

IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE

[2024] NZERA 179  
3133775

BETWEEN                    ITWINDER SINGH  
   Applicant  
  
AND                            SJ MCKEE LIMITED  
   First Respondent  
  
AND                            STEPHEN JOHN MCKEE  
   Second Respondent

Member of Authority:    Michael Loftus  
  
Representatives:         Applicant in person  
   Paul Wicks KC, counsel for the Respondents  
  
Investigation Meeting:    20 and 21 March 2023 in Auckland  
  
Submissions Received:    At the investigation meeting  
  
Determination:            27 March 2024

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DETERMINATION OF THE AUTHORITY

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**Employment Relationship Problem**

[1]     The applicant, Itwinder Singh, claims he was both unjustifiably dismissed and unjustifiably disadvantaged. He also claims he is due wages with his final pay being incorrect, public holidays and hours he worked at race meetings remaining unpaid.

[2]     The disadvantages include a claim he was bullied and his employer's response was lacking when he complained; that there was a failure to respond to two specific complaints dated 19 October 2019 and 25 November 2019; that records were inaccurate and that the employer provided unsafe accommodation.

[3]     Originally there was also a claim of discrimination but that was withdrawn as Mr Singh chose to pursue it under the provisions of the Human Rights Act 1993.

[4] The claim was originally lodged against SJ McKee Limited with the response being it could never have employed Mr Singh as it was not even incorporated until 24 September 2020 and did not enter into an employment agreement with Mr Singh prior to his departure.

[5] Mr McKee was then added as a second respondent after he admitted he employed Mr Singh in his personal capacity from March 2018 until Mr Singh's dismissal on 29 December 2020. He claims the dismissal justified by reason of redundancy. The wage claims are denied largely on the grounds they were raised beyond the six-year limitation though it is added Mr McKee has, in any event, paid everything due.

[6] A number of the other claims are denied on the grounds they relate to employees other than Mr Singh and the Authority therefore lacks jurisdiction to consider them. Those that do relate to Mr Singh are denied on the grounds they were not raised within 90 days as required by s114 of the Act.

### **This Determination**

[7] 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 evidence and submissions received.

[8] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

### **Background**

[9] Mr Singh worked, with a short break, for approximately 10 years as a stable hand at a thoroughbred racehorse training business. It was, when he commenced, owned by Mr McKee's late father and by Mr McKee from 2017.

[10] That said Mr Singh claimed he was originally employed by Stephen McKee as while he was paid by Mr McKee senior the later was never mentioned and nor was his role in the business. Mr McKee has no recollection of engaging Mr Singh but accepts he may well have interviewed Mr Singh and offered the employment but it would have

been with his father's business in which he was an active manager. He states he did not employ staff on his own account till 2016 and later took over the staff engaged by his father's company in 2017. That said nothing turns on this as while Mr Singh claims he was not paid his full entitlements during his first period of employment he accepts he left to undertake postgraduate studies more than six years ago and did not pursue it at the time. Any relevant claims are therefore out of time.

[11] Mr Singh says that having left he then asked Mr McKee whether he could work a part-time role while pursuing his studies. That was agreed and Mr Singh returned, part-time, in December 2011. Again Mr McKee does not dispute this.

[12] Mr Singh says that for the first four months he worked the morning shift every day and full days at weekends with no days off. He states he wasn't paid any public holidays. After that he worked regular part-time hours till 2017 which were paid from the account of "McKee T&S" but any extra shifts were paid separately in cash.

[13] Again Mr McKee does not dispute this evidence claiming that while he managed and directed the staff's work he played no part in their payment or administration.

[14] In June 2017 Mr Singh resigned. He accepts he was paid outstanding holiday pay for that period when he requested it, though no payslips were provided and he has no idea how the amount was calculated. Mr McKee accepts Mr Singh worked the occasional public holiday during this period but believes he was properly paid though accepts he does not really know on the grounds he was not the employer and has no access to relevant records and under questioning Mr Singh conceded he probably had been correctly paid.

[15] In early 2018 Mr Singh says he contacted Mr McKee about the possibility of returning. He says he sought work over the weekends with the occasional extra shift if needed. The approach was accepted and he commenced in March 2018, but adds he was regularly asked to do extra shifts at short notice. He states he didn't mind as at that stage his course wasn't to start till July 2018.

[16] Essentially Mr McKee agrees saying the agreed hours were a split shift on Saturday totalling 7.25 hours and another on Sunday when Mr Singh was expected to work 3.75 hours. He says they also agreed he would work the odd additional shift and that they agreed he could occupy employer provided accommodation for a weekly rent

of \$150. That said, Mr McKee states the rent was never paid and while he occupied the accommodation Mr Singh was not asked about it.

[17] Mr Singh says there was no written employment agreement and while Mr McKee says all staff received one, or at least should have, he accepts there was an administrative issue and Mr Singh is probably correct.

[18] Mr Singh says that within the first couple of months two staff left and another reduced from fulltime to part-time. As a result he says he was regularly asked to work extra shifts which he did reluctantly after his studies resumed. He justifies this on the grounds that he had work provided accommodation and didn't want to look for a new house and job in the middle of a semester. He also says the work regularly continued till about 10:00am when it was supposed to stop at 9:30am but he was not paid for the additional time.

[19] It was around this time another issue arose which involved a colleague who he says regularly got drunk and then started cooking late at night. This then led to the cooker being left unattended which Mr Singh considered dangerous. On 25 September 2018 Mr Singh informed Mr McKee of his concerns by text. He says Mr McKee replied that he would deal with it but Mr Singh complains he has no knowledge of an outcome and whether it had been attended to.

[20] Mr Singh says a similar thing happened on 29 September with the colleague passing out and leaving food cooking unattended. Mr Singh adds that he said he could Facetime the event so Mr McKee could see for himself. Mr Singh says the reply was that Mr McKee was in Australia and to show it to another flatmate. Again, Mr Singh says he has no knowledge of any outcome and it was he who then stayed up at night to ensure the gas was off.

[21] Mr Singh says that in late 2018 another two Indians were recruited along with a foreman. A third Indian joined in April 2020. Mr Singh complains the foreman almost immediately started having altercations with the staff and he soon made his first complaint. He says Mr McKee responded by asking that he come and talk rather than texting about these issues. Mr Singh says, "I realise that that was his preferred way of handling issues so there would be no record of incidents." Mr Singh says he was told Mr McKee would keep an eye on the foreman's behaviour but complains nothing changed; indeed it got worse as time went by.

[22] Mr Singh states that at about 5.30am on 19 October 2019 all staff were asked to come to the coffee room. He says that once everyone had gathered Mr McKee slammed the door and started yelling at the staff. He adds the foreman complained the staff, particularly the Indian staff, were not obeying his orders. He says Mr McKee screamed, "I am the boss here" and looked at the Indian staff one by one yelling, "Who am I?" until they responded, "The boss." Mr Singh says that was followed by Mr McKee saying, "That's right, and when I'm not here, he's the boss" pointing towards the foreman. Mr Singh says Mr McKee then warned there would be consequences if he received any more complaints from the foreman.

[23] Mr Singh says Mr McKee then pulled out a form describing disciplinary processes downloaded from the Employment New Zealand website entitled "Reasons for Dismissal." He says it had the names of the Indian staff handwritten on it. It was then pinned to the noticeboard with the comment, "I'm going to leave it here for everyone to see and be a warning to all." Mr Singh says that the named staff were then told that this was their final warning and he could get their visas revoked.

[24] Mr Singh complains the staff tried to reply but were told to shut up. He says he was of the view the meeting was held in the weekend so that he would be present but notes he could not be threatened as he was not on a work visa.

[25] That said, Mr Singh chose to challenge what had occurred and did so in writing that day. He advised he was of the view Mr McKee had failed to comply with proper procedural protocols. He then went on to comment about the foreman's behaviour alleging he had had physical altercations with most of the staff and that Mr McKee had chosen not to act despite having the issues brought to his attention. He then raised the fact his last pay had been late, before moving to an allegation Mr McKee was being abusive and attempting to stop staff conversing in their native languages. He then raised health and safety concerns with allegations sick and injured staff were required to either work or be taunted; that health and safety reporting requirements were deficient and equipment of poor quality and badly maintained.

[26] This led to further exchanges over the following days over the timing of a meeting between himself and Mr McKee and, on 30 October, Mr Singh suggesting some of the immigration documentation entered into with other Indian staff was inaccurate and they were being underpaid.

[27] Mr Singh says that when the meeting did occur he was told false stories about the staff's alleged misbehaviour and was subject to various implied threats.

[28] He also states he was told by some of his migrant colleagues that on 31 October they had been called into Mr McKee's office and told to sign an affidavit handwritten by Mr McKee declaring they had no problems with their employer and were well looked after.

[29] Mr Singh says that on 23 November 2019 there was another altercation between himself and the foreman over his filling horse feed bins with the senior worker who had instructed Mr Singh to do so being told the foreman did not want part-time workers doing the task. This, according to Mr Singh, was despite the fact he had done it for years and he again complained verbally to Mr McKee.

[30] Mr Singh says that on 25 November the foreman told him he didn't want part timers touching his horse when Mr Singh went to assist with unloading the animal which led to another written complaint covering that, the event of 23 November and another incident also alleged to have occurred on 23 November when the foreman was said to have abused another worker.

[31] Mr McKee responded by noting Mr Singh had left the workplace after raising the incident on 23 November but was still paid. He had not therefore been present to see the matter dealt with.

[32] In December 2019 the foreman left, purportedly because his demand one of the Indian workers be sacked was not complied with. Mr Singh says he overheard the foreman making the request of Mr McKee. Mr Singh says he also helped the employee concerned write a written explanation of the events which led to the request.

[33] Mr Singh complains from that point relationships between the other staff and Mr McKee improved while his regressed.

[34] On 22 December there was another incident between a senior staff member who was now in charge of the shift and one of the Indian workers witnessed by a number of staff. Mr Singh goes on to note the worker concerned never returned to work.

[35] On 10 January Mr Singh received an email asking him to attend a formal meeting on the 12<sup>th</sup> regarding the incident and which he interpreted as suggesting he

himself may have been involved and breached his terms of employment. He replied by email listing reservations and concerns about the meeting. He took issue with the suggestion he was involved and said it was hypocritical to be concerned about an incident involving loud voices and abusive language when Mr McKee acted in that way. He also questioned the visa status of one of those involved.

[36] Mr Singh says he had a reply from Neville Farrelly, a contractor engaged to look after human resource issues within the company and ultimately the transfer of staff previously engaged by Mr McKee as a sole trader to the employ of S J McKee Limited which was incorporated in September 2020. The reply emphasised Mr Singh's involvement was as a witness and the meeting was rescheduled.

[37] On 25 March 2020 the Covid lockdown commenced and on 27 March Mr Singh received a text advising him not to come to work. When he queried that he was told it was to maintain the bubble as the rest of the staff had been at work for the previous two days. Mr Singh says he was surprised because he lived in the workplace accommodation and shared it with a colleague who was working. Mr Singh says Mr McKee then worked his weekend shift which was unusual. He says he was willing to work in what was an essential service and the change occurred without consultation notwithstanding the fact Mr McKee had taken the wage subsidy for himself as well as other staff. Mr Singh also comments Mr McKee chose to cease working the horses until the end of Covid lockdown unlike other trainers.

[38] Mr McKee has a different view saying he was advised to keep only a skeleton crew sufficient to ensure the horses welfare and that was what he did using only six of his staff working in two groups of three.

[39] On 23 August 2020 Mr Singh made a complaint about the behaviour of a colleague the previous day. It concerned abusive language and an accusation the employee involved was under the influence of drugs at work. He complains there was no response and adds the complaint further worsened his relationship with management and the employee he had complained about. Mr Singh is of the view that was because the employee was important to Mr McKee and notes that notwithstanding earlier intervention by WorkSafe New Zealand, he was allowed to work without wearing mandatory safety equipment. He was, according to Mr Singh, provided with special privileges.

[40] On 10 November 2020 Mr Singh received a notice advising he was required to attend a meeting the following morning though an alternate date was offered if attendance was not possible. The meeting was said to be due to the establishment of the company and “The meeting will be to inform you personally what this means, such as the updating the Employment Agreements to meet the requirements of the new company.” The letter added Mr Singh could bring a support person or representative.

[41] Mr Singh chose the alternate date, 15 November, as 11 November was not one of his working days. He asked other staff whether they had received a similar notice and was told yes. He was also told the meeting had been very short with staff being told about a name change, Mr McKee senior’s death and that it wouldn’t affect them in any way. He says he was told the only other issue discussed was a new no smoking policy and there was no mention of a company restructure.

[42] Mr Singh states his meeting was different. He was told it was about a restructure which was explained in a four page document entitled “Proposal of Restructure or Disestablishment of Roles”. It attributes the changes to the death of Mr McKee Senior, the resignation of the foreman and a decrease in horse sales and training which had led reduced income.

[43] Mr Singh goes on to say that the document proposed the removal of all three then extant part time positions though he is of the view this was a misrepresentation as one of the other part timers had retired and the third had resigned. He says there was only one part-time employee left, namely himself.

[44] Mr Singh also notes the restructure proposed five fulltime ground staff when there were in fact six. One, who he believes Mr McKee was desperate to retain, had been stuck in India since the outbreak of Covid. He says he proposed his part-time role be made fulltime to cover that absence but was told the company only needed five fulltime employees at that time. He disagrees and is of the view he could have been retained at least until the employee in India returned.

[45] As a second alternative Mr Singh suggested he be retained instead of another employee who occupied a similar, albeit fulltime, role with the same title. The only difference was the employee concerned was on a sponsored visa and he suggests the reason he was retained is that he was in fact paying a premium for that support.

[46] Mr Singh replied challenging the accuracy of the proposal and the number of staff it mentioned. He also asked what was considered part-time with the reply advising 20 hours a week or under. Mr Singh states that as he was working more than 20 hours a week he should not therefore have been deemed part-time.

[47] Notwithstanding that and considerable correspondence, the redundancy went ahead. He was dismissed with effect late December and that was followed with further correspondence about his pay and what Mr Singh contends are deficiencies therein.

[48] He claims the redundancy was a sham and he was targeted as a result of his various complaints and his having commenced proceedings in the human rights jurisdiction. He contends the restructure was only done to get rid of a what was by then seen as a difficult employee.

[49] Mr McKee has a different view saying that not only was the company incorporated there was less training being performed though it is his evidence that having commissioned the restructuring exercise he took little part in the process which was managed by Mr Farrelly. He does however deny any suggestion it was designed to remove Mr Singh.

[50] Mr Farrelly accepts the proposal only addressed part-time staff with one of the three having resigned as Mr Singh says but is of the view the suggested approach could be justified by the businesses needs. It rejected Ms Singh's suggestion he be retained in preference to a colleague on the grounds "it Is not a legal option to remove someone, who has the legal right to work in New Zealand and an Individual Employment Agreement with the company and replace them on the grounds they are an immigrant worker." While not mentioned at the time it is now argued the employee in question performed a different role to Mr Singh though Mr Singh remained adamant that was not so.

[51] The suggestion Mr Singh's role be increased to full time was "under consideration and [the company] will advise you of accordingly on the merits of this option." That response, sent on 24 November, also noted the final decision was scheduled for the following day but offered a delay as that was not a normal working day for Mr Singh.

[52] As events transpired the company then concluded it “does not have a need or the capacity to increase the ground staff’s overall hours of work per week. Simply put, the extra hours you propose do not exist.”

### **Analysis**

[53] As said in opening Mr Singh, claims he was both unjustifiably dismissed and unjustifiably disadvantaged. The disadvantages include a claim he was bullied and his employer’s response was lacking when he complained. He also claimed he was due wages with his final pay being incorrect, public holidays and hours he worked at race meetings remaining unpaid.

[54] There is an underlying problem in that Mr Singh’s original explanation of the background facts opens with “I am complaining because I believe I have been discriminated against because of my ethnic or national origins; race; racially harassed”.

[55] While additional issues have since arisen, the way the claims were presented and answers Mr Singh gave strongly indicate this remains a central theme in his complaints. This creates an issue in that he is now precluded from pursuing these claims and their effect in the Authority. Mr Singh had an option with respect to these claims which was to pursue them in either the Authority or the human rights jurisdiction – he cannot do both.<sup>1</sup> Mr Singh chose the latter, withdrawing his discrimination claim in the Authority and was successful elsewhere.<sup>2</sup>

[56] Similarly, he evidenced and commented on events that were alleged to have disadvantaged others but again claims on their behalf are precluded. This is essentially a “personal” grievance and aside from the fact none of these individuals gave evidence Mr Singh has not evidenced any authority to act on their behalf. Again, these claims cannot be considered but these issues did raise a question as to what remained for the Authority to consider.

[57] When asked Mr Singh advised he was pursuing the dismissal; the underpayments; bullying by the supervisor; a lack of response to his complaints of 19 October and 25 November 2019 and a disadvantage arising from the lack of response

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<sup>1</sup> Section 112 of the Employment Relations Act 2000

<sup>2</sup> *Singh v McKee* [2024] NZHRRT 3

to his complaint about the colleagues unsafe cooking. No mention was made of the August 2020 incident.

*Disadvantage claims*

[58] I shall deal with all but the dismissal and wage claims first. The defence is that none of the events cited as constituting a disadvantage was raised as a personal grievance within 90 days as required by s 114 of the Employment Relations Act 2000. I agree.

[59] The Act requires the employer be put on notice there is a personal grievance and that requires more than advising an unhappiness. In this instance, and despite the fact he was clearly raising issues, the first intimation they might constitute a personal grievance for disadvantage arose when Mr Singh's lodged his claim in the Authority. That occurred on 5 March 2021.

[60] March 2021 is well past October and November 2019 when two of the specified disadvantage arose and putting aside an allowance for realising a response would not be forthcoming delay a year and a quarter is too long especially as Mr Singh continued to work for the bulk of that period without revisiting the claims.

[61] Similarly the supervisor alleged to have bullied Mr Singh left in December 2019. Putting aside issues as to whether or not these allegations were more properly evidence supporting the discrimination claim the supervisor could have done nothing disadvantageous after December 2019. Again, well over year passed before it was suggested his actions constituted a personal grievance. The same applies to the issue around the colleagues cooking which was aired in 2018. Finally, and while Mr Singh did not include it in his list of alleged disadvantages, more than 90 days had passed since he aired his complaint in August 2020.

[62] In none of these instances has Mr Singh asked his grievances be allowed out of time pursuant to s 114(3) of the Act. For these reasons they cannot be considered further.

## *Dismissal*

[63] Turning to the dismissal claim. The dismissal was advised on one month's notice on 29 November 2020 and the final pay was made on 31 December. The dismissal was raised in the statement of problem meaning it is well in time.

[64] That Mr Singh was dismissed is not in dispute with the justification relied upon being redundancy. That does, however, raise the issue of who the employer was.

[65] I conclude it was, as Mr McKee states, he who employed Mr Singh as a sole trader at least after his return in 2018 and Mr Singh also accepted this. While the company had by then been incorporated a contract of employment cannot be reassigned without the agreement of the parties and in this instance that conversation never occurred.

[66] With respect to justification s 103A of the Employment Relations Act 2000 (the Act) states the issue:

*... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.*

[67] In determining this the Act requires I consider, having regard to its resources, whether the employer's enquiry was sufficient. A sufficient investigation requires, as a bare minimum, that the employer put its issues/concerns to the employee, allow an opportunity to reply and consider the response with an open mind.

[68] Resources and knowledge are not an issue here with an external consultant being engaged.

[69] Traditionally and while issues of substance and process overlap and there is no such thing as a firm delineation, separation has often been used for analytical purposes especially as the requirements of [67] above are enshrined in statute and have a procedural focus.<sup>3</sup>

[70] In a redundancy setting this might be simplistically summarised as requiring the employer to establish it had a genuine business reason for the termination (the

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<sup>3</sup> Employment Relations Act 2000 at ss 4(1A) and 103A(3)(b) to (d)

substantive justification) and that there was full and genuine consultation incorporating the good faith and information sharing requirements of s 4(1A) of the Act (the procedural requirements).

[71] With respect to genuine business decision it is well established the employer is entitled to make its business more efficient and doing so might include *re-organisation or other cost saving measures*.<sup>4</sup> It is also well established a decision to restructure is a commercial one and the strategy and its wisdom cannot be questioned by the Authority.<sup>5</sup>

[72] Furthermore the correctness of the employer's business judgment is not the issue and it is not the role of the Authority to minutely examine all the detail of the purported cost saving.<sup>6</sup>

[73] Here the evidence supports an initial conclusion there may well have been an issue that had to be addressed. The evidence is that between the financial year ended 31 July 2018 and 31 July 2020 the number of horses in training more than halved and revenue from stakes reduced by 65%. The year to 31 July 2019 saw a minimal reduction in horses in training but a reduction of 18% in stakes related income.

[74] The reason why, however, I say there may have been an issue is the evidence is far from complete. As Mr Wicks conceded in submission the above data was provided by Mr Singh<sup>7</sup> and in my view appears to have two key deficiencies. The first is the last year's data was affected by covid and I have no evidence about either the extent or continuing effect of that.

[75] The second and more significant issue is that while there was some oral evidence of a high level problem the data only covers two aspects of the overall situation. I have no evidence as to whether or not it is complete or whether other income streams such as the wage subsidy were included. That said, the evidence as I have it would suggest not. I have virtually nothing from or on behalf of Mr McKee and as a result must conclude he has fallen well short of establishing the situation justified the proposal that led to Mr Singh's redundancy.

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<sup>4</sup> *G N Hale & Sons Ltd v Wellington Caretakers IUOW* [1990] 2 NZILR 1079 (CA) at 1084

<sup>5</sup> See *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] ERNZ 55 at [50] citing *G N Hale*.

<sup>6</sup> *New Zealand Nurses Union v Air New Zealand* [1992] 3 ERNZ 548 at 571.

<sup>7</sup> Closing submission at [29]

[76] Similarly there are issues with the process. While there was a consultation process of some form the evidence makes it appear incomplete and, frankly, ill informed. For example, when questioned by Mr Singh, Mr Farrelly conceded he had not sought advice or input about the effect of immigration law despite relying upon it when rejecting one of Mr Singh's counter proposals. His answers also indicated he was unsure of exactly how many employees were potentially involved. Indeed, his evidence makes it clear he entered into the process convinced he could retain the full time staff and there was only one answer which was remove the part timers. I also note there is no evidence Mr Singh as fully advised of the situation giving rise to the proposal and none he was given a detailed appraisal of the financial situation said to justify the proposal.

[77] Furthermore there is no evidence the restructuring was raised with the fulltime staff. Indeed the opposite appears to be the case and there is no evidence they might have been given a chance to provide input, suggest alternate options or even go so far as to have one of them indicate a willingness to depart voluntarily thus giving Mr Singh an opportunity to remain.

[78] While the evidence does not go so far as to allow me to agree with Mr Singh's assumption the process was a sham designed to see his removal it does make it clear the process was truncated and incomplete. The dismissal is therefore unjustified.

[79] That conclusion raises the question of remedies. Despite Mr McKee's assertion Mr Singh did not seek lost wages, he did. He said he sought 12 months at a rate payable for a prospective job he was discussing but then undermined his claim by advising he could not start that job due to his university studies. That last point must mean an inability to mitigate limits his wage loss to the three months provided for under s 128 of the Act.

[80] Mr Singh also sought \$20,000 as compensation pursuant to s 123(1)(c)(i) of the Act but as was submitted for Mr McKee the supporting evidence was sparse. What there was also concentrated on the effect of the alleged discrimination and that has been dealt with in another forum.

[81] Accepting hurt must emanate from an unjustified dismissal the evidence I do have that directly addresses the effect of the dismissal does not warrant a large sum. Considering it and current levels of payment I consider \$8,000 appropriate.

[82] Having concluded Mr Singh was unjustifiably dismissed and remedies accrue I must also consider whether they should be reduced due to contributory conduct.<sup>8</sup> The answer must be no. The justification is redundancy which, by definition, is a no-fault situation.

***Wage claim***

[83] With respect to the wage claim there was again confusion with claims being both added and withdrawn.

[84] When asked to clarify Mr Singh advised he was seeking:

- (a) Arrears with respect to two wage reductions he says he suffered;
- (b) Wages for 7 or 8 unpaid race meetings per year;
- (c) Payment for a total of 7 public holidays he claims to have worked or, if he was paid, he is yet to receive a day in lieu; and
- (d) A shortfall of \$2000 in his final holiday pay though this claim was subsequently withdrawn.

[85] Here one key concession should be noted and that was that Mr Singh accepted that he was employed by TJ McKee Limited up to his resignation in 2017 and with that withdrew all claims relating to any period prior to his reemployment by Mr McKee in March 2018.

[86] The difficulty for Mr Singh is he was simply unable to substantiate his wage claims. Before the Authority were a number of wage records and each time Mr Singh was led through them by Mr Wicks he conceded they were accurate. Indeed he even accepted one clear overpayment.

[87] The claim regarding a reduction in pay also struck difficulties in that it was based upon an assertion there was an agreement Mr Singh receive a guaranteed weekly net rate. That said there was no evidence of this agreement and it was undermined by Mr McKee's evidence the hourly rate was \$22 and this was essentially confirmed by both the timesheets which consistently applied that rate and Mr Singh's concession that was how he was paid.

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<sup>8</sup> Section 124 of the Employment Relations Act 2000

[88] Also of note, and putting aside the fact Mr Singh was unwilling or unable to specify exactly what he should have been paid with respect to the race meetings, there is the point that while this alleged deficiency was briefly mentioned in an email dated 30 October 2019 the issue did not resurface until after termination. This was, as Mr wicks submitted, at odds with Mr Singh's practice of consistently raising issues throughout his employment.

[89] To that I add the uncertainty reflected by the claim regarding unpaid public holidays where he says he wasn't paid but on the other hand I might have been but then I didn't get a day in lieu.

[90] The simple fact, as already said, is that with one exception Mr Singh's evidence did nothing to support his claims while the records before the Authority along with various concession he made under cross examination brought them into doubt.

[91] The exception was one public holiday that the scrutiny confirmed has not been paid which was Anzac Day 2019. That is payable.

[92] The final point is that there is a claim Mr McKee's inability to produce a copy of Mr Singh's signed employment agreement warrants a penalty but there appears little doubt from the evidence that one was signed. It is Mr McKee's evidence is it was inadvertently thrown out when papers were being cleared after his father's death and copies of the standard form were produced. To that I add the fact Mr Singh no longer had his copy which leads me to concluded this is not the stuff of penalties which are imposed in response to deliberate and wrongful misdeeds.

### **Conclusion and Orders**

[93] For the above reasons I conclude Mr Singh has a personal grievance in that he was unjustifiably dismissed. As a result I order Stephen McKee pay Itwinder Singh:

- (a) Three months pay being wages lost as a result of the dismissal; and
- (b) A further \$8,000.00 (eight thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act;
- (c) Payment for Anzac Day 2019.

[94] Costs are reserved though I note Mr Singh, as the successful party, was self represented which means recoverable costs are likely limited to the Authority's filing fee of \$71.56. That is payable in addition to the sums ordered above.

[95] Should either party disagree and an Authority determination on costs is needed that party may lodge, and then serve, a memorandum on costs within 28 days of the issue of this determination. From the date of service of that memorandum the other party will have 14 days to lodge any reply.<sup>9</sup>

Michael Loftus  
Member of the Employment Relations Authority

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<sup>9</sup> For further information about the factors considered in assessing costs, see [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).