

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 510
3131385

BETWEEN DEEPAK DHIMAN
 Applicant

AND NAANAK LIMITED (IN
 LIQUIDATION)
 Respondent

AND DEVINDER MANN
 Second Respondent

Member of Authority: David G Beck

Representatives: John Wood, advocate for the Applicant
 Devinder Mann, for the Respondents

Investigation Meeting: 6 July 2022 at Manakau

Submissions Received: 19 July 2022 from the Applicant
 None from the Respondents

Date of Determination: 6 October 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Deepak Dhiman was employed in various roles by Naanak Limited (Naanak) at its pizza making business operating over four Auckland locations from July 2012 until 30 September 2020. Mr Dhiman seeks to recover arrears of wages for unpaid hours worked, holiday pay and interest on such. Mr Dhiman also seeks orders to recover the arrears against Devinder Mann, the sole director and sole shareholder of Naanak. Naanak is now in liquidation and the liquidator who was appointed on 20 June 2022 has, pursuant to s 248 of the Companies Act 1993, not consented to the matter being pursued against Naanak. For that

reason, this determination when considering remedies, is confined to the claims against Devinder Mann as a person potentially involved in breaches but in first addressing the question of potential liability, the Authority does consider the position of Naanak.

[2] Mr Mann denies involvement in the alleged breaches of minimum entitlements and any liability he may have under s 142Y Employment Relations Act 2000 (the Act) but in a statement in reply when represented by counsel who later recused himself, it was conceded that “some payments in respect of public holidays” were owed but the wage arrears claims were refuted. A further claim suggested Mr Dhiman destroyed or deleted “business records” and that counterclaims for damages, breach of contract and breaches of good faith, would be quantified prior to the investigation meeting, but they were not advanced so the Authority cannot consider such.

The Authority’s investigation

[3] An investigation meeting of 6 July 2022 was attended by Deepak Dhiman, Manoj Vaidya (a co-worker), Sunil Khosla (a co-worker), and Ravi Dhiman (Deepak’s brother) attended by telephone. All spoke and were questioned about written statements that they had previously provided.

[4] Devinder Mann was not represented at the investigation meeting, did not provide a written statement as directed or additional evidence to support his counter claims but his then counsel had previously filed a statement in reply and various counterclaims.

[5] Mr Mann initially attended the investigation meeting, stating he was present to observe only. However, after the Authority provided an overview of how the investigation would proceed, including that Mr Mann would be questioned under oath, he abruptly left, proclaiming a view that the whole process and Mr Dhiman’s claim was a “set up”. The Authority is disappointed that Mr Mann chose not to participate as this is an investigation where issues of credibility were at stake and the onus of proving whether minimum entitlements and statutory obligations were met, rests with the employer party. The Authority was unable to consider any counter claims made by Mr Mann as he presented no further evidence or submissions around such.

[6] At the end of the investigation meeting, the Authority timetabled submissions to allow Mr Mann further input. Mr Wood provided a comprehensive submission but Mr Mann did not.

[7] The Authority under s 173(2) of the Act, has in these circumstances decided to proceed to issuing a determination in the absence of Mr Mann's further input as the Authority has provided him with all the relevant material and ample opportunity to participate and comment on such.

[8] As permitted by s 174E of the Act this determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all evidence given during the investigation meeting, background documentation and a submission.

The issues

[9] The relevant issues to now be decided were set out by the Authority in a minute of 22 June 2021 after a case management conference attended by representatives of all parties – they are:

Deepak Dhiman's claims

- (i) Did Naanak Limited breach its obligation to keep and/or provide wages, time and holidays/leave records under the Act and the Holidays Act 2003 (HA)?
- (ii) Did Naanak Limited breach its obligations under the Act as regards:
 - (a) Failing to engage with Mr Dhiman's representative, towards the end of Mr Dhiman's employment; and
 - (b) Fabricating time and wage records?
- (iii) Did Naanak Limited breach the minimum Wage Act 1983 (MWA) by failing to pay Mr Dhiman's minimum wages?
- (iv) Did Naanak Limited breach the Holidays Act 2003 regarding annual holiday payments and public holiday payments?

- (v) Did Naanak breach Mr Dhiman's employment agreement by:
- (a) Breaching good faith;
 - (b) Failing to pay wages on the due dates and the total amounts due; and
 - (c) Under one of the agreements, failing to provide and pay for specified hours of work?
- (vi) Does Naanak Limited owe Mr Dhiman arrears of wages, holiday pay, payment for working on holidays (considering the limitation period) and if so, how much and should interest be awarded?
- (vii) If Naanak Limited breached statutory and/or contractual obligations, should it pay a penalty and if so, how much?
- (viii) Was Devinder Mann a person involved in any breaches?

What caused the relationship problem?

[10] At the outset, the Authority had difficulty in determining whether the terms of any of the disclosed employment agreements were met, as seven different individual employment agreements were disclosed (three by Mr Dhiman and four by Mr Mann). As discussed below, the employment agreements were of limited value as they did not always reflect the actual terms of Mr Dhiman's engagement over time and it was not clear if they had been properly executed or freely entered.

[11] Mr Dhiman says he approached Mr Mann on the recommendation of a friend, in July 2012 seeking a job at a pizza shop in Mangere. At the time, Mr Dhiman an Indian national, was on a student work visa, seventeen years old, and seeking an employer to sponsor him and upgrade his work visa status. Mr Dhiman says he was offered and accepted the job at \$8 per hour for 20 hours per week (his student visa restriction). No employment agreement was provided. Mr Dhiman says he proceeded to work 20 hours per week but was paid for 10 (artificially making his rate \$13.50 per hour). Mr Dhiman says that as an immigrant he felt pressured to accept this situation and feel grateful for the opportunity of some work.

[12] On 9 April 2013, Mr Dhiman obtained an open work visa allowing him to work unlimited hours but says Mr Mann maintained his effective \$8 per hour rate although his

hours greatly increased. Mr Dhiman says he was provided with no annual leave, paid sick leave or public holiday pay, on top of being paid less than other workers with permanent resident status.

[13] The following year on 10 April 2014, Mr Dhiman says he was issued a two years' work visa attached to Naanak, trading as Select Pizza in Flatbush, where he was designated an Assistant Manager. Mr Mann provided the Authority a copy of an employment agreement dated as being signed by the Flatbush store manager and Mr Dhiman on 23 April 2014. Mr Dhiman says the signature was not his and he was not at the time provided with a copy of the employment agreement. This agreement, for duties performed at Select Pizza Flatbush, stated "the Employee is required to perform a minimum of **35-40 hours** of work per week, rostered between the core hours of: ----- Monday to Sunday" with actual hours being varied by agreement. Under a heading "Wages" it specified: "The employee's salary is **\$29000** per annum".

[14] Mr Dhiman says despite what the employment agreement says, he was supposed to get \$15 per hour for a minimum of 40 hours per week but he worked in excessive of 50 hours per week on an "as required" basis and was only paid for 40 hours. The payroll records Mr Mann provided are disputed as they show 40 hours or less worked by Mr Dhiman. Mr Dhiman provided rosters, and WhatsApp messages to Mr Mann, that supported his claim he worked additional hours.

[15] A former co-worker engaged at the time when Mr Dhiman was managing the shop (2014 – 2017), says he recalled Mr Dhiman regularly working 50-55 hours per week. The co-worker indicated he was summarily dismissed and he had similar problems of not being afforded paid holidays and sick leave. In addition, another former co-worker of Mr Dhiman's indicated similar issues in his employment with Naanak that included a spell as duty manager where he says he was underpaid for working excessive hours. This worker also attested to observing Mr Dhiman working regularly up to 55 hours per week and never taking any sick leave. The worker concerned left Naanak when immigration rules permitted him to switch to an open visa. The worker claimed there was a pattern of exploitation of migrant workers.

[16] Mr Dhiman says that in February 2015 he took his first period of annual leave to visit family in India, that Mr Mann restricted to three weeks. Another employment agreement provided by Mr Mann and signed on 2 March 2016, designates Mr Dhiman a 'store manager'

at a salary of \$37,500. The hours of work clause stated “the Employee is required to perform a minimum of **35-40 hours** of work per week, rostered between the core hours of: ----- Monday to Sunday”

[17] On 4 April 2016, Mr Dhiman was granted a three years’ essential work visa under the auspices of Select Pizza (Flatbush) in the capacity as a store manager. Mr Mann provided the Authority an employment agreement dated 14 September 2016 describing Mr Dhiman as a store manager (Select Pizza Glen Innes) at a salary of \$32,000. The hours of work clause stated:

The parties agree that the Employee is required to perform a minimum of **40-45 hours** of work per week, according to the roster. The work involves night shifts and weekend work.

[18] Mr Dhiman says he continued to work between 50 – 57 hours per week and he was not allowed to take any annual leave apart from a two weeks’ trip to India to try and sort out a visa problem his wife was having in accessing New Zealand residency, which was hampered by the lack of time they had been able to spend together.

[19] On 1 November 2019, Mr Mann sold the Select Pizza shop to another employee and Mr Dhiman says he was forced to continue working there as manager fearing his visa would be cancelled by Mr Mann if he refused to do so. An employment agreement dated 2 March 2019 was produced by Mr Mann detailing a salary of \$45,000 for a store manager role with an hours of work clause that indicated:

The parties agree that the Employee is required to perform a minimum **40 hours** of work per week, **rostered** between the hours of:

09:00 – 23:00 Monday to Sunday

Note: The actual days and hours of work may be varied as agreed to between the employer and employee.

The Employee shall be available for emergency callouts on a 24 hour/day basis.

[20] Mr Dhiman says he was not provided with an employment agreement to work for the new owner but Mr Mann disclosed an employment agreement/letter of offer dated 15 October 2019 signed by a Gurwinder Singh on behalf of GSB 2019 Ltd T/A Select Pizza offering Mr Dhiman a store manager job at \$45,000. The hours of work clause was identical to the one above at para [14] except for the weekly span of hours being: “09:00 – 24:00”. Mr Dhiman says his pattern of working over 50 hours per week persisted.

[21] Mr Dhiman says he continued to have contact with Mr Mann over work visa issues whilst engaged by GSB Limited. Contact, that culminated in Mr Mann meeting with him on 15 July 2020, insisting that Mr Dhiman vary his visa or find another job. At this time, Mr Dhiman became distressed and took some time off work that led to GSB Limited making him redundant.

[22] Around July 2020, Mr Dhiman engaged an advocate to pursue wage and holidays arrears' claims against Naanak and Mr Mann. On 18 August 2020, in a conversation that was recorded and transcribed, Mr Mann met Mr Dhiman's brother. The conversation recording confirms various threats were made against Mr Dhiman and his family in India. Mr Mann also threatened to enact physical violence on Mr Dhiman's then advocate.

[23] Mr Mann provided the Authority with various unsigned statements refuting Mr Dhiman's and his witness's, version of events but none of the authors of such were brought before the Authority to answer questions. Of note, was an email to the Authority from Gurwinder Singh suggesting once he took over the Select Pizza branch "Deepak was borrowed as a manager to help me out for 6 months". Mr Dhiman's IRD statements show that Naanak continued to pay Mr Dhiman up to 30 September 2020.

Issue One – wage, time and holidays/leave records kept by Naanak

[24] Section 130 of the Act has detailed provisions on the content and record keeping requirements an employer must fulfil. All Mr Mann provided on was a document entitled "Employee Pay Summary Report" spreadsheet that contained information related to weekly: "Hours Paid", "Days Worked" and "Normal Pay" for the period 5 July 2015 to 16 August 2020. These records record up to 7 April 2019 that Mr Dhiman worked 35 hours per week and thereafter 40 hours per week. It was apparent that daily hours of work were not recorded and no rosters were provided. The pay summary report had a column to record accumulated leave hours but none were recorded.

[25] A separate spreadsheet entitled "Leave History Report" for the date range – 23 April 2014 to 30 August 2020 showed that applicant had a leave balance of 5.07 hours.

[26] In terms of the latter, s 81(2) of the HA has specific requirements for a holiday and leave record that are not complied with, including the date the employment commenced, the

cumulative days of leave taken, the amount of payment made for each period of leave and the number of hours worked on any public holidays and date when alternative holidays fell due.

[27] Mr Dhiman was not provided with any pay slips setting out his wages and holiday balances and disputes the quantum of holidays he allegedly took and says he worked on public holidays without any level of additional compensation or lieu days.

[28] The duty to maintain records is an employer one (s 130(1) of the Act and s 81 of the HA Act). It is not an employee responsibility. An employer cannot fulfil these obligations by assuming the employee is keeping records. Where an employee holds a position of responsibility for maintaining records as part of their role, an employer should have systems in place to ensure that task is carried out in accordance with the legislation. There is no evidence before the Authority that Naanak had any such system in place or even that Mr Dhiman had responsibility for this task. Evidence showed Mr Mann controlled the hours of work by imposing obligations on Mr Dhiman without recording his actual hours worked. Likewise, Mr Mann controlled when Mr Dhiman took leave and did so in a wholly discretionary manner that at times took no account of the purpose of the HA Act.

[29] I accordingly find that Naanak and Mr Mann have failed to keep proper, accurate records under the Act and HA Act and that Mr Mann was an active party to this breach as he directly controlled the allocation of working hours and statutory leave including public holiday entitlement matters.

Issue two – did Naanak fail to engage with Mr Dhiman’s representative at the end of the employment relationship and were time and wage records fabricated?

[30] On the first issue, whilst no penalty was sought or appropriate, the Authority finds that there was evidence that Mr Mann did not constructively engage with Mr Dhiman’s first chosen representative including some credible evidence that this included Mr Mann making threats of physical violence toward the person involved. I will consider this as a potential aggravating factor when assessing an approach to penalties.

[31] On the second more serious allegation I find that there was a discrepancy between the hours Mr Dhiman and his witnesses say he worked, and the payroll hours spreadsheet provided by Mr Mann. This is the core of the dispute and as I have already found that no robust system was in place to record Mr Dhiman’s attendance at work and actual hours he

worked, the Authority concludes the records provided were ‘created’ to give the impression that Mr Dhiman worked less hours and in some instances, Mr Mann’s spreadsheet entries did not correspond with the bank statements Mr Dhiman provided.

Issue three - did Naanak breach the Minimum Wage Act 1983 by failing to pay Mr Dhiman’s minimum wages?

[32] For the period August 2012 to 9 April 2013 Mr Dhiman’s evidence was that he was working 20 hours but he was paid for only 10 hours effectively making his hourly rate \$8 per hour. The applicable ‘new entrant’ minimum wage at the time (August 2012) was \$10.80 per hour and \$11.00 from 1 April 2013.

[33] I find that Naanak in paying Mr Dhiman \$8 per hour breached s 6 MWA.

[34] Mr Dhiman gave evidence that for the next period up to 10 April 2013 when he had gained an open work visa with no limiting hours, he continued to be paid \$8 per hour as opposed to the adult minimum rate that was \$13.75 per hour (increasing to \$14.25 on 1 April 2014).

[35] I find that Naanak in paying Mr Dhiman \$8 per hour breached s 6 MWA.

[36] For the next period post 10 April 2014 when Mr Dhiman obtained a two-year work visa attached to Naanak Limited t/a Select Pizza, working as an assistant manager, his pay increased to \$15 per hour for a 40 hours per week. Whilst being 75c above the minimum wage rate Mr Dhiman’s evidence was his hours were between 50 – 57 hours per week.

[37] I find the minimum wage was paid but Mr Dhiman was entitled to be paid for all hours worked at \$15 per hour. I find this reduction in wages owed breached s 4 Wages Protection Act 1983 (WPA) that provides “an employer shall, when any wages become payable, pay the entire amount of those wages to that worker without deduction”.

[38] From 4 April 2016, Mr Dhiman was placed on a three years’ essential worker visa and he worked for Naanak as a store manager. The employment agreement entered specified he was paid \$37,500 for 40 hours per week (an hourly rate of \$18). Mr Dhiman however, indicated his working week remained at around 57 hours.

[39] Again, whilst finding the minimum wage was paid, Mr Dhiman was not paid for all the hours he worked and I find this a breach of s 4 WPA.

[40] On 16 May 2017 a new agreement purported to place Mr Dhiman on \$45,000 per annum for 40 hours per week (\$21.64 per hour) but Mr Dhiman indicated his working hours continued to be between 50-57 per week.

[41] Again, whilst finding the minimum wage was paid, Mr Dhiman was not paid for all the hours he worked and I find this a breach of s 4 WPA and the breach was ongoing until Mr Dhiman's employment ended on 30 September 2020.

Issue 4 - Did Naanak pay annual holiday payments and public holiday payments in accord with the Holidays Act 2003?

[42] In determining these issues, the Authority was hampered by Naanak's failure to keep accurate holiday and leave records as required by s 81 (2) HA.

[43] A first issue is the period back to which any arrears should be assessed. Whilst Mr Dhiman commenced being remunerated on 5 July 2012, it is the case that a holiday pay entitlement exists until such holidays are taken or until the employment ceases – entitlements owed thus accumulate.¹ Any arrears of untaken leave run from the commencement of employment and should have been paid at the ending of Mr Dhiman's employment on 30 September 2020.

[44] The second issue is determining the quantum of any arrears. In this respect in the absence of disclosed accurate holiday and leave records the onus proving an accurate claim does not fall upon the employee (s 83(3) HA) and the Authority is able in the absence of any evidence to the contrary, to accept statements made by the employee on unpaid holiday pay including for public holidays worked.

[45] I find arrears of holiday pay and pay for public holidays are owed in the amount detailed by Mr Dhiman (in amounts outlined below).

Issue 5 – Did Naanak breach Mr Dhiman's employment agreements pertaining to wages owed?

¹ *Wanaka Pharmacy v McKay* [2021] NZEmpC 112 at [73].

[46] This issue is dealt with above paras 34-39.

Issue 6 – What, if any, arrears of wages and holiday pay are due to Mr Dhiman – how should they be calculated and should interest be awarded on such?

[47] Given the findings, Mr Dhiman was underpaid during his period of employment as I accept the evidence corroborates he regularly worked excessive hours. In the absence of credible and accurate wage and time records, I am charged with assessing what would be a fair and reasonable approach to wage arrears owed. Mr Dhiman's advocate has carefully detailed claims between 2012 and 16 August 2020 and the hours Mr Dhiman was not paid for. The total amount Mr Dhiman claims is due in underpaid wages is \$69,981.06.

[48] For holiday pay it is equally difficult to calculate arrears in the absence of credible and accurate holidays records. Mr Dhiman suggests the total amount of unpaid holiday pay owed is estimated at \$28,153.14.

[49] Due to the inaccurate wage time and holidays records kept s 132(2) of the Act and s 83(4) HA apply so that evidence given by Mr Dhiman and witnesses observing his hours of work may be accepted unless Naanak and Mr Mann can prove that the amounts claimed are inaccurate.²

[50] The Authority is satisfied on the balance of probabilities that the applicant has discharged the onus of proving his claims and that Naanak and Mr Mann by their non-participation in the investigation meeting and submission process have failed to convince the Authority that the additional hours worked by Mr Dhiman were properly remunerated and holidays (including payment for public holidays worked) provided and paid for as per statutory entitlements.

[51] In the circumstances, I find the amounts claimed by Mr Dhiman are established as unpaid and due.

Interest

[52] Mr Dhiman claimed interest on the amounts due. Given the time that has elapsed since the arrears fell due to be paid, I find the sum calculated as claimed shall also have

² *Shah Enterprise NZ Limited and Sapan Jagdishbhai Shah v A Labour Inspector of Ministry of Business, Innovation and Employment* [2022] NZEmpC 177, EMPC 1/2021 at [26].

interest levied upon the whole amounts, in accord with Schedule 2, clause 11(1) of the Act i.e., to be calculated as set out in Schedule 2, Interest on Money Claims Act 2016.

Is Naanak liable for any penalty actions?

[53] Given that Naanak is in liquidation the applicant accepted claimed penalty actions against the company could not succeed.

Was Devinder Mann a person involved in any of the breaches and is he liable to pay the arrears identified?

[54] Under s 142Y of the Act the Authority may determine that Mr Mann was a person involved in the breaches identified to the extent that he is personally liable to pay Mr Dhiman any amounts that Naanak is unable to pay.

[55] In assessing the facts and documentation and taking account of Mr Mann's role as sole director and shareholder, involvement in administration and oversight of the business and applying the appropriate statutory³ and legal tests⁴ it is apparent that Mr Mann was heavily involved in the breaches. The Authority finds Mr Mann was knowingly involved in the underpayment of Mr Dhiman's wages for extra hours worked as he set up the employment, administered wages and frequently visited the workplace and at times set work rosters. Mr Mann also 'loaned' out Mr Dhiman as a manager once he sold the business and continued to exercise a degree of personal control and influence over Mr Dhiman.

[56] As such Mr Mann was aware of the essential facts, initiated the breaches and ignored his record keeping obligations. Mr Mann was a clearly a person involved in the breaches and when they were brought to his attention, he failed to resolve the underpayments identified. An aggravating factor was the evidence that Mr Mann exploited a young vulnerable immigrant worker on an ongoing basis and intimidated his advocate.

[57] The Authority finds that Mr Mann is personally liable for the unpaid wages and unpaid holiday pay in the amounts claimed to the extent that Naanak is unable to meet these arrears.

³ Section 142W(1) Employment relations Act 2000.

⁴ *Labour Inspector v Southern Taxis* [2021] NZCA 705, (2021) 18 NZELR at [42].

Contribution

[58] Section 124 of the Act states that I must consider the extent to what, if any, Mr Dhiman's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced.

[59] I find that in the circumstances Mr Dhiman did not contribute in a manner to the breaches his former employer wilfully committed.

Orders

[60] Within 28 days of the date of this determination, Devinder Mann must pay to Deepak Dhiman the following amounts in arrears of wages and holiday pay:

- a) Arrears of wages in the amount \$69,981.00 gross.
- b) Arrears of holiday pay in the amount of \$28,153.14 gross.
- c) Interest on the two above amounts to be calculated as set out in Schedule 2, Interest on Money Claims Act 2016.

Costs

[61] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Deepak Dhiman has 14 days from the date of this determination in which to file and serve a memorandum on costs. Devinder Mann has a further 14 days in which to file and serve a memorandum in reply.

[62] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.⁵

David G Beck
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1