometres, totalling \$5,682.39. I order CCSL to pay Mr Puneet within 28 days of the date of this determination \$5,682.39 as reimbursement of travel expenses.

[80] Reimbursement of expenses comes within the category of other money owing to an employee under s 131 of the Act. Non-payment of money owing under an agreement is a breach of that agreement and the employer is liable to a penalty under s 134(1) of the Act.

Is there holiday pay owing?

[81] Mr Puneet did not take any holidays when working for CCSL and was not paid any holiday pay when his employment finished.

[82] The employment lasted less than a year and so the 8% of total pay calculation is used, with total wages of \$13,861.04 giving an \$1,108.88 result. CCSL is ordered to pay Mr Puneet \$1,108.88 gross holiday pay within 28 days of the date of this determination.

What happened with public holidays?

[83] Mr Puneet claims to have worked on 25 and 26 December 2019, as well as 1 and 2 January 2020. There is evidence of text exchanges between Mr Singh and Mr Puneet on 2 January with Mr Puneet specifying the hours of work of several staff for payment. GPS data also shows trips on 1 and 2 January to places where Mr Puneet bought supplies for CCSL. Given the nature of the work, including supplying security guards and work in stores, it is feasible that public holiday work was required.

[84] Mr Sidhu suggested that if work was done on public holidays it was paid for. I do not accept that. There is no indication, even on the payslips provided by CCSL, of payment of time and a half for any hours of work. There is also no record of payment for alternative holidays.

[85] I conclude that Mr Puneet worked on four public holidays. The payment of the ordinary rate on those days is covered by the wage arrears claim. What does need to be accounted for is the extra half time at \$120.20 gross per day that should be paid for

work on public holidays under s 50 of the Holidays Act. CCSL is ordered within 28 days of the date of determination to pay Mr Puneet the sum of \$480.80 gross for public holiday pay.

[86] Failure to pay for the additional half time in the pay period in which the public holiday occurs is in breach of s 56 of the Holidays Act. CCSL is thus liable for a penalty under s 75 of the Holidays Act.

[87] Mr Puneet is also entitled under s 56 of the Holidays Act to alternative holidays, as he worked on those public holidays. As these were not taken before he finished work at CCSL payment should have been made under s 60(1)(b). Failure to do so was a breach by CCSL of that section making it liable for a penalty under s 75 of the Holidays Act.

[88] CCSL owes Mr Puneet for four alternative days, which at \$240.40 a day totals \$961.60 gross. CCSL is to pay Mr Puneet \$961.60 gross for alternative holidays within 28 days of the date of this determination.

Did CCSL breach its duty of good faith?

[89] During his employment Mr Puneet raised his employment relationship problem of non-payment of his full and proper wages on a number of occasions. Mr Sidhu on behalf of the company largely ignored his concerns. This was not open and communicative behaviour. CCSL breached its duty of good faith to Mr Puneet.

[90] I have considered whether a penalty should be granted for this breach but conclude that it is a matter better dealt with under the constructive dismissal claim which covers the same ground.

Is a penalty warranted?

[91] There are six relevant breaches. This is a case where penalties are warranted. There have been substantial underpayments continuing for an extended period despite Mr Sidhu saying that if anything was owing it would be paid.

What penalty should be imposed?

[92] In considering what the right amount of penalty is, I have regard to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.³

[93] There are six breaches; no employment agreement provided, wages unpaid, holiday pay not paid, public holiday pay not paid, alternative holidays not paid and travel reimbursement not paid. I am prepared to globalise the holiday matters, leaving four breaches. The maximum penalty against a company is \$20,000. For three breaches that gives a total of \$80,000.

[94] In terms of seriousness, the actions involve a mix of employment standards, minimum entitlement and employment agreement breaches. Mr Punnet was a migrant although his visa was not dependent on CCSL and so he was less vulnerable than many migrants for whom such claims are brought. However, he was without wages for periods. There were repeated requests by him for payment which were often ignored.

[95] The wage payment breaches were intentional and continued for an extended period of time. The public holiday pay and alternative day matters could be seen as negligent. The employment agreement was provided after about a month in employment.

[96] The wages breach involves payment covering a relatively short period of time and partials payments were made. There was indication of Mr Puneet's concerns about other staff being put in similar situations. There is a need for deterrence of CCSL and Mr Sidhu.

[97] There was some indication of there being cashflow problems at the time of Mr Puneet's employment but no financial information was provided by the company.

[98] Standing back, looking at that figure, including in comparison to other cases and the total arrears, I conclude that a fair penalty is \$10,000.

[99] Payment is sought of penalties to Mr Puneet. The wages and holiday pay matters are minimum entitlement provisions and so a matter of particular public

³ *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

interest.⁴ Lack of wages put pressure on Mr Puneet. I regard a 80% payment as suitably reflecting his difficulties in being without full pay for an extended period, the work required in putting together calculations without wages and time records and having to pursue CCSL through the Authority.

[100] CCSL is ordered to pay a penalty of \$10,000 within 28 days of the date of this determination, with \$8,000 paid to Mr Puneet and \$2,000 paid into the Authority's bank account to be forwarded to the Crown account.

Was Mr Puneet dismissed?

[101] Mr Puneet claims that he was constructively dismissed by CSSL.

[102] The three categories of constructive dismissal set out by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* are where:

- (a) the employee is given a choice of resignation or dismissal;
- (b) the employer has followed a course of conduct with a deliberate and dominant purpose of coercing an employee to resign; and
- (c) a breach of duty by the employer leads an employee to resign.⁵

Did CSSL breach its duty, causing Mr Puneet to resign?

[103] The third category is the relevant one here. For this category of constructive dismissal it is not sufficient for the employer's conduct to be inconsiderate and cause some unhappiness to the employee.⁶ What is required is dismissive or repudiatory conduct; a breach of the employer's duty to the employee. If that is established, I then examine whether:

- (a) the conduct caused the resignation; and
- (b) the breach of duty was sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing? Was there a substantial risk of resignation?⁷

⁴ The Act, s 5 definition.

⁵ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at 374-375,

⁶ *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95 (AC).

⁷ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] NZLR 415 (CA).

[104] Mr Puneet claims that he was constructively dismissed because his employer breached its duty to pay him what he was contractually owed. I set out a sequence contacts by Mr Puneet seeking payment for himself and others.

[105] On Mr Sidhu's instructions, Mr Puneet was the face of the appointment process for guards and many assumed he was in charge of payment, even though he was not. There are several texts about payments not being received by security guards. On 18 December 2019 Mr Puneet texted to Mr Sidhu:

Everyone is asking for money to me, I can't take financial responsibility for all guards if we can't pay them on time.

Guys are losing their trust on me and getting aggressive.

[106] Mr Puneet paid two or three of the guards who were his friends. He wanted to save his relationship with them.

[107] On 30 December Mr Puneet texted about a cheque not clearing, with the employee waiting at the bank.

[108] Mr Puneet was paying for things like fuel, high viz vests and torches for the guards to take out on the job. His salary was not coming in regularly.

[109] On 2 January 2020 Mr Puneet messaged Mr Sidhu setting out the guards' hours for payroll to be paid "today". Mr Sidhu responded that the banks were closed (presumably because it was a public holiday). Mr Puneet then messaged saying one guard was going for a cheque clearance. There was no response on that subject.

[110] On 10 January Mr Puneet messaged Mr Sidhu:

If you have any financial problem then just let me know.

I will look for other job as I need timely payment with salary slips to show to immigration.

Otherwise I will not have any explanation.

[111] No relevant reply seems to have been received. On 12 January Mr Puneet texted Mr Sidhu including:

I am unable to handle the pressure from all the boys asking me for money.

Every day I get unlimited calls and now even threats which is not even my fault or responsibility.

[112] Another message from Mr Puneet on the same day read:

Before proceeding further I need my previous dues clear.

Please bring out some time for meeting so that we can discuss how to take it forward.

[113] On 16 January 2020 Mr Puneet texted asking if there was any update about his payment. He then said he was sitting at home with nothing to do “Please let me know if we have to restart work again”. Mr Sidhu replied, sure. Mr Puneet replied, “please sort out all issues and discuss what to do next”. Mr Sidhu replied “Wait two days all good. I am working on a proper plan” but asked Mr Puneet to book two guards. Mr Puneet asked about calling. Mr Sidhu replied that he would call tomorrow.

[114] The final message from Mr Puneet before his resignation:

Even I have not received my payment yet. Previous guards have also not got their pay, How can I take any responsibility further.

[115] On 22 January 2020 Mr Puneet emailed Mr Sidhu informing him of his resignation, stating that he was resigning as he has not been paid as promised.

[116] Mr Puneet was frustrated, depressed and sacred. People approached him in public, seeking payment for their work for CCSL. Mr Sidhu was not responding to messages or calls. Mr Puneet believed that Mr Sidhu took advantage of the employees and hiding to avoid their pursuit of wage payment. On occasions Mr Sidhu would not respond about messages that pay was due but instead instruct Mr Puneet to keep hiring new staff to cover.

[117] CCSL breached its duty to pay Mr Puneet, along with the other guards, for their work. It was this conduct which caused the resignation. Mr Puneet considered he had no option but to resign. The breach of duty was sufficiently serious and given the texts Mr Puneet sent, it was foreseeable by CCSL that Mr Puneet would not be prepared to work under these conditions. It was evident from his messages that there was a substantial risk of him resigning.

[118] Mr Puneet has established that he was constructively dismissed by CCSL. There were no grounds for that dismissal and no proper process followed by the company. Mr Puneet was unjustifiably dismissed by CCSL.

What remedies should Mr Puneet receive?

[119] The grievance remedies sought on behalf of Mr Puneet are modest. No lost wages were claimed. Mr Puneet was able to arrange other work later in January 2020.

[120] Compensation of \$5,000 was claimed. This was a difficult and stressful time for Mr Puneet, having only been paid a small amount of the wages he should have been paid, let alone any reimbursement for the extensive driving required. He struggled to pay for his food and rent. He describes himself as totally depressed after he finished with CCSL and took a long time to recover. The amount of compensation claimed is very modest but I am unable to award more than that in the absence of a larger claim.

[121] I have considered under s 124 of the Act whether Mr Puneet's compensation should be reduced due to any contribution by him. I do not find any conduct by him which was causative of the outcome and blameworthy. No deduction is warranted.

[122] CCSL is ordered to pay Mr Puneet \$5,000 without deduction within 28 days of the date of this determination.

What about the disadvantage grievances?

[123] The claims for unjustified actions to Mr Puneet's disadvantage regarding CCSL's failure to provide an employment agreement, the lack of availability provision, failure to pay wages and good faith have already been dealt with under the penalty claims and the constructive dismissal claim. To look at further remedies would involve double dipping and so are not considered further.

Was Mr Sidhu a person involved in breaches?

[124] CCSL has been found to owe Mr Puneet wages and other categories of money. On behalf of Mr Puneet, it is sought to have Mr Sidhu identified as a person involved in those breaches.

[125] Mr Sidhu decided what wages would be paid. He had to approve the presenting of cheques and would instruct that they were not taken to the bank until he advised it

was time. Mr Puneet passed on information about security guards' hours but Mr Sidhu was the person who arranged payment, often via direct credit into employees' bank accounts. Mr Sidhu aided and abetted the breaches as specified in s 142W(1) of the Act.

[126] Mr Sidhu is a director of CCSL and so under s 142W(2) and (3) may be treated as a person involved. Leave is granted for recovery to be pursued against Mr Sidhu if CCSL is unable to pay the amounts due.

Costs

[127] Mr Puneet sought costs towards the expenses incurred by his union in pursuing this matter. There was no objection to costs being dealt with at this point. If the matter against Mr Sidhu is pursued further that may be the subject of an additional costs determination.

[128] The Authority has the power under clause 15 of Schedule 2 of the Act to award costs. The Authority's discretion is governed by principles which were outlined in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.⁸

[129] The principles include that costs will usually follow the event and the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience. Also, costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct.

[130] Mr Puneet was largely successful in his claims and is entitled to a contribution towards his costs.

[131] The investigation meeting took one full day and a little under half second day in person along with almost two thirds of the final day by audio-visual link. Based on the Authority's daily tariff of \$4,500 for the first day and \$3,500 for each subsequent day the starting point is assessed as \$8,000. No reasons were advanced for an increase or decrease from the tariff.

[132] Given the claim largely focused on CCSL's liability to Mr Puneet, with less on Mr Sidhu's status as a person involved the costs should be split as follows, with all payments to be made within 28 days of the date of this determination:

⁸ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

- (a) CCSL is to pay Mr Puneet \$6,000 as a contribution to his costs;
- (b) Mr Sidhu is to pay Mr Puneet \$2,000 as a contribution to his costs; and
- (c) CCSL and Mr Sidhu are jointly and severally liable to pay Mr Puneet \$71.56 for the Authority's filing fee.

Nicola Craig

Member of the Employment Relations Authority