

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2022] NZERA 621
3044831

BETWEEN

GAURAVJEET SINGH
Applicant

AND

NOW NOW BRANDS LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Chris Fernando, counsel for the Applicant
Robert Thompson, advocate for the Respondent

Investigation Meeting: 28 September 2022 at Christchurch

Date of Determination: 25 November 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Gauravjeet Singh worked as a manager of a Christchurch restaurant owned by Now Now Brands Limited (NNB). At the time he started working in 2013, Mr Singh's work visa was tied to NNB (then operating as Casbah NZ Limited). Mr Singh was recruited by and reported to Adel Aberkane, the sole director of NNB. When Mr Singh commenced employment the restaurant, trading as Casbah Moroccan Grill, had just opened.

[2] There is a dispute about the extent of Mr Singh's hours and days worked due to inadequate wage and time records. Mr Singh says he at times worked six to seven days a week and averaged 82.12 hours up until his employment ended in May 2014. In an

application to the Authority Mr Singh claims he was not paid for all the hours he worked and is seeking wage arrears of \$27,682.30, interest on this amount and costs.

[3] NNB denies the claimed wage arrears, contending Mr Singh was correctly paid in accord with the company's time recording system. However, NNB acknowledge there was a dispute about underpayment of wages at the time Mr Singh resigned but say this was resolved by a full and final agreement of all employment related issues that paid Mr Singh an amount of \$3,000.

The Authority's investigation

[4] The investigation meeting was attended by Adel Aberkane and his wife Nica Hustedt who assisted with paying staff wages. Gauravjeet Singh joined the meeting by video link from India.

[5] Having regard to s 174E of the Employment Relations Act 2000 (the Act), I do not refer to all evidence and the submissions advanced by the witnesses and their representatives.

The issues

[6] The Authority must determine:

- (i) Whether Mr Singh was paid for all the hours he worked and if not, the quantum of any arrears owed?
- (ii) Whether the purported settlement agreement prevents Mr Singh from pursuing arrears of wages?
- (iii) If arrears of wages are due should interest be paid?

What led to Mr Singh's claim?

[7] NNB, a limited liability company, operates two Moroccan restaurants in Christchurch. Mr Aberkane is the sole director and shareholder of NNB and he recruited Mr Singh.

[8] Mr Aberkane recalled being approached by Mr Singh around May 2013 seeking a job with more responsibilities to advance his New Zealand residency ambition. At the time,

Mr Singh worked as an assistant manager in a fast-food business and was paid \$16 per hour. Mr Aberkane agreed to employ Mr Singh as the manager of his new restaurant he was busily establishing (a 'fit out' for newly leased premises was underway).

[9] Mr Aberkane says he is an experienced food business operator, having previously run a take-away business and another restaurant in Christchurch that he opened just after the 2012 earthquake. Mr Aberkane says he normally ran his restaurant with his wife and part-time staff. He said the engagement of Mr Singh was the first time he had offered an employment agreement and he downloaded the first agreement off the internet. However, Mr Aberkane says he now employs over 40 staff with 10 being on work visas.

First employment agreement

[10] The parties signed an employment agreement dated 27 May 2013. In this agreement, the employment of Mr Singh as "Restaurant Manager" is said to commence "on a mutually convenient date" as NNB's new premises were in the process of being fitted out. Other relevant terms included:

- An hourly rate of \$16.50
- Hours of work – 45 hours per week.

Normal working hours are 11 am – 8 pm - Tuesday – Saturday. However, reasonable extra hours and days over and above those already specified must be worked when required by the employer or to ensure that the job is done. Also, without reducing the number of hours, some flexibility of those hours is required".

- A half hour unpaid dinner break each day.
- A notice period of four weeks.
- The specific duties of the position were set out as an appendix.

[11] I was supplied with a copy of an Immigration NZ work visa application form signed by Mr Aberkane and dated 27 May 2013. Mr Aberkane represented the job he was offering Mr Singh to Immigration NZ as a permanent restaurant manager at \$16.50 per hour for 45 hours per week and he provided a copy of the above employment agreement.

[12] Mr Singh started work on 9 October 2013 when the restaurant opened. Mr Singh says as the restaurant was busy, Mr Aberkane insisted he work seven days a week during opening hours and, that he would be paid later for extra hours. Mr Singh says this essentially involved him working significant additional hours but being paid for 40 hours. Mr Singh recalled taking December 2013 off to return to India for a holiday and being told by Mr Aberkane on his return, that he still could not pay him for the extra hours he was working until profitability improved.

Correspondence with Immigration NZ

[13] The Authority was also provided with a letter of 19 June 2013, from Mr Singh's immigration advisor to Immigration NZ that shows a concern had been raised by them on the inadequate level of Mr Singh's hourly rate being, below market rates and not meeting policy guidelines. The immigration advisor's letter in response, indicates Mr Singh's employer had subsequently raised the rate to \$18.50 per hour. A signed letter from Mr Aberkane confirmed this to be so. When questioned, Mr Aberkane recalled signing the letter for Immigration NZ but it was apparent no action was then taken to increase Mr Singh's hourly rate or address any arrears owed.

Second employment agreement

[14] Mr Singh says in mid-January 2014, Mr Aberkane insisted he sign a new employment agreement placing him on a salary because he was doing lots of extra hours and NNB could not afford to pay him. Mr Singh says he was pressured by Mr Aberkane to sign the agreement or forfeit his work visa opportunity. This agreement signed by both parties on 25 January 2014, still describing Mr Singh as a "Manager", included new relevant terms being:

- A salary of \$38,610 per annum.
- Hours of work under a heading: "**Full Time Hours with an obligation to perform overtime as necessary without extra payment**" and: "The Employee's normal hours of work shall be **60** hours per week, **from open to close, six days a week**" and:

The Employee may also be required to perform such overtime as may be reasonably required by the Employer for the Employee to properly perform their duties. The Employee's salary fully compensates them for all hours worked.

[15] The Authority observes a division of the "normal" hours expected and the salary specified, amounts to an hourly rate of \$12.37 which was below the then, adult minimum wage of \$13.75 per hour.¹

[16] Mr Singh says Mr Aberkane still maintained the extra hours were required to be worked but he told Mr Singh and the chef, that at the end of the year they would each get a \$10,000 bonus to recognise their extra hours. Mr Aberkane denied saying this and indicated he had several performance issues with Mr Singh including him not adhering to the restaurant's time recording system.

Ending of employment relationship and the purported settlement agreement

[17] Mr Singh's last day of work was 21 May 2014. Mr Singh says he resigned due to his constant requests to be paid for hours worked not being responded to. Mr Singh says because of these requests, Mr Aberkane was angry and frustrated towards him. Mr Singh also suggested at the time of his resignation, Mr Aberkane did not need him any longer as he was in the process of selling the restaurant on a franchise basis. Mr Aberkane says he discussed the possibility of Mr Singh purchasing the franchise.

[18] NNB provided the Authority a letter dated 21 May 2014, signed only by Mr Singh (on the same day) over Mr Aberkane's name that says:

As you are aware you have resigned. We have agreed to make a payment to you of a bonus of \$3,000.00. This payment would be paid as full and final settlement of the employment relationship.

[19] Mr Aberkane explained in his written brief, that the letter reflected an agreement to resolve Mr Singh's claim he was not paid \$16.50 per hour for the last 13 weeks of his employment and:

The reason it was processed as a bonus is because that was the only way to process a lump sum in the payroll system. Otherwise, I would have to enter in hours

¹ <https://www.employment.govt.nz/hours-and-wages/pay/minimum-wage/previous-rates/>

worked etc. This was not a bonus payment. I never agreed to pay him a bonus payment.

[20] Mr Singh says he went into the restaurant on 21 May and Mr Aberkane presented him the letter to sign 'there and then' so he could leave and have his final pay made up including holiday pay.

[21] In evidence, Mr Aberkane says he sought advice from his employment advocate who indicated he was vulnerable to a minimum wage claim and the advocate drafted the letter for him. Mr Aberkane says he thought by paying it as a bonus he could avoid taxation issues. In response during questioning, Mr Aberkane also said he knew by placing Mr Singh on a salary he was underpaying him for the hours he worked but claimed he was unaware until he got advice that he may have been paying him below the minimum wage.

Record keeping

[22] Mr Aberkane did not keep wage, time, and holidays records. His system was to leave Mr Singh in charge of recording his hours of work and he was supposed to clock in and out on the till system but Mr Singh did not always do this and he provided Ms Hustedt (who was administering the payroll), with a piece of paper detailing his hours worked and a record of the weekly "cash up" and invoices and he would be paid accordingly. Mr Aberkane claimed he constantly reminded Mr Singh to use the till time 'in and out' recording system. He also suggested it was Mr Singh who approached him to be placed on a salary for 60 hours "for the same amount of money he was getting". Mr Aberkane says this lasted for 13 weeks then because of concerns over Mr Singh's performance they signed a variation to place Mr Singh back on an hourly rate of \$18.50. Mr Aberkane says he could not locate the signed variation. Mr Aberkane claimed this latter period of employment lasting 10 weeks involved Mr Singh being paid a split wage - \$18.50 when he was undertaking managerial work and \$16.50 when doing "ordinary hours".

[23] Mr Aberkane disputed the extent of Mr Singh's working hours and at times his attendance but this claim was hampered by a lack of adequate records. I would also have expected, given Mr Aberkane's business experience, that he would have dealt with any concerns in a more formal manner. It was evident that Mr Aberkane engaged Mr Singh

despite his inexperience and left him to manage the restaurant and this included being present for lengthy periods of time.

[24] The only record NNB produced was a “Quick notes” report of Mr Singh’s earnings and tax paid for the period 1 October 2013 to 28 June 2014 and a “Detailed Hours Worked Report” for the same period. The latter showed that Mr Singh was paid an average of 40 hours per week for 18 weeks at \$16.50 per hour. Then an average of 11.5 hours for six weeks paid for at \$18.50 are recorded (designated “management” hours). A further amount of salary for 13 weeks is recorded at \$742 per week with no hours worked being recorded. The total amount paid is recorded as \$23,204.50.

Mr Singh’s claim

[25] Mr Singh suggested his hours worked were an average of 80.12 per week and says he only acceded to the second employment agreement for fear his work visa would be cancelled and he would have been deported. Mr Singh is claiming he should have been paid for all his hours at \$18.50 which reflected what was portrayed to Immigration NZ as his hourly rate for a restaurant manager’s position. Mr Singh produced a range of timesheet clocking in/clocking out records he had retained that showed he was regularly working 12-hour days in November 2013 and a calculation sheet in which he claimed arrears of \$27,682.30 for his whole period of employment (inclusive of holiday pay). However, the records he had were incomplete.

Issue 1: Was Mr Singh paid for all hours he worked?

[26] In assessing the first issue of whether Mr Singh was paid for all hours worked which is essentially an arrears claim under s 131 of the Act, I have to have regard to s 132 (2) of the Act (and the corresponding provision s 83(3) Holidays act 2003) which allows the Authority to accept as proved claims made by the employee due to a failure “to keep or produce records” prejudicing an employee’s ability to bring an accurate claim. Here, no wage time or holidays records were kept but I accept no retrospective holiday pay is at issue other than on the shortfall amounts of arrears claimed.

[27] Broadly assessing the limited evidence provided and Mr Singh's claims, I was not convinced of how the \$27,682 claim was arrived upon. The till records and pay records provided however, pointed to Mr Singh being present at work well over 45 hours per week and not being paid adequately for all hours worked. I also have regard to Mr Singh's work visa status and his vulnerability and lack of bargaining power.

[28] In all the circumstances, I consider it is equitable to determine that \$18.50 per hour was an appropriate rate of pay for the type of work undertaken. Before calculating an amount of arrears, I accept it should be discounted by the \$3,000 which was paid on termination as on Mr Singh's account, this sum was to address additional unpaid hours, he had worked rather than a performance bonus.

[29] To calculate a fair amount of arrears owed I have used a calculation based on 31 weeks work at an average of 80 hours per week which comes to \$45,800. I then reduce this amount by the \$29,494 paid to Mr Singh and \$3,000 termination payment – this leaves a total of \$14,306. With 8% holiday pay calculation, this amounts to a total of arrears owed of \$15,450.

Issue 2: Was the settlement agreement full and final preventing Mr Singh from claiming arrears of wages?

[30] I do not find in the circumstances of how the agreement was procured, that Mr Singh was given any opportunity to seek legal advice and he would be unaware of the full import of what he signed. There was no true "meeting of the minds" or intention on Mr Singh's behalf to compromise his arrears claims. The settlement agreement does not prevent Mr Singh pursuing his arrears claim.

Issue 3: Should interest be ordered on the arrears owed?

[31] Section 123(1)(b) of the Act allows the Authority to consider reimbursing "other money lost" by the employee flowing from a grievance and interest plainly falls under this category of remedy. I find that interest as claimed should be paid on the unpaid holiday pay and lost wages awarded. Given the delay of Mr Singh in pursuing his claim I fix that for a period of 12 months.

Orders

[32] Within 28 days of the date of this determination being issued Now Now Brands Limited must pay Gauravjeet Singh arrears of wages in the gross sum of \$15,450 (inclusive of holiday pay) and interest is to be paid on this amount in accordance with Schedule 2 of the Interest on Money Claims Act 2016 for a period of 12 months.

Costs

[33] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Gauravjeet Singh has 14 days from the date of this determination in which to file and serve a memorandum on costs. Now Now Brands Limited has a further 14 days in which to file and serve a memorandum in reply.

[34] 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.²

David G Beck
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1