

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TAMAKI MAKAUROHE**

[2024] NZERA 288
3142541

BETWEEN	A LABOUR INSPECTOR of the MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Applicant
AND	JDFOODS LIMITED trading as CHILLI INDIA RESTAURANT First Respondent
AND	JAYANT KAUSHAL Second Respondent
AND	DEEPTI KAUSHAL Third Respondent

Member of Authority:	Michael Loftus
Representatives:	Martin Denyer and Lauren Dennehy, counsel for the Applicant Arunjeev Singh, counsel for the Respondents
Investigation Meeting:	1, 2, 3, 4, 5, 8 May, 12, 13 and 14 June, 19, 20 and 21 July 2023 in Auckland
Submissions Received:	17 August and 10 October 2023 from the Applicant 25 September 2023 from the Respondents
Determination:	16 May 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, A Labour Inspector (the Inspector), claims the first respondent (JDFoods) was, as the employer of Diksha Diksha, Dheeraj Kumar and Rina Ranjitkar, in breach of various obligations with respect to minimum standards in that it:

- (a) Failed to pay the applicable adult minimum wage for each and every hour worked to Diksha Diksha and Dheeraj Kumar as required by s 6 of the Minimum Wage act 1983;
- (b) Failed to pay public holiday pay to all three employees as required by the Holidays Act 2003;
- (c) Failed to pay annual holidays to all three as required by the Holidays Act 2003;
- (d) Sought and received premium payments from Diksha Diksha and Dheeraj Kumar contrary to the provisions of s 12(a)(i) of the Wages Protection Act 1983;
- (e) Failed to keep compliant wage and time records for the employees as required by s 130 of the Employment Relations Act 2000 (The Act); and
- (f) Failed to keep compliant holiday and leave records for the employees under s 81 of the Holidays Act.

[2] The Inspector seeks to recover any monies owing and have penalties imposed.

[3] Jayant and Deepti Kaushal, the second and third respondents, are alleged to be persons involved in the above breaches as defined by ss 142W(2) and (3)(a) of the Act. Both were directors of JD Foods and according to the Inspector were directly or indirectly, knowingly concerned in or party to the breaches.

[4] The Inspector seeks to recover the arrears owing from the second and third respondents in the event the first respondent is unable to pay. Again, penalties are also sought.

[5] The respondents deny the alleged breaches with Mrs Kushal (third respondent) adding that apart from a couple of rare events when she exchanged a couple of whatsapp messages with Diksha Diksha as a result of her husband (a) being on holiday and (b) recovering from leg surgery, she played no part in running the business with that responsibility lying wholly with the second respondent. Mr Kaushal concurs.

The Investigation and this Determination

[6] The investigation meeting took some time, being spread over twelve days. During that time a multiplicity of people gave evidence, many from overseas and by

AVL Subsequent written submission were then prepared by Counsel and forwarded via a sequential exchange.

[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 and Discussion

[9] Attached to this is the Statement of Problem (SoP) lodged on the Inspector's behalf and dated 8 June 2021 which sets out in detail the Inspector's claims. While this may appear an unusual way of describing the background, especially given twelve days of evidence, I adopt this approach given this is the first time, in some nineteen years in this role (including some as a Tribunal member) I have faced a situation such as this. The claim will be determined on the basis of credibility and that, in my experience, is new.

[10] The claim is one taken by a Labour Inspector and as such the claim is her's. It is not that of those she represents hence, again, the reliance on the SoP as being capable of describing the background and outlining the evidence upon which she based her claims. Of that evidence there is a significant amount and while repetition was frequent amidst the nine Eastlight binders I received, I would suggest the documentary evidence, without said repetition, would have filled five. In addition to the multiplicity of documents there were also audio recordings and all strongly supported the claims veracity.

[11] The defence, while it may be dressed in different ways, was simple. The claims were a fiction developed as a conspiracy by those the Inspector represented. It, along with that of the supporting witnesses, was designed to wrongfully extract undeserved money from an innocent party, namely the Kaushal's. They say most of the alleged premium payments are a fiction as are allegations money paid was returned. The

exception to this approach was money that according to the Inspector was passed to Amit Seth by Diksha Diksha. These were said to be a combination of rent (she tenanted at his home twice) and other money she allegedly owed him. The Inspector's answer to that was that was, apart from the fact Diksha Diksha had been forced to occupy those lodgings as a condition of employment, the money was in addition to the rent payable.

[12] The parties were presenting two very different views of what occurred with little or no correlation, and inviting me to prefer their view of the facts over that of the other party.

[13] Virtually all those referred to in the SoP gave evidence with a number doing so with the assistance of an interpreter. They were also widely dispersed with witnesses in New Zealand, India and the United States. Add to that a number spoke no English and an interpreter was required. Here I would add he excelled in the view of myself and both parties. His understanding of the cultural issues and his ability to explain when required was invaluable.

[14] It was, however here, with the approach adopted by them, that the respondents came spectacularly unstuck. They spent nine days cross examining the Inspectors' witnesses and attempting to undermine the claims and the evidence proffered in support by picking minuscule holes therein.

[15] That led to frequent questions about issues not raised in briefs and which appeared ancillary. In turn that led to numerous queried from myself about the relevance of a line of questioning to which I was essentially told I was disturbing the defence and its approach. At times the exchanges got a bit antagonistic but ultimately I decided that while I could see little benefit or relevance in a line of questioning I would allow it to proceed for fear of being considered biased. That added to the time (and here I note I make these comments as I am to retiring and another member may have to consider the issue of costs).

[16] This was, I accept, to the well veiled chagrin of the Inspector's counsel. He should not now be disappointed as the respondents' approach has undermined the defence.

[17] As already said cross examination of the Inspector's witnesses amounted to a forensic examination of their evidence with a number of issues being raised that were

not canvassed in their briefs. I must have heard dozens of times the question “Why did you not say that in your brief” (or words similar). Almost as many times I heard the reply “But no-one has asked before” (or again words similar). In almost all cases the issue or event being queried was one involving at least two of the Inspector’s witnesses.

[18] I have no doubt the exercise was intended to expose inconsistency but that did not occur. The high level of resulting consistency in the answer being given had the effect of confirming the veracity of their evidence.

[19] For example there was hours of questioning of various witnesses as to how and why they had travelled between places when making the alleged payments. One that springs to mind was the absolute correlation regarding one journey involving two witnesses that involved multiple stages and forms of transport. Similarly answers regarding the acquisition of money by various witnesses sourced for alleged forwarding to the Kaushal family met with equally consistent answers. This consistency continued even when the subject matter of the questioning involved the ancillary issues that came to light as a result of the questioning referred to in [17] above and had not been briefed. The ever increasing impression was that the Inspector’s case and the evidence of her supporting witnesses, was strong.

[20] I now turn to the evidence of the respondents’ witnesses. By and large that of most witnesses followed the script though it was not as consistent or compelling, especially as it often included little more than bald assertions one or more of the applicant’s witnesses was doing nothing other than lying when some explanation as to how or why that assertion was lying absent further explanation where it might have been expected. One example was Amit Seth’s failure to explain how some of the debts he says Diksha Diksha owed him arose.

[21] Similarly there was evasion and again I cite one example again involving Amit Seth. When asked about the payment of \$3,000 Diksha Diksha made to him he initially had no recollection despite the amount. Even when shown the bank statements he still “couldn’t remember” before suggesting the arrangement might have been with his wife. When it was pointed out he had made a statement about it that exchange ended with “it was so long ago I don’t remember”. That exchange was not unique when it came to the evidence of the respondents’ witnesses but was not one that was reflected in the evidence of those who appeared on behalf of the Inspector.

[22] Then there was the evidence of Mrs Kaushal, the third respondent, which was given on the second to last day. With respect to the case it was trying to support it was undoubtedly the most destructive I have ever heard in this role.

[23] She admitted a large proportion of what she had told the Inspector during the latter's investigatory stage was fabricated and false. She also accepted she had made up and fabricated various documents she had offered to support the respondent's story. She also stated that some of the evidence of another of the respondents' witnesses, Mr Kaushal's mother was false and the result of the mother simply saying what she, Deepti Kaushal, had told the mother to say.

[24] That was followed by Mr Denyer then asking "So you and your husband decided to make up a story which you could not then abandon?" The answer was "yes as we were under stress". She then went on to say the Inspector had told her to create a "good story" so that she (the Inspector) could allegedly drop the claims. That then changed to "she (the Inspector) was both asking and pressuring us to make up false evidence."

[25] Suffice to say matters degenerated even further with more contradictions and admissions of falsified evidence and documents. Mrs Kaushal also began to avoid answering questions with, for example, her answer to question about payment both to her husband and via Amit Seth being "no idea" as opposed to a rejection of the propositions.

[26] When asked to explain why she had acted as she now admitted two rationales were offered. The first was that neither she nor her husband were themselves at the time having suffered the covid related deaths of three relatives in India around that time. The second was a reiteration the Inspector had told her to lie and knew she had. It as claimed the Inspector said something along the lines of "develop a plausible story and all will be well".

[27] Finally I note that while Mrs Kaushal also had another job her evidence confirmed that while not necessarily the senior partner in the business she played a part.

[28] I was asked by Counsel for the respondents to choose between two very different views of what occurred and effectively to make a credibility finding. I do. Before Mrs Kaushal's evidence the respondents' were facing some difficulties. There witnesses had been evasive and showing signs of inconsistency. After Mrs Kaushal's

evidence and the admissions of falsifying evidence and creating false documents the defence was in tatters.

[29] Given the above and the choice with which I was faced it follows I accept, in its totality, the evidence and claims of the applicant and her witnesses. I reject JD Foods defence.

[30] Finally I note one last point and that these were not the only claims faced by JD Foods. There were others of failing failed with respect to minimum standards that had already been settled through mediation and to which a section 149 agreement applies. The settlement as not confidential and the Inspector asks I take that into account when considering penalties.

Discussion

[31] My acceptance of the Inspectors evidence means I also accept each of the claimed failures/breaches occurred. It also means I accept premiums were sought and received as alleged. Finally, it follows the imposition of penalties is now a possibility.

[32] With respect to the failure to pay minimum wages, holiday pay and annual leave the Inspector sought the following amounts with these being in addition to those already conceded at mediation.

- (a) For the breaches in respect to the payment of minimum wages;
 - (i) \$4,403.68 for Diksha Diksha; and
 - (ii) \$4,153.92 for Dheeraj Kumar.
- (b) For the breaches in respect to the payment of public holiday pay;
 - (i) \$3,648.24 for Diksha Diksha;
 - (ii) \$544.25 for Dheeraj Kumar; and
 - (iii) \$357.12 for Rina Ranjitkar.
- (c) For the breaches in respect to the payment of annual holiday pay;
 - (i) \$2,997.21 for Diksha Diksha;
 - (ii) \$1,395.78 for Dheeraj Kumar; and
 - (iii) \$996.18 for Rina Ranjitkar.

[33] The veracity of the claims were challenged in their totality – not the calculations that would follow should I find in the Inspector’s favour. It follows the above amounts are payable.

[34] With respect to the premiums the Inspector claimed reimbursement of \$37,757.55 for Diksha Diksha and \$4,565.49 for Dheeraj Kumar. Again, my acceptance of the Inspectors case and more importantly in this case my rejection of the respondents’ means these amounts are also payable.

[35] Interest is also sought on these amounts. Interest is to reimburse someone for use, by others, of money that is theirs. There can be no doubt JD Foods has, by failing to make payments properly due, continued to have use of money rightfully belonging to those the Inspector represents. This is, I conclude, a circumstance in which interest should be payable but a question remains as to how much given the significant variations as to when the amounts became due.

[36] Given the complications I adopt an approach beneficial to the respondents and say the applicable date is that upon which the complaints were raised with the Inspector. That was 9 June 2020. Applying the governments civil debt interest calculator the amount due as at the date of determination is \$7,378.71. That is payable and has the potential to increase with each day that passed until payment. I will not address that at this time but put the respondents on notice this debt may increase should they be tardy with respect to payment. I also leave it the Inspector to distribute this amount as appropriate.

[37] Turning now to the allegation the respondents failed to maintain proper wage, time and holidays records.

[38] The evidence is clear that for whatever reason responsibility for the maintenance of these records purportedly passed to Diksha Diksha and the records were inaccurate. That, however, must be seen in light of equally compelling evidence she was ordered to falsify them.

[39] At the time the Inspector conducted her investigation the respondents failed to provide the records, (even if, as it transpires, they were false). Subsequently they provided additional records but they did not cover the entire period.

[40] The defence was that Diksha Diksha was responsible but that fails to address the fact I have accepted the Inspectors' case in its entirety. That includes an accusation Diksha Diksha was ordered to, and did, falsify the records. It follows I accept the respondents failed to maintain the time and leave records required by law.

[41] There is then the question of whether or not the Kaushal's were, as alleged, persons involved who should be held liable for both penalties, and arrears, should JD Foods be unable to pay.

[42] Here, the answer is significantly clearer. Both were directors, the only directors, and that clearly places them within the bounds of the definition that they were persons involved.¹ There is no argument Mr Kaushal was given he concedes he also fulfilled the second required criteria in that he was active in controlling the business. The question is whether or not Mrs Kaushal also qualifies.

[43] I conclude the answer is yes. Putting aside her oral evidence which, to be blunt, negates any denials she might otherwise express, the documentary evidence supports a conclusion that while she might have been primarily engaged elsewhere, she also continued to perform roles associated with the running of JD Foods.

[44] Both were persons involved.

[45] It means both are liable as requested by the Inspector, jointly and severally, for any failures should JD Foods not be able to honour the wage awards that will undoubtedly be made against them. It also means both are now liable for penalties should they be imposed which now raises that question.

[46] There are multiple breaches, both as a result of my conclusions and for those earlier recorded in the s149 settlement. In my view this multiplicity of breaches warrants some form of penalty, especially as the procuring of premiums which is one of the more odious forms of improper behaviour, is involved.

[47] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited*

¹ Section 142W(3)(a) of the Employment Relations Act 2000

and Warrington Discount Tobacco Limited,² *A Labour Inspector v Prabh*³ and *A Labour Inspector v Daleson Investment*.⁴

[48] Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[49] The Court has found the Act's objects, which include the effective enforcement of employment standards, are particularly relevant in penalty matters involving migrant employees as it does here. Failure to provide minimum standards directly disadvantages employees, and arise in circumstances which the Court has described as *involving a distinct power imbalance* and here the evidence is the employees were acutely aware of that imbalance.⁵

[50] With respect to the nature and extent of the breaches I note that while the Inspector sought penalties for all breaches there was no discussion about globalisation which is a frequent consideration. Here, three employees were involved with four breaches applicable to all (a failure to properly pay public and annual holidays, along with a failure to maintain wage and holiday records). Two of the ex-employees suffered two additional breaches, namely the procuring of premiums and a failure to pay the minimum wage which are, my view, more serious.

[51] To that can be added the claims settle din mediation though they reflect, to some extent, the findings in that they include further admitted breaches of the Minimum Wage Act and a failure to pay holidays to both the three employees who's residual claims were considered here.

[52] Having considered the issues I conclude the breaches should be globalised to the extent there are four breaches for all employees and two further breaches for two.

[53] That mean six breaches in total each potentially attracting a penalty of \$20,000.

² *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

³ *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

⁴ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

⁵ *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [27].

[54] The two record keeping breaches I consider minimal and further consolidate to one breach. I consider a penalty of \$2000 appropriate.

[55] Turning now to the more serious breaches – failure to pay the minimum wage, public holidays, annual holidays and the procuring of premiums. Each of these I globalise to one covering all affected employees.

[56] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question⁶, or failed to take reasonable steps to fulfil their legal obligations.⁷ Here there can be no doubt their acts were intentional and that applies more particularly to the premiums.

[57] With respect to the breaches severity I note the judgement of the Court in *Preet* suggests failures to pay proper entitlements should be assessed at 70 to 80%.⁸ That said recent decisions suggest this is excessive and, to be practical, will never be paid with the respondent liquidating. A more realistic award which might see the ex-employees paid what they are due is now expected.

[58] The loss is monetary and its extent is reflected in the order made regarding arrears. As a result the employees lost the use of the money they were entitled to at the time it became due⁹ and particularly with respect to the premiums JDFoods improperly reduced its costs.¹⁰

[59] Given the line of defence I must conclude there has been no attempt to remedy or mitigate the breaches and comment has already been made about the fact the employees were, originally, migrant workers. They are inherently vulnerable, particularly because they were unfamiliar with New Zealand laws and regulations.¹¹

[60] Finally, there is no evidence of similar previous conduct by JDFoods.

⁶ *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383

⁷ *El-Agez v Comprede Limited*, TT 4121553, at para 18

⁸ See *Preet*, at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

⁹ *A Labour Inspector v Daleson Investment Limited*, above n 3, at para [31]

¹⁰ *Ibid.*

¹¹ The Court has noted, in *A Labour Inspector v Prabh Limited* at para [10]

[61] Having weighed these factors I conclude that while some of the above points, such as the failure to remedy acknowledged breaches, would suggest an increase there are many more that favours a reduction such as the likelihood payment might actually be made. It is here proportionality also becomes a factor.

[62] Having weighed these factors I conclude JD Foods should be required to pay a penalty of \$3,000 in respect to each of the three breaches regarding unpaid wages and holidays. To that I add the two thousand for the record keeping breaches. Finally there are most serious breaches which are those of procuring premiums. For that I would consider \$8,000 each appropriate but given that would exceed the premium obtained in one of the cases proportionality again becomes an issue. Having considered that I conclude an amount in the order of 25% for each appropriate, meaning a total of \$10,000 for both.

[63] The total, payable to the Ministry of Business, Innovation and Employment, is therefore \$21,000.

[64] There is then the argument the second and third respondents should also be liable. That they should goes without question, but then there is then the issue of to what extent.

[65] The penalty to which an individual is liable is half that of a company so it follows that by applying the same rational as that applied to JD Foods the amount due is \$10,500. That should not be doubled given my conclusion they are jointly and severally liable.

Conclusion and Orders

[66] For the above reasons I find each and every one of the breaches alleged by the Inspector did occur and as a result make the following orders:

- (a) The first respondent JD Foods Limited, is to pay to the Labour Inspector the sum of \$18,496.38 (eighteen thousand, four hundred and ninety six dollars and thirty eight cents) gross being the amount owing as a result of its failure to pay minimum wages; public holiday pay and annual holiday pay. Payment is to be made within 28 days of this determination and the Labour Inspector will attend to the distribution of the arrears to

those it represented, including deduction and payment of tax, as appropriate.

- (b) The first respondent JD Foods Limited, is to pay to the Labour Inspector a further \$42,323.04 (forty-two thousand, three hundred and twenty three dollars and four cents) being the amount owing as a result of it having sought and received premiums in breach of s 12A of the Wages Protection Act 1983. Payment is to be made within 28 days of this determination and the Labour Inspector will attend to the distribution of this money to those it represented as appropriate.
- (c) In the event JD Foods is unable to pay the above amounts or part thereof liability shall pass to Jayant Kaushal and Deepti Kaushal, jointly and severely, to pay any deficiency as persons involved pursuant to s 142W(2) and (3)(a) of the Employment Relations Act 2000.
- (d) The first respondent, JD Foods Limited, is to pay to the Labour Inspector a further \$7,378.71 (seven thousand, three hundred and seventy eight dollars and seventy one cents) being interest due on the above amounts as at the date of determination. That amount may yet increase depending on the response to this determination. Payment is again to be made within 28 days of this determination and the Labour Inspector will attend to the distribution of this money to those it represented as appropriate.
- (e) That the first respondent, JD Foods Limited, pay to the Inspector penalties totalling \$21,000 with payment to be made within 28 days of this determination.
- (f) That the second and third respondents, Jayant Kaushal and Deepti Kaushal, jointly and severely pay to the Inspector penalties totalling \$10,500 with payment to be made within 28 days of this determination.

[67] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed the Inspector may, as the successful party, lodge a memorandum on costs within 28 days of the date of issue of this determination. From that date the respondents will have 14 days to lodge any reply memorandum. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily

rate unless circumstances or factors require an upward or downward adjustment of that tariff.¹²

Michael Loftus
Member of the Employment Relations Authority

Attachment 1: Applicant's Statement of Problem dated 8 June 2021

¹² For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.

Application to Authority

Section 158, Employment Relations Act 2000

Between

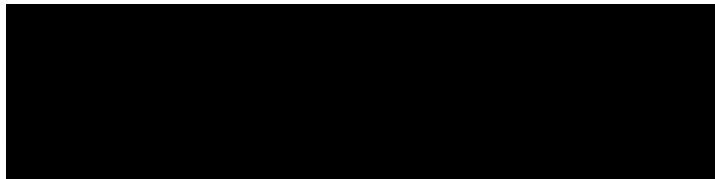
Full name of Applicant

**A LABOUR INSPECTOR of THE MINISTRY OF BUSINESS
INNOVATION AND EMPLOYMENT**

Address:

Phone:

Email:



Applicant

And

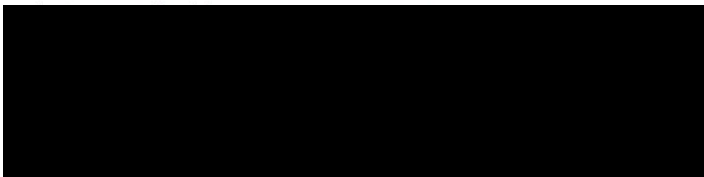
Full name of First Respondent

JDFOODS LIMITED trading as CHILLI INDIA RESTAURANT

Address:

Phone:

Email:



First Respondent

And

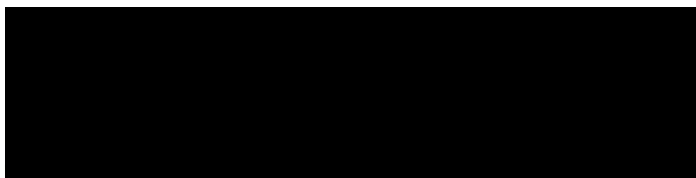
Full name of Second Respondent

JAYANT KAUSHAL

Address:

Phone:

Email:



Second Respondent

Full name of Third Respondent

DEEPTI KAUSHAL

Address:

Phone:

Email:



Third Respondent

To the Employment Relations Authority

And

To the respondents

Statement of problem (or matter)

1 The problem or matter that I wish the Authority to resolve is:

1.1 The First Respondent being the employer of the employees Diksha Diksha, Dheeraj Kumar and Rina Ranjitkar:

- 1.1.1. Failed to pay the applicable adult minimum wage for each and every hour worked to Diksha Diksha and Dheeraj Kumar as required by s 6 of the Minimum Wage Act 1983 ("MWA"). The applicant seeks to recover the minimum wages owing pursuant to s 11 of the MWA.
- 1.1.1 Failed to pay public holiday pay to Diksha Diksha, Dheeraj Kumar and Rina Ranjitkar in accordance with ss 49, 50, 55, 56 and 60 of the Holidays Act 2003 ("HA"). The applicant seeks to recover the public holiday pay owing pursuant to s77 of the HA.
- 1.1.2 Failed to pay annual holiday pay to Diksha Diksha, Dheeraj Kumar and Rina Ranjitkar in accordance with ss 23, 24, 25 and 27 of the HA. The applicant seeks to recover the annual holiday pay owing pursuant to s77 of the HA.

- 1.1.3 Sought and received payment from Diksha Diksha and Dheeraj Kumar in the form of a premium in respect of their employment under s 12A(1) of the Wages Protection Act 1983 (“WPA”). The applicant seeks to recover the premium owing pursuant to s 12A(2) of the WPA.
- 1.1.4 Failed to keep a compliant wages and time record for the employees under section 130 of the Employment Relations Act 2000 (“ERA 2000”).
- 1.1.5 Failed to keep a compliant holiday and leave record for the employees under s 81 of the HA.

1.2 The Second and Third Respondents being persons involved in the breaches of employment standards by the First Respondent:

- 1.2.1 Were each a person involved, as defined in sections 142W(2) and (3)(a) of the ERA, in all of the failures outlined above. Both the Second and Third Respondents were a person occupying the position of a director of the First Respondent and were directly or indirectly, knowingly concerned in, or party to, the breaches under s 142W(1)(c) of the ERA.
- 1.2.2 The applicant seeks to recover the arrears owing to the employees from the Second and Third Respondents pursuant to s 142Y(2)(b) of the ERA, s 77A of the HA, s11A of the WPA, and s 11AA of the MWA to the extent that the First Respondent is unable to pay the arrears.
- 1.2.3 Penalties are sought against the Second and Third Respondents for the above failures pursuant to s 142X(1) of the ERA and as outlined below.

1.3 The applicant further seeks penalties against each of the Respondents for:

- 1.3.1 Each failure to pay the applicable adult minimum wage pursuant to s 10 of the MWA and s 135 of the ERA;
- 1.3.2 Each failure to pay public holiday pay pursuant to s 75 of the HA;

- 1.3.3 Each failure to pay annual holiday pay pursuant to s 75 of the HA;
- 1.3.4 Each instance of seeking and receiving a premium pursuant to s 13 WPA.
- 1.3.5 Failing to keep a compliant wages and time record for the employees pursuant to ss 130(4) and 135 of the ERA;
- 1.3.6 Failing to keep a compliant holiday and leave record for the employees pursuant to s 75 of the HA.

2 The facts that have given rise to the problem or matter are:

- 2.1 The applicant is a warranted Labour Inspector under s 223 of the ERA and is employed by the Ministry of Business, Innovation and Employment ("MBIE") at Hamilton.
- 2.2 The first respondent is a limited liability company incorporated on 18 February 2015. It operates Chilli India Restaurant situated at 27A Whatawhata Road, Dinsdale, Hamilton. It is a relatively large restaurant that can seat up to 44 customers. The second and third respondents are husband and wife who operate the restaurant. A copy of the Company Extract for the first respondent is attached and marked "A".
- 2.3 The restaurant operates with a mix of New Zealand citizen and resident employees and migrant workers from India on temporary visas.
- 2.4 Prior to the COVID-19 pandemic lock down that occurred on 25 March 2020, the business was open seven days and operated approximately 59.5 hours per week. The trading hours were from 11:00am to 2:30pm for lunch and 4:30pm to 9:30pm for dinner. It was open on all public holidays except from Christmas Day 2016 onwards.
- 2.5 On 10 May 2020, the business's hours were reduced to approximately 49.5 hours per week.
- 2.6 The first respondent employed a number of staff in the restaurant. Three are related to these proceedings. Those employees are:
 - Diksha Diksha
 - Dheeraj Kumar

- Rina Ranjitkar

Investigation of complaint by Labour Inspectorate

- 2.7 On 9 June 2020 a former employee of the first respondent, Diksha Diksha, contacted MBIE's national contact centre alleging that they were paid below the minimum wage rate, forced to pay premiums and did not receive correct holiday and leave entitlements. A copy of the complaint is attached and marked "B".
- 2.8 The complaint was initially investigated by Labour Inspector Leigh McGeady. On 18 December 2020, Labour Inspector Stella Gong was allocated the investigation as Leigh McGeady moved to a different position within MBIE.
- 2.9 On 23 June 2020, the applicant commenced an investigation into the complaints raised by Diksha Diksha, including in particular the payment and provision of minimum entitlements under the MWA, the HA, the claim that premiums had been sought or received in breach of s12A of the WPA, and the maintenance of wages and time records under s 130 of the ERA and holiday and leave records under s 81 of the HA.
- 2.10 In the course of the Labour Inspectors' investigation the applicant was supplied with information by the employees including:
- (a) Individual Employment Agreements between Diksha Diksha and the first respondent:
- An employment agreement with the first respondent as an Assistant Restaurant Manager dated 1 August 2017, signed by the second respondent. A copy of this employment agreement is attached and marked "C".
- An employment agreement with the first respondent for the position of Restaurant Manager dated 11 May 2018 and signed by the second respondent. A copy of this employment agreement is attached and marked "D".
- An offer of employment letter and an employment agreement with the first respondent, both dated 13 January 2019 and signed by the third respondent, for the

position of Restaurant Manager. A copy of this individual employment agreement is attached and marked **E**".

- (b) WhatsApp messages between Diksha Diksha and the second respondent where the second respondent instructed her to send less working hours than were actually worked to the first respondent's accountant. Copies of WhatsApp messages are attached and marked **"F"** to **"H"**.
- (c) Screenshots of WhatsApp messages from Diksha Diksha showing communications with the second respondent regarding all aspects of the first respondent's business. Copies of WhatsApp messages between Diksha Diksha and the second respondent are attached and marked **"I"** to **"J"**.
- (d) A diary/register of hours worked by Diksha Diksha, maintained by Diksha Diksha from the period of March 2018 to July 2018. Copies of the diary are attached and marked **"K"**.
- (e) A diary/register of hours worked by Diksha Diksha and other employees including Dheeraj Kumar and Rina Ranjitkar, maintained by Diksha Diksha and the second respondent from the period of August 2018 to June 2020; Copies of the diary are attached and marked **"L"**.
- (f) A diary/register of hours worked by Diksha Diksha and other employees including Dheeraj Kumar and Rina Ranjitkar, maintained by Diksha Diksha and the second respondent from the period of March 2020 to June 2020. Copies of the diary are attached and marked **"M"**.
- (g) Bank statements from Diksha Diksha showing money she transferred into Amit Seth's bank account so he could transfer that money to the second and third respondents. This was to disguise payments that were for a premium for Diksha Diksha's employment. Amit Seth is a former employee of the first respondent and friend of the second and third respondents. Copies of Diksha Diksha's bank statements concerning payments to Amit Seth are attached and marked **"N"**.

- (h) A screenshot of a text message from Amit Seth to Diksha Diksha on 19 December 2018 confirming he had received \$2,885 and \$2,000 from her. A copy of the text message is attached and marked "O".
- (i) A statement of Vikram Singh, a friend of Diksha Diksha's husband Navdeep, who stated that he lent a cash of amount INR230,000 (NZD \$5,000.00) to Navdeep and went with Navdeep together to the office of the third respondent's father, Deepak Sharma and handed this money to him. A copy of the statement is attached and marked "P".
- (j) Bank statement belonging to Navdeep, showing INR 264,000 (NZD \$5,739.13) withdrawn in India to pay the second respondent's parents, namely Devinder Kaushal (mother) and Anil Kaushal (father). A copy of the bank statement is attached and marked "Q".
- (k) A statement of Ramesh Kumar, Navdeep's uncle, who stated that Navdeep borrowed INR 200,000 (NZD \$4,347.82) to pay Devinder Kaushal and Anil Kaushal. A copy of the statement is attached and marked "R".
- (l) A statement of Diksha Diksha's father in law, Rajkumar, who stated he took a loan for the amount of INR200,000 (NZD \$4,255.31) and added his personal cash saving of \$744.69 to pay the second respondents parents', Devinder Kaushal and Anil Kaushal, at their new residential address. Copies of the statement of Rajkumar and the loan document are attached and marked "S" and "T".
- (m) Google Map history from Navdeep. The history is dated 1 February 2019, and showed that he mapped the trip to an address at Regalia Towers where the second respondent's parents' lived in India. This trip was to pay \$5,000.00 as a premium for Diksha Diksha's employment. A copy of the Google Map history record is attached and marked "U".
- (n) A screenshot of a WhatsApp message between Diksha Diksha and the second respondent where on 3 October 2019 Diksha Diksha informed the second respondent

that she left \$200.00 in the restaurant till and would cash out \$280.00 the next day. A copy of the screenshot with a translation are attached and marked "V"

- (o) A statement from Navdeep's friend Sumit Singh and a bank transaction record from Sumit Singh to Amit Seth. This payment (NZD \$2,000) was between third parties to disguise the payment going from Diksha Diksha to the second and third respondents as a premium for employment.

Copies of Sumit Singh's statement and bank transaction record are attached and marked "W".

- (p) Audio recordings of Diksha Diksha and Dheeraj Kumar talking to the second and third respondents where hours of work, premiums and hourly rates below the applicable minimum wage were discussed. Copies of the audio recordings are attached to a memory stick and marked "X", "Y" and "Z".

- (q) Bank statements from Diksha Diksha and Dheeraj Kumar showing withdrawals from ATMs which they claim to have used to pay wages back to the second and third respondents as a premium for employment. Copies of Diksha Diksha and Dheeraj Kumar's bank statements are attached and marked "AA" and "AB".

- (r) Screenshots of WhatsApp messages between Diksha Diksha and the second respondent dated 1 April 2019 and 2 May 2019, showing the amount that Diksha Diksha was required to convert from New Zealand Dollars to Indian Rupees for premium payments that Navdeep was to pay to the second and third respondents' family members in India. Copies of WhatsApp messages showing the conversion are attached and marked "AC".

- (s) Audio recordings of Diksha Diksha and the second respondent discussing the premium of \$30,000. A copy of the audio recording is attached to the memory stick and marked "AD".

- (t) A statement from Diksha Diksha's husband Navdeep attached and marked "AE".

(u) Diksha Diksha provided a phone video where she was forced to hand her personal diary with hours recorded to the second respondent.

A copy of the video is attached to the memory stick and marked "AF".

(v) A screenshot of a WhatsApp message between Diksha Diksha and the second respondent where she requested the return of her diary which had her hours recorded within. A copy of the WhatsApp message is attached and marked "AG".

2.11 The applicant in investigating this matter:

(a) Conducted a workplace visit to the restaurant on 10 September 2020.

(b) Gave the respondents a notice to supply wages and time records, holiday and leave records and individual employment agreements for all current and past employees, dated 10 September 2020. A copy of the notice to supply records is attached and marked "AH".

(c) Reviewed the available employment related documentation from April 2015 to April 2020 in respect of the affected employees.

(d) Conducted an interview and received a statement from Diksha Diksha on 1 July 2020. A copy of the statement is attached and marked "AI".

(e) Conducted an interview and received a statement from Dheeraj Kumar on 31 August 2020. A copy of the statement is attached and marked "AJ".

(f) Conducted an interview and received a statement from Rina Ranjitkar on 6 August 2020. A copy of the statement is attached and marked "AK".

(g) The second and third respondents, on behalf of the first respondent, advised the applicant that they could not provide the workers' hours worked each day in a pay period, as it was Diksha Diksha's responsibility as the Restaurant Manager to record that

information. A copy of the email from the third respondent is attached and marked "AL".

- (h) The second respondent could not provide a diary that Diksha Diksha kept as a record of the workers' hours worked each day, as he had disposed of it. The second respondent, in his interview with the applicant, could not explain what was written in the diary that prompted him to destroy it. A copy of the statement made by the second respondent is attached and marked "AM"
- (i) Conducted formal interviews with the second and third respondents on 15 April 2021. A copy of the first respondent's statement and formal interview are attached and marked "AM" and "AN". A copy of the second respondent's statement and formal interview are attached and marked "AO" and "AP".
- (j) Contacted other workers, namely Charlotte Elizabeth and Manu Mathews, who had been employed by the first respondent and for whom records had been provided. Copies of Charlotte Elizabeth and Manu Mathews' statements are attached and marked "AQ" and "AR".
- (k) Contacted an interview with a regular customer, Michelle Lynette Stevens. A copy of a statement from Michelle Lynette Stevens is attached and marked "AS".
- (l) Interviewed workers at shops neighbouring the restaurant and obtained witness statements in relation to the affected employees' hours of work and the time the second respondent spent at the restaurant. Statements were provided by Sandy Singh, Vijay Kumar Bans and Hussein Eliassi. Copies of statements from workers in neighbouring shops are attached and marked "AT", "AU" and "AV".
- (m) Requested information from Immigration New Zealand in relation to any employer-sponsored visa applications made by Diksha Diksha and Dheeraj Kumar together with information on whether the first respondent had supported any residence applications for Restaurant Managers, whether those residence applications were successful and the information submitted in support of those applications. Copies of the documents received from INZ are attached and marked "AW".

- 2.12 The respondents advised the applicant on 5 November 2020 that they had provided all records prior to April 2020 and they would provide the records from May 2020 to September 2020 before 10 November 2020. On the same date, the respondents advised that they did not have timesheets before 20 June 2020.
- 2.13 In the absence of adequate records, the applicant took statements from the workers in question and relied on the diary/register provided by Diksha Diksha as to the days the employees worked and the hours spent working on those days. Relying on that information, the applicant has assessed arrears of minimum wages and holiday pay, and compensation due for monies unlawfully deducted, in relation to the affected employees for the entire period of their employment, and made the findings below in relation to each of the workers.
- 2.14 The second and third respondents advised the applicant that they left the business to Diksha Diksha to solely operate and they did not interfere with the management of the business until the COVID-19 lockdown in March 2020.
- 2.15 The second and third respondents advised the applicant in an email dated 13 March 2021 that they did not interfere with the operations of the business before the second respondent's knee surgery. They stated that the second respondent only came to the restaurant once or twice a week to cover Diksha Diksha's shift or other staff days off. A copy of the email is attached and marked "AL".

Investigation findings regarding Diksha Diksha

- 2.16 Diksha Diksha had two periods of employment with the first respondent. The first period was from 22 August 2015 to 25 June 2016. The second period of employment was from 13 August 2017 to 11 August 2020.
- 2.17 Diksha Diksha worked for the first respondent and held four individual employment agreements during her entire period of employment.
- (a) Diksha Diksha could not find a copy of her first employment agreement but confirmed one was provided to her by the first respondent. The first period of employment was

as a Customer Service Representative from August 2015 until July 2016 to work 20 hours per week.

(b) The second agreement was for an Assistant Manager dated 1 August 2017 and signed by the second respondent. The agreement provided that Diksha Diksha work 35 hours per week at \$18.00 per hour.

(c) The third employment agreement was for the position of Restaurant Manager, dated 11 May 2018 and signed by the second respondent. The agreement provided that Diksha Diksha work 35 hours per week at \$21.00 per hour.

(d) The fourth employment agreement included an offer of employment letter dated 13 January 2019 for the position of Restaurant Manager, signed by the third respondent, together with an employment agreement dated 13 January 2019 and signed by the third respondent. The agreement provided that Diksha Diksha work 40 hours per week at \$25.00 per hour.

2.18 None of these agreements included an indication of the arrangements relating to the days or times that Diksha Diksha was to work. The agreements all stipulated the wages would be paid weekly by direct credit.

2.19 For the first period of Diksha Diksha's employment she worked on average 20 hours a week due to her student visa conditions. Her normal working days were Thursday, Friday, Saturday and Sunday. She worked on 25 December 2015 and 26 December 2015 and was not paid time and half or allocated an alternative day. She worked a total of 10 hours on 1 January 2016 and 2 January 2016 but only got paid for 3 hours for the time and a half component and did not get allocated an alternative day. She worked on 25 March 2016 for 4 hours and was paid correctly for 4 hours of time and a half but did not get allocated an alternative day. All of these holidays were otherwise working days.

2.20 The first period of Diksha Diksha's employment was less than 12 months. She did not get her 8% annual holiday pay on termination. The payslips show that she was paid \$1,658.79 in her last pay for annual holidays, but Diksha Diksha claimed in her statement that she never received this amount of money and provided all her bank statements to support that there

was no such amount of money deposited in her account. It was noted by the applicant that Diksha Diksha had received all her wages during this period of employment through her bank account. The second and third respondents told the applicant that they paid her 8% holiday pay with cash. Diksha Diksha denies that she received cash from any of the respondents for her holiday pay.

- 2.21 Based on the information gathered, the applicant concluded the first respondent owed Diksha Diksha \$125.38 time and a half arrears, \$633.48 alternative holiday arrears, and \$1,569.44 in arrears for 8% holiday pay on termination, for the period 22 August 2015 to 25 June 2016. A copy of the applicant's spreadsheet to calculate arrears owed to Diksha Diksha is attached and marked "AX".
- 2.22 For the second period of Diksha Diksha's employment, she initially worked as an assistant manager and became a restaurant manager when she obtained a managers certificate in January 2018.
- 2.23 She alleged that she was charged two types of premium by the second and third respondents. The second and third respondents charged a sum of money (\$30,885) to secure her employment and also required her to pay back a proportion of her wages to retain employment.
- 2.24 Diksha Diksha alleges that before she started working as the assistant manager, the second and third respondents promised her residence in New Zealand if she paid the premium for employment. She stated that she had no reason not to believe this would happen as they had told her they had done this with the previous restaurant manager, Angrej Singh, and chef, Amit Seth, both of whom had successfully obtained residence. The second respondent told Diksha Diksha that Angrej Singh paid him \$25,000 for his residence and Amit Seth paid \$20,000 to him.
- 2.25 Diksha Diksha told the applicant that the second respondent invited her to attend Amit Seth's daughter's birthday party and introduced her to the previous manager, Angrej Singh. This led her to believe that paying for this job would lead to the same result as for Angrej Singh and Amit Seth, becoming a resident in New Zealand.

- 2.26 The applicant obtained information from Immigration New Zealand who confirmed that Angrej Singh and Amit Seth had been supported by the first respondent for residency under the skilled migrant category and both were successful in obtaining residence in New Zealand. Diksha Diksha had no way of knowing that information unless the second and third respondent had told her this.
- 2.27 Diksha Diksha told the applicant that when the second and third respondents told her in June 2020 that they would no longer be supporting her for residence in New Zealand, she asked the respondents to return the money she had paid them as a premium. The second and third respondents refused to return the \$30,000 to her which left her in a desperate situation as she and her husband had borrowed so much money from friends and family to secure their dream of residing in New Zealand.
- 2.28 Diksha Diksha's husband Navdeep was employed by the first respondent in 2016. He met Diksha Diksha while working for Chilli India in 2016. Diksha Diksha alleged that Navdeep received his holiday pay of \$1,295.52 in July 2016 and he repaid it in cash on request from the second respondent in the same month.
- 2.29 The premium of \$30,885 was paid in a series of instalments, mostly in the form of cash as required by the second and third respondents. Some of the instalments were paid in New Zealand and some were paid in India. All premium payments were on the request of the second and third respondents who were located in New Zealand.
- 2.30 Diksha Diksha provided detailed information about when and how the payments were made. Together with the claim, she provided receipts of withdrawals, lending documents and bank statements. She also provided statements from the following family and friends: Her husband Navdeep, her father in-law Rajkumar, her husband's uncle Ramesh Kumar, her husband's friend Vikram Singh, her friends Shameen Sharma, Sumit Singh and Amit Seth. The details and evidence for these payments is as follows:

(a) July 2017, **\$5,000** in New Zealand

Diksha Diksha borrowed this amount from her friend Shameen Sharma who made two deposits totalling \$5,000 to Diksha Diksha.

- Diksha Diksha's bank statement shows that the two deposits, of \$2,000 and \$3,000, were made on 24 and 25 July 2017. The description shows that the two deposits were from Shameen Sharma. A copy of a bank statement showing these transaction records is attached and marked "N"
- \$2,000 was cashed out of Diksha Diksha's bank account on 25 July 2017 and handed to the second respondent, the maximum amount able to be withdrawn from the Automatic Telling Machine (ATM)
- \$3,000 was transferred to Amit Seth who cashed it out and handed it to the second respondent in front of Diksha Diksha.

(b) July 2017, **\$5,000** in India (the foreign exchange rate for New Zealand Dollars to India Rupees at the time was one dollar to 46 INR)

On 25 July 2017, Diksha Diksha's husband Navdeep borrowed INR230,000 from his friend Vikram Singh in India.

On 27 July 2017, Navdeep and Vikram Singh went to the third respondent's father's office in Panchkula City, Haryana State, India and handed this money to Deepak Sharma at the second respondent's request.

- A statement from Navdeep and Vikram Singh confirms this information.

(c) October 2017, **\$10,000** in India (the foreign exchange rate for New Zealand Dollars to India Rupees at the time was one dollar to 46 INR)

On 4 October 2017, Navdeep cashed out INR264, 000 (\$5,739.13) in India from his Axis bank account.

Navdeep borrowed INR200,000 (\$4,347.82) in India from his uncle Ramesh Kumar. Navdeep handed INR 460,000 (\$10,000) in cash to the second respondent's mother Devinder Kaushal, and father Anil Kaushal, at their residential address in Panchkula City. Navdeep used the balance of INR4,000 Navdeep to pay for fuel for his vehicle to travel to the second respondent's parents' house. He also brought some sweets as gifts to the second respondent's parents.

- Bank Statement showing withdrawal of INR264,000 from Navdeep's Axis bank account
- Statements provided by Navdeep and Ramesh Kumar

(d) May 2018, **\$1,000** in New Zealand

Diksha Diksha deposited \$1,000 into Amit Seth's bank account on 28 May 2018.

- The bank verified the account which the money went to was 01-0071-0053177-01. A copy of bank statements containing a teller's certified account information of the above account number are attached and marked "AY".
- Amit Seth used this account number to receive weekly rent payments from Diksha Diksha at that time.

(e) December 2018, **\$2,000** in New Zealand

Diksha Diksha borrowed this amount from Sumit Singh who deposited it into Amit Seth's bank account on 20 December 2018.

- A screenshot of the amount going from Sumit Singh's bank account to Amit Seth's bank account number as provided in (d) above.
- Statement provided from Sumit Singh.

(f) December 2018, **\$2,885** in New Zealand

Diksha Diksha deposited two amounts into Amit Seth's bank account through payments made from India to NZ.

- A screenshot of text message from Amit Seth to Diksha Diksha, shows that Amit Seth confirmed two transactions totalling \$2,885 were received.

(g) February 2019, **\$5,000** in India (the foreign exchange rate for New Zealand Dollars to India Rupees at the time was one dollar to 47 INR)

On 29 January 2019, Rajkumar took a loan from Sadhu Singh for the amount of two lakhs which converted to NZD \$4,255.31 at the time.

Rajkumar had personal savings of \$744.69 of cash.

On 1 February 2019, Rajkumar paid \$5,000 to Devinder Kaushal and Anil Kaushal at their new residential address, FLAT NO- 304A, Regalia towers, Zirkarapur, PUNJAB, India.

- Lending receipt provided from Sadhu Singh
- Statement provided by Rajkumar
- Photo screen shot provided by Navdeep, to show the Google map of this address on the date this money was given to Devinder Kaushal and Anil Kaushal, the second respondent's parents.

- 2.31 Diksha Diksha claimed that the payments made in New Zealand were handed to the second respondent directly or transferred to Amit Seth. The reason that she transferred payments to Amit Seth was to disguise the fact that this money was then transferred to the second and third respondents as a premium.
- 2.32 Diksha Diksha rented a house with Amit Seth so money being transferred to him would not look suspicious to Immigration New Zealand.
- 2.33 Diksha Diksha alleges she sent the second respondent details of the premium amounts, converted from New Zealand Dollars to Indian Rupees, via WhatsApp messenger. The corresponding amounts were withdrawn from the bank account of Diksha Diksha's husband Navdeep. Two copies of the screenshots of the WhatsApp messages Diksha Diksha provided the second respondent and Navdeep's bank statement to confirm the withdrawals were provided by Diksha Diksha.
- 2.34 Regarding the repayment from wages, Diksha Diksha explained that the second and third respondents would pay her through the payroll system for fewer hours than she actually worked, and would ask her to pay back a portion of her pay. Her bank statements show withdrawal records from the ATM near the restaurant and the cashing out history.
- 2.35 Diksha Diksha explained that repayments were rounded numbers and not the exact repayment amounts, as per the request of the second respondent.
- 2.36 In an audio recording from 3 June 2020 between Diksha Diksha and the second respondent, the second respondent calculated how much Diksha Diksha was required to repay for the week of 23 May 2020, which was \$81.00.

- 2.37 Diksha Diksha provided a bank statement showing an ATM withdrawal on 8 June 2020 of \$80 corresponding to the alleged cash payment. A copy of the bank statement is attached and marked "AZ".
- 2.38 Timesheets from March 2020 to June 2020 were provided. In these timesheets, the second respondent recorded the actual weekly payment and hours worked each day for Diksha Diksha. The amounts of the payments are different from the amounts contained in the payslips. The differences between the two amounts was the amount that Diksha Diksha was required to pay back to the second respondent.
- 2.39 Diksha Diksha stated that in the diary (maintained from August 2018 to March 2020) the second respondent recorded the amounts of weekly payments to Diksha Diksha for most of the weeks, and those amounts were different from what was recorded in the payslips. The amounts in the payslips were greater than those recorded in the diary.
- 2.40 Diksha Diksha stated that in the diary, Shikha Rani wrote the amounts that she was required to pay back to the second respondent as well. Shikha Rani admitted that she wrote those amounts. A copy of a confirmation email from Shikha Rani is attached and marked "AAA".
- 2.41 Diksha Diksha stated that the second and third respondents had different pay practices between the employees who were on employer-supported visas and the employees who were not. The pay practices were as follows, until the lockdown occurred:
- a. Employees who were supported by the employer were only paid at a fixed weekly rate. Any excess amount received in their wages was repaid to the second respondent.
 - b. Employees who were New Zealand citizens were paid for all hours worked and in accordance with their employment agreement.
 - c. Employees who were on student visas were paid a maximum of 20 hours weekly even though they worked more than 20 hours. For any hours worked above 20, the employer would record those hours as being worked in a subsequent week where less than 20 hours were worked, or pay workers cash for excess hours.

- d. Shikha Rani, a current employee who is a New Zealand resident and a friend of the second and third respondent, was paid for more hours than she actually worked (for record-keeping purposes) and asked to repay the money paid for the unworked hours back to the employer.

- 2.42 Based on the information gathered, the applicant concluded the respondents owed Diksha Diksha \$37,757.55 in premiums for the period of 13 August 2017 to 11 August 2020. A copy of the applicant's spreadsheet of calculations of arrears owed to Diksha Diksha is attached and marked "AAB".
- 2.43 Diksha Diksha alleged the respondents kept two sets of records. From August 2017, Diksha Diksha kept a personal record which showed how many hours she worked each day in a pay period. This record was taken by the second respondent who later admitted to disposing of it, but who could not explain to the applicant what was contained within the record that prompted him to dispose of it.
- 2.44 Diksha Diksha provided photos of the diary for 2 pay periods, weeks ending 23 June 2018 and 30 June 2018, which show her working hours were 59.5 and 61.5 hours respectively. In the same weeks, her payslips only recorded 35 hours per week. The records show that Diksha Diksha worked longer hours than what was recorded in the respondent's payslips. Copies of the diary for those weeks are attached and marked "K", copies of the payslips for those weeks are attached and marked "AAC".
- 2.45 From August 2018 Diksha Diksha was instructed by the second respondent to record the hours the employees worked but for Diksha Diksha to instruct the first respondent's accountant to pay less hours each week to Diksha Diksha and Dheeraj Kumar.
- 2.46 Screenshot of WhatsApp messages where the second respondent acknowledges running a dual system of recording working hours, including asking Diksha Diksha to send documents to the accountant stating that less hours were worked than were actually worked, are attached and marked "F" to "H".

- 2.47 The applicable minimum wage rates during Diksha Diksha's second period of employment were \$14.70 per hour from 1 April 2015 to 31 March 2016; \$15.25 per hour from 1 April 2016 to 31 March 2017; \$15.75 per hour from 1 April 2017 to 31 March 2018; \$16.50 per hour from April 2018 to March 2019; and \$17.70 per hour from 1 April 2019 to 30 July 2019.
- 2.48 In the week ending 23 June 2018, Diksha Diksha worked 59.50 hours but was only paid for 35 hours with a gross amount of \$735. The payment equated to \$12.35 gross per hour. In the week ending 30 June 2018, Diksha Diksha worked 61.50 hours but was only paid for 35 hours with a gross amount of \$735. The payment equated to \$11.95 gross per hour.
- 2.49 Diksha Diksha worked on public holidays when the restaurant was open. She did not get paid time and half for every hour that she worked on a public holiday and did not receive any alternative days off.
- 2.50 Based on the information gathered, the applicant concluded the first respondent owed Diksha Diksha \$4,403.68 in minimum wage arrears, \$1,560.41 in public holiday arrears and \$1,328.98 in arrears of alternative holiday pay for the period 13 August 2017 to 11 August 2020.

Investigation findings regarding Dheeraj Kumar

- 2.51 Dheeraj Kumar was employed as a chef by the first respondent from approximately 21 January 2019.
- 2.52 Dheeraj Kumar had one employment agreement. It was signed on 25 August 2015 as a chef, working 35 hours a week with an hourly rate of \$21.00. The agreement stipulated wages would be paid weekly by direct credit. A copy of the employment agreement is attached and marked "AAD".
- 2.53 Dheeraj Kumar was paid for 15 hours with gross \$315 payment in his first week but he actually worked 41 hours. The payment equated to \$7.68 gross per hour. In the week ending 2 February 2019 he worked 47.5 hours with gross \$735 payment which equated to \$15.47 gross per hour. During his employment there were approximately 20 weeks that he was paid under the minimum wage rate. A copy of these payslips is attached and marked "AAE"

- 2.54 The applicable minimum wage rate during the employment of Dheeraj Kumar was \$16.50 per hour from 1 April 2018 to 31 March 2019; and \$17.70 per hour from 1 April 2019 to July 2020.
- 2.55 Contrary to the pay rate and working hours in his employment agreement, Dheeraj Kumar was required to work six and a half days per week but only got paid \$600 per week in the first three months of his employment. After three months, he received \$700 per week. Any amount in excess of these agreed amounts was required to be paid back to the second respondent.
- 2.56 Dheeraj Kumar was pressured by the second respondent to play games at Skycity Hamilton Casino while cashing out money to make it appear that he was withdrawing money for that purpose.
- 2.57 Dheeraj Kumar was required by the respondents to minimise his usage of the ATMs in the vicinity of the restaurant and cash out money when he was making personal purchases. The second and third respondents required that any cash out amount had to be rounded and not the exact amount owed by Dheeraj Kumar, so that it was less apparent that the withdrawals were for the purpose of paying the second and third respondents.
- 2.58 Dheeraj Kumar provided his bank statements where he has highlighted in yellow the frequency of cashing out and ATM withdrawals for payments that were given to the second respondent.
- 2.59 Dheeraj Kumar was the only chef in the restaurant during his employment. He worked on public holidays when the restaurant was open. He worked 8 public holidays and for 2 of them did not get paid time and a half. These were Auckland Anniversary Day 2019 and Waitangi Day 2019. For Waitangi Day 2019, he was not provided with an alternative holiday for working on an otherwise working day. He worked 5 hours on Queen's Birthday 2020 and got paid the time and half component for those 5 hours but he did not get an alternative day off. For 5 public holidays, he was paid the time and half component, however for less hours than he actually worked on those days. For example, he worked 8.5 hours on Waitangi Day 2020 but he was only paid time and half for 5 hours and did not get an alternative day off when the day was an otherwise working day for him.
- 2.60 Based on the information gathered, the applicant has concluded the following arrears are owed to Dheeraj Kumar: \$4,153.92 in minimum wage arrears, \$330.75 in arrears of public

holiday pay, \$213.50 in arrears of alternative holiday pay, \$1,366.05 in arrears of annual holiday pay, \$29.72 in arrears of 8% holiday pay for the period of 21 January 2019 to 24 July 2020, and \$4,565.49 in premiums. A copy of the applicant's spreadsheet to calculate arrears owed to Dheeraj Kumar is attached and marked "AAF".

Investigation findings regarding Rina Ranjitkar

- 2.61 Rina Ranjitkar had three employment periods with the first respondent. The first was from 4 October 2016 to 14 February 2017. The second was from 2 October 2018 to 4 June 2019. The third was from 31 December 2019 to 3 March 2020.
- 2.62 Rina Ranjitkar worked six public holidays during her first and second periods of employment. For two of these public holidays she was not paid correctly. On 26 December 2018, the timesheet shows she worked 6.15 hours, but the pay records show that she was paid for 6 hours. On 1 January 2019 and 2 January 2019, the timesheets show she worked 14 hours for these two days but she was paid only 10.5 hours with time and half. She did not get 2 alternative holidays when she worked on her otherwise working days.
- 2.63 Based on the information gathered, the applicant concluded that the following arrears are owed to Rina Ranjitkar: \$30.11 in arrears of public holiday pay, \$327.00 in arrears of alternative holidays and \$996.18 in arrears of 8% holiday pay for her 3 periods of employment. A copy of the applicant's spreadsheet to calculate arrears owed to Rina Ranjitkar is attached and marked "AAG".

Persons Involved

- 2.64 The second respondent in an interview with the applicant on 15 April 2021, alleged that he did not have control of the management of the restaurant, that he was hardly at the restaurant, and usually there only once or twice per week to relieve the chef on their day off. He stated that Diksha Diksha had full control of managing the staff, paying the wages, sorting supplies (food and alcohol) and reservations for the restaurant on a day to day basis.
- 2.65 The second respondent alleged it was Diksha Diksha's responsibility to record the hours worked each day in a pay period for the employees and that is why the first respondent

doesn't have that information. However it was noted in the interview with the second respondent that he disposed of those records.

- 2.66 Diksha Diksha provided copies of diaries where the second respondent and other employees had recorded their hours. These diaries were not provided to the applicant when they requested the employees' hours worked each day in a pay period from the first respondent. The applicant believes the second and third respondents do not want to produce diaries where they show employees working more hours than they were paid for.
- 2.67 The second and third respondents promised Diksha Diksha they would support her residence application with Immigration New Zealand if she paid \$30,000 in premiums. The second and third respondents were personally involved in devising the method by which Diksha Diksha would pay premiums to them so the payments could not be tracked. That plan included money being paid in India to both the second and third respondents' parents, and money being transferred to Amit Seth either by Diksha Diksha directly or by her friends on her behalf. The money would then be transferred to the second and third respondents.
- 2.68 Part of the Immigration process was that Diksha Diksha and Dheeraj Kumar were to be paid a certain amount each per hour as a Restaurant Manager and Chef respectively. The second and third respondents suggested that Diksha Diksha and Dheeraj Kumar would pay part of their wages back to them to compensate for the amount the first respondent had to pay. In doing so the second and third respondents devised a plan on how Diksha Diksha and Dheeraj Kumar were to pay the money back to them so the payments could not be tracked. That plan included withdrawing money from ATMs that were not in the immediate vicinity of the restaurant, taking Dheeraj Kumar to Skycity to withdraw money from the ATM there and cashing out money when they were making personal purchases.
- 2.69 In a series of WhatsApp conversations covering the period between September 2018 to April 2020 between Diksha Diksha and the second respondent, the second respondent was the person who gave Diksha Diksha instructions for every aspect of the restaurant's day to day operation. This included grocery shopping, maintenance of the appliances in the restaurant, sales figures and working hours for the employees. Copies of the correspondence are attached and marked "D" "E" "F" and "G".
- 2.70 In an interview with Charlotte Elizabeth and Manu Mathew, they corroborated Diksha Diksha's claims that the second respondent was in the restaurant on a daily basis. Charlotte Elizabeth had on average three shifts a week during October 2019 to January 2020. Manu

Mathew had on average four to five shifts per week during March 2019 to April 2019 and both of them claimed that they would see the second respondent at work whenever they came to work.

- 2.71 In interviews with people from neighbouring businesses, they stated the frequency of the second respondent's attendance at the restaurant which was more than what the second and third respondents claimed in their statements. The owner of the Barbershop who uses the toilet upstairs at the restaurant, stated that they met the second respondent on a daily basis during the period when Diksha Diksha worked there.
- 2.72 Vijay Bans, a former employee in a liquor store at the back of the restaurant, stated that he saw the second respondent almost every day. He stated that the second respondent often visited the liquor shop to purchase alcohol, or he would walk past the front of the shop heading towards the Countdown supermarket or to the vegetable shop to get fresh ingredients. Copies of the statements are attached and marked "AU".
- 2.73 In an interview with regular customer Michelle Lynette Stevens, she stated that she came to the restaurant at least one day a week between Monday and Sunday. She saw the second respondent whenever she went to the restaurant. Most of the time the second respondent would be standing beside the kitchen door.
- 2.74 The third respondent in her interview with the applicant on 15 April 2021, alleged that she did not have any control or management over the restaurant during the full period Diksha Diksha worked for the first respondent. The third respondent claimed she only started to look into the running of the business and take control of it during the COVID-19 lockdown in March 2020. The reason for this is that she discovered that the restaurant was not making any money and their accountant told her it was because the wages they were paying were too high. She considered this Diksha Diksha's fault and it was Diksha Diksha who told them what to pay the staff in wages.
- 2.75 In the interview with the second respondent on 15 April 2021, he claimed that during Diksha Diksha's employment he would check decisions he made with the third respondent as he considered the third respondent had more experience than him in business matters. This statement contradicted what the third respondent told the applicant about having nothing to do with the running of the business until after March 2020.

- 2.76 In a series of WhatsApp conversations between June 2019 and February 2020 between Diksha Diksha and the third respondent, the third respondent requested sales figures, grocery shopping lists and checked on the set up for events. The third respondent was copied into emails where Diksha Diksha reported wages, working hours, an employee's employment agreement and their bank account numbers. Copies of the correspondence are attached and marked "J".
- 2.77 In an audio recording recorded on 7 June 2020 the third respondent told Diksha Diksha that they would tell her how they have spent \$30,000, which suggests that the third respondent knew about the premiums that Diksha Diksha had paid.
- 2.78 In the applicant's opinion, the second and third respondents are persons involved, as defined by s 142W of the ERA, in all breaches alleged against the first respondent in this statement of problem. The second and third respondents have aided, abetted, counselled, or procured the breach, and/or have induced, whether by threats or promises or otherwise, the breach, and/or have been in any way directly or indirectly knowingly concerned in, or party to, the breaches.

Applicant's findings

- 2.79 In the Investigation Report and attached spreadsheets provided to the respondents on 5 June 2021, the applicant gave the conclusions she had reached from her investigation and advised that in her view a total of **\$60,819.40** arrears were due to three employees.
- 2.80 The applicant in her Investigation Report also alleged that the respondents had breached particular employment standards and other statutory minimum entitlement provisions. A copy is attached and marked "AAH".
- 2.81 The respondents have, during the course of the investigation, denied all breaches investigated.

3 I would like the problem or matter to be resolved by the Authority:

- 3.1 Determining that the workers Diksha Diksha and Dheeraj Kumar were not paid minimum wages under s 6 of the MWA, as follows:
 - 3.1.1 Diksha Diksha: \$4,403.68
 - 3.1.2 Dheeraj Kumar: \$4,153.92

- 3.2 Determining that the workers Diksha Diksha, Dheeraj Kumar and Rina Ranjitkar were not paid public holiday pay under ss 49, 50, 55, 56 and 60 of the HA as follows:
 - 3.2.1 Diksha Diksha: \$3,648.24
 - 3.2.2 Dheeraj Kumar: \$544.25
 - 3.2.3 Rina Ranjitkar: \$357.12

- 3.3 Determining that the workers Diksha Diksha, Dheeraj Kumar and Rina Ranjitkar were not paid annual holiday pay under ss 23, 24, 25 and 27 of the HA and as follows:
 - 3.3.1 Diksha Diksha: \$2,997.21
 - 3.3.2 Dheeraj Kumar: \$1,395.78
 - 3.3.3 Rina Ranjitkar: \$996.18

- 3.4 Determining that the Respondents sought and received premiums in breach of s 12A of the WPA from the workers Diksha Diksha and Dheeraj Kumar as follows:
 - 3.3.1 Diksha Diksha: \$37,757.55
 - 3.3.2 Dheeraj Kumar: \$4,565.49

- 3.5 Determining that the Respondents breached s 130 of the ERA 2000 by failing to keep and maintain a compliant wages and time record in relation to the employment of Diksha Diksha, Dheeraj Kumar and Rina Ranjitkar.

- 3.6 Determining that the Respondents breached s 81 of the HA by failing to keep and maintain a compliant holiday and leave record in relation to the employment of Diksha Diksha, Dheeraj Kumar and Rina Ranjitkar.

- 3.7 Ordering the First Respondent to pay to the applicant, for the use of Diksha Diksha, Dheeraj Kumar and Rina Ranjitkar, the amounts of minimum wages, public holiday pay, annual holiday

pay, and premiums sought and received (as outlined above) that are outstanding pursuant to s 10 of the MWA, s 77 of the HA and s 12A of the WPA.

- 3.8 Determining that the Second and Third Respondents are persons involved in the breaches and ordering the Second and Third Respondents to pay to the applicant pursuant to s 142Y(2)(b) of the ERA 2000, s 77A of the HA, s11A of the WPA, and s 11AA of the MWA, for the use of Diksha Diksha, Dheeraj Kumar and Rina Ranjitkar the amounts of minimum wages, public holiday pay, annual holiday pay, and premiums sought and received, that are outstanding to the extent that the First Respondent is unable to pay.
- 3.9 Awarding penalties against the Respondents up to a maximum of \$20,000 for the First Respondent and \$10,000 for the Second and Third Respondents respectively for each breach as outlined below:
 - 3.9.1 Each failure to pay the applicable adult minimum wage for each hour worked in breach of s 6 of the MWA, pursuant to s 10 of the MWA; and
 - 3.9.2 Each failure to pay public holiday pay in breach of ss 49, 50, 55, 56 and 60 of the HA, pursuant to s 75 of the HA; and
 - 3.9.3 Each failure to pay annual holiday pay in breach of ss 23, 24, 25, 26 and 27 of the HA, pursuant to s 75 of the HA; and
 - 3.9.4 Each instance of seeking and receiving a premium in breach of s 12A of the WPA, pursuant to s 13 of the WPA; and
 - 3.9.5 Each failure to keep a compliant wages and time record as required by s 130 of the ERA 2000, pursuant to ss 130(4) and (5) and 135 of the ERA 2000; and
 - 3.9.6 Each failure to keep a compliant holiday and leave record as required by s 81 of the HA, pursuant to s 75 of the HA.
- 3.10 Ordering payment of interest on the arrears owing to Diksha Diksha, Dheeraj Kumar and Rina Ranjitkar pursuant to clause 11 of Schedule 2 of the ERA 2000.

3.11 Ordering the Respondents to pay the legal costs and expenses, including the filing fee of \$71.56, incurred by the applicant in making this application, and incurred by the applicant and her witnesses in participating in any investigation meeting the Authority may direct be held pursuant to clause 15 of Schedule 2 of the ERA 2000.

4 I attach the following documents that I think are relevant to the problem or matter:

- A Company extract for the first respondent
- B The original complaint made by Diksha Diksha
- C Diksha Diksha first IEA
- D Diksha Diksha second IEA
- E Diksha Diksha third IEA
- F WhatsApp messages between Diksha Diksha and the second respondent where the second respondent asked to see hours before those were sent to the accountant.
- G WhatsApp message between Diksha Diksha and the second respondent where the second respondent sighted two timesheets with different working hours recorded and instructed Diksha Diksha to send less hours to the accountant.
- H WhatsApp message between Diksha Diksha and the second respondent where the second respondent instructed her to not send last week's hours to the accountant.
- I WhatsApp message between Diksha Diksha and the second respondent where Diksha Diksha sent information related to business operations to the second respondent.
- J WhatsApp message between Diksha Diksha and the third respondent where Diksha Diksha sent sales information, grocery shopping list and event set up photos to the third respondent.
- K A diary/register maintained and provided by Diksha Diksha for the period March 2018 to July 2018
- L A diary/register maintained and provided by Diksha Diksha for the period August 2018 to March 2020
- M A diary/register maintained and provided by Diksha Diksha for the period March 2020 to June 2020
- N Diksha Diksha bank statements show three transactions made to Amit Seth in 2017, 2018 and 2019 respectively. The amount was \$3000, \$1000 and \$600.
- O Amit Seth confirming that he received \$2,885 and \$2,000 from Diksha Diksha in total.

- P Vikram Singh's statement.
- Q Navdeep's bank statement showing INR264,000 withdrawn
- R A statement from Navdeep's uncle that Navdeep borrowed INR200,000 from him to pay the second respondent.
- S Rajkumar's statement
- T a lending document showing Rajkumar borrowed money from Sadhu Ram
- U Navdeep's phone screenshot showing google history on 1 February 2019
- V WhatsApp message between Diksha Diksha and the second respondent where Diksha Diksha informed him that she left \$200 in the till and would cash out \$280 the next day.
- W Sumit Singh's statement and bank statement
- X An audio recording recorded on 7 June 2020 where the third respondent told Diksha Diksha they would tell her how they had spent \$30,000.
- Y An audio recording where the second respondent instructed Diksha Diksha how to calculate repayment and told her the hourly rate she was paid.
- Z An audio recording where the second respondent was talking to Dheeraj Kumar
- AA Diksha Diksha's bank statement with repayments highlighted
- AB Dheeraj Kumar's bank statement with repayments highlighted
- AC Two screenshots of amounts of foreign exchange, \$919 and \$1499.99.
- AD An audio recording of the second respondent talking about \$30,000
- AE Statement by Navdeep
- AF A video where the second respondent requested Diksha Diksha hand her diary to him
- AG WhatsApp message about return of diary
- AH Notice to supply records
- AI Diksha Diksha's interview statement
- AJ Dheeraj Kumar's interview statement
- AK Rina Ranjitkar's interview statement
- AL Emails from the third respondent where she stated that they left all duties of managing restaurant to Diksha DikshaAM the interview statement of the second respondent part 2
- AN the interview statement of the second respondent part 1

- AO the interview statement of the third respondent part 2
- AP the interview statement of the third respondent part 1
- AQ Charlotte Elizabeth's statement
- AR Manu Mathew's statement
- AS Mitchel Lynette Stevens's statement
- AT Sandy Singh's statement
- AU Vijay Kumar Bans' statement
- AV Hussein Eliassi the Barbershop owner's statement
- AW OIA request from Immigration New Zealand
- AX the applicant's calculation of Diksha Diksha's first period of employment August 2015 to June 2016
- AY Bank certification of account number
- AZ a bank statement shows the withdrawal of \$80.00
- AAA Screenshots of Shikha Rani's handwriting and her confirmation that those handwritings were hers
- AAB the applicant's calculation of Diksha Diksha's period of employment August 2017 to August 2020
- AAC the payslips provided by the first respondent including the week ending 23 June 2018 and 30 June 2018
- AAD Dheeraj Kumar's individual employment agreement
- AAE Dheeraj Kumar's payslips for the first and second week
- AAF Dheeraj Kumar's spreadsheet with arrears calculation
- AAG Rina Ranjitkar's spreadsheet with arrears calculation
- AAH Investigation Report

Mediation

- 5 Have the parties tried to resolve this problem or matter by using mediation services provided by the Ministry of Business, Innovation, and Employment? **NO**

If the answer to this question is "Yes", please provide the date or dates of the mediation: **N/A**

- 6 Have the parties tried to resolve this problem or matter by using mediation services provided by someone other than the Ministry of Business, Innovation, and Employment? **NO**

- 7 If you, the applicant, have answered "No" to both the question in paragraph 5 and the question in paragraph 6, please indicate why you have not used mediation services to try to resolve the problem or matter:

- 7.1 The applicant is not opposed to mediation but notes the following matters which may constrain or limit the outcomes achievable from that process:

- (a) With regard to the claim to recover minimum wages and holiday pay, any settlement agreed by the parties must provide for the workers to receive their full entitlements for the total hours they worked; s 148A(2) of the Employment Relations Act.
- (b) With regard to the claim for penalties, any agreement reached as to the level of penalties to be paid will require formal determination by the Authority; *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143, paragraph [41].

- 8 Have you, the applicant, taken any other steps of any kind to resolve the problem or matter? **YES**

If the answer to this question is "Yes", specify the other steps taken:

- 8.1 The applicant has prepared an Investigation Report in which her findings and conclusions are presented, and she has provided that report to the respondents for any response they may wish to give.

Prescribed fee

- 9 This application is accompanied by the prescribed fee.

Address for service