

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 165
3069193

BETWEEN	HARMANDEEP SINGH Applicant
AND	NIKHIL HIMALAYA HOLDINGS LIMITED First Respondent
AND	NIKHIL HIMALAYA TAIHAPE LIMITED Second Respondent
AND	RAVINDER KUMAR ARORA Third Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Gerardus Elwell, counsel for the Applicant
Myriam Mitchell, counsel for the Respondents

Investigation Meeting: 19-21 January 2022

Submissions Received: Up to and including 16 February 2022

Date of Determination: 4 April 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Harmandeep Singh says that he was employed by Nikhil Himalaya Holdings Limited (NHHL) and then subsequently by Nikhil Himalaya Taihape Limited (NHTL) in full time roles from 26 January 2014 to 5 December 2018. Mr Singh says following a heated discussion between himself and Mr Ravinder Kumar Arora on 3 December 2018, he subsequently

received an email dated 5 December 2018 informing him his resignation had been accepted. Mr Singh said he had not resigned and accordingly the email constituted a dismissal from his employment with NHTL.

[2] Mr Singh says further that for most of the time he was employed, whether by the first respondent or second respondent, he was paid less than the minimum wage because he was required to work as many as 80 to 90 hours a week.

[3] Mr Singh also says that at the meeting of 3 December 2018, he raised personal grievances through Mr Arora which covered working substantially more hours than he had been contracted for and had been paid less than not only his agreed rate, but less than the minimum wage.

[4] The Applicant also claims he was required to pay an unlawful premium for employment. He claims:

- (a) Unpaid annual leave entitlements of some \$39,000.00;
- (b) Unpaid wages of some \$219,321.44;
- (c) Lost wages of \$10,080;
- (d) Compensation for humiliation, loss of dignity and injury to feelings totalling \$20,000 together with costs.

[5] NHHL, NHTL and Mr Ravinder Kumar Arora (the Respondents) deny the claims. The Respondents say the Applicant was paid the minimum wage for all hours worked, whether that was with the First Respondent or Second Respondent. They say there is no evidence that Mr Singh worked any hours which were not recorded. Further, they say this is not a case where the employer has failed to provide wage and time records. They say these were provided and that as at the date of the investigation meeting, the Applicant was owed nothing.

[6] The Respondents say the Applicant signed an acknowledgement that all wages were paid up to date and no arrears were outstanding in respect of the First Respondent, on 20 December 2017 when the Applicant was paid the sum of \$2,500. Further, they say the Applicant resigned from the Second Respondent's employment, when along with two other employees he approached Mr Arora, threatening him, and stating they would protest with the Union if they were not given money to return to India. The Respondents say that when

Mr Arora refused to give them money, they advised that they needed to return to India and did not want to work any more. They then left. They did not turn up to work on either 6 December 2018 or 7 December 2018. Thus on 7 December 2018, Mr Arora wrote to the Applicant advising he had accepted his resignation.

[7] The Respondents also say that the Applicant cannot pursue any case because he did not raise a personal grievance in time for unjustified dismissal. They say that although the Applicant wrote on 3 February 2019, that letter was not addressed to Mr Singh's employer, rather it was sent to Mr Arora who was not the employer. The Respondents say further that that letter contained insufficient information for them to address the personal grievance, and despite requests for further information this did not happen.

The Authority's investigation

[8] Witnesses appeared either in person or by Zoom and the Authority heard from Harmandeep Singh, Ann Levy, Dharampartap Singh, Varid Raj, Arun Chopra, Sara Bjeet Singh, Mohit Nakol and for the Respondents, Ravinder Kumar Arora, Rohit Kumar Arora, Barbara Lee Houlbrooke, Kunal Dhambri and Himani Khullar.

[9] All witnesses gave their evidence on oath or affirmation.

[10] The following issues requiring determination were identified as:

- (a) Did the First and Second Respondents or either, fail to pay the minimum wage to the Applicant?
- (b) Did the First and Second Respondents or either, fail to provide the minimum entitlements under the Holidays Act 2003, specifically ss 27 and 46?
- (c) If there had been a failure as set out above, was Mr Arora as the Third Respondent a person involved in the above breaches in terms of s 142W of the Employment Relations Act 2000?
- (d) Did the First Respondent, NHHL, require Mr Singh to pay an unlawful premium?
- (e) How did Mr Singh's employment with NHTL end, and if it was a dismissal, was it unjustified and if so what remedies should flow?

[11] The witnesses listed above gave their evidence by speaking to written statements and answering questions from the Authority and counsel. There was a considerable amount of documentary evidence which the parties spoke to.

[12] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all the evidence and submissions received.

[13] This determination has been issued outside the timeframes set out in s 174C(3)(b) of the Act in circumstances that the Chief of the Authority has decided that, as he is permitted by s 174C(4) to do, are exceptional.

Background

[14] Mr Singh has brought his claims against three Respondents, NHHL, NHTL and Mr Arora as a person involved in breaches of minimum entitlements, namely the failure to pay wages when due together with annual leave entitlements. Mr Singh's claims have also included a claim for an unlawful premium.

[15] It is fair to say that the Nikhil Himalaya group of companies have been involved in significant claims either made by migrant workers or made on their behalf. Of relevance here, was a memorandum of understanding entered into between Ravinder Arora and Anuradha Arora on behalf of the Nikhil Himalaya group of companies which was defined as those companies whose shareholders were Ravinder Kumar Arora, Anuradha Arora, or Arora Trustee Limited (as trustee of the Arora Family Trust) which was in the business of retail sale of liquor products (off licence). Mr Sieghal, the original representative of Mr Singh, had signed the memorandum of understanding as a representative of the Migrant Workers Association. The MOU was also signed by the Unite Union.

[16] The purpose of the agreement was to record a settlement between the companies and Mr Manjinder Singh, however it also purported to settle some 35 other employees with the group of companies. The important aspects of the settlement included an agreement that from the date of settlement, the parties agreed Nikhil Himalaya was compliant with its wage obligations under the Minimum Wage Act 1983 and Wages Protection Act 1983, in other words, at least from the date of the agreement, the parties acknowledged ongoing compliance

with employment law. The MOU also contained a provision (5.5) that no related party would represent, assist, advise or in any way be involved in any capacity whatsoever in relation to any claim or prospective claim by a former or existing employee or worker of Nikhil Himalaya against Nikhil Himalaya. Initially, it was argued that this provision would have prevented Mr Sieghal from representing Mr Singh in these current proceedings. That was not a proposition accepted by the Authority. However, in any event, Mr Elwell appeared as counsel for the Applicant.

Discussion and analysis

Illegal premium

[17] Mr Singh's claim in respect of an unlawful premium was based on his initial evidence that he was required to meet the cost of advertising for his position as part of his visa application with Immigration New Zealand. However, during the investigation meeting, although Mr Singh did not withdraw his claim, his evidence was that he did not pay a premium for his employment. Accordingly, this claim can be dispensed with.

Wage and holiday pay claims

[18] Mr Singh's claims under this heading, are prefaced on an argument that wage and time records produced were incorrect and that timesheets were either forged or also incorrect. Further, it had been put to Mr Singh that on 20 December 2017, he had signed an acknowledgement that at that date, all wages were up to date and there were no arrears owing to him from NHHL. At that point in time, he was paid a sum of \$2,500 (see bundle of documents 19).

[19] Mr Singh's claims rely on the proposition that he worked greater hours than were recorded. He has however produced no evidence of the quantification of his claim, and indeed there was some confusion about what he was claiming. The Amended Statement of Problem filed on his behalf, claimed:

- (a) unpaid wages of sum \$219,321.44 (net); and
- (b) annual leave of sum \$39,000 (gross).

[20] During the investigation meeting, the claim seemed to be:

- (a) unpaid wages of sum \$140,275.17 (gross);

- (b) annual leave of sum \$20,820.97; and
- (c) public holidays of sum \$13,256.46.

[21] Mr Arora's businesses had had interactions with a Labour Inspector and indeed it transpires that some of his companies have been found wanting. However, that was not the case with NHHL in respect of Mr Singh. The Company had engaged Ms Holbrook in February 2021 to conduct a payroll review of all his business entities to determine whether those businesses had complied with all payroll related legislation including the Holidays Act 2023. Ms Holbrook is a director of the Holbrook Group Limited a specialist payroll and human resource information system company. She is a Chartered Accountant and a member of the NZ Payroll Practices Association and has worked in the area for some 30 years.

[22] As part of her role, she was engaged to do an audit which included Mr Singh's pay. When looking at the working information on Mr Singh, she had also worked with the Labour Inspector on the process. She confirmed that all the data she used came from MYOB and says that the system allowed her to see how many employees were in the store at any given time. In her analysis she looked at three stores that would have paid Mr Singh.

[23] She gave evidence that Mr Singh had been incorrectly paid and she calculated the amount at \$3,131.62. Payment by way of remediation was made once she had finished her exercise. In order to do her analysis, Ms Holbrook said she was given access to the pay transactions in MYOB ACE payroll and subsequently the transactions contained in the current MYOB essentials payroll system. She says that her analysis confirmed that Mr Singh was paid on a weekly basis and that the information that payroll system relied on were Mr Singh's timesheets, most of which had been signed by him. Each timesheet had the start and finish times for each day worked and the timesheets also included other information such as sick leave and annual leave.

[24] Ms Holbrook confirmed that out of 118 weeks there was some 12 weeks that she could not locate timesheets for NHHL and two weeks when the payroll system did not show any payments. This caused her to go through copies of NHHL's bank statements to verify payments made to Mr Singh. For each pay period she physically matched the physical timesheet to the information contained in the payroll system.

[25] Ms Holbrook concluded that Mr Singh had been paid at least the minimum wage for each and every hour he had worked. She did however state that her review did disclose that

Mr Singh appeared to be owed some \$51.95 (gross) and holiday pay of some \$772.50. She said this discrepancy came about because there were three instances where annual leave had been paid at the incorrect rate. Ms Holbrook was adamant that her analysis confirmed that other than the above error, Mr Singh's public holidays were paid correctly and that he received payments for public holidays in accordance with the Holidays Act. She says that all annual leave payments were paid in accordance with the Holidays Act other than the rating error mentioned above. She says he was paid at least minimum wage for each and every hour worked.

[26] In respect of work in the Taihape office, Ms Holbrook's evidence was that Mr Singh had worked in Taihape from 25 February 2018 until 2 December 2019. She had access to all timesheets and payroll system records. She also had access to the Labour Inspector's findings in respect of the Taihape business and noted that her figures matched the Labour Inspector's findings, namely that Mr Singh was owed \$714.46 (gross) for alternate holidays accrued but not taken. The sum was made up of:

- (a) two public holiday days worked which had been incorrectly paid at ordinary rates instead of time and a half (\$248.08);
- (b) the two alternative days not paid in the final pay, totalling \$413.46; and
- (c) holiday pay at eight percent on the above amounts which totalled \$52.90.

[27] Ms Holbrook said she had done an in-depth analysis and could not find any evidence that supported Mr Singh's claims that he had worked the excess hours, and certainly nothing in the vicinity of 80 to 90 hours per week as he had claimed.

[28] Mr Singh acknowledged in his evidence that he prepared his timesheets more often than not but still maintains that they were incorrect and that they under-reported his hours. He said that this was because of pressure that was placed on him. Mr Singh was more often than not the most senior person in the workplace, and he could not explain in any satisfactory way, how this pressure was applied.

[29] Mr Singh's claim in respect of holiday pay claims and wage claims, is simply that all the information provided by the respondents from their payroll records is wrong because timesheets were incorrect or forged. Ms Holbrook rightly conceded that her analysis could be wrong if timesheets were falsified or forged. Mr Singh however has produced no evidence to mitigate that is the case. Indeed wage time records for NHTL had been reviewed by the Labour

Inspector who appears not to have taken issue with it (BOD 415). Further, Mr Singh was asked to point to timesheets he said were forged. He said that timesheets contained in BOD 332 were not signed by him, but were signed by a person working for him. He conceded these time sheets showed him working until 4.00 pm which was consistent with timesheets he agreed he had signed. He confirmed he had never raised this as an issue at the time.

Unjustified dismissal – 90 days

[30] Any unjustified dismissal claim is against NHTL who was the employer at the time. It is worth noting that the uncontested evidence was NHTL sold the Taihape store in 2019 and no longer trades.

[31] Mr Singh's evidence regarding this was straight forward. There was no dispute that the employer at this time was NHTL. The business has since been sold and the company no longer trades. The evidence from the parties is diametrically opposed. It is not in dispute that Mr Singh with two colleagues met with Mr Arora in December 2018. Mr Singh's evidence was that they went to discuss annual leave issues and unpaid wages. They say that Mr Arora became angry and told them he would not be paying unpaid wages or any other entitlement. On 7 December 2018 it is not disputed that Mr Singh received an email from Mr Arora stating he had accepted his resignation some two days earlier and acknowledged his employment was at an end.

[32] Mr Arora's evidence regarding the events on 5 December 2018 was quite different. He confirmed that Mr Singh and two other employees, namely Partap Singh and Navnet Singh came into his office. He says he was not expecting them and the meeting had not been arranged. He says the employees acted in a very threatening way towards him saying that they wished to return to India, they had no future here, and they did not want to work with him anymore. He says they demanded money from him and threatened to protest with the union outside of the shops if they were not given money. He says he refused to give them money. He referred to the Memorandum of Understanding that the parties had signed. He says the three then left the premises and he did not hear from them again. They should have attended work the next day but did not.

[33] On 7 December 2018, Mr Arora confirmed he emailed the three employees accepting their verbal resignations and trespassing them. He said he received no reply.

[34] The Unite Union had been involved in sorting out disputes between the parties. Accordingly, Mr Arora approached Mr McCarten, and asked what he should do. Mr McCarten did not give evidence however Mr Arora said he was advised he should pay all holiday and other entitlements which he did.

[35] It is obvious however that such advice would have been given in the belief the three employees had resigned. The only evidence the Union would have had, would have been the statement from Mr Arora.

[36] The Respondents argue that the raising of any personal grievance was out of time in terms of the Act. This is because although a grievance was raised on 3 February 2019, it was simply addressed to “Bottle-O”, Attention Ravinder Kumar. It is clear however, that reference to Ravinder Kumar was indeed a reference to Ravinder Kumar Arora. The evidence before the Authority makes it clear, Ravinder Arora was the human face of NHTL. Indeed, on 6 March the response on behalf of Mr Ravinder Kumar Arora acknowledged he had received a purported “notice of personal grievance”.

[37] The grievance was properly raised within the 90-day period prescribed for under the Act.

Conclusion

Unlawful premium

[38] Mr Singh has produced no evidence that he was paid an unlawful premium for employment with NHHL. Indeed, when the question was directly put to him, his evidence was that he did not pay a premium when he commenced his employment with the First Respondent. Mr Singh’s claim in that regard fails.

Wage and holiday pay claims

[39] Mr Singh has not been able to show that the wage and time records held by either NHHL, and/or NHTL are incorrect. He made various statements during the investigation meeting that he was working 60 to 70 hours a week which later became 80 to 90 hours a week, but he has been unable to show that the First and Second Respondents’ records are incorrect. Further, in answer to direct questions in cross-examination regarding his calculations which formed his claim, he said he had never seen it before and opined it had been prepared by his

lawyer. He indicated he had not checked it before it had been filed and could produce no evidence indicating it was accurate.

[40] On the other hand, Ms Holbrook's evidence was clear and concise. She had analysed the First Respondent's and Second Respondent's records, had seen minor discrepancies which had been rectified. She confirmed that her audit would have been unlikely to pick up falsified timesheets, however, Mr Singh was not able to satisfy me that indeed any of the timesheets were anything other than accurate and either prepared by him or on his behalf. Accordingly, Mr Singh's claim in respect of wage and holiday pay fails. Because of this, there is no need to consider further whether Mr Arora was a person involved in a breach in terms of s 142Y of the Act.

Unjustified dismissal

[41] As noted earlier, Mr Singh's personal grievance in respect of an unjustified dismissal was validly raised on 3 February 2019. It is clear this came to the attention of his employer well within the statutory time period.

[42] Whilst Mr Singh and two of his colleagues did drop in on Mr Arora, as the human face of NHTL, unexpectedly, I can accept that the meeting was volatile. However, there is no evidence that Mr Singh resigned from his employment. Indeed, it would be strange if he were to do so without putting that resignation in writing. In support of his argument that Mr Singh resigned, Mr Arora says that the three employees did not return to work, which prompted him to send out his email accepting their resignations. However, he also trespassed them. Mr Singh's evidence was that this essentially happened at the meeting of 3 December. Accordingly, it was entirely foreseeable that Mr Singh would not return to work.

[43] I place no emphasis on the subsequent discussion that Mr Arora may have had with the Union. This is because it would have also been presupposed on the basis of a resignation, not dismissal.

[44] Mr Singh gave evidence in respect of the humiliation, injury to feelings and loss of dignity he had suffered. He said he was upset and felt he had been treated badly. Under the circumstances I consider an award of \$15,000.00 appropriate.

[45] Mr Singh has also given evidence of wage loss of some \$10,080.00 and as he has been unjustifiably dismissed, it is appropriate this claim be allowed.

[46] Mr Singh has succeeded in his claim that he was unjustifiably dismissed. Section 124 of the Act requires that I consider any contribution Mr Singh may have made in respect to his personal grievance. Under the circumstances, I cannot see how Mr Singh has contributed in any way to his unjustified dismissal and accordingly it is not appropriate to make any deduction.

Summary of Orders

[47] Nikhil Himalaya Taihape Limited is ordered to pay Mr Singh the following sums under s 123 of the Act within 14 days:

- (a) Compensation of \$15,000.00;
- (b) Lost wages of \$10,080.00 (less PAYE).

Costs

[48] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Singh may lodge and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, Nikhil Himalaya Taihape Limited would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Geoff O'Sullivan
Member of the Employment Relations Authority