

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 475
3228920

BETWEEN	SHARNPREET KOUR Applicant
AND	ARVIND AND SHALINI'S CAKES LIMITED (IN LIQUIDATION) First Respondent
AND	UGESHNI SHALINI NAIDU Second Respondent

Member of Authority:	Sarah Blick
Representatives:	John Wood and Sunny Sehgal, advocates for the applicant Shalini Naidu for the respondents
Investigation meeting:	7 May 2024 in Auckland
Information and Submissions received:	At the investigation meeting and 8 May, 11 and 24 June 2024 from the applicant 10 May 2024 from the respondents 19 July 2024 from the liquidator and Ms Naidu
Determination:	08 August 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Sharnpreet Kour worked for Arvind & Shalini's Cakes Limited (Shalini's) as a cake baker and decorator between August 2021 to March 2023. She has made a claim for recovery of wages, annual holiday pay, sick leave pay and interest. Further, she seeks leave to recover monies directly from Shalini's director, Ugeshni Shalini Naidu (known as Shalini Naidu) on the basis she is a person involved in employment standards

and in the event Shalini's is unable to pay monies owed. Finally, she asks that penalties be imposed on both respondents.

[2] Ms Naidu acknowledges that Ms Kour is owed annual holiday pay and money for a deduction made, but otherwise denies the claims.

[3] Following the investigation meeting, a liquidator was appointed for Shalini's. The liquidator has since granted consent for the proceedings to continue.¹

The Authority's process

[4] The respondents lodged a statement in reply and participated in a case management conference, but following the withdrawal of their advocate they failed to comply with Authority directions. No witness statements or other information was provided in response to Ms Kour's witness statement.

[5] The day prior to the investigation meeting Ms Naidu advised she could not attend the investigation meeting in person for medical reasons. The Authority asked for medical information confirming this. On 7 May 2024, shortly prior to the meeting starting, Ms Naidu emailed a medical certificate simply stating she was "currently unwell" and was unable to attend. At the start of the investigation meeting, the Authority telephoned Ms Naidu, who confirmed she wished to participate by telephone. In the circumstances leave was pragmatically given for her to participate by telephone. I heard evidence from Ms Kour and Ms Naidu who answered questions under affirmation. Oral submissions were also given by the parties.

[6] 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 but all material has been considered.²

Issues

[7] The following are the issues for investigation and determination - whether Shalini's:

- (a) failed to pay Ms Kour correctly in August 2021 during a COVID-19 Level 4 lockdown;

¹ Companies Act 1993, section 248(1)(c).

² Employment Relations Act 2000, section 174E.

- (b) failed to pay holiday pay and/or sick leave pay;
- (c) failed to pay wages during Ms Kour's notice period;
- (d) failed to comply with s 130 of the Employment Relations Act 2000 (the Act) and if so whether a penalty be awarded, payable to Ms Kour;
- (e) breached the employment agreement and Ms Naidu aided and abetted its breaches, and if so, penalties should be imposed on them;
- (a) breached employment standards, and if so, whether leave should be granted to recover defaults in payment from Ms Naidu.

Background

[8] Shalini's traded as Shalini's Cakes in Auckland. Ms Naidu and Ms Kour signed an employment agreement on 3 August 2021. It says Ms Kour would work 40 hours each week for \$25.50 an hour. Ms Kour was required to give four weeks' notice of termination. Changes to the agreement were required to be in writing.

[9] Just a short time after Ms Kour started working for Shalini's, Alert Level 4 COVID-19 restrictions were implemented from 17 August 2021. Ms Naidu says Shalini's sent an email to employees advising they would be paid at the wage subsidy rate, at \$600. Payslips show Ms Kour was paid this amount each week for the two pay periods between 16 August 2021 to 29 August 2021. Ms Naidu says, and Ms Kour acknowledges, that Ms Kour did not raise an objection to receiving less pay at the time.

Deduction in March 2022

[10] Shalini's deducted four hours wages from Ms Kour's pay in March 2022 on the basis Ms Kour was responsible for leaving an oven on overnight. Although it appears Ms Kour agreed verbally that an amount could be deducted to cover the cost of power used overnight, after receiving her pay she queried the \$106 deducted as too high and asked for a meter reading. Ms Naidu declined to provide a meter reading. There is no evidence of agreement in writing to the deduction, and at the investigation meeting Ms Naidu acknowledged the four hours should not have been deducted.

Sick leave

[11] By way of context, Ms Kour had taken several weeks off work in October and November 2022 after disciplinary matters were raised with her. This included a claim

that she “abused” her sick leave entitlement. There is no evidence of any disciplinary outcome, and Ms Kour returned to work.

[12] Ms Kour’s sick leave entitlement rolled over on 3 February 2023 and as at that date Shalini’s sick leave report shows Ms Kour was entitled to 13 days sick leave.

[13] On 7 March 2023, Ms Kour says she had a sore neck. A text message shows she texted Ms Naidu advising she would not be able to come to work that day. Ms Naidu responded by saying Ms Kour needed to call her and not text, and if she could not call she expected Ms Kour to come to work. That evening, Ms Naidu asked Ms Kour to call her, to which Ms Kour responded she was not feeling well and asked Ms Naidu to email instead. Ms Naidu responded that Ms Kour must call her to ask for a day off otherwise she will expect her to be at work. Ms Naidu clearly remained concerned about what she perceived as absenteeism by Ms Kour. There is no other correspondence that week indicating Shalini’s asked for a medical certificate. Time sheets indicate Ms Kour was on “unpaid leave” that week.

Resignation

[14] Ms Kour says on 14 March 2023 she attended work but Ms Naidu sent her back home. Ms Naidu has not denied that claim. Ms Kour says she could not take it anymore and resigned so she could regain her mental health. She emailed Ms Naidu the same date, advising she was resigning, giving four weeks’ notice with her last working day being 10 April 2023. She advised she felt “mentally harassed” by her employer. Of note Ms Kour stated Ms Naidu always raised questions when she was not well, and advised Ms Naidu could contact her doctor or physio any time. Ms Kour noted she had not received her pay the week before, but says she was subsequently paid for that week.

[15] Ms Naidu responded on 14 March 2023 saying the four weeks’ notice would have to be worked “in order for holiday pay to be paid”. Ms Naidu said she wanted Ms Kour to provide a medical certificate stating Ms Kour was fit to return to work. She disputed that Ms Kour’s issues had anything to do with work. She said not to send any more emails, and that “I only want your doctors certificates”.

[16] Ms Kour did not attend work the next day 15 March 2023. Ms Naidu emailed Ms Kour that afternoon saying she had not shown up for work and had not sent a medical certificate. She said this was a breach of contract, to which Ms Kour responded

that she booked a doctor's appointment on 13 March 2023 but the only available appointment was for 16 March 2023. Ms Kour subsequently provided a medical certificate dated 16 March 2023 which stated she was medically unfit to attend work between 14 March to 20 March 2023, and should be fit to return on 21 March 2023.

[17] By 24 March 2023 both parties had engaged advocates. Ms Kour remained away from work while negotiations took place, which the Authority is not privy to. On 24 March 2023 Ms Kour's advocate asked Shalini's to send the roster for that weekend and the next week, saying Ms Kour had no other income and must work. Ms Naidu responded that she had requested a "full medical report" clearing Ms Kour to work which had not been provided, and that was required before she returned to work. Ms Kour's advocate responded that Ms Kour was prepared to get a sign off from her local GP saying she is fully fit for work. The advocate stated on that basis, to send the roster and assured a certificate would be forthcoming. Ms Naidu wrote back two minutes later saying Ms Kour was asked to get a "full medical certificate from a [sic] independent doctor not her gp, which I will pay for." The advocate asked Ms Naidu to book an appointment with Ms Naidu's preferred doctor and Ms Kour would attend. Ms Naidu responded saying Ms Kour could go to any doctor other than her GP.

[18] The next afternoon, on 25 March 2023 Ms Kour's advocate advised she had decided "to end this relationship at this point onwards" and a personal grievance letter would follow.³

[19] On 28 March 2023, Ms Kour's advocate requested wages and time and holiday and leave records. Ms Kour's advocate followed up by emails on 4 April, 7 April and 19 April 2023. On 26 April 2023 Shalini's advocate emailed attaching "time sheets". Shalini's advocate stated it was in a precarious financial position and could not afford to pay Ms Shalini's holiday pay in full and proposed paying it off at \$500 per month. Shalini's acknowledged \$5,105.73 was owing as annual holiday pay. It then made seven payments of \$500 to Ms Kour between May and November 2023. Ms Naidu acknowledges an outstanding balance of \$1,605.73 is owing.

[20] The evidence shows it was not until 15 November 2023 (pursuant to an Authority direction) that Shalini's provided holiday and leave records to Ms Kour.

³ Personal grievances were later raised but not pursued in the Authority.

Analysis of wages and Holidays Act claims

August 2021 lockdown pay

[21] Ms Naidu says Ms Kour is not owed additional wages for the August 2021 period as she did not challenge receiving the wage subsidy amount at the time. However, Ms Kour had an entitlement to work up to 40 hours per week under her employment agreement. Shalini's was not entitled to unilaterally reduce her pay without agreement, despite the difficult times.⁴ The agreement also required agreed changes to be made by the parties in writing, which is not what occurred. Ms Kour is entitled to be paid for 40 hours at her hourly rate of \$25.50 for each of the two weeks. Shalini's owes her a shortfall of \$840.00 gross.

Deduction in March 2022

[22] There is no dispute Ms Kour is owed four hours pay in relation to the oven deduction made in March 2022. It was made in breach of s 5 of the WPA. By the time of the deduction, Ms Kour's hourly rate was \$26.50. Shalini's owes Ms Kour \$106.00.

Sick leave

[23] Ms Kour attempted to return to work on 14 March 2023 but did not work out her shift. Shalini's requested Ms Kour provide a medical certificate the same day. Given Ms Kour had returned to work, Shalini's could have required proof of injury within the first three days as long as it agreed to meet the reasonable expenses in obtaining the proof.⁵ Although Ms Naidu was frustrated with what she saw as Ms Kour's absences and the inconvenience it caused to her small business, she failed to manage the situation appropriately. Ms Kour provided proof at her own expense by 16 March 2023 in the form of a medical certificate. In her resignation email Ms Kour had given Shalini's permission to contact her health providers, which Shalini's failed to do. Having provided a medical certificate, Ms Kour was entitled to sick leave pay at her relevant daily pay or average daily pay for five days over 14 to 20 March 2023. She is owed \$1,060.00.

⁴ *Raggett and Ors v Eastern Bays Hospice Trust t/a Dove Hospice* [2020] NZERA 266, at [32].

⁵ Holidays Act 2003, section 68(1A).

Payment for notice period

[24] Ms Kour's claim for payment of arrears for the remainder of her notice period came at a late stage, but I am satisfied she is entitled to payment for five days of work between 21 to 25 March 2023. Shalini's was not entitled to withhold work from Ms Kour when she was saying she was ready, willing and able to return, having been given the opportunity to contact Ms Kour's health providers the week before. Ms Kour is entitled to \$1,060.00 pay for the five days. The claim for payment of the notice period beyond 25 March 2023 is not supported by the evidence, Ms Kour having ended the employment relationship effective as of that day.

Annual holiday pay

[25] Shalini's acknowledges it still owes Ms Kour \$1,605.73 in outstanding annual holiday pay. This amount is owed.

[26] Ms Kour also seeks 8% holiday pay on top of the other monies owing. The Authority calculates \$245.28 in additional annual holiday is owed based on its findings.

Interest

[27] Ms Kour is entitled to an award of interest on the pay due to her. Interest must be calculated using the Ministry of Justice civil debt interest calculator.⁶ Interest should be calculated from 31 March 2023 (after what should have been Ms Kour's last pay day). Interest accrues until full payment is made.

Persons involved claim

[28] Shalini's breached employment standards under sections 4 and 5 of the Wages Protection Act 1983 (WPA) in relation to the wage subsidy, oven deduction and her notice period. It also breached ss 71 and 72 of the Holidays Act 2003 (HA) in relation to sick leave, and sections 24, 25 and 27 of the HA in relation to annual holidays. The defaults in payment are due to those breaches.

[29] Ms Naidu was a director and equal shareholder in Shalini's. It was Ms Naidu who had significant influence over the management of Ms Kour's employment and payroll. She had knowledge of the essential facts that established the breaches. I accept that Ms Naidu was a person knowingly concerned with Shalini's breaches and/or aided

⁶ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

or abetted its breaches of employment standards. Ms Naidu and her actions fall within the ambit of s 142W of the Act as a person involved. Leave is granted to recover the monies owing to the extent Shalini's cannot pay. It is appropriate to also order that Ms Naidu is liable to pay the monies to the extent Shalini's cannot pay those amounts.

Penalties

[30] Ms Kour seeks penalties for breaches of s 130 and 134 of the Act and s 4 of the WPA.⁷

[31] The first of the WPA breaches occurred in August 2021 and March 2022, but the statement of problem was not lodged until May 2023. The breach of failing to pay wages at the end of employment was in March 2023, and that claim was only identified at the investigation meeting on 7 May 2024. The penalty claims under the WPA have been brought outside the statutory timeframe and are dismissed.

[32] Ms Kour's claim for penalties under s 134 of the Act were not particularised in the statement of problem or amended statement of problem. At the investigation meeting the claimed breaches were said to only relate to sick leave pay. I am not satisfied details of the s 134 penalty claims were fully, fairly or clearly identified such that this claim was brought in time. The s 134 penalty claims are dismissed.

[33] Shalini's has clearly breached s 130 of the Act in failing to provide Ms Kour with immediate access to or a copy of wages and time records. Records were provided to Ms Kour a month after they were requested, and when they were, they were time sheets which were not fully compliant with the requirements of s 130(1) of the Act.

[34] In assessing a penalty for this breach I have had regard to the factors in s 133A of the Act and additional relevant considerations.⁸ This included (but was not limited to) the failure having prejudiced Ms Kour's ability to calculate wages and holiday pay owed to her; penalties in other cases; and Shalini's financial circumstances. A penalty of \$2,000 is payable, of which \$1,000 is payable directly to Ms Kour.

⁷ For completeness, no claims for penalties were brought under the Holidays Act 2003, those having been removed in the amended statement of problem.

⁸ *Borsboom (Labour Inspector) v Preet PVT Limited* [2016] NZEmpC 143 and *Nicholson v Ford* [2018] NZEmpC 132.

Outcome

[35] Arvind & Shalini's Cakes Limited is to pay Sharnpreet Kour within 21 days of the date of this determination the following:

- (a) \$840.00 gross (August 2021 shortfall);
- (b) \$106.00 gross (overtime deduction);
- (c) \$1,060.00 gross (sick leave pay);
- (d) \$1,060.00 gross (notice period);
- (e) \$1,851.01 gross (annual holiday pay);
- (f) Interest on amounts (a) to (f); and
- (g) A \$1,000 penalty.

[36] By the same date Arvind & Shalini's Cakes Limited is to pay a penalty of \$1,000 into the Authority, to be paid to the Crown bank account.

[37] Ms Naidu is liable, as a person involved, to pay the monies at [37](a) to (f) above to the extent Arvind & Shalini's Cakes Limited default in payment on those amounts.

Costs

[38] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Kour may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Shalini's and/or Ms Naidu will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[39] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.⁹

Sarah Blick
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.