IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 69
3150426

	BETWEEN	SIMRAN KAUR Applicant
	AND	SURF ‘N’ TURF HOSPITALITY LIMITED Respondent
Member of Authority:	Antoinette Baker	
Representatives:	Applicant in person Simon Graham, counsel for the Respondent	
Investigation Meeting:	16 August 2023 at Christchurch and by AVL.	
Submissions received:	6 November 2023 from the respondent	
Determination:	7 February 2024	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Kaur was employed by the respondent (SNT) in its then Geraldine hospitality venue from 10 August 2020 to 4 June 2021. Ms Kaur commenced working for SNT after her husband, Mr Amandeep Singh, had expressed interest in an advertised duty manager role with SNT, a role that potentially met with requirements for him to work in New Zealand on a work visa sponsored by a specific employer. The couple communicated with SNT, they travelled and met at the workplace with Mr Zandbergen, director of SNT. SNT offered positions to both, and it was agreed that Ms Kaur would be employed straight away pending the outcome of Mr Singh’s

application for a work visa sponsored by SNT. Ms Kaur gave notice in her then hospitality position in Nelson, and the couple moved to Geraldine. Mr Singh commenced working for SNT on 7 October 2020. The claims he makes against SNT have also been determined today having been heard together with this matter.

[2] Ms Kaur claims[1] that SNT breached her written individual employment agreement (IEA) because during her employment she was not offered work at the agreed 40 hours per week and because a variation to reduce her weekly pay from $25.50 to $22.50 was not recorded in writing; she claims that she did not receive paid ten minute breaks (a statutory breach); that SNT verbally agreed to pay for family accommodation for three months and did not do this; and that she resigned because the job became financially unsustainable (less hours than agreed).

[3] On 1 September 2021, through her then representative, Ms Kaur raised a personal grievance for unjustified dismissal and included claims for breach of contract; on 2 September 2021 through her same representative Ms Kaur added a grievance of unjustified disadvantage explaining that the 'unjustified disadvantage' in employment brought about the unjustified dismissal.

[4] Ms Kaur claims loss of paid hours due to a shortfall of 40 hours per week not offered during her employment; to be paid the shortfall of all hours at her first agreed hourly rate ($25.50); any holiday pay arrears owed because of the above arrears; $25,000.00 compensation for each of the two grievances (a total of $50,000.00) as well as reimbursement of lost earnings and various statutory penalties. She also references the nonpayment of the three months' accommodation.

[5] SNT says that the grievances were raised outside of the 90 days from when Ms Kaur resigned in May 2021, it does not consent to the raising outside of that time frame and notes there are no exceptional circumstances that would explain the delay in raising the grievances. [2]

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[1] Statement of Problem, 3 September 2021.

[2] Employment Relations Act 2000, ss 14 and 115.

In any event, SNT denies all grievance claims. SNT denies the claims that it breached terms of the IEA to pay a higher rate of hourly pay (saying Ms Kaur agreed to this) or offer more hours than it did; it denies the claim for unpaid breaks and the penalties claimed. SNT says it did not agree to pay for 3 months accommodation.

The Authority's investigation

[6] An investigation meeting was scheduled to be held across three days in Timaru (1,2,3 August 2023) with both this claim and Mr Singh's claim to be heard together. Before any written evidence was lodged, the representative for both Ms Kaur and Mr Singh communicated that she no longer had instructions to act but that Ms Kaur and Mr Singh would appear at the investigation meeting and give oral evidence. The Authority communicated with Ms Kaur and Mr Singh about providing written evidence and they provided brief statements before the investigation meeting was due to be held.

[7] Mr Zandbergen and his counsel appeared on the first day of the scheduled investigation meeting in Timaru. Ms Kaur and her husband Mr Singh did not. Neither had previously communicated that they would not be attending nor was any reason given prior to the meeting date. Because there has been email participation by Ms Kaur and Ms Singh about their evidence and noting they were now unrepresented, I stood the matter down while the Authority made inquiries. These inquiries resulted in the matter being adjourned to recommence the following day. Mr Singh explained something to the effect of not knowing about appearing on the first day but could travel up from Dunedin by the second day which he did. He indicated that Ms Kaur was out of the country for a family bereavement and provided copies of tickets showing she had travelled in a family group on 29 June 2023 to India. In these circumstances I continued to hear the claim for Mr Singh that day and adjourned to complete this and then hear Ms Kaur's claim, and her evidence relating to Mr Singh's claim on 16 August 2023 in Christchurch which I did. I proposed AVL for all parties and impressed upon Mr Singh to ensure Ms Kaur attended. At the continued meeting on 16 August 2023, Mr Zandbergen and his counsel appeared in person, Mr Singh on AVL from Dunedin and Ms Kaur on AVL from India.

[0] Following the investigation meeting on 16 August 202 I asked for some further information and then reserved my decision.

[1] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[2] The issues requiring investigation and determination are:

a. Did SNT breach the IEA in relation to the hourly rate of pay and, if so, what is the remedy?
b. Did SNT breach the IEA by not offering and paying Ms Kaur 40 hours per week during her employment? If so, what is the remedy?
c. Did SNT breach an obligation to provide paid breaks to Ms Kaur during her employment and if so what is the remedy?
d. Did SNT agree to pay three months' accommodation for Ms Kaur and, if so, what is the remedy?
e. Are Ms Kaur's grievance claims out of time?
f. If not, did SNT through Mr Zandbergen's actions unjustifiably disadvantage Ms Kaur during her employment?
g. If not, did SNT constructively dismiss Ms Kaur?
h. Depending on f. and g. what if any remedies follow:
. Compensation
    ii. Lost earnings.
i. Should any grievance remedies awarded be reduced for blameworthy by Ms Kaur?
i. Should penalties claimed be awarded?
j. Should either party be ordered to pay a contribution towards their legal costs by the other?

Did SNT breach the IEA in relation to the hourly rate of pay and, if so, what is the remedy?

What does the IEA record?

[11] The IEA signed and dated 20 July 2020 before Ms Kaur commenced her employment records at 'Schedule A' 'Wages: $25.50 per hour' The $25.50 per hour is handwritten by Mr Zandbergen and the page is initialled by Ms Kaur. There is no dispute this IEA applied to the employment relationship. The dispute relates to what came after this signing and whether this varied the rate of paid agreed.

[12] Mr Zandbergen says a mistake was made about the $25.50 rate. The evidence varies about whose mistake this was. I will consider this below. While this was not submitted for SNT I note that while this jurisdiction may consider mistake as a remedy in contract, the relief available from that does not extend to a mistake in the interpretation of the contract[3]. Here there can be no doubt that Ms Kaur's IEA stated $25.50 per hour rate.

Was there a variation to the pay rate of $25.50 to $22.50 per hour

[13] The IEA records that any variation to the agreement must be in writing:

> 21.0 VARIATION OF THIS AGREEMENT
>
> The parties to this agreement acknowledge that circumstances may arise during the term of this agreement that warrant variation of this agreement. The parties agree that this agreement may be varied by agreement between the parties in writing and that no such variation shall be effective until signed by both parties.

[14] The above clause is directly above where both parties signed the agreement and declared 'By signing this Agreement the parties below acknowledge and agree to be bound by the terms of this Agreement.'

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[3] Employment Relations Act 2000, s162; Contract and Commercial Law Act 2017, s25.

[15] For Ms Kaur I need to consider that on the face of it while her IEA recorded $25.50 per hour, the payroll records and her own evidence is that she continued to be paid $22.50 per hour for the period of her employment which lasted approximately 10 months. I am asked by SNT to consider that this means there was an agreement to vary the pay rate. It is submitted for SNT that I should consider that in the absence of Ms Kaur raising issue about the rate during her employment, this lower rate was agreed by her. I do not agree with that submission for the following reasons.

[16] It was put forward for Ms Kaur in lodging her claim that this was not a variation recorded in writing.[4] I agree that any change to the rate is not supported by a written variation as clearly required in the IEA. The IEA was presented to Ms Kaur by Mr Zandbergen and as I understand the evidence it is not in dispute that they met, Mr Zandbergen went and got the template IEA (he said he had copies to use in his office) and that Ms Kaur's agreement was then signed with both present.

[17] Mr Zandbergen has put forward that he offered Ms Kaur $22.50 per hour, that she 'required a position that reflected $25.50 per hour' and would think about it.[5] His evidence has included that he would never offer this higher rate for a Duty Manager, that he assumed Ms Kaur and her husband were a couple (a package deal as I understood him), and that somehow he then assumed that $25.50 was the rate Ms Kaur would require for a work visa. The latter is inconsistent with the fact that Ms Kaur was on an open work visa. This meant she did not require SNT to sponsor her and have that approved by INZ to work in New Zealand. Had she had the same status as her husband she would not likely have been able to immediately start working for SNT.

[18] Ms Kaur says that after signing the IEA and then moving with her family to Geraldine to take up the job with SNT, Mr Zandbergen then told her it was a mistake that he recorded

[4] Statement of Problem
[5] Statement in Reply paragraph 2.3.

$25.50 as her hourly rate of pay on the IEA. Mr Zandbergen says it was Ms Kaur who told him it was a mistake. Ms Kaur says she protested about the reduced rate proposed and that Mr Zandbergen told her she should accept it. Mr Zandbergen says she agreed to the reduced rate and that the ongoing payment and lack of further protest from Ms Kaur during her employment supports this.

[19] Standing back from the above I find the likely situation was the one explained by Ms Kaur. It is consistent with the context of her, and her husband wanting to live and work in New Zealand and her saying that she was concerned not to complain further about the reduced pay rate because she did not want to jeopardise her husband's sponsorship by SNT. I also consider it reasonable to conclude that an employee signing up to an IEA where the employer has handwritten a rate of pay is highly unlikely to then so soon after return to the employer and say it should be reduced by $3.00 per hour.

[20] Accordingly, SNT did not obtain a written variation to this reduction and by the terms of the IEA that Mr Zandbergen provided for signing the IEA represents what the parties agreed to. I find it likely Ms Kaur reluctantly went along with reducing her rate for the reasons she has explained and as such I find based on the agreed $25.50 per hour in the IEA she should now be reimbursed the shortfall per hour during her employment both the hours she worked and was paid for.

[21] Based on the payroll records and doing the best I can to bring an end to this employment relationship problem I calculate the shortfall relating to the $25.50 agreed payrate as follows (all figures are gross):

a. Total ordinary time paid at $22.50 per hour was $25,610.63
   The same time @ $25.50 per hour = $29,025.38
   The difference is = $3,414.75 gross.

b. Total public holidays paid at $22.50 per hour was $1,350.00
   The same at $25.50 per hour is $1,530.00
   The difference is $180.00 gross.

c. Total public holidays paid at time and one half at $33.75 was $1982.82
The same at $46.50 per hour is $2,731.88
The difference is $749.06 gross.

d. The sum of a-c is $4,343.81 gross. This is the amount I find is to be reimbursed to Ms Kaur for her loss in relation to the short fall in hours recorded as worked and paid for.

Did SNT breach the IEA by not offering and paying Ms Kaur 40 hours per week during her employment? If so, what is the remedy?

[22] Ms Kaur claims she should have been offered 40 hours per week in hours because she was 'full time'. Mr Zandbergen says the business was seasonal according to customers and that the hours were flexible. However, while I accept this was likely the nature of SNT's business I need to consider what was agreed. My assessment of the electronic pay records supplied for Ms Kaur show that of the 33 weekly pays during her employment, at least 21 weeks show she worked less than 30 hours per week.

What does the IEA record are the hours of work?

[23] I will consider the relevant references in Ms Kaur's IEA to assist me to understand what was agreed in terms of her hours of work.

[24] Firstly, full-time employees and part-time employees are defined as follows:

> 2.1 **Full time employees** Full time employees are those generally employed for 30-40 hours a week, but not more than 40 hours per week unless the parties agree otherwise.
>
> 2.2 **Part-time employees** Part-time employees are those employed for flexible hours depending on the requirements of the employer. Hours are expected to be less than 40 hours per week. A particular number of hours cannot be guaranteed.

[8] Ms Kaur in her written evidence states that 'at the time of signing Gerard [Mr Zandbergen] offered me a pay rate of $25.50 and *full time ...*[6]' The full-time reference is consistent with Clause 5.0 of the IEA which includes that the position was 'DUTY MANAGER' and that, 'The position is full time' with 'full time' emphasised with handwritten brackets and the subsequent 'part-time' crossed out. I accept this was Mr Zandbergen's markings when as he explained to me he printed off the template and filled it in at relevant points before it was signed with Ms Kaur.

[9] I find a likelihood that what was agreed in Ms Kaur's IEA is a 'full-time' role that is defined in the IEA as between 30 – 40 hours per week, not the guaranteed 40 hours per week Ms Kaur claims she should have been offered each week according to rosters. While there is a handwritten reference to '40' for hours of work in Schedule A, that is then followed immediately with, 'Flexible hours as required by the employer. Hours may vary from week to week. Minimum Engagement of 2 hours per shift.' Ms Kaur in her oral evidence told me that 'flexible' meant hours above 40 hours per week. I do not find the IEA supports this. The following is inconsistent with this interpretation:

> Clause 6.0 HOURS AND DAYS OF WORK.
>
> > 6.1 The ordinary hours of work should not normally exceed forty (40) hours in any one week or 10 hours in any one day and may be worked on no more than five days of the week, Monday to Sunday inclusive, except as provided in Clause 6.3.
>
> . . .

[10] A plain reading of the above satisfies me that while the IEA has reference to '40' there is sufficient other specific explanation that the work is flexible. At best a minimum for a 'full time' employee was agreed to as 30 hours per week at 2.1. Even if there was some form of misunderstanding in the way the parties communicated verbally, this would all have been easily readable for both Mr Zandbergen and Ms Kaur when they signed the IEA.

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[6] I have added the italics emphasis.

[28] Equally while Mr Zandbergen explained to me that everyone pitched in at the business and did whatever was needed to be done, he is the one who provided Mr Kaur with the IEA which on a plain reading shows there was a minimum of 30 hours per week. If then he could not provide these hours I find that without any form of restructuring of Ms Kaur's role it constituted the breach of the IEA Ms Kaur claims albeit at not providing 30 and not 40 hours per week. I further find it likely that Ms Kaur continued to ask for more hours satisfying me she remained ready to do these hours.

[29] Based on the above I find that SNT employed Ms Kaur to work a minimum of 30 hours per week. It did not offer her these hours throughout her whole employment. I am satisfied this was a cause of concern for her when she was not getting her agreed to hours.

[30] I find the above is a breach of the IEA for which SNT is to now pay Ms Kaur her loss.

[31] To bring an end to this employment relationship problem I find the loss to Ms Kaur is calculated as follows:

a. My calculation from the payroll records of the ordinary hours each week short of 30 hours totals 101.5 hours.
b. 101.5 hours at the $25.50 gross rate that Ms Kaur should have been paid is $2,588.25 gross.

Holiday pay

[32] Ms Kaur claimed holiday pay in her Statement of Problem. It was not particularised, but I understand it to mean any holiday pay owed on any awards of wages made to her. I have made these awards above.

[33] Ms Kaur worked less than 12 months and was entitled to 8% of her total gross earnings less any annual paid leave taken in advance of entitlement at the end of her employment.[7] The pay records show what appears to be a reconciling at the end of employment for annual leave taken in advance against holiday pay. I take that related to what her earnings were. Therefore, I find that SNT is to pay an additional 8% of the total gross of the awards above which calculates (all figures in gross) as:

a. $4,343.81

b. $2,588.25

c. Total a. and b. is $6,932.06 gross x 8% is $554.57 gross.

Did SNT breach an obligation to provide paid breaks to Ms Kaur during her employment and if so what is the remedy?

[34] Ms Kaur claims she was denied paid breaks during her employment. She refers to statutory break provisions. Mr Zandbergen gave evidence that described what I accept was the likely way of service delivery in his business with fluctuating time for busy service and times otherwise for breaks. Ms Kaur also gave oral evidence about this but added for the first time she was told by another manager not to take breaks. I did not find this evidence plausible. Ms Kaur was not specific in her evidence about when the lack of breaks occurred. I prefer Mr Zandbergen's evidence that there were opportunities for breaks.

[35] Accordingly, based on the above I find I have insufficient reliable evidence regarding breaks and dismiss this part of Ms Kaur's claim.

Did SNT agree to pay three months' accommodation for Ms Kaur and her family and if so what is the remedy?

[36] For me to be satisfied there should be reimbursement to Ms Kaur for three months of rental accommodation costs by SNT, I would need to be satisfied this was likely agreed to as

[7] Holidays Act 2003, s23.

part of her job. She says it was verbally agreed to. Mr Zandbergen denies this. He says that while there was staff accommodation available it was not suitable for a family. He says that the advertisement placed by SNT that attracted Mr Singh to contact him and then visit with Ms Kaur as well, referred to accommodation to the 'right' candidate. It is common ground that he assisted them to get local accommodation by offering a reference.

[37] Given the disparity about what was verbally agreed to, the best evidence I have is the written employment agreement for Ms Kaur's position. It is comprehensive. It does not refer to an accommodation package. The advertisement for a Duty Manager job that referred to accommodation as a package for the 'right' candidate is not the same as agreement to be bound by.

[38] It has been submitted for SNT that Ms Kaur raised nothing about the accommodation costs not being paid for those first three months during her employment or in her resignation. The evidence of Mr Singh is also that he raised nothing about these accommodation costs until after he left the employment. If this had been agreed to, I would have expected the matter to have been raised earlier than after the end of the employment even given the context that I have given weight to about Ms Kaur's hours of work and rate of pay. Ms Kaur's first three months of employment spanned August to October 2021. I would expect an employee who had an accommodation package that meant three months of market value accommodation was to be paid for by the employer would have raised issue well before resignation the following May 2021 if it remained unpaid. This would have been a sizeable amount of a living cost that would have burdened the family.

[39] Standing back from the above, I find it likely the accommodation package was not agreed to and make no finding that any money is due to be reimbursed to Ms Kaur for the first three months' accommodation costs.

Are Ms Kaur's grievance claims out of time?

[11] It is submitted for SNT that these grievances are brought out of time. This was made clear to Ms Kaur in the Statement in Reply to these proceedings when she remained represented.

[12] Section 114 (1) of the Employment Relations Act 2000 ("the Act") includes that an employee must raise a personal grievance within 90 days beginning with the date when the action that the grievance is based on occurred or came to their notice.

[42] Section 114 (2) of the Act includes that:

> "...a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address."

[43] The Employment Court summarised principles arising from earlier cases about raising a personal grievance within 90 days.

[44] The grievance process is designed to be informal and accessible. A grievance may be raised orally or in writing with no formula of words that must be used. What matters is that the employee's communications convey the substance of the complaint to the employer to enable it to respond, 'with a view to resolving it soon and informally, at least in the first instance.' [8]

[45] I accept the submission that the time Ms Kaur would have had to raise grievances either for the disadvantage claims or the constructive dismissal crystalised when she resigned in May 2020. Her grievances were lodged on 1 and 2 September 2020 consecutively. That is outside of the 90-day time frame. I have nothing before me to show that issues were raised before this that I could consider were sufficient for her employer to respond to. While I accept Ms Kaur raised contractual issues about her pay rate and hours not offered I have addressed this above with a remedy and these are not subject to the same time frame.

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[8] *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, [36] to [38].

[40] For SNT it is submitted that there has been no application to bring the matter out of time for 'exceptional circumstances'. While I acknowledge that Ms Kaur by the time she appeared at the investigation meeting no longer instructed the representative who had assisted her with lodging wat was a lengthy claim, I note that representatives act on their client's instructions. I accept the submission for SNT that the defence that these grievances were not brought within time and were not agreed to as out of time was raised in the Statement in Reply and that there is correspondence provided to show that for Ms Kaur the matter was not accepted with no further position put forward.

[41] In these circumstances I have determined this issue and find as submitted for SNT that Ms Kaur is prevented from bringing the grievances claimed in her Statement of Problem.

Penalties

[42] Penalties for breaches of various sections of the Act open a company to liability to a maximum amount of $20,000.00 per penalty.

[43] In deciding whether to impose a penalty, and if I decide to, I would need to consider the factors in s 133A of the Act and the approach as set out by the Employment Court.[9] This includes a consideration of the number and nature of the breaches; the severity of each breach; the ability of the person in breach to pay; and proportionality to ensure that any final penalties awarded are 'just in all the circumstances.'

[44] Penalties are punitive and a reason to award them is to support compliance with employment standards and not primarily to compensate employees individually. The Employment Court has observed that there can be a risk of doubling up of penalties in relation to things that effectively arise from the same facts that give rise to the grievances claimed. Global penalties are sometimes awarded.[10]

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[9] *Borsboom v Preet PVT Limited* [2016] NZEmpC43 at [151].
[10] *Xu v McIntosh* [2004]2 ERNZ 448 at [43] – [45]

[46] Ms Kaur in her Statement of Problem instructed her then representative to apply for a lengthy list of penalties. I accept the submission for SNT that the claim for penalties was not easy to follow and not fully established with details as this matter progressed likely impacted in part because Ms Kaur no longer instructed a representative by the time she provided written and then oral evidence.

[47] I note that penalties were lodged for breach of good faith referring to SNT imposing 'unlawful conditions' that were 'deliberate, serious and sustained undermining the employment relationship to the point it was no longer possible for the applicant to continue.'

[48] There are further penalty applications referring to lack of records, the requirement to provide breaks, non-provision of the IEA, default in the minimum wage and illegal deductions under the wages.

[49] None of the above were progressed by Ms Kaur. I note further that I have already considered her contractual claims and awarded her remedies. Her grievances I have found were out of time.

[50] Accordingly, I accept the submission from SNT that with little to base a serious determination in relation to penalties I have not considered the application any further.

Summary of orders

[51] Surf 'N' Turf Hospitality Limited is to pay Simran Kaur with 28 days from the date of this Determination:

a. $6,932.06 gross for breach of her employment agreement as to hours and rate of pay; and
b. $554.57 gross as holiday pay based on 8% of the above.

Costs

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

[58] If they are not able to do so and an Authority determination on costs is needed Ms Kaur may lodge, and then should serve a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum SNT or from that date being 14 days after this determination SNT has 14 days to lodge a memorandum as to costs. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[59] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless circumstances required an upward or downward adjustment of that tariff.[11]

Antoinette Baker
Member of the Employment Relations Authority

[11] https://www.era.govt.nz/determinations/awarding-costs-remedies/.