

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 548
3176208

BETWEEN	HARMANPREET SINGH Applicant
AND	YK FOVERAGE LIMITED First Respondent
AND	PUNEET KALIA Second Respondent

Member of Authority: Sarah Blick

Representatives: Harmanpreet Singh, in person
Kamal Preet Chadha, for the first respondent
Puneet Kalia, in person

Investigation Meeting: 23 June 2023 in Hamilton

Submissions received: At the investigation meeting

Determination: 22 September 2023

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Harmanpreet Singh was employed by the first respondent YK Foverage Limited (YK), which trades as at least one “Mex it Up” store selling takeaway food in Hamilton. He worked as an assistant restaurant manager for around six months. The employment ended acrimoniously following a physical altercation between Mr Singh and the second respondent Mr Kalia outside YK’s Chartwell Mex it Up store, during one of Mr Singh’s shifts. The altercation arose out of personal relationship matters between Mr Singh and his partner, in

which Mr Kalia became involved. It is common ground Mr Singh was not paid wages or holiday pay at the end of his employment.

[2] Mr Singh seeks arrears of wages for certain hours worked, first week compensation in relation to a work-related personal injury, and annual holiday pay and alternative holiday pay due on termination of employment. He says he is owed a total of \$3,984.00 in arrears.

[3] YK's current director and shareholder is Kamal Preet Chadha. She is married to Mr Kalia who, prior to Mr Singh's employment, was also a director and shareholder of YK.

[4] At the investigation meeting, the respondents claimed Mr Singh was in fact overpaid some \$1,090.22 during his employment. They said this occurred because of YK's payroll settings which failed to deduct time taken by Mr Singh as unpaid meal breaks.

[5] During the Authority's investigation Mr Kalia has denied being involved in the Mex it Up business during Mr Singh's employment.

What has the Authority's process been?

[6] Mr Singh represented himself during the Authority investigation. Initially it was unclear who Mr Singh believed his employer was, as Mr Kalia was the sole named respondent in the statement of problem lodged. It was also unclear what the employment relationship problem was between the parties and what resolution Mr Singh sought from his application. Specifically, the statement of problem referred to the altercation, that Mr Singh had complained to the Police, and that he sent a medical certificate to the "owner" that he would be off work. In terms of resolution, it stated Mr Singh would like to apply for "my migrant exploitation visa" as he felt he could not work in an unsafe environment and could not imagine going back to work at Mex it Up.

[7] The parties attended mediation which did not resolve any of the problems between them.

[8] During its case management process the Authority clarified with Mr Singh that his employer was in fact YK. During a case management conference Mr Singh confirmed the only claim he wished to pursue was for wage arrears and holiday pay. Mr Singh also confirmed he still intended to pursue his application against Mr Kalia personally, based on the claim Mr Kalia was a person involved in employment standards breaches.

[9] At the investigation meeting Mr Singh and his partner Simran Kaur gave evidence in support of his claim. YK's director Kamal Chadha, Mr Kalia and YK's operations manager Priya Bhau also gave evidence.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination does not record all the evidence and submissions received and considered during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

What are the issues?

[11] The following are the issues for investigation and determination:

- (a) Does YK owe Mr Singh arrears of wages, first week compensation and holiday pay?
- (b) Is Mr Kalia a person involved in employment standards breaches and if so should leave be granted to seek recovery of arrears from him to the extent YK is unable to pay them?
- (c) Should interest be awarded on arrears owing and if so for which periods should it be calculated?

What happened?

[12] Mr Singh is an Indian national who applied for and was granted a work visa allowing him to work for YK from 6 January 2022. He started work for YK on or about 24 January 2022 on \$21 per hour, which later increased to \$22 per hour.

[13] The parties are at odds about which of two written employment agreements applied to Mr Singh's employment. The Authority has been provided with both agreements which are addressed below.

Employment agreement 1

[14] Firstly, Mr Singh provided the Authority with a written employment agreement signed and dated 14 December 2021 (Agreement 1) identifying YK as his employer. Agreement 1 stated he would start working upon the approval of a work visa, his hours of work were 40 hours per week, and his pay was \$24.50 gross per hour paid weekly into his bank account.

Agreement 1 stated the parties could agree to change the terms and conditions of the agreement at any time, but any changes must be agreed by both parties in writing.

[15] Under the heading “Ending employment”, Agreement 1 stated the parties were required to give each other two weeks’ notice in writing to end the employment. Relevantly, it stated “if the employee does not give the agreed amount of notice, the employer might be able to claim a breach of this agreement”.

[16] Agreement 1 holds the initials “H.S” and “KC” on every second page, and signatures for Mr Singh and Ms Chadha on the final page. Mr Singh says he and Ms Chadha both signed this agreement on 14 December 2021, and it was sent to his licensed immigration adviser for submitting to Immigration New Zealand (INZ) in support of his visa application. Mr Singh says Agreement 1 is the only written agreement he signed with YK during his employment. Mr Singh has also provided a support letter and INZ Employer Supplementary Form holding Ms Chadha’s signature, both dated 14 December 2021.

Employment agreement 2

[17] After Mr Singh provided Agreement 1 to the Authority, just a few days for before the investigation meeting the respondents lodged their own version of the employment agreement between the parties, which is dated 24 January 2022 (Agreement 2). Agreement 2 is signed by Ms Chadha on behalf of YK and holds a signature purporting to be Mr Singh’s. Mr Singh claims he never signed Agreement 2 and points out obvious differences between his signature on Agreement 1 and on his drivers’ licence, compared with the one contained in Agreement 2.

[18] Agreement 2 offered Mr Singh work as a “shift manager” starting from 24 January, that his hours of work were 30 hours per week, and his pay was \$21.50 gross per hour paid weekly into his bank account.

[19] Under the heading “Ending employment”, Agreement 2 included different wording from Agreement 1:

The employee or the employee will give 2 weeks’ notice in writing, unless otherwise set out in this agreement. If the employee does not give the agreed amount of notice, the employer will be able to claim a breach of this agreement, wage deductions and forfeiture of wages.

[20] Agreement 2 also included two entirely new clauses as follows:

Forfeiture of wages

In the event that the employee fails to give the required notice then equivalent wages of three weeks shall be forfeited and deducted from any final pay including any holiday pay.

General Wage Deductions

The employer may make a deduction from your next salary/wage payment should any overpayment have been made because of some issue (e.g., technical issue or clerical issue or software or equipment failure).

The altercation

[21] The altercation outside the store occurred between Mr Singh and Mr Kalia on 16 June 2022. Ms Kaur and Ms Bhau were present. Mr Singh says Mr Kalia pushed him and slapped him on the ear. Mr Kalia and Ms Bhau say this is not true and Mr Kalia only intervened to protect Ms Kaur from Mr Singh. Shortly after the incident, Mr Singh made a Police complaint which has ultimately not resulted in any charges. In an early email response to the Authority, Mr Kalia provided a signed statement from Ms Kaur confirming Mr Singh was the aggressor during the altercation. At the investigation meeting Ms Kaur gave evidence that Ms Kalia forced her to sign what was an untrue statement, saying Mr Kalia threatened that he would cancel her visa which entitled her to work for YK.

Mr Singh did not return to work and requested pay

[22] Mr Singh never returned to work at Mex it Up, and obtained medical certificates stating he was unfit for work between 16 June 2022 through to 17 July 2022. Two of the medical certificates are ACC medical certificates referring to Ms Singh's diagnosis as "contusion, chest wall" along with comments "pushed by employer and slammed on L) ear". An ACC document also provided shows Mr Singh applied for weekly compensation on 28 June 2022, after which he received payments.

[23] Mr Singh remained employed but absent from work. There are numerous text messages between Mr Singh and Mr Kalia which show Mr Kalia wished to speak to Mr Singh about allegations, to which Mr Singh responded they were false. Although it is not clear which date it was sent, Mr Singh sent a message to Mr Kalia asking when his pay would be sorted out, to which Mr Kalia responded, "I am trying to get it sorted this week Harman". On 28 June 2022 Mr Singh again asked about his pay saying, "you didn't me my 48 hours pay", to which

Mr Kalia responded “...no one is denying your pay...there are bank issues going on and it will be released soon.”

Mr Singh’s resignation and further requests for pay

[24] On 10 July 2022 Mr Singh emailed a letter of resignation to the company email to which Ms Chadha eventually responded on 19 July 2022, saying it had gone to the “spam folder”. They then exchanged emails during which Mr Singh again asked for his pay, to which Ms Chadha responded because his resignation had now been accepted “it will come in the full and final payment on the last day” two weeks from 19 July 2022.

[25] YK acknowledge it never did make any further payments to Mr Singh.

[26] At the investigation meeting, for the first time the Authority is aware, the respondents claimed Mr Singh had been overpaid due to its payroll settings which did not deduct 30-minute unpaid meal breaks from the shifts worked by Mr Singh during his employment. Mr Kalia handed up a spreadsheet and gave evidence about it.

Does YK owe Mr Singh arrears of wages, first week compensation and holiday pay?

[27] Yes. I am satisfied Mr Singh is entitled to recover both arrears of wages, first week compensation and holiday pay.

Agreement 1 applied to employment

[28] The respondents’ evidence that the parties purportedly entered into Agreement 2 on 24 January 2022 is not reliable or credible. Of concern is that it appears the respondents have generated Agreement 2 for the purposes of the Authority’s investigation to align with their narrative that Mr Singh had agreed to a lesser pay rate early in his employment, that he did not give the required notice on termination, and that he had been overpaid for breaks during his employment. Agreement 2’s inclusion of a new forfeiture of wages and holiday pay clause upon a failure to give the required notice, and a new wage deduction clause purporting to give YK the ability to deduct from wages in the event of overpayment due to technical, clerical or software issues is an entirely convenient answer to Mr Singh’s claims. The respondents’ evidence about the circumstances of entering the agreement was wholly incredible in contrast to Mr Singh’s evidence. The Authority is satisfied the applicable agreement to Mr Singh’s employment is Agreement 1.

Purported overpayments

[29] The respondents only provided a spreadsheet at a late stage of the Authority's investigation without providing the payroll information behind it. Given the Authority's significant concerns about the provision of Agreement 2 during the investigation, I give no weight to this late evidence. In any event, Mr Singh was entitled to rely on wage payments he received being calculated correctly during his employment.

Mr Singh is entitled to recover at higher pay rate

[30] Agreement 1 entitled Mr Singh to a pay rate of \$24.50 gross per hour. I accept Mr Singh's evidence that he objected to the reduction in his hourly pay rate, but Mr Kalia implemented the change regardless. Because of my findings above, the Authority finds YK did not comply with its employment agreement with Mr Singh which required variations to the agreement to be in writing signed by both parties. No variation was agreed in accordance with the agreement and Mr Singh is entitled to recover arrears of wages based on his pay rate of \$24.50 gross per hour.

Mr Singh is entitled to 48 hours pay worked

[31] At the end of his employment the respondents acknowledged Mr Singh was owed wages for hours he had worked. The respondents made no claims of forfeiture or overpayment at the time and advised it would pay Mr Singh, but YK ultimately failed to pay despite saying it would do so. Mr Singh is entitled to 48 hours pay for the hours he worked between 13 to 16 June 2022. The Authority calculates to be \$1,176.00 gross.

Mr Singh is entitled to first week compensation

[32] I am also satisfied Mr Singh is entitled to recover "first week compensation" following the altercation.¹ ACC accepted Mr Singh suffered a work-related personal injury for which he received earnings related compensation. As such, YK was and is obliged to pay Mr Singh first week compensation of 80% of his earnings. The Authority calculates this to be \$784.00 gross.

¹ In accordance with sections 97 and 98 of the Accident Compensation Act 2001.

Mr Singh is entitled to holiday pay

[33] The evidence established Mr Singh received no holiday pay on termination of employment. YK has failed to provide a holiday and leave record in relation to Mr Singh's employment despite the Authority's request to do so. In those circumstances I accept Mr Singh's evidence in relation to holiday pay. The Authority finds he is entitled 8% of his gross earnings (being what YK was required to pay him under Agreement 1). The first week compensation should be included in that calculation.² The Authority calculates 8% to be \$1,677.76 gross.

[34] Mr Singh is also entitled to pay for three alternative days for public holidays worked during his employment. The Authority calculates this to be \$588 gross.

[35] For completeness, Mr Singh initially only sought to recover arrears at the rate of \$22 per hour, but after receiving some advice, he decided to seek it at the higher \$24.50 rate. He has not sought to recover arrears in relation to other periods of employment, although he remains entitled to.³

Is Mr Kalia a person involved in breaches of employment standards and should leave be granted for Mr Singh to recover arrears from him personally?

[36] Yes. I find Mr Kalia was, at the very least, a person knowingly concerned with YK's breaches of several employment standards. The evidence amply demonstrated he occupied a position in YK and exercised significant influence over the management or administration of YK, including of employees and their pay. His and YK's other witness evidence regarding this was not compelling in light of the overwhelming documentary evidence.

[37] The defaults in payment are due to employment standards breaches of s 4 of the Wages Protection Act 1983 and ss 23 and 27 of the Holidays Act 2003. The effect of s 142Y of the Act and the finding that Mr Kalia's actions fall within the ambit of s 142W means he can be held liable for YK's defaults in payments owing to Mr Singh.

² Holidays Act 2003, section 14.

³ Employment Relations Act 2000, section 142.

[38] It is appropriate to grant leave to recover the arrears of wages, first week compensation and holiday pay from Mr Kalia personally to the extent YK is or becomes unable to pay the arrears.

Should interest be awarded on arrears owing and if so for which periods should it be calculated?

[39] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. It is appropriate for a person such as Mr Singh, who has been deprived of the use of his money, to receive an award of interest.

[40] Interest must be calculated using the civil debt interest calculator.⁴ Interest on the gross amount of \$4,225.76 is to be calculated from 10 July 2022 until full payment is made.

Outcome

[41] YK Foverage Limited is ordered to pay to Harmanpreet Singh the following within 14 days of the date of this determination:

- a. \$1,176.00 gross in wage arrears;
- b. \$784.00 gross in first week compensation;
- c. \$1,677.76 gross in annual holiday pay arrears;
- d. \$588.00 in alternative holiday pay arrears;
- e. Interest on these amounts as above.

[42] Mr Kalia is a person involved in breaches of employment standards and leave is granted to recover the amounts at [41] above from Mr Kalia personally to the extent YK is or becomes unable to pay the arrears.

Costs and expenses

[43] No issue of costs arises at the parties represented themselves throughout the Authority investigation.

⁴ See <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

[44] YK Foverage Limited is ordered to reimburse Mr Singh the expense of the Authority application fee of \$71.55 that he paid to lodge his application, within 14 days of the date of this determination.

Sarah Blick
Member of the Employment Relations Authority