

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 615
3172146

BETWEEN	ARUSHI ARUSHI Applicant
AND	ISHER ENTERPRISES LIMITED First Respondent
AND	KULVINDER SINGH (AKA KELVIN SINGH) Second Respondent
AND	LIONMEAD CAPITAL GROUP LIMITED Third Respondent

Member of Authority:	Sarah Blick
Representatives:	Michelle Urquhart and Drisana Sheely, counsel for the applicant Arunjeev Singh, counsel for the respondents
Investigation meeting:	25-28 July 2023 and 22-24 November 2023 in Rotorua and 13 December 2023 by audio visual link
Submissions and information received:	26 January, 13 March and 1 July 2024 from the applicant 26 February, 8 and 19 March and 5 July 2024 from the respondents
Determination:	3 October 2024

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Arushi Arushi has brought a number of employment relationship problems to the Authority for resolution. She worked at two public bars - VC Turf Bar (VC Bar) and a tavern (the tavern) in Rotorua between October 2018 to March 2022. Lionmead Capital Group Limited (Lionmead) operated VC Bar which has been closed for some

time, and Isher Enterprises Limited (Isher) operated the tavern which had an attached liquor shop. The tavern and liquor shop were sold in July 2022 and have new owners.

[2] Ms Arushi claims Kulvinder (Kelvin) Singh, a director of both companies, required her to pay unlawful premiums during her employment. Ms Arushi is originally from India. She says her parents paid the equivalent of \$10,000 cash to a person known to Mr Singh in India shortly after she was granted a work visa and started work. Ms Arushi also claims she later paid \$10,000 into Mr Singh's personal bank account in New Zealand, after he requested a further payment. Ms Arushi also wishes to recover underpaid wages and holiday pay of over \$60,000.

[3] She also makes an application for leave to recover the alleged premium amounts, arrears of wages and holiday pay from Mr Singh as a person involved in employment standards breaches.

[4] Ms Arushi is asking for penalties for breaches of the Wages Protection Act 1983 (the WPA) in relation to the alleged premiums, and the Employment Relations Act 2000 (the Act) for failing to keep or produce wages and time records relating to her work.

[5] Ms Arushi was ultimately dismissed by Isher in March 2022 following an incident with a customer of the tavern. She pursues a personal grievance for unjustified dismissal, as well as personal grievances for unjustified disadvantage in relation to Mr Singh's alleged interference with her right to representation, her suspension during the disciplinary process and not being paid for all the hours she worked and correctly for public holidays.

[6] The respondents deny all of Ms Arushi's claims. They essentially claim that Ms Arushi has made up the allegations and falsified records to try and extract money from them. They say Ms Arushi's dismissal was justified, and she does not have personal grievances.

What was the Authority's process?

[7] The Authority held its investigation meeting in three parts. Under oath or affirmation witnesses confirmed their statements and gave oral evidence in answer to questions from myself and the parties' representatives. A Punjabi-speaking interpreter was available to witnesses during the investigation meetings. Ms Arushi gave evidence as well as her husband Vipin Atwal and parents Mr and Mrs Bains. Mr Singh and the

companies' co-director Jagdev Singh Bhullar gave evidence, along with former employees Christopher Wright and Rumaki Whitewood. Tavern customers Graeme Willers, Stuart Baker and Rod McIndoe also gave evidence, along with a mutual friend of Ms Arushi and Mr Singh, Harcharan Singh Grewal. Donna Burgess, who dealt with the companies' human resource matters, gave evidence by audio visual link. Extensive written closing submissions were received after the final investigation meeting date.

[8] In closing submissions Ms Arushi, then Mr Singh, asked the Authority to make non-publication orders in relation to their names. After the Authority requested further information in relation to those applications, Ms Arushi advised orders were no longer sought if the determination would not be referring to intensely personal information. Mr Singh subsequently advised he was also no longer seeking orders. No evidence has been provided in support of orders and none are made.

[9] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received. The Authority sets out its findings of fact and law, and expresses conclusions on issues as necessary to dispose of the matter, and specifies the orders made as a result.

What are the issues?

[10] The issues for determination are the following:

- (a) Did the respondents seek or receive unlawful premiums from Ms Arushi and if so should they be paid back?
- (b) Was Ms Arushi paid correctly, and if not, are arrears owing?
- (c) Have the first and/or third respondents failed to comply with a request to access or a copy of wages and time records?
- (d) Should interest be awarded on any amounts owing?
- (e) Is Mr Singh a person involved in employment breaches and if so should leave be granted to recover monies from him?
- (f) Can and should penalties be imposed?
- (g) Does Ms Arushi have personal grievances and if so should remedies be awarded?

What happened?

Employment with Lionmead and first alleged premium

[11] In July 2018 Ms Arushi secured a duty manager role with Lionmead at the VC Bar. She applied for a work visa based on the role, and on 1 October 2018 it was granted for a year. Her employment agreement stated she was employed for a minimum of 35 hours per week on \$20 per hour. A few days after it was granted, Ms Arushi says Mr Singh told her she had to pay \$10,000 in relation to her visa and to repay taxes that he was paying on her behalf. Ms Arushi says he told her that if she did not pay, he would arrange for her visa to be cancelled.

[12] Ms Arushi says Mr Singh placed a significant amount of pressure on her and her parents in India, and she felt she had no choice but to comply with the request. This was because she was “locked” into the visa for a year, with the other option being to pay for a new visa with another employer and await that process.

[13] Ms Arushi says payment was to be made in cash to Mr Singh’s contact, who was based in India near where Ms Arushi’s parents live. Ms Arushi says Mr Singh provided the contact’s name (who I will call “Mr S”) and contact number on a slip of paper. She in turn says she sent it to her parents by instant message through one of her siblings. Ms Arushi brought the slip of paper to the investigation meeting. Mr Singh denies knowing Mr S, but at the investigation meeting acknowledged the name and number on the slip of paper was his handwriting.

[14] Ms Arushi has produced a diary of hers from 2018, which records an entry on 14 October 2018 saying “Remind mum dad for payment 494 !!”. Ms Arushi and her parents say they spoke over the phone and Ms Arushi urged them to make the payment, which converted to about 500,000 Indian rupees. At the investigation meeting Mr Bains said Ms Arushi had told them to pay the amount but keep proof of what was paid.

[15] Mr and Mrs Bains agreed to make the payment and Mr Bains says he borrowed money from friends and a money lender at a market. Once they had the required amount they say they called Mr S, and on 18 October 2018 visited him at an address in Chandigarh. At the investigation meeting Mr Bains recalled the address visited, and described how after arrival they were invited inside and offered tea and cake. Ms Arushi’s sibling had also come with them. Two videos provided to the Authority by Ms Arushi allegedly show the cash exchange of the equivalent of \$10,000 to Mr S. The

first video is filmed by a third person off camera (said to be Ms Arushi's sibling) and shows a person handing over cash in small bundles over a table to a male. The male speaks and starts to count the cash. Mr Bains gave evidence that it was him who passed over the cash. The second video shows the male continuing to count cash. There is no indication he is aware he is being video recorded. Mr and Mrs Bains say Mr S advised the payment would reach Mr Singh, and that Mr S telephoned Mr Singh to confirm receipt of the payment. That call is not shown in the video footage. The Authority has not been provided with technical evidence about the date the videos were created, but the media creation of the videos on the Authority's version states it was "16/10/2018".

[16] Ms Arushi says after payment was made she spoke to Mr Singh and he confirmed the payment had been received. Ms Arushi's evidence at the investigation meeting was that Mr Singh told her she would be required to make a payment like this for each year of her employment.

[17] There is no documentary evidence showing Mr Singh received subsequent payment. Mr Singh denies requesting or receiving the money claimed, and says the videos were fabricated.

Employment with Isher and second alleged premium

[18] It is common ground that Ms Arushi was offered a promotion on 30 April 2019 as General Manager at the tavern and Isher became her employer. The employment agreement stated her hourly rate would be \$26 on a minimum 40 hours per week. She says this was to meet the median pay rate required by Immigration New Zealand for an offer of employment. Her evidence at hearing was that she and Mr Singh discussed this and he said she would still be paid \$20 per hour for actual hours worked.

[19] Ms Arushi applied for a residence visa under the Skilled Migrant Category in July 2019, which Isher supported. On or about 26 August 2019 Ms Arushi applied for and was granted a further work visa valid for three years.

[20] Ms Arushi says in January 2020 Mr Singh demanded she pay a further \$10,000. She says he continued to apply pressure on her to pay this further sum, but she avoided paying until the pressure from Mr Singh became more frequent and too much. In November 2020 she says she decided she had to pay the amount and borrowed money from two good friends to add to her own savings to make up the amount. In a diary

entry for the date 12 November 2020, it records Mr Singh harassed her again for “\$6 every hour pay back since last year” and that she organised money to pay him back. The \$10,000 figure was noted. Ms Arushi’s evidence is that she originally intended to give the money to Mr Singh in cash as he demanded, but decided to speak to her friend Mr Grewal about the situation first.

[21] On 17 November 2020 Ms Arushi paid \$10,000 into Mr Singh’s personal account at a bank in Rotorua, so there would be a record of the payment. A bank receipt for the \$10,000 payment is before the Authority. She says Mr Grewal gave her the bank account number, which he does not deny. Ms Arushi says when Mr Singh found out about the payment he was unhappy and wanted to return the money to her account and be paid in cash instead. Ms Arushi replied that if he had trusted her enough to ask for the money to be paid in exchange for a visa, then he should trust her enough not to say anything. She says Mr Singh did not press her further but stated if she did report him to the authorities, he would know what to do and say to prove her wrong.

[22] Mr Singh acknowledges receiving money into his account but he and Mr Grewal explain that this transaction related to a loan Ms Arushi owed to Mr Grewal. At the time, Mr Grewal owed Mr Singh money, so instead of Ms Arushi making payment directly to Mr Grewal, she paid Mr Singh. Messages between Mr Singh and Mr Grewal have been provided showing the former asking for payment. Although Ms Arushi acknowledges having loans from Mr Grewal in the past, she denies she owed Mr Grewal money as at November 2020 or was repaying a loan by depositing the \$10,000.

[23] Ms Arushi gave evidence that she was due to make another payment to Mr Singh in 2021. When she told Mr Singh she did not have the money he was not happy, but she delayed payment and by March 2022 had no job.

[24] By July 2021 Ms Arushi’s pay rate had increased to \$27.50 per hour (or it at least was recorded as such in payslips). In 2021 Ms Arushi applied for a residence visa under the 2021 Residence Visa which was granted on 1 February 2022, with her earlier application having been withdrawn.

Hours of work and payment

[25] Ms Arushi’s evidence was that during her employment she was not allowed to record her actual hours on timesheets. She says she usually worked six days a week

and often 55 to 60 hours per week, but Mr Singh told her to record 40 hours per week. She says she was not paid for many additional hours worked.

[26] In support of her claim of having worked additional unpaid hours, Ms Arushi says throughout her employment she recorded the actual hours and days she worked in successive diaries, having been accustomed to doing this from previous employment, which can be seen from her 2018 diary. She has produced diaries for the years 2018 to 2021 which detail the days, times and often work tasks performed. The diaries show Ms Arushi worked at both VC Bar and the tavern until November 2019. Her diaries show her sometimes working at both venues on one day, doing one shift after the other.

[27] The respondents challenge the reliability of the diary entries, suggesting they were fabricated in response to their evidence, and point to some timesheets to appearing to be at odds with some dates. The payslips produced record her working 40 hours per week almost uniformly from the start of employment in October 2018 to May 2021. From that date the payslip hours fluctuated between 41 to 50 hours, with approximately 8 weeks between 50 and 60 hours towards the end of employment. Under cross-examination at the investigation meeting, Ms Arushi stated while she was told to record 40 hours work per week, Mr Singh told her “after COVID” that she could increase her recorded hours up to a capped amount, and she checked with him each week how many hours she was allowed to upload on the electronic time recording system. This, she said, resulted in the higher hours recorded.

Incident on 1 February 2022

[28] On the same date Ms Arushi found out she had been granted a residence visa, 1 February 2022, she went to work at the tavern and an incident with a regular customer, Mr Willers, occurred. It is common ground Mr Willers was drinking a beer and was waiting for takeaway pizza and chips, ordered through Mr Singh. Mr Singh then left. The only order put through the kitchen was for pizza. The tavern’s restaurant manager took the pizza to Mr Willers when it was ready. Ms Arushi says she overheard what then occurred. She says Mr Willers noticed the chips were missing and threatened to “wrestle the manager to the ground” if he did not get his chips.

[29] Mr Singh then called Ms Arushi about the missing chips, after Mr Willers contacted him about them. He told her to place the order for the chips and give them to Mr Willers. Ms Arushi placed the order with the kitchen. This second order was

taken out to the table by another female employee, but the chips were not in a takeaway bag. Ms Arushi says the female employee returned and advised her Mr Willers had made inappropriate comments to her and she was visibly upset.

[30] It was about 4pm on a Tuesday afternoon, and it is common ground the tavern had few customers at the time. Ms Arushi transferred the chips to a takeaway bag and took them to Mr Willers' table herself. Ms Arushi says she stood her ground with Mr Willers and told him he was not to speak to her or any other staff members in the way he had. Regular customers Mr Baker and Mr McIndoe were also present. What happened next is disputed.

[31] Accompanied by a barman (who was also Indian), Ms Arushi says she requested Mr Willers' leave the tavern, but Mr Willers refused to. Ms Arushi maintains Mr Willers made racist comments and she became upset and said to him "how would you feel if I called you white trash". After several minutes the Police arrived, along with Mr Bhullar, who took Mr Willers' home.

[32] Ms Arushi made an entry in an incident book kept in the tavern relating to the incident the same day. It records a Police callout number given to Ms Arushi by officers attending, and records they gave her a trespass notice to fill out and serve on Mr Willers' when came he to the tavern next. The entry also records some of the comments Mr Willers' allegedly made and that he would not leave the premises when asked to do so.

[33] The Authority has been provided with CCTV footage of the incident which was played at the investigation meeting. The CCTV has no audio, so it is not possible to confirm what was said from it. At the investigation meeting I questioned Ms Arushi about what was happening as it played, and both counsel were given the opportunity to do so.

Investigation process

[34] The next day, on 2 February 2022, Ms Arushi says during her shift Mr Singh asked her to attend a meeting with him to discuss what she understood was a problem with compliance with liquor licencing requirements. However, once she was in that meeting, Mr Singh proceeded to tell Ms Arushi she had breached her employment agreement because of an alleged insult she made to Mr Willers.

[35] On 3 February 2022, Ms Arushi emailed Mr Singh saying she was following up on their conversation the day before. She referred to the incident with Mr Willers and previous interactions with him as being problematic and that Mr Singh had reassured her his behaviour would not continue. She asked for details of how, when and in what context she had breached her employment agreement.

[36] Ms Arushi says on 6 February 2022 that Mr Singh and Mr Bhullar took her aside for a meeting at the tavern. In this meeting, she says Mr Singh informed her that a formal complaint had been made about her and she was required to attend a formal meeting with Ms Burgess and himself to investigate. Ms Arushi says she was asked to apologise to Mr Willers and the matter would be resolved. She refused to apologise. Mr Singh and Mr Bhullar deny Ms Arushi's claims about this meeting, and say they discussed work matters. On the same night, Ms Arushi emailed Mr Singh, Ms Burgess and Mr Bhullar referring to having a conversation at 9pm that day, saying she understood a formal issue was being raised with her. She asked for details of a meeting time and informed them that she would like to bring a support person.

[37] On 7 February 2022, Ms Burgess emailed Ms Arushi. In the email Ms Burgess said Isher did not deny Mr Willers' history of behaviour which had been dealt with on a case-by-case basis previously. Ms Burgess acknowledged Ms Arushi and Mr Singh having had a "frank and open conversation" regarding the matter alleged and that further discussion was needed as Ms Arushi may have said to Mr Willers "how would you feel if I called you white trash". The email said management would be addressing an allegation of what Ms Arushi said to Mr Willers.

[38] The email then outlined for "clarity" the process would involve a formal meeting, an adjournment to consider the explanations, then a second meeting at which the employer would either accept the explanation or not. It was stated this will determine whether and or what disciplinary action was required. The email strongly recommended Ms Arushi bring a support person to the formal meeting, and stated:

The breach of the employment relationship is;
ADVERSE COMMENTS

- a) Both during employment and after employment is terminated, the employee agrees they will not directly or indirectly make or cause to be made any disparaging comments ...:
 - (i) About ... any other party associated with the employer's business;
 - (ii) That brings the employer into disrepute;...

Also:

a) Bullying

Failure to treat people with respect and dignity;

- *Physical & verbal abuse toward another employee/customer on or off company premises;*

The breach regarding “ADVERSE COMMENTS” appears to have been pulled from a clause in Ms Arushi’s employment agreement, which says a breach of the clause “will be treated as serious misconduct”. The agreement itself is not referred to in the email. Finally, the email proposed meeting dates a few days later and stated the “expectation is that business must continue as normal and the meeting is dealt with separately”.

[39] On 11 February 2022, Ms Arushi’s counsel wrote to Isher asking for the purpose of the proposed meeting, details of steps taken in the investigation to date, notes of witness interviews, CCTV footage and any Police statements or notes. Alternative meeting times were requested. Counsel also stated Ms Arushi had concerns about anomalies between her pay and hours worked, breaches of the Holidays Act 2003 (the HA) and her annual holiday balance, and the lack of response taken in response to her “numerous entries” in the incident book about Mr Willers’ behaviour toward staff. She asked for:

- (a) all entries in the “incident book” relating to Mr Willers;
- (b) actions taken to eliminate or minimise risks from his behaviour;
- (c) payslips and detailed leave reports relating to both Lionmead and Isher.

[40] Ms Burgess responded that once a meeting date was confirmed, Isher would forward the information requested in relation to the incident. She referred to Ms Arushi’s other allegations, saying Isher would assume Ms Arushi was raising a personal grievance. Later that afternoon counsel confirmed a personal grievance had not been raised, and again asked for clarification of the purpose of the meeting. Lastly, counsel asked that Isher refrain from communicating with Ms Arushi directly about the matters.

[41] On 14 February 2022, Ms Burgess emailed a statement from Mr Baker about the 1 February incident. The statement said when Mr Willers’ pizza was brought out by the restaurant manager he noticed his chips were missing and said “don’t make me wrestle you to the ground for the chips”. He says they all laughed as it was not meant as a threat. Mr Baker is recorded as saying Mr Willers “moaned and muttered some derogatory comments about Indians”, then waited for his chips. The statement further

says when the female employee brought out the chips in a basket, Mr Willers “erupted in disapproval” and “scoffed and complained” about the service, but he could not recall the exact words but that it “would have been insulting as that is normal for Graeme and he is in a Public Bar”. The statement says Ms Arushi walked over and told Mr Willers not to talk to staff like that and she was sick of him insulting Indians. It states she called Mr Willers “white trash” and two other names. It said Mr Baker believed her comments applied to all the white people at the bar. Despite Mr Baker being present during the incident, the statement says he did not know who called the Police.

[42] Ms Burgess’ cover email outlined a process to be followed. The email again referred to Ms Arushi and Mr Singh’s “frank and open discussion”. She said Mr Singh explained that she represents the business as a senior manager and again referred to Ms Arushi saying “how would you feel if I called you white trash”. Ms Burgess said “on the basis of that statement, the behaviour is not acceptable from any staff member”. The email also stated Isher was appreciative of Ms Arushi “maintaining a professional manner while at work throughout this process”.

[43] A short witness statement from the restaurant manager (who I understand was Indian) was also provided to Ms Arushi. It stated the manager did not hear Mr Willers’ comment to him about the chips but that Ms Arushi overheard it and replied “I will put you on the ground”. The manager says he then went on his lunch break. The statement does not address what happened next.

[44] On 15 February 2022 counsel responded outlining Ms Arushi’s recollection of the 1 February 2022 events as different from Mr Baker’s. It stated Ms Arushi when Ms Arushi brought the chips out in a takeaway container to Mr Willers, he was still upset and started to call her names and make racist insults towards her including calling her a “bloody Indian” and something along the lines that all Indians were useless. It says Ms Arushi saw it as her role as duty manager to manage inappropriate client conduct. It records Ms Arushi as saying he was not to speak to her or any other staff members like that and not to use racist comments. She then said “how would you feel if I called you white trash”, which was directed at Mr Willers only and not intended to include anyone else. She denied making the other comments from Mr Baker’s statement. She further denied the statement “how would you feel if I called you white trash” was a disparaging comment, and was an attempt to make him understand the impact of his remarks. The letter asked for detail about the allegation of bullying.

[45] On 16 February 2022, Ms Arushi attended a meeting with Ms Burgess, Mr Bhullar and her counsel. At that meeting Ms Arushi provided only a written response disputing the allegations. Ms Arushi recalls Ms Burgess said this was not a “head-hunting exercise”, that Arushi was a valued employee and that Isher wanted her to stay. Ms Burgess said that a second complaint had been received, now from Mr Willers himself, but she had “concerns” with the timing and content of that complaint. Ms Burgess said that she had viewed CCTV footage. Ms Arushi asked Isher to supply this complaint and the footage.

[46] Ms Arushi says that on 20 February 2022 Mr Singh approached her at work and asked to speak “off the record” out in the garden bar. Further, that he said he did not want to provide wages and time records as it was too much hassle. He then told her she should “get the lawyers out of the way” and just accept the consequences of the process and move on. Ms Arushi says she made it clear she would not be doing that, after which he asked “don’t you trust me” and offered to pay her “an incentive” when he sold the business if she stopped using a lawyer. Ms Arushi says he stated this twice and inferred it would be a large sum of money. Mr Singh denies the meeting occurred and that he said these things.

[47] On 24 February 2022, Ms Arushi raised a personal grievance through counsel. The grounds for her personal grievance were:

- (a) Failing to provide the wage and time records as requested;
- (b) Attempting to undermine and deny employment rights due to Mr Singh’s discussions with Ms Arushi on 20 February 2022;
- (c) Paying Ms Arushi’s wages and leave incorrectly;
- (d) Making an unlawful demand for a payment for a visa.

[48] The letter also asked for payslips and a detailed leave report. The letter again requested the incident book entries. The letter referenced Mr Singh’s comments to Ms Arushi on 20 February 2022. Counsel also asked for details of the bullying and further allegations that were being made against Ms Arushi.

[49] The letter also referred to the \$10,000 November 2020 payment into Mr Singh’s account, and sought payment of it. It did not refer to the earlier October 2018 payment. It also raised issues about how Ms Arushi had been required to alter her hourly rate

from \$27 to \$23 per hour and use that rate for the hours she worked, and work hours in excess of 50 hours per week.

[50] On 25 February 2022, Isher provided some payslips for Arushi, the CCTV footage from 1 February 2022 and statements from Mr Willers, the female employee and the barman present during the incident.

[51] An incident book covering the period between 13 April 2021 to 19 February 2022 was also provided during the investigation. There are no entries in the incident book relating to Mr Willers except for the entry on 1 February 2022. Ms Arushi acknowledged this, but in response said staff were told not to record incidents relating to Mr Willers.

[52] The statement from Mr Willers was dated 15 February 2022, the day before Isher's meeting with Ms Arushi. It records that after Mr Willers made a "funny" comment like "don't make me wrestle you to the ground for my chippies" as a joke to the restaurant manager, the next thing he knew was that Ms Arushi was yelling across from across the bar that she would put him on the ground. He said after a long wait his chips were then brought out in a basket by a female employee and he complained to her about the service. He says Ms Arushi then brought his chips out and started "nagging at me about picking on her staff and that I am a racist and to stop insulting Indians, then went back behind the bar". It says he phoned the Police as it was a "verbal assault", then he phoned Mr Singh again to complain. He says a few minutes later Ms Arushi returned and called him "a piece of white trash" and the same names Mr Baker claimed, and made "other raging insults". He said she later returned with a barman and told Mr Willers to leave. He said no he was waiting for the Police and owner as he was not putting up with what Ms Arushi did. He said Ms Arushi was "ranting and raving" at him and Mr Baker.

[53] The statement from the female employee referred to being shocked by a comment Mr Willers made to her when she brought the chips out to him. When she told Ms Arushi what happened, it says she saw her yelling at Mr Willers from behind the bar saying she swore and told Mr Willers he was "white trash" and that Indians work hard and she would not be there if she did not work hard. It further says Ms Arushi asked the barman to help her get Mr Willers out and that she started yelling and

swearing at Mr Willers and Mr Baker, including swearing at Mr Willers to get out of the bar. It said she went right up in their faces, pointing her finger at them.

[54] The barman's statement says he observed Ms Arushi, Mr Willers and Mr Baker arguing. He said "they were both saying some bad words to each other" and he told Mr Willers he cannot disrespect anyone here. He says he tried to ask Mr Willers to leave and come back the next day and they will sit together and talk. He says he took Mr Willers' food outside and placed it on the back of his vehicle, and after Ms Arushi returned to the bar the Police arrived and Mr Willers left.

[55] Mr Singh has provided the Authority with a hospital discharge summary stating he was admitted to hospital on 25 February 2022, to show he was not involved in the disciplinary process on or after that date as he was unfit to work.

[56] On 1 March 2022, Ms Arushi provided a response to the further evidence. She pointed out inconsistencies between the witness statements and disputed the evidence. She noted she had received advice from the barman that he was presented with a witness statement and felt intimidated into signing it and was not happy with its contents.

[57] On 4 March 2022, Ms Arushi and her counsel attended an online meeting with Ms Burgess and Mr Bhullar. At the meeting Ms Burgess read out a pre-prepared letter that Isher did not accept Ms Arushi's explanations, and it would be proceeding with disciplinary action for "bullying and bringing the company into disrepute". The statement said Ms Arushi made "racist and abusive remarks" to Mr Willers, intentionally put herself in Mr Willers' personal space and behaved aggressively by pointing fingers. It was said her actions gave Mr Willers:

...reasonable apprehension of an imminent, harmful or offensive contact that was serious enough for Graeme to contact the Police in fear of his personal safety not once but twice as the abuse escalated. The fear for his safety was such that he would not leave public view until the Police arrived as clearly shown on CCTV.

The investigation has clearly established that Arushi did make racist and abusive remarks to [Mr] Willers. That Arushi did harass [him] and behave menacingly with the clearly displayed intent to intimidate as seen on CCTV.

[58] The letter says Ms Arushi's claims were "untrue" and reiterated that Mr Willers phoned the Police "because he feared for his safety", and referred to Ms Arushi having a "racial tirade" and "uncontrolled racial rantings and open abusive attack on a customer". The statement referred to the investigation process including that the

statements from staff members were recorded as they were watching the CCTV footage of the incident. The letter referred to counsel's responses on Ms Arushi's behalf as "feeble to say the least". Ms Burgess also advised that Isher was suspending Ms Arushi on full pay, noting counsel's "interjections" about the suspension but did not seek Ms Arushi's feedback on it.

[59] It also sent a letter proposing to dismiss Ms Arushi due to its finding of serious misconduct and asking for her feedback. The letter stated that at a business meeting with the owners on 28 February the determination was made that disciplinary action would be taken.

[60] The letter also referred to a step in the process "Inform the employee of the problem" and said:

01//2/2022 when the Owner, Kulvinder Singh returned to the bar, Arushi stated that Graeme had threatened staff and spoke inappropriately to a female staff member. Arushi was very adamant that Graeme is barred from the Tavern and not to be allowed in the premises again. Kulvinder informed Arushi then that he would investigate the matter. Arushi was unaware at the time that Graeme's phone was on and he overheard a section of the conversation. Kulvinder hoped that time would calm matters, but it didn't. On the day and since that conversation formal complaints were made and a formal investigation took place...

[61] No evidence was provided to Ms Arushi about what Mr Singh overheard of the conversation on 1 February 2022, nor has it been provided to the Authority.

[62] The letter says it had given numerous genuine opportunities to respond to all of the information provided, but "what we get in response is unsubstantiated and irrelevant recollections that simply do not exist coupled with wild allegations against the company on unrelated matters". It said it had diminished confidence in Ms Arushi's "decision making and perception of truth". The preliminary decision was recorded as:

Bringing the Employer and the Business into disrepute.

- a) Arushi has brought the business into disrepute by her inappropriate, vicious, unprovoked and sustained verbal attack on a customer while being the face of Isher Enterprises Limited. The formal complaints were laid against the business through Arushi's actions. Arushi was the face of the business. Customers have openly stated that they will not come back to the Tavern because of what they had heard regarding Arushi's behaviour.

Bullying a customer:

- b) Bullying a sustained form of physical or mental abuse repeated over a period of time. This is clearly evidence over the 45-minute coverage of CCTV showing 10 occasions of harassment from behind the bar also directly facing Graeme and in his personal space.

[63] The letter stated Isher had taken into account Ms Arushi's comments that Mr Willers had a history of inappropriate behaviour, but noted there were no other records in the incident book by Ms Arushi or other staff. It was said its preliminary decision was based on two clear breaches of the employment agreement which was also covered in Isher's Code of Conduct attached to the agreement.

[64] The letter stated Isher's preliminary view was that it was appropriate to dismiss Ms Arushi without notice. It said it wanted to hear Ms Arushi's views on the proposed disciplinary action before a decision was made, and to provide any additional or clarifying information that is relevant by 14 March 2022.

[65] On 9 March 2022, Isher wrote another letter to counsel responding to the personal grievances raised. It referred to providing three years of payslips which also recorded leave, and that Ms Arushi was responsible for her own timesheets. It referred to Ms Arushi and Ms Singh having an "off the record" discussion at Ms Arushi's instance in which she voiced an objection to Ms Burgess's investigation. It says Mr Singh stated the problem could have been managed differently and that it was in his opinion out of his hands as Ms Burgess and counsel would now follow a process.

[66] In relation to Ms Arushi's claim an unlawful demand was made for payment of a visa, it was outside of the 90 day period to raise a grievance, it says she was "trying to discredit a clearly legal process to detract from the disciplinary process". It also claimed Ms Arushi of fabricating her claims about suffering hurt and humiliation.

[67] On 14 March 2022, counsel wrote to Isher responding to the proposal to terminate, outlining why Ms Arushi believed a flawed process had been followed and that a pre-determined retaliatory decision had been made. It referenced how drastically its approach had changed after Ms Arushi's personal grievance letter of 24 February 2022, and said within four days, by 28 February 2022, a decision was made to take disciplinary action, which was also before Ms Arushi had responded to the further evidence provided.

[68] On 16 March 2022, Ms Arushi and her counsel attended a meeting with Isher represented by Ms Burgess and Mr Bhullar. Ms Burgess advised the allegations were upheld and termination would follow. Later that day, Isher sent a one-page letter confirming its decision, saying it had considered her response "in depth" but did not accept her explanations.

Did the respondents seek or receive unlawful premiums from Ms Arushi and if so should they be paid back?

[69] Section 12A(1) of the WPA provides that no employer or person engaged on behalf of an employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person. An employer demanding or receiving a payment or a bond in return for support with a work visa has been held by the Employment Court to be a premium for employment.¹

October 2018 payment

[70] Having considered the evidence, I find on the balance of probabilities that Mr Singh requested a \$10,000 payment from Ms Arushi in October 2018.

[71] Ms Arushi retained the relevant slip of paper in his handwriting about who was to be contacted in India about the payment. It is not credible that Mr Singh had a piece of paper in his office, in his own handwriting, with the name and contact details of a person he did not know. Mr Singh's various explanations about the slip of paper were implausible and not accepted.

[72] The respondents say the videos of the payment were fabricated and/or edited, and through counsel say "the entire scenario was scripted by Arushi to extort money" from Mr Singh. The respondents have not called technical or expert evidence calling into doubt the date of the footage or that it has been edited in some way. The Authority finds on the balance of probabilities the video footage is reliable and shows the stated exchange taking place. Further, it must be said, were the videos somehow staged, one might expect them to contain more probative dialogue of what the exchange related to.

[73] The respondents also suggest Ms Arushi should have attempted to call Mr S as a witness, and point out that Ms Arushi's brother did not give evidence, having taken the videos. These and the respondents' various other criticisms including the source of the funds are not compelling. Although it would have been corroborative to hear evidence from Ms Arushi's sibling at the investigation meeting, the Authority heard largely consistent evidence from Ms Arushi's parents regarding the transaction. There is some doubt about whether the payment was possibly made on 16 rather than 18

¹ *Labour Inspector v Newzealand Fusion International Ltd* [2019] NZEmpC 181.

October 2018, but the witness and documentary evidence clearly supports a finding that a payment equivalent to \$10,000 was made on Ms Arushi's behalf in mid-October 2018.

November 2020 payment

[74] I also find on the balance of probabilities that Mr Singh requested a further \$10,000 payment from Ms Arushi, and she paid it in November 2020.

[75] Mr Grewal gave evidence of the money that he had loaned Ms Arushi in the past. However, he did not provide any details of the amount Ms Arushi owed as at November 2020, when it was allegedly loaned to her or how it was paid to her. Mr Grewal also did not provide detail, supported by documentary evidence, of when or how he requested Ms Arushi repay him the alleged loan.

[76] Text messages from Mr Singh to Mr Grewal provided to the Authority refer to Mr Grewal owing Mr Singh \$25,000, not \$10,000. As pointed out by Ms Arushi's counsel, neither Mr Grewal nor Mr Singh gave evidence of any partial repayment or prior repayments that would explain the difference between those two figures. Mr Grewal and Mr Singh's evidence was vague and lacked detail and it appears to have been a coincidence that Mr Singh requested the return of his money from Mr Grewal around the same time Ms Arushi paid her money to Mr Singh.

[77] Ms Arushi has by contrast provided detailed documentary evidence of gathering together the money and repaying money to her friends. Given these matters, and my earlier finding that Ms Arushi's had been pressured to make a payment in October 2018 (and in fact made payment) her explanation, based on documentary evidence, was more credible. The Authority accepts Ms Arushi's evidence.

[78] The respondents highlighted that Whatsapp messages between Ms Arushi and Mr Singh made no reference to the premium payments. That there was no reference in the messages to the payments is unsurprising, given the "off the record" and unlawful nature of the payments Mr Singh was requiring of Ms Arushi.

Offshore payment of premiums

[79] Relevant to the first premium cash payment is the Employment Court's decision in *Mehta v Elliott*.² In *Mehta v Elliot*, the Court determined that an unlawful premium

² *Mehta v Elliott* [2003] 1 ERNZ 451.

paid in India by a prospective employee to a consultancy business owned by Mr Mehta in India was not recoverable outside of New Zealand. The Court determined that there was a traditional reluctance in New Zealand to imply extra-territorial jurisdiction where Parliament could have expressly provided for that but did not do so, as was the case with the WPA.

[80] In closing submissions counsel for Ms Arushi referred to obiter comments in *Newzealand Fusion Ltd and Guan* in support of the recoverability of the offshore payment here.³ Chief Judge Inglis observed that the decision in *Mehta* may have been affected by subsequent changes in legislation and a judgment of the Supreme Court, *Brown v New Zealand Basing Ltd*.⁴ The *Brown* decision highlighted the importance of 2004 legislative amendments made to the Authority and Court's Regulations, which specifically gave the Authority and Court extra-territorial reach by providing them authority to give leave to serve claims on overseas parties, and in certain defined instances, decline jurisdiction to hear and determine a matter where there is an overseas party. The Supreme Court endorsed an approach to territoriality on a case-by-case basis as to whether the provisions of the Act relied on apply to the particular claim.⁵ It saw the 2004 amendments as giving "reasonable pointers" as to the features of an employment relationship in which it was assumed that the Court would have jurisdiction in respect of an employment dispute.⁶

[81] The Employment Court has since considered the difference in language in the 2004 amendments between reg 31A(5)(b) of the Employment Court Regulations and reg 19A of the Authority Regulations.⁷ The former includes five matters (or pointers) for consideration when leave is sought to serve a statement of claim on an overseas party. These are focused on the employment agreement that is the subject of the proceedings – this includes whether it was made in New Zealand; or was made by or through an agent trading or residing in New Zealand; or was to be wholly or partly performed in New Zealand; or was expressly or impliedly to be governed by New Zealand law. It found the absence of specific criteria applying to the Authority's decision-making did not alter or diminish the breadth of its jurisdiction.⁸

³ Above note 4 at [59].

⁴ Employment Court Amendment Regulations 2004 and *Brown v New Zealand Basing Ltd* [2018] 1 NZLR 245.

⁵ *Brown v New Zealand Basing Ltd* [2018] 1 NZLR 245 at [41].

⁶ At [43]-[45], in which regs 31A and 31G are referenced.

⁷ *Radford v Chief of New Zealand Defence Force* [2021] NZEmpC 35 at [148].

⁸ At [149].

[82] In *Labour Inspector v Tech 5 Recruitment Ltd* the Employment Court noted the underlying intent of s 12A which included the desire to protect vulnerable employees from potential exploitation, consistent with the aim of the WPA overall - to provide broad protection to an employee from overbearing conduct undermining that employee's financial independence from their employer.⁹

[83] Although the above authorities do not involve a consideration of the extraterritoriality of the WPA, it is clear the decision in *Mehta* has been affected by the amended regulations as demonstrated in the authorities. Accordingly, I do not see *Mehta* as an impediment to the recovery of the offshore premium and penalties sought in this case. The request and payment related to an employment agreement made in New Zealand, which was to be wholly performed in New Zealand, and was governed by New Zealand law. The request for payment contravened s 12A(1), even absent a payment. The evidence also supports a finding Mr Singh was the intended recipient or beneficiary of the first payment.

[84] The Authority is satisfied the two payments of \$10,000 requested by Mr Singh constituted unlawful requests for premiums for employment. Payments were made on Ms Arushi's behalf by her parents, and then directly by her to Mr Singh. She is entitled to cover both amounts from her employers. Accordingly, Lionmead and Isher are liable to pay \$10,000 each to Ms Arushi as debts due to her.

Have the first and/or third respondents failed to comply with a request to access or a copy of wages and time records?

[85] On 11 and 24 February 2022 Ms Arushi's counsel wrote to Ms Burgess requesting payslips and leave reports for both Lionmead and Isher. Ms Arushi has given evidence that during that time, on 20 February 2022, Mr Singh told her that he did not want to provide wage and time records as it was too much "hassle".

[86] The evidence showed that on 25 February 2022, the respondents provided payslips, but no time or leave records. The payslips also did not include the period between October 2019 and March 2020. The payslips recorded a balance for annual holidays but no detail. Timesheets relating to only two weeks in 2019 were later included in the respondents' bundle of documents in July 2023. A few more selective

⁹ *A Labour Inspector of the Ministry of Business, Innovation and Employment v Tech 5 Recruitment Ltd* [2016] NZEmpC 167, [2016] ERNZ 552 at [50].

timesheets were provided by the respondents at the Authority investigation meeting in July 2023, on which counsel sought to cross-examine Ms Arushi. At the resumed investigation meeting in November 2023, Mr Bhullar gave evidence that he had given all timesheets to his previous counsel, however no evidence has been produced corroborating that or that the respondents have followed up that issue with their previous counsel.

[87] The respondents have suggested Ms Arushi was responsible for timesheets as the tavern's manager. The evidence showed however that Mr Bhullar was solely responsible for payroll, and he is the one that Arushi gave any manual timesheets to for processing. The evidence also showed that from 2020, time records were recorded electronically, but these were not provided to Ms Arushi, or the Authority, either.

[88] Both Lionmead and Isher have failed to provide full (and accurate) records showing the number of hours Ms Arushi worked each day in a pay period and the pay for those hours, in breach of s 130(2) of the ERA.

Was Ms Arushi paid for all the hours she worked, and if not, are wages and holiday pay owing?

[89] Copies of Ms Arushi's diaries were provided in a supplementary bundle, after the respondents' statements and bundle were lodged. The original diaries were produced at the investigation meeting and the respondents had the opportunity to view them. The diaries record Ms Arushi's start and finish times, where she worked, tasks she carried out (for example, stocktakes, shopping for venue events, staff members she carried out tasks with, and meeting times).

[90] Although there were a few discrepancies between dates recorded in the limited timesheets produced for the investigation meeting, I am not satisfied the timesheets produced are at all a reliable record of Ms Arushi's worked hours or leave taken. On the occasions where Whatsapp messages between herself and Mr Singh appeared to align with what was recorded in a timesheet rather than her diary record, Ms Arushi gave reasonable explanations for these. Ms Arushi was also challenged in cross-examination about why her diaries entries recorded her working outside normal trading times. She explained tasks needed to be done prior to opening and after closing to the public. Other less regular tasks included stocktaking at the tavern liquor shop and needing to be onsite for the installation of new gaming machines.

[91] In order to estimate what she worked, Ms Arushi put together a spreadsheet listing start and finish times, based on her diary entries, and compared it with hours she was paid for using the payslips she did have. Ms Arushi was questioned at length about her hours and her diary entries. The Authority is satisfied her diary evidence is reliable. Although there appears to be some errors in the spreadsheet regarding hours, I accept the majority of them are consistent with the diary entries. Utilising s 132 of the Act and s 83 of the HA, I accept Ms Arushi's calculations of wages and holiday pay as accurate and orders will be made for those amounts.

[92] I am satisfied Ms Arushi is entitled to received wages based on the rates recorded in her written employment agreements as calculated, rather than at the relevant minimum rate of wages. No good faith bargaining took place in relation lowering her hourly rate that would go anywhere towards complying with the Act.¹⁰

[93] Using that spreadsheet she estimates she is owed unpaid wages and unpaid annual holiday pay from Lionmead of \$6,316.26 and unpaid wages and unpaid annual holiday pay from Isher of \$54,207.90.¹¹

[94] Ms Arushi's evidence was that she worked most public holidays and was not given alternative holidays. She estimates she has not been paid \$1,774.75. Of that amount Lionmead have not paid \$656.66 and Isher have not paid \$1,118.10.

Should interest on amounts owing be awarded?

[95] Clearly Ms Arushi has been denied the use of funds she has an entitlement to. It is appropriate to award interest, calculated using the Civil Debt Interest calculator.¹² Interest on the premium payments and arrears of wages and holiday pay is due from the date Ms Arushi lodged her statement of problem being 4 November 2022, until the date the debts are repaid.

¹⁰ Employment Relations Act 2000, section 63A.

¹¹ Ms Arushi adjusted this figure from those in her amended statement of problem, to reflect her acknowledgement that her start time was two hours later than recorded in her diary and the spreadsheet for 8 December 2021.

¹² <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

Is Mr Singh a person involved in employment breaches and if so should leave be granted to recover wages and other money from him?

[96] The Act allows an employee, with prior leave from the Authority, to recover monies from a person involved in breaches of employment standards, to the extent that an employer is unable to pay the arrears.¹³ Mr Singh is and was at all relevant times a director and shareholder of Lionmead and Isher. He holds a qualifying position falling within s 142W(3)(a) of the Act. He was the person who requested the premium amounts and received these either directly or benefitted from these. Although he did not have responsibility for payroll matters directly, he was a managing director and was aware of the VC Bar and the tavern's trading hours and days which Ms Arushi worked. He was in constant contact with Ms Arushi through instant messaging and regularly present in person at the venues. He made decisions about the hours Ms Arushi was to record, which led to Ms Arushi being underpaid. He was a person involved in both Lionmead and Isher's breaches of employment standards, namely provisions of the HA in respect of annual and public holiday pay and ss 4 and 12A of the WPA.

[97] Leave to recover the premium amounts paid, shortfall in wages and holiday pay and interest from Mr Singh is granted, and he is liable to pay those monies to the extent Lionmead and Isher are unable to pay them.

Should penalties for breaches of s 12A of the WPA and/or s 130(2) of the Act be imposed?

Time limitations

[98] Ms Arushi has brought penalty claims under s 13 of the WPA in relation to the premium payments, and s 130 of the Act in relation to wages and time records.

[99] Section 135(5) of the Act provides an action for the recovery of a penalty under the Act must be commenced within 12 months after the earlier of (a) the date when the cause of action first became known to the person bringing the action; or (b) the date when the cause of action should reasonably have become known to the person bringing the action. The time limit in s 135(5) applies to actions for the recovery of penalties under s 13 of the WPA. Ms Arushi was clearly within time to bring a penalty claim in relation to the breach of s 130 of the Act. Her claim for a penalty or penalties under the WPA is however out of time under both s 135(5)(a) or (b).

¹³ Employment Relations Act 2000, section 142Y.

[100] Counsel for Ms Arushi submitted the Authority should grant leave to bring the application for a penalty in relation to the premiums under s 219 of the Act. Section 135 provides a detailed description of the manner in which time limitations are to work in relation to penalty actions. No authorities have been brought to my attention that have granted leave to bring a penalty claim out of time, and I do not consider the powers in s 219 (or s 221 for that matter) can be used to extend the time limitation provision in s 135(5). The claim for a penalty under the WPA is dismissed as out of time.

Penalty assessment

[101] Relevant matters for determining an appropriate penalty are listed in s 133A of the Act and the associated steps developed in case law which assist that assessment.¹⁴

[102] There is one breach by each respondent company. The maximum penalty is \$20,000 each.

[103] In my view a penalty here would be appropriate to meet one of the objects of the Act, being to promote the effective enforcement of employment standards, of which s 130 is one. There is a need to make it clear to these respondents, and other employers, that accurate wages and time records are to be kept and produced upon request by employees.

[104] The breaches of s 130 of the Act are serious for this type of breach. Ms Arushi requested wage and time records on more than one occasion and then raised a personal grievance about that issue. Despite this, Lionmead and Isher did not provide any timesheets or a complete record of Ms Arushi's payslips or holiday and leave records. Ms Arushi points out they clearly had further records, as some were produced at the Authority investigation meeting, more than a year after they were requested.

[105] Ms Arushi submits the breach of the Act was intentional, given Mr Singh's statements to Ms Arushi about not wanting to provide them when requested, and the ultimate failure to do so when further records existed.

[106] The failure to provide full and accurate records has hampered Ms Arushi's ability to understand and calculate how much she was underpaid, and the Authority's

¹⁴ *A Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143 and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

ability to investigate and determine this matter. The loss Ms Arushi has proved based on her own records and the limited records available have proved to be significant. Lionmead and Isher have also continued to deny the hours worked, which is an aggravating circumstance.

[107] The Authority is not aware of any prior findings of similar conduct.

[108] Taking into account these matters, an appropriate starting point is 50% of the maximum penalties available.

[109] There are no discernible mitigating features. Neither Lionmead nor Isher have taken any steps to address the breaches except belatedly providing a few selected timesheets in an attempt to discredit Ms Arushi's claims, which have not been found reliable in any event.

[110] Neither Lionmead or Isher appear to be currently trading. The Authority gave Mr Bhullar the opportunity to give evidence about the companies' financial circumstances, but he chose not to give any substantive response. No other financial information has been submitted, and no reduction in penalty is warranted for either company.

[111] I find a proportional penalty would be \$8,000 each. That amount is awarded, with 30% payable to Ms Arushi.

Does Ms Arushi have a personal grievance(s)?

[112] When the Authority considers justification for the actions of Isher including its suspension and dismissal decisions it does so by applying the test of justification in s 103A of the Act. In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of Isher and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time.

[113] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. In a dismissal setting these are whether allegations against Ms Arushi were sufficiently investigated, concerns were then raised with her, she had a reasonable opportunity to respond to them and her explanations were considered genuinely by Isher before dismissal. The Authority may take into

account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Ms Arushi being treated unfairly.

[114] Isher could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

Was Ms Arushi unjustifiably dismissed?

[115] I take into account the fact Isher was a relatively small employer, but it did have access to a human resources manager in the form of Ms Burgess.

[116] There were a number of defects in Isher's investigation process which were not minor and resulted in unfairness to Ms Arushi.

Impromptu and "off the record" meetings

[117] I accept Ms Arushi's evidence that Mr Singh and Mr Bhullar requested and held impromptu meetings with her for which she was not given prior notice and given the opportunity to have a representative or a support person. The Authority finds Ms Arushi's evidence of what was discussed at the meetings more reliable than Mr Singh's or Mr Bhullar's version, her having contemporaneously raised her concerns about the meetings at the time, either directly or through her counsel including as part of a personal grievance. Her recall of what was discussed was also not disputed by Ms Burgess in her contemporaneous letters – rather Ms Burgess accepted conversations had taken place.

[118] Mr Singh's attempt to have an "off the record" discussion with Ms Arushi on 20 February 2022, in which he told her to get the lawyers out the way and accept the consequences of the disciplinary process, undermined the investigation. Ms Arushi says she made it clear she would not comply, he then offered to pay her an "incentive" once he sold the business if she stopped using a lawyer. This offer was designed to dissuade Ms Arushi from being represented during the investigation process and raising other employment relationship problems.

[119] Ms Arushi was disadvantaged by Isher's conduct as it meant she did not have the opportunity to have a representative or support person during important discussions relating to the investigation.

Isher did not sufficiently investigate the allegations

[120] The Authority finds Isher did not sufficiently investigate the allegations against Ms Arushi.

[121] After receiving Ms Arushi's explanation of the incident and her version of what she had said and Mr Willers' conduct, Isher could have followed up with the witnesses about what was said during the incident. She pointed out discrepancies between the statements and timing of the events which called into question what was said and when. Isher appears to have accepted the statement of all witnesses uncritically – all except Ms Arushi's. By asking further questions of witnesses some of the factual disputes could have been resolved. There is no evidence Isher asked any further questions, and this is concerning in the face of her saying one of the staff members had felt intimidated into agreeing to the contents of his statement.

[122] Ms Arushi's unchallenged evidence was that at no point during the investigation did Isher invite her to watch the CCTV footage together and go through it to provide her explanation for what occurred, despite stating it afforded that opportunity to the other staff member witnesses. Because the CCTV footage had no sound, undertaking such a process assumed importance.

[123] Isher also did not consider Mr Willers' words and actions during the incident and its impact on the events of the day and on Mr Arushi's behaviour. It essentially took the position that his conduct was not relevant. This is despite Mr Willers' past acknowledged behavioural patterns and Ms Arushi's previous attempts to manage them as manager. It also gave no consideration to his and Mr Baker's ability to accurately recall the events of that day, and Mr Willers' refusal to leave the premises when told to do so by Ms Arushi and the barman.

[124] Taking these matters into account, Isher has not shown it sufficiently investigated the words and actions said to amount to serious misconduct in all the relevant circumstances. A reasonable employer could be expected to look far closer at the events of 1 February 2022.

Isher did not provide information and allegations to Ms Arushi

[125] At the time of the 16 February 2022 meeting, Isher had obtained a statement from Mr Willers, but did not provide it to Ms Arushi until 25 February 2022. The

statements from the female employee and the barman (dated 21 and 22 February 2022, respectively) were also not provided to Ms Arushi until 25 February 2022. It also appears the restaurant manager's statement dated 14 February 2022 was not provided to Ms Arushi until after the meeting also.

[126] At the 4 March 2022 outcome meeting, Isher then made a number of serious findings on allegations that had not previously been put to her for comment.

[127] In closing submissions, counsel cited the evidence Isher considered in deciding to terminate employment, which included "three camera footages of CCTV from different angles".¹⁵ As a result of questioning the respondents during the investigation meeting, the Authority understood no further CCTV footage was available. If additional CCTV footage did exist at the time and was indeed considered, it ought to have been provided to Ms Arushi as part of the investigation process.

Ms Arushi's explanations not genuinely considered

[128] There is no evidence that Isher genuinely considered Ms Arushi's explanations prior to dismissal. The nature and tone of Isher's written communication was dismissive and incredulous of Ms Arushi's explanations, despite it having failed to make sufficient enquiries with Ms Arushi and the witnesses. The evidence points to a pre-determination that disciplinary action would be taken against her. This is demonstrated by the timeline.

[129] There is evidence then that on 28 February 2022 Mr Bhullar and Ms Burgess met. While Mr Bhullar denied the meeting occurred, Ms Burgess did not while giving evidence. Ms Burgess' evidence on this point was consistent with her letter to Ms Arushi that on 28 February that the owners met and determined disciplinary action would be taken. At this point, Arushi had not responded to the additional evidence provided on 25 February 2022. As such, I find on the balance of probabilities that the decision to take disciplinary action was made by 28 February 2022, which predetermined that there would be a disciplinary outcome.

[130] The decision to take disciplinary action against Ms Arushi also appears to have been in retaliation for Ms Arushi raising an unrelated employment relationship problem, and then personal grievance, with Isher. After Ms Arushi raised personal

¹⁵ Respondents' closing submissions, 27 February 2024, para 134.

grievances raised on 24 February 2022, the decision to take disciplinary action swiftly followed before she had the opportunity to respond. An employer can be expected to have an unbiased consideration of an employee's explanation free from pre-determination and retaliation. Isher has been unable to demonstrate its findings were not pre-determined or that retaliation was not a factor in play during the process.

Substantive findings

[131] The first ground of dismissal was that Ms Arushi had brought Isher into disrepute through an "inappropriate, vicious, unprovoked and sustained verbal attack on a customer". In light of the defects in the investigation process, that finding was unsustainable.

[132] Ms Arushi acknowledged she was upset at Mr Willers' conduct that day and made the comment about how Mr Willers would feel if she called him white trash. Given the evidence of the witnesses about the type of behaviour and language that had been accepted and expected at the tavern, this comment could not objectively have been viewed as capable of bringing Isher into disrepute.

[133] The other ground for dismissal was that Ms Arushi bullied Mr Willers, with a "sustained form or physical or mental abuse" with CCTV footage showing "10 occasions of harassment". A fair and reasonable employer could not have drawn such conclusions based on the CCTV footage. Further, bullying is widely accepted as being repeated and unreasonable behaviour directed at an individual which can lead to physical or psychological harm. The incident on 1 February 2022 was a one-off event involving Ms Arushi's attempt to manage Mr Willers' behaviour. It was not bullying and an employer could not have reasonably concluded that it was in the circumstances.

[134] Isher's related finding that Mr Willers' feared imminent danger from Ms Arushi is objectively untenable. Mr Willers' own witness statement made no reference to being in fear at the time of the incident. Instead, his motivation for refusing to leave the tavern and calling the Police was stated to be that he was not putting up with Ms Arushi's behaviour would not tolerate such behaviour from his staff.

[135] At the investigation meeting Mr Willers, a local middle-aged businessman with a very confident and robust demeanour and personality, confirmed he of course did not physically fear Ms Arushi. Under cross-examination he also acknowledged he was free

to leave the tavern at any time during the incident, and that he called the Police to cover himself. This is despite his witness statement to the Authority referring to him being “so terrified” by Ms Arushi’s behaviour that he called 111.

No alternatives considered

[136] It is common ground that until the incident on 1 February 2022, Ms Arushi was a long-serving and well-regarded employee. She has been described as hard working, loyal and good at her job. Her counsel submits that as she had never been disciplined during her employment, a reasonable employer would have considered other less drastic options as being more suitable. This could have included a written warning, training on how to deal with difficult customers/circumstances, counselling and support. There is no evidence that any of these options or that alternatives were considered by Isher.

[137] Taking into account these matters, Ms Arushi has established a personal grievance of unjustified dismissal on both procedural and substantive grounds.

Was Ms Arushi unjustifiably disadvantaged?

[138] Ms Arushi claims she was unjustifiably disadvantaged as a result of (a) Mr Singh’s alleged attempt to dissuade her from seeking legal advice and taking action against Isher; (b) Isher’s unlawful suspension of her; and (c) not being paid for all the hours she worked or correctly for public holidays.

[139] Given the Authority’s findings on (a) and (c) above, it is satisfied Ms Arushi has established personal grievances for unjustified disadvantage on those grounds.

[140] In relation to the suspension, Ms Arushi’s employment agreement allowed for suspension on pay while an investigation into serious misconduct was taking place. Ms Arushi was suspended by Isher at the outcome of investigation meeting on 4 March 2022, over one month after the incident. She had been working (and was later unwell) but Isher had not deemed her a risk during that time. Despite her counsel querying if she would be given a chance to respond to the suspension, Isher did not do so prior to the decision to suspend. There was no justification for deciding to suspend Ms Arushi without hearing from her on that subject. Isher’s failure to consult with Ms Arushi disadvantaged her, as she did not have her views heard on the decision to suspend.

Should compensation for humiliation and distress should be awarded and are there issues of contribution?

[141] Ms Arushi has established a personal grievance for unjustified dismissal and unjustified disadvantage. She is entitled to a consideration of remedies.

Compensation

[142] Ms Arushi seeks compensation for humiliation, loss of dignity and injury to feelings. She refers to experiencing humiliation and distress at the way Isher handled Mr Willer's behaviour towards her on 1 February 2022. The evidence was clear Ms Arushi was a highly valued employee until the events resulting in her dismissal. She was dismissed during the COVID-19 pandemic, when she says hospitality jobs were hard to come by leaving her anxious as to her financial future. Ms Arushi refers to being isolated from her family by the COVID-19 border closures, with Mr Atwal not being able to travel here until mid-2022. This meant that she was largely on her own while coping with her distressing employment situation. This amplified the emotional toll on Ms Arushi.

[143] The Authority is satisfied Ms Arushi has experienced harm under each of the heads in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation. Having regard to the particular circumstances of this case, an award of \$30,000 under section 123(1)(c)(i) is appropriate.

[144] Ms Arushi was also successful in her claims of unjustifiable disadvantage. The first two claims are based upon the same facts as formed the basis of her successful unjustifiable dismissal claim for which she has been awarded remedies. There is no clear basis for a separate remedy award under these heads.

[145] Ms Arushi's disadvantage in not being paid for all the hours she worked or correctly for the public holidays she worked related to conduct that occurred in the 90 days prior to raising her grievances on 24 February 2022. The evidence supports an award of compensation of \$4,000 for financial and emotional distress for this grievance, which takes into account her employers' belligerent responses to the concerns she raised her pay at a stressful time at the end of her employment.

Contribution

[146] On the day of the incident, by her own admission Ms Arushi became angry and upset with Mr Willers. While the Authority accepts as duty manager Ms Arushi was obliged to manage problematic conduct of customers at the tavern, she had other options available to her that did not involve the type of confrontation that took place.¹⁶ For example, she could have contacted the Police earlier to address the behaviour and the refusal to leave the premises prior to the matter escalating further. However, given Isher did not sufficiently investigate the allegations against Ms Arushi, and Isher has not otherwise shown it had substantive justification for finding serious misconduct as it did, a reduction in remedies is not appropriate nor is it required.

Outcome

[147] Lionmead Capital Group Limited must pay within 21 days of the date of this determination the following to Arushi Arushi:

- (a) \$10,000 as a debt for a premium payment;
- (b) \$6,316.26 as arrears of wages and annual holiday pay;
- (c) \$656.66 as arrears of public holiday pay;
- (d) Interest on the premium debt and arrears; and
- (e) \$2,400 as a penalty.

[148] Lionmead Capital Group Limited must also pay the remainder of the penalty amount totalling \$5,600 into the Crown bank account, within the same timeframe.

[149] Isher Enterprises Limited must pay within 21 days of the date of this determination the following to Arushi Arushi:

- (a) \$10,000 as a debt for a premium payment;
- (b) \$54,207.90 as arrears of wages and annual holiday pay;
- (f) Interest on the premium debt and arrears;
- (g) \$2,400 as a penalty; and
- (h) \$34,000 as compensation.

¹⁶ A manager of a licensed premises who allows any violent, quarrelsome, insulting, or disorderly conduct to take place on the licensed premises commits an offence under section 253(2) of the Sale and Supply of Alcohol Act 2012.

[150] Isher Enterprises Limited must pay the remainder of the penalty, totalling \$5,600 into the Crown bank account, within the same timeframe.

[151] Leave to recover the premium debts, arrears of wages, holiday and leave pay and interest from Kulvinder Singh is granted to the extent Lionmead and Isher are unable to pay those monies.

Costs

[152] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[153] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Arushi 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 the respondents 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.

[154] 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.¹⁷

Sarah Blick
Member of the Employment Relations Authority

¹⁷ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.