

NOTE: This determination contains orders prohibiting publication of certain information at [111]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE**

[2025] NZERA 124
3207479

BETWEEN	JASWINDER SINGH Applicant
AND	SK AUTOS LIMITED First Respondent
AND	SHALVIN VISHAL NAIDU Second Respondent
AND	KOMAL CHETTY Third Respondent

Member of Authority:	Shane Kinley
Representatives:	John Wood, advocate for the applicant Shalvin Naidu and Komal Chetty, respondents in person
Investigation Meeting:	29 and 30 August 2024 and 15 October 2024 in Wellington and by AVL
Submissions and further information:	Up to 29 November 2024
Determination:	28 February 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jaswinder Singh was employed by SK Autos Limited (SKAL) from May 2019 until February 2022 as a battery and roadside service technician as part of contracted services which SKAL provided to AA Road Service. Mr Singh says he worked additional hours above those provided for in his written individual employment

agreement (IEA), with an arrangement for cash payment for extra work. Mr Singh says he was not paid in full for the extra hours he worked and acknowledges he then arranged for payments which should have been made to SKAL to be deposited into his own personal bank account, to recover his unpaid wages.

[2] The situation came to a head when AA sought payment for batteries for which Mr Singh had been taking the payments from SKAL's customers and he admitted this was what had occurred to Shalvin Naidu, director and shareholder of SKAL, claiming this was because he had not received unpaid wages. Mr Singh says he then paid SKAL and Mr Naidu a significant amount of money, through a combination of payments to SKAL's bank account, the retention of unpaid holiday pay and cash payments.

[3] Mr Singh's employment with SKAL ended in February 2022. He claims to have received partial payments after this for unpaid hours, but to then have been ignored when he sought further payments from SKAL, Mr Naidu and Komal Chetty, who is Mr Naidu's wife. Substantial arrears of unpaid wages, unpaid holidays entitlements and reimbursement of unlawful deductions were sought, as well as penalties and a declaration that Mr Naidu and Mrs Chetty were persons involved in breaches of employment standards. Mrs Chetty was added as a third respondent as part of Mr Singh's amendments to the statement of problem, including in response to the respondents' counterclaim.

[4] SKAL, Mr Naidu and Mrs Chetty deny Mr Singh's claims and say Mr Singh was paid for all hours he advised he had worked. They say Mr Singh agreed to make repayments for an agreed debt, which was satisfied in part by an agreed "holiday pay deduction". They say no penalties should be ordered.

[5] The respondents counterclaimed alleging Mr Singh breached duties to SKAL in relation to allegations of theft as a servant or misappropriation of funds, and failure to return SKAL's property.

The Authority's investigation

[6] At the initial stages of the Authority's investigation process the respondents were legally represented, however, during the investigation process the respondents chose to be represented by Mr Naidu and Mrs Chetty. While the respondents' former counsel informally indicated a "strike-out" application would be made by Mrs Chetty

it was agreed at a case management conference on 14 November 2023 this matter be investigated with Mrs Chetty as a respondent.

[7] For the Authority's investigation written witness statements were lodged by Mr Singh, Mr Naidu and Mrs Chetty. Oral evidence with reference to emails was also provided from Verendra Singh, an AA Service Delivery Manager, Kayla Mihaere, a former employee of SKAL, Bhan Mishra, the respondents' accountant and Vashisma Rani, an acquaintance of Mr Naidu and Mrs Chetty. All witnesses answered questions, under oath or affirmation, from me and from the representatives. Verendra Singh, Ms Mihaere and Mr Mishra provided their evidence by AVL.

[8] At the conclusion of the first two days of the investigation meeting I timetabled for documentary evidence discussed during the investigation meeting to be provided and identified a number of points I considered it would be helpful for submissions to address. The representatives were provided an opportunity to indicate if they wished to ask further questions on the evidence which had been timetabled to be provided prior to submissions, which led to the third day of the investigation meeting being scheduled. Following the third day of the investigation meeting the representatives provided written submissions and further information in accordance with timetable directions made at the conclusion of the investigation meeting. A permanent non-publication order was requested in relation to Mr Naidu's name and identifying details.

[9] 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

[10] The issues requiring investigation and determination are:

Claims raised by Mr Singh

- (a) Did SKAL fail to comply with the wages and time record provisions under s 130 of the Act in relation to Mr Singh?
- (b) Did SKAL fail to pay Mr Singh annual holiday pay in accordance with s 27 of the Holidays Act 2003 (HA2003) and fail to provide Mr Singh entitlements to public holidays in accordance with s 46 of the HA2003?

- (c) Did SKAL breach Mr Singh's IEA by failing to pay his contractual payment rate and breach s 6 of the Minimum Wage Act 1983 (MWA) by failing to provide Mr Singh with at least the minimum wage?
- (d) Did SKAL make an unlawful deduction from Mr Singh's wages?
- (e) If any failures or breaches are established in relation to SKAL's or Mr Naidu's actions, what remedies should be awarded, considering:
 - (i) arrears under s 131 of the Act; and
 - (ii) penalties under ss 130(4) and 134 of the Act?
- (f) If any penalties are awarded against SKAL or Mr Naidu, should any part of the penalty be ordered to be paid to Mr Singh?
- (g) Were either or both Mr Naidu or Mrs Chetty a person involved in breaches of employment standards, as defined in s 142W of the Act?
- (h) If so and SKAL are unable to pay arrears or other money due to Mr Singh, should leave be granted under s 142Y of the Act for Mr Singh to recover those arrears or other money from either or both Mr Naidu or Mrs Chetty?

Counterclaims raised by respondents

- (i) Did Mr Singh breach his duty of good faith to SKAL, breach the implied duty of trust and confidence or breach his employment agreement, with regard to the alleged theft as a servant / misappropriation of funds?
- (j) Did Mr Singh breach his employment agreement by failing to return SKAL's property when his employment with SKAL ended?

Non-publication orders

- (k) Should any permanent non-publication orders be made?

Costs

- (l) Should either party contribute to the costs of representation of the other party?

[11] Mr Singh withdrew a claim for a penalty associated with an unlawful deduction from his wages, although the claim for the unlawful deduction itself remains to be determined and is reflected in the total amount Mr Singh claims from the respondents. The respondents' former counsel withdrew counterclaims and claims for penalties against Mr Singh. These claims are not addressed further in this determination.

Approach to conflict of evidence, given nature of claims by Mr Singh and remedies sought

[12] Mr Singh's claims are for breaches by SKAL including of record-keeping obligations, failure to meet minimum employment standards and unlawful deductions, rather than relating to the ending of the employment relationship. There are significant conflicts in evidence between Mr Singh and the respondents' witnesses about how the employment relationship operated, particularly the number of hours Mr Singh worked and how he was paid.

[13] Subsection 132(2) of the Act and ss 83(4) of the HA2003 allow me to accept Mr Singh's claims about wages paid, hours, days and time worked, and holidays actually taken, due to SKAL's failure to produce complete wage and time records as required under s 130 of the Act, and holiday and leave records as required under s 81 of the HA2003.

[14] The nature of conflict in evidence, however, means I decline to exercise my discretion under ss 132(2) of the Act and ss 83(4) of the HA2003 to accept Mr Singh's claims. Instead, I consider I must decide which evidence I prefer based on an assessment of credibility, relying on the guidance provided by Judge Harding in the District Court in *R v Biddle* that was cited with approval on appeal to the High Court¹ and guidance from the Employment Court in *Lawson v New Zealand Transport Agency* and *Cornish Truck & Van Limited v Gildenhuys*.²

[15] The key aspects of this guidance for this case are consistency of the witnesses' evidence, how plausible the evidence of each witness is and whether there are elements of confirmation bias evident.

[16] In this determination I have summarised at some length the evidence I consider relevant in order to then make findings of fact and about credibility of the witnesses, which is necessary in order to reach conclusions on issues necessary to dispose of this matter. I then step through each of the claims and make orders as required.

¹ *R v Biddle* [2015] NZDC 8992; and *Biddle v R* [2015] NZHC 2673 at [21].

² *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165; and *Cornish Truck & Van Limited v Gildenhuys* [2019] NZEmpC 6.

How the employment relationship was claimed to have operated, what payments were made and what payments are due

SKAL operated multiple AA Road Service contracts

[17] At different times during Mr Singh's employment with SKAL it operated either one or two contracts with AA Road Service, which were described as the battery service contract and the road service contract, also described as AA assist. Under the road service contract SKAL was responsible for a rotating roster with another contractor for either 10am to 10.59pm or 7am to 8pm on weekdays, and 7am to 10.59pm on one weekend day, with the day alternating each fortnight. Under the battery service contract hours of work were 7am to 11pm each day, with an AA roster provided in evidence showing there were two other battery service contractors operating the same hours. Total hours to be covered each week amounted to 81 per week for the road service contract and 112 per week for the battery service contract.

[18] The respondents claimed Mr Singh operated a contract with AA Road Service for part of this time through a business which he was a shareholder and director of, although he claimed he did not genuinely operate the contract or receive any benefit from the company which the contract was in the name of. It appeared this contract was more likely than not operated by KS Autos Traders Limited (KSATL) before being taken over by SKAL. Companies Register records show both Mr Singh and Mrs Chetty were initially directors of KSATL, from its incorporation date on 07 May 2019 until 23 September 2019, when Mrs Chetty ceased to be a director. Mrs Chetty then took back over as sole Director from Mr Singh on 11 May 2020. Companies Register records also show Mr Naidu initially being a shareholder of KSATL until 13 May 2019, then Mrs Chetty and Mr Singh both shareholders from then until 23 September 2019, Mr Singh the sole shareholder until 13 May 2020, when Mrs Chetty became the sole shareholder. I return to discussion of this company and Mr Singh's contract with AA Road Service at paragraph [44] below.

Mr Singh's IEA contained minimum hours of work

[19] An IEA between SKAL and Mr Singh, signed by Mr Naidu as Director of SKAL and Mr Singh, dated 06/08/2020, records Mr Singh's position as Customer Service and Administration Manager, with the business' normal hours of operation being Monday to Sunday 6.00am to 11.00pm. Clause 7.2 of the IEA reads as follows:

Your hours and days of work shall be set by the Employer in advance in accordance with a roster. You will be required to work 35 hours per week

within the business' normal hours of operation. The Employer may offer you additional hours of work from time to time.

[20] In addition, cl 8 of the IEA required Mr Singh "complete regular time recordings as directed by management".

Records provided by respondents

[21] Record-keeping by SKAL involved Mrs Chetty recording manually hours worked, which she said was kept in a notebook and then summaries were emailed to Mr Mishra to prepare payslips. A significant number of summary emails were provided which recorded Mr Singh as working 35 hours per week until July 2020, then 40 hours per week until February 2022. In June 2021 Mr Mishra requested the summary emails also record details of how many days were worked for payroll purposes, which Mrs Chetty provided on almost all occasions.

[22] These emails also showed requests that Mr Singh be paid:

- (a) 45 hours of annual holiday pay while working a full week in May 2020;
- (b) for working on a public holiday on Labour Day 2020;
- (c) for not working on Christmas Day 2020;
- (d) for working on public holidays on Monday 28 December 2020 (as an observed public holiday), 1 January 2021, Wellington Anniversary Day 2021 and Waitangi Day 2021;
- (e) for two days sick leave in March 2021;
- (f) for working on public holidays on Good Friday, Easter Monday, Anzac Day, Queens Birthday and Labour Day 2021, 27 and 28 December 2021 (as observed public holidays), 3 and 4 January 2022 (as observed public holidays), Wellington Anniversary Day 2022 and Waitangi Day 2022; and
- (g) a payment was made for attending training for two hours in February 2022.

[23] The emails also showed other workers who generally had variable hours, including Ms Mihaere, Mr Naidu and Mrs Chetty. Weekly hours for the other workers were frequently significant, with Ms Mihaere paid on occasions for a 15-hour day and Mr Naidu and Mrs Chetty's hours sometimes recorded as monthly amounts of up to 240 hours for 24 working days.

[24] The final email provided recorded Mr Singh as having been "suspended for misconduct and dishonesty on 11/02/2022. He is legally entitled to be paid for not working on Friday".

Payslips provided largely matched requested payments

[25] Payslips for Mr Singh were provided by both Mr Singh and the respondents. The payslips say payments were made on the day after the work week ended. These payslips showed payment consistent with Mrs Chetty's instructions, including payment of annual leave in advance in May 2020, for Christmas Day 2020 as a public holiday not worked and for almost all public holidays worked from Labour Day 2020 (although this appears to be recorded in the wrong week) through to Waitangi Day 2022. The exception was the week containing Good Friday and Easter Monday 2021, where it appears only one public holiday was paid at time-and-a-half.

[26] Time-and-a-half payments for work on public holidays only appear to have commenced from Labour Day 2020, which suggests time-and-a-half was not paid prior to this date. Mrs Chetty's email summaries of hours do not record any worker having worked on a public holiday prior to this date. Given records from this date show Mr Singh working on all but two public holidays after this date, I consider he more likely than not worked on almost all public holidays prior to this date as well.

[27] A further public holiday worked was recorded in the payslip for the week of 06/01/2021 to 12/01/2021, which could have been an adjustment to account for the fourth public holiday over the Christmas and New Year period. Payments of time-and-a-half for working on a public holiday for Wellington Anniversary Day, Waitangi Day, Anzac Day, Queens Birthday and Labour Day 2021, 27 and 28 December 2021, 3 and 4 January 2022, and Wellington Anniversary Day and Waitangi Day 2022 appear to have been made one week after they should have been.

[28] The payslips also recorded Mr Singh's annual leave balance, accruing annual leave and alternative holidays, which show increases over time including where public holidays have been worked.

Mr Singh admits to diverting SKAL revenue

[29] In February 2022 the employment relationship between Mr Singh and SKAL unravelled. Mr Singh admits he diverted a substantial amount of revenue which should have been paid into SKAL's bank account, including taking cash payments for his own benefit. At the investigation meeting Mr Singh admitted to having diverted payments totally \$30,700.25 to his bank account, as well as receiving an unspecified amount of additional cash payments. This was markedly higher than he acknowledged in an email

from February 2022 when he said "... amount i have received in my account was 14,410\$ and I don't know what's a cash amount roughly i can say is 1000\$ pr 1200\$" (sic).

[30] Letters provided by the respondents record what happened next. Mr Singh was suspended by Mr Naidu based on an allegation of serious misconduct on 11 February 2022. Mr Singh then provided a letter of resignation and apology on 15 February 2022, which acknowledged his misconduct at work and included comments "It's unfortunate that I didn't inform you before my dishonest act" and "Please accept my apologies and thank you for your resolve to settle this matter peacefully".

[31] On 21 February 2022 Mr Naidu sent Mr Singh a letter accepting his resignation and recording "As discussed, and agreed by you, the Business requires you to repay the outstanding debt from your serious misconduct to the value of \$36,000". This letter went on to say:

In line with clause 21, 23.9 of your employment agreement the Business proposes to withhold your final pay which is valued at \$9876.97. The Business requires you to begin a payment plan to repay the outstanding money by paying \$26123.03 to the Business' bank account [number] by no later than 28th February 2022.

[32] Bank records provided by Mr Singh show on 28 February 2022 he transferred \$22,270.03 to SKAL's bank account, with text messages showing he paid a further \$3,853 in cash.

[33] Following this Mr Singh received a cash payment from the respondents of either \$13,000 (Mr Singh's evidence) or \$13,800 (based on a document provided by the respondents) on 28 April 2022. The document says Mr Singh had "requested full remaining payment to be paid in cash". I return to this payment at paragraphs [39], [48](c), [51](d) and [52] below.

[34] Mr Singh provided emails subsequently obtained in July 2023 from an AA Battery Service General Manager, however, that individual was not called as a witness and their evidence is untested. The email chain, which was not challenged by the respondents, said "I can tell you emphatically, the lost stock did NOT total \$36,000 from the information that has been provided to me to date, from my understanding it was \$4000.00".

Mr Singh's additional evidence about how the employment relationship operated, what payments were made and what payments are due

[35] Mr Singh's evidence about his hours of can be summarised with reference to his final claims for underpayment. Detailed calculations were provided from the start of his employment in May 2019 which asserted he worked 55 hours in the first week of employment and then 81 hours per week for every week which followed until the last week of his employment, where he acknowledged working only 16 hours. He claimed to have been paid either 40 or 25 hours per week every week, acknowledging pay increases which occurred throughout his employment. In total, his claim was he had worked 11,816 hours but paid for only 5,656 hours, leaving a shortfall of 6,160 hours with a value of \$155,595.00.

[36] When questioned at the investigation meeting Mr Singh said his hours of work had never been set by a roster, rather he had been required to work 7am to 11pm when on the battery van and shift-work on the road service van with week-day hours for one week involving 7am to 3pm then being on stand-by until 8pm, and the other week being on call from 10am to 3pm then working from 3pm to 11pm. He also claimed to work 16 hours on alternating Saturdays and Sundays from 7am to 11pm. As there was no provision in his IEA related to whether or not he would be paid when on stand-by or call he claimed he should be paid for all of those hours, and said he had been logged in and doing tasks such as paperwork or stocking-up batteries in time when he wasn't on the road.

[37] Mr Singh disputed claims from SKAL, Mr Naidu, Mrs Chetty and Ms Mihaere that other hours were covered by a combination of Mr Naidu, Ms Mihaere and other workers. For periods he said Mr Naidu was working elsewhere and he claimed Ms Mihaere only worked on the battery van.

[38] Mr Singh claimed the employment agreement reflected a minimum arrangement, and additional hours were agreed to be paid in cash, which occurred for parts of his employment, with records he said were in Mrs Chetty's handwriting supporting this. He also said there was an arrangement where he would be paid \$20 for battery jobs, which he recorded in spreadsheets and sent to Mrs Chetty by WhatsApp messages. Between October 2021 and February 2022, when he recorded these jobs in one set of spreadsheets, he says he did 174 battery jobs and was owed \$3,480.00.

[39] Mr Singh also said at the investigation meeting that the payment he received in cash on 28 April 2022 of approximately \$13,000 (referred to at paragraph [33] above) was for weekend work he had done but had not been paid for, as well as for repayment of a loan to Mr Naidu for the purchase of a motorbike. His witness statement also said arrears had been paid “up to 09 August 2020”, before going on to claim a total amount of 3,197 unpaid hours with a total value of \$79,925.00.

[40] Mr Singh said he resigned and paid the respondents because they asked him to do so, referring to his visa being linked to employment with SKAL. He said he had no other options and there had been issues in relation to his residency visa application, including him needing to obtain a variation to his visa conditions to start work with a new employer.

The respondents' additional evidence about how the employment relationship operated, what payments were made and what payments are due

[41] Mr Naidu and Mrs Chetty claimed they expected Mr Singh to have worked “mainly only 8 hours per day”, with there being some flexibility for the sharing of work across other AA contractors and sharing of the available work between SKAL’s employees including Mr Singh, Mr Naidu and Ms Mihaere. They accepted SKAL did not create rosters, but said this was acceptable so long as there was always a van on the road as required by AA. A number of text messages were provided which showed either Mrs Chetty or Mr Naidu advising Mr Singh when other drivers would be working, which were said to support the sharing of work, as were emails which recorded the hours each driver should be paid.

[42] While Mr Naidu accepted he worked in other jobs at various times, Mr Naidu and Mrs Chetty maintained Mr Singh had only worked initially 40 hours per week, then reduced this to 35 hours per week because they said Mr Singh told them he was only working this much for a period of time. Mr Naidu and Mrs Chetty accepted Mr Singh returned to working 40 hours per week and maintained the pay records they provided showed this accurately.

[43] Mrs Chetty accepted text and WhatsApp messages showed Mr Singh providing her with records of battery jobs he had done, and that there was evidence she had paid him for “anything extra” including in cash although claimed this was “for a short period of time”. Mrs Chetty also accepted there were messages asking Mr Singh if he could

cover for another driver, including Mr Naidu, although downplayed how frequently this happened.

[44] Mr Naidu and Mrs Chetty were adamant Mr Singh had operated his own contract with AA Battery Service, providing a email after the first two days of the investigation meeting from AA which said this was the case from 2019 until 2020 when Mr Singh's visa status changed. They accepted SKAL took responsibility for the contract back from Mr Singh at some point in time around the end of 2019. A letter from AA to Mr Naidu dated 25 June 2020 was also provided saying Mr Singh's status as a driver was being revoked due to customer complaints. Mr Naidu said the respondents agreed to give Mr Singh another chance after he provided a written apology.

[45] Text and WhatsApp messages provided by the respondents were said to support Mr Naidu raising concerns with Mr Singh that he was logged-in to the AA system when he was not working, including messages where Mr Singh was instructed to sign-off the AA system.

[46] Mr Naidu said the payment received from Mr Singh of \$36,000 took into account both the batteries which Mr Singh acknowledged diverting payment for to his own bank account, as well as calculations he had made of lost business for SKAL due to Mr Singh declining jobs he should have accepted or closing jobs where he had diverted the payments. Mr Naidu said this amount was accepted by Mr Singh at the time, and as Mr Singh knew what money he had taken, inferred Mr Singh's acceptance should be taken as an acknowledgment he had caused that level of loss to SKAL.

Findings in relation to nature of employment relationship, how it operated, what payments were made and what payments are due

[47] As indicated at paragraph [15] and [16] above I proceed now to address the consistency of the witnesses' evidence, how plausible the evidence of each witness is and whether there are elements of confirmation bias evident, before moving to make findings of fact and findings about credibility of the witnesses.

[48] Considering firstly the consistency of Mr Singh's evidence:

- (a) He raised claims of underpayment during his employment with SKAL, although the nature of those claims has evolved over time and increased markedly between his witness statement (as discussed in paragraph [39]

above) and his final calculations of arrears he said was due (as discussed in paragraph [35] above).

- (b) He initially acknowledged having diverted approximately \$15,000 from SKAL's customers into his own bank account or as cash taken, which was inconsistent with bank records he later provided which showed over \$30,000 was diverted into his bank account.
- (c) He consistently claimed to have undertaken "battery jobs", with text or WhatsApp messages supporting him having kept a record of these jobs, and text or WhatsApp messages supporting Mrs Chetty acknowledging payments were due for these jobs. He said some cash payments were made earlier in his employment and the payment of approximately \$13,000 meant he had been paid for a portion of weekend work which he was owed money for.
- (d) Mr Singh provided two sets of records he said were extra jobs, with one set of records going back to March 2021, while the other started at October 2021. There were inconsistencies between these records and text messages which showed him first sending the spreadsheet of extra jobs to Mrs Chetty in April 2021 and her saying payment would be made in cash the next day. The longer time-series of records showed variable numbers of days per week and many days had very low numbers of jobs recorded, including frequently zero jobs or one job. This was inconsistent with Mr Singh's claims to have worked long hours on every day of the working week, but more consistent with him having performed a small amount of extra work which he would be paid for separately in cash.
- (e) He consistently claimed others had not worked as much as SKAL claimed and said I should discount Ms Mihaere's evidence, saying they performed different roles, so her hours were irrelevant to whether he worked the hours he claimed. He did not offer a convincing response as to why he would have worked all the available hours when others claimed to work. Neither could he reconcile his claims with text or WhatsApp messages which showed him being asked and agreeing to work extra hours on some occasions³, which I do not consider consistent with his claim to have worked 81 hours per week.

³ For example, a text or WhatsApp message exchange above the date stamp for 14 March 2021 showed Mrs Chetty being asked to work on the battery van from 7am to 3pm, then the road service van from 3pm to 11pm. Mr Singh's response was to ask for his road service van shift to finish at 8pm, which Mrs Chetty

- (f) When questioned by Mr Naidu on hours of work and evidence of being asked to log-off when not working, Mr Singh's answers were to ask why those questions were relevant and he did not provide any convincing responses, which undermined his evidence he was working all the hours he claimed. I have placed no weight on the evidence of Mr Singh that he was always working when logged into the AA system due to this inconsistency.
- (g) Payments to Mr Singh from SKAL throughout the time he was supposed to be a contractor to AA through his own company is consistent with his evidence he was never really the controller of that company, although Companies office records say he was. This is also consistent with text messages from Mr Naidu to Mr Singh in November 2019 which said "AA might call you about your company" and "Please don't make any mistakes. Just say it's your company".
- (h) Mr Singh's repayment to SKAL essentially immediately on being caught provides some support for his claims to have been at the mercy of the respondents due to his visa being linked to his employment. I do not consider, however, Mr Singh's claim to have been underpaid when he was on an open-work visa and not reliant on SKAL to sponsor him, was consistent with his claimed vulnerability throughout his employment.

[49] Considering secondly the consistency of Mr Naidu and Mrs Chetty's evidence, and the respondents' other witnesses:

- (a) The respondents' witnesses consistently claimed Mr Singh was paid for his regular hours and that other drivers, including Mr Naidu and Ms Mihaere were working some of the hours Mr Singh claimed to have worked.
- (b) Mr Naidu and Mrs Chetty's evidence changed about the reason for why paper-based records were destroyed initially saying this due to high rainfall weather events, before saying it was due to a pipe leak, with paperwork from an insurance claim provided related to the leak. Mrs Chetty also claimed workers refused to provide timesheets even though she said she had provided them.
- (c) Mrs Chetty did not provide a clear or consistent answer to why text or WhatsApp messages between her and Mr Singh referred to extra jobs and

said she would discuss with Mr Naidu. The next day Mrs Chetty asked Mr Singh at 8pm to come to her house to discuss hours of work with her and Mr Naidu, which suggests he would have finished work at that time.

why she indicated in those messages that extra payments would be made for the battery jobs referred to. She also did not provide a convincing answer to what payments may have been outstanding, which was inconsistent with messages from her in August 2021 acknowledging not all payments had been made and saying “Will slowly start paying from next week”. Neither were there any extra payments shown in weeks where Mr Naidu appeared to be asked to cover extra shifts.⁴

[50] Assessing the consistency of all the evidence I conclude that neither Mr Singh nor Mr Naidu and Mrs Chetty’s version of events are fully credible. On balance I consider Mr Singh’s evidence he worked some additional hours is more credible than Mr Naidu and Mrs Chetty’s evidence he did not, but I do not consider Mr Singh’s evidence he worked all the hours he claimed is credible. In relation to the claims Mr Singh was operating his own contract with AA for part of the time he was employed by SKAL, I prefer Mr Singh’s evidence he was never really the controller of the claimed company, which is consistent with evidence of payments to him from SKAL at that time.

[51] Dealing next with the plausibility of the evidence:

- (a) Mr Singh’s claim to have discovered the extent of underpayments later in employment, leading to his diversion of payments from SKAL’s customers, is not plausible. I consider it more plausible that Mr Singh’s frustration grew over promises he would be paid for the extra work he had done particularly for battery jobs where there were clear promises from Mrs Chetty in text or WhatsApp messages to make payments.⁵ While I consider Mr Singh’s frustration led to him choosing to divert payments from SKAL’s customers, this does not support the full extent of his claims about underpayment.
- (b) Mr Singh’s claim that other drivers did not work significant hours is not plausible considering time and wage records he signed as part of his immigration application including for other drivers, including for Ms Mihaere. Mr Singh claimed part of his role was administration but said he effectively only ever signed paperwork when directed by either Mr Naidu

⁴ For example payslips for the week associated with the text or WhatsApp message exchange referred to at n 3 above do not show Mr Singh being paid for any extra hours worked.

⁵ One exchange of messages between Mr Singh and Mrs Chetty on 5 August 2021 shows Mrs Chetty sending an excel spreadsheet to Mr Singh saying “Hi Jess I have not paid you from here”. When Mr Singh replies later in the messages “Yes that’s right” Mrs Chetty then replies “Will slowly start paying from next week”.

or Mrs Chetty. I consider it more plausible he was working some extra hours and the records of other workers which he signed were genuine given Ms Mihaere's records were consistent with how she described her work and was paid.

- (c) I consider it more likely than not Mr Singh paid \$36,000 to SKAL as he was aware there were records which showed he had diverted a substantial amount of money from SKAL's customers. It was plausible he received cash payments from SKAL's customers on top of the money received directly into his bank accounts, given he earlier acknowledged receiving more than \$1,000 in cash.
- (d) Mr Naidu and Mrs Chetty's claim that payment of \$13,800 to Mr Singh after his employment had ended included an amount for goodwill for helping with paperwork is not plausible taking into account the ending of his employment due to misappropriating SKAL's funds by diverting customer payments. I consider it more plausible that Mr Naidu and Mrs Chetty, having recovered money which had been diverted away from SKAL, were attempting to strike a balance in providing Mr Singh with some compensation for hours he had not been paid for or payments for battery jobs, where there was uncertainty over how much Mr Singh was owed due to poor record-keeping.

[52] My overall impression is that it is more likely than not Mr Singh worked some extra hours for cash payments, particularly doing jobs on the battery van, but he did not work all of the hours he claimed. The lack of clear evidence means I am unable to reach a conclusion on whether cash payments or the payment of approximately \$13,000 to Mr Singh after his employment ended was sufficient to compensate him for all of the extra work he performed.

[53] In terms of confirmation bias:

- (a) Mr Singh discovered from AA Battery Services the value of batteries where he had diverted payments from SKAL's customers to his own bank account was a fraction of the amount he had repaid. I consider it likely this raised his concerns over having been exploited, in circumstances where he was already frustrated by SKAL's refusal to provide him information supporting its claimed losses. I consider he likely then conflated his grievance about these aspects of what occurred with his dissatisfaction about arrears which he was

due for extra work he had performed for SKAL, which led him to reinforce his view he had worked the hours he claimed, even when confronted with evidence to the contrary. While he accepted his fault for diverting funds, I consider his claims about the extent of underpayments were deliberately false but they were affected by confirmation bias to support his view that SKAL had underpaid him. The manner and extent of confirmation bias operated to inflate Mr Singh's claims beyond what the evidence supports.

- (b) Mr Naidu and Mrs Chetty conflated Mr Singh's acknowledgement of having diverted payments from SKAL's customers with their belief any claims he had for extra work being another attempt to obtain money from them and SKAL. I consider this likely led Mr Naidu and Mrs Chetty to disregard evidence, including text or WhatsApp messages, which showed Mr Singh had performed additional work, even where this was the most clear and likely meaning of their own messages.
- (c) I also consider Mr Naidu and Mrs Chetty's belief that because Mr Singh had not provided timesheets or challenged payments as they were made over the period of his employment meant Mr Singh had not worked extra hours. This also likely led Mr Naidu and Mrs Chetty to disregard evidence, including their own text or WhatsApp messages, which supported Mr Singh's claim he had performed additional work.

Conclusions based on credibility of witnesses

[54] Based on my assessment of consistency, plausibility and probable confirmation bias in terms of both the oral and documentary evidence including the various text or WhatsApp message exchanges this is what I conclude is more likely than not in relation to working arrangements for Mr Singh:

- (a) Mr Singh performed some additional work for SKAL particularly battery jobs for which he was paid, at least initially, on a cash basis;
- (b) Mrs Chetty acknowledged Mr Singh was owed money, at a minimum for the battery sales. While payment in part has been made for this it was unclear what cash payments made to Mr Singh on 28 April 2022 were for and whether this fully reflected additional work Mr Singh had done; and
- (c) The extent of additional work has not been established to the extent Mr Singh claimed.

[55] I turn now to consider Mr Singh's specific claims and the respondents' counterclaims in light of these findings on credibility.

Did SKAL fail to comply with the wages and time record provisions under s 130 of the Act in relation to Mr Singh?

[56] Section 130(1) of the Act prescribes a range of record keeping requirements for an employer, most pertinently for the purposes of this matter including a record of:

- (i) the number of hours worked each day in a pay period and the pay for those hours:
- (j) the wages paid to the employee each pay period and the method of calculation: ...

[57] Three sets of documents were provided in relation to Mr Singh's employment by SKAL which are relevant to the question of whether it kept the records required as outlined in paragraph [21], being:

- (a) Mrs Chetty's manual records of hours worked, which she said was kept in a notebook. The notebook was destroyed in disputed circumstances but a small number of pages where photos had been taken were provided;
- (b) Emails which showed Mrs Chetty advising Mr Mishra hours worked per week for payroll purposes, which included days worked from June 2021; and
- (c) Pay slips which showed pay rates and hours worked each week.

[58] None of these records show clear evidence of the number of hours worked by Mr Singh on each day, despite the respondents claiming this was recorded in the destroyed notebook. While timesheets were provided for some employees of SKAL as part of Mr Singh's immigration application, those were for other drivers. Mr Singh also says the payslips did not show the method of calculation for wages for weeks including public holidays, including whether Mr Singh did or did not work on the public holidays.

[59] I also consider SKAL's records were deficient in relation to specifically recording how pay was calculated for days when Mr Singh worked on a public holiday, although it appeared from those records the time-and-a-half payments required under s 50 of the HA2003 were met from Labour Day 2020. The records simply stated a daily rate without expressly stating it included time-and-a-half payments.

SKAL has not complied with its record-keeping obligations

[60] I find SKAL's record-keeping was insufficient to comply with the wages and time record requirements under s 130 of the Act. I return to the issue of penalties in relation to this at paragraphs [79] to [88] below.

Did SKAL fail to pay Mr Singh annual holiday pay in accordance with s 27 of the HA2003 and fail to provide Mr Singh entitlements to public holidays in accordance with s 46 of the HA2003?

Did SKAL make an unlawful deduction from Mr Singh's wages?

[61] I approach these two issues together for reasons which will become apparent.

[62] Mr Singh claimed based on his allegations about underpayment he had not received his annual holiday pay entitlements in accordance with s 27 of the HA2003 and or his public holidays entitlements in accordance with s 46 of the HA2003. Initially this claim was presented in relation to SKAL retaining Mr Singh's holiday pay entitlements of \$9,876.97 when his employment ended as part of the repayment he made to SKAL of \$36,000, discussed at paragraph [31] above. Mr Singh revised the calculations of his claims for unpaid holidays entitlements based on his claimed hours of work with the unpaid annual leave claim being \$22,115.55 and public holidays claims being \$9,107.00.

[63] Mr Singh also said the deduction was unlawful as SKAL had not complied with the requirements of ss 5 and 5A of the WPA, particularly the prohibitions under:

- (a) subsection 5(1A) of the WPA on an employer making a specific deduction in accordance with a general deductions clause in a worker's employment agreement without first consulting the worker; and
- (b) section 5A of the WPA on an employer making a deduction under section 5 from wages payable to a worker if the deduction is unreasonable.

[64] Mr Singh referred me to the Court's judgment in *A Labour Inspector of the Ministry of Business, Innovation and Employment v Prisha's Hospitality (2017) Ltd (t/as Royal Cambridge Indian Restaurant)*⁶ as an analogous situation, claiming as SKAL had not demonstrated its losses, the deductions were unlawful.

⁶ *A Labour Inspector of the Ministry of Business, Innovation and Employment v Prisha's Hospitality (2017) Ltd (t/as Royal Cambridge Indian Restaurant)* [2023] NZEmpC 89 at [121].

[65] The respondents focussed on Mr Singh's original claims for unpaid holidays entitlements and said Mr Singh was consulted about the holiday pay deduction and agreed to it, referring to cl 21 of Mr Singh's IEA as providing authority for such deductions. The respondents also claimed Mr Singh had not mentioned any claims for outstanding wages or holiday pay, implying he had consented to the deduction.

SKAL has not paid Mr Singh his holiday entitlements and retention of those amounts was an unlawful deduction

[66] SKAL acknowledged there was no actual payment of the \$9,876.97 net amount for holiday entitlements which it said Mr Singh was due on his resignation, but claims it was entitled to deduct this amount. I therefore need to consider whether this amount was unlawfully deducted from his wages.

[67] I find it was applying the Court's approach in *Prisha's Hospitality*. I am not convinced Mr Singh was genuinely consulted over or expressly agreed to this deduction. He may have impliedly agreed to the deduction through his payment of other amounts at the same time to SKAL, but I consider SKAL's failure to provide proof of actual losses, when Mr Singh requested that proof on multiple occasions, means it has not established the deductions were reasonable and as a consequence the deductions are unlawful.

[68] The Court clearly stated in *Prisha's Hospitality*:⁷

If a general deductions clause in an employment agreement allows an employer to make deductions without proof of loss when an employee fails to work out their notice, then that clause will essentially function as a penalty provision. A deduction from an employee's minimum entitlements which functions as a penalty is unreasonable under s 5A and unlawful for the purposes of s 5(1) of the Wages Protection Act, which states that deductions must be made for a lawful purpose.

[69] SKAL may consider this unfair in circumstances where Mr Singh had admitted to diverting funds, and the actual amount of funds diverted appears similar to the amount Mr Singh repaid, however, this does not displace SKAL's obligations to demonstrate its losses.

[70] I return to the issue of penalties in relation to SKAL's non-payment of Mr Singh's holiday entitlements and SKAL's unlawful deduction at paragraphs [79] to [88] below.

⁷ Ibid.

[71] In terms of the quantum of Mr Singh's unpaid annual holidays entitlements I consider it appropriate to award the gross amount associated with the deduction being \$15,054.06. Mr Singh said SKAL had not paid the tax on this amount, which means I do not consider it should be deducted from the amount due.

[72] This amount includes annual holiday pay based on SKAL's records of the amount due and accruing, and payment for 16 alternative holidays. I consider this is an appropriate amount to order be paid by SKAL due to my finding at paragraph [54](c) above that the extent of additional work has not been established to the extent Mr Singh claimed.

[73] I also consider it appropriate to order additional payments associated with short-paid public holiday pay as Mr Singh's payslips show he received his ordinary pay when I consider he more likely than not worked on public holidays up until Labour Day 2020. Time-and-a-half payments required under s 50 of the HA2003 did not appear to have been paid prior to this date, as discussed at paragraph [25] above, although public holidays were separately recorded after this date. I calculate the amount due as \$875 based on extra-half time for ten public holidays⁸ at seven hours per day, with an additional ten alternative holidays due on the ending of Mr Singh's employment at a value of \$2,160.⁹

[74] Combined, SKAL are ordered to pay Mr Singh \$18,089.06 gross.

Did SKAL breach Mr Singh's employment agreement by failing to pay his contractual payment rate and breach s 6 of the MWA by failing to provide Mr Singh with at least the minimum wage?

[75] Mr Singh said I should, in light of the respondents' failure to provide wage and time records, and what he said was a failure by the respondents to prove his claims about hours worked to be untrue, apply s 132 of the Act to accept his claims as proved.

[76] The respondents said Mr Singh had been paid in accordance with his employment agreement and they had not breached the MWA.

[77] I have summarised at some length at paragraphs [17] to [53] above the evidence presented about how the employment relationship was claimed to have operated, what

⁸ While there were twelve public holidays in time period, I consider more likely than not Mr Singh would have worked ten of those public holidays based on the number and pattern of public holidays he worked after this.

⁹ Calculated at \$216 per alternative holiday, being 8 hours at \$27 per hour.

payments were made and what payments are due, as well as making assessments of credibility about the evidence of Mr Singh, Mr Naidu and Mrs Chetty. My overall conclusion at paragraph [54](a) to (c) was that Mr Singh had performed some additional work, he had received some additional payments although it was unclear if those payments were sufficient, but the extent of additional work has not been established to the extent Mr Singh claimed.

[78] In light of those findings and the Authority's role under s 157(3) of the Act to "act as it thinks fit in equity and good conscience", I decline to make any findings or orders in relation to Mr Singh's claims to have not been paid his contractual payment rate for all the hours he claimed to have worked, or for alleged breaches of s 6 of the MWA.

Penalties

[79] Mr Singh sought arrears under s 131 of the Act, and penalties under ss 130(4) and 134 of the Act for any failures or breaches established in relation to SKAL's or Mr Naidu's actions, and considering of whether any part of the penalty be ordered to be paid to Mr Singh. Given my findings above, I need to consider only penalties in relation to SKAL's record-keeping deficiencies in complying with the wages and time record requirements under s 130 of the Act, SKAL's non-payment of Mr Singh's holiday entitlements and SKAL's unlawful deduction, as well as whether any part of the penalty be ordered to be paid to Mr Singh.

[80] In deciding whether to impose a penalty, and if I decide to how much that penalty should be, I need to consider the factors in s 133A of the ERA and the approach as set out by the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*¹⁰, *Labour Inspector v Daleson Investment Ltd*¹¹ and *Nicholson v Ford*.¹²

[81] Mr Singh said, in relation to the matters where I found penalties need to be considered, he was due a significant amount of holiday pay and while he accepted his employment "probably had to" end without notice, this left him "in the unenviable position of having no income".

¹⁰ *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143 at [137] to [151].

¹¹ *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12 at [19].

¹² *Nicholson v Ford* [2018] NZEMPC 132 at [19].

[82] The respondents said no penalties were appropriate as they did not commit any breaches and, if I found there was, they said they had defences under ss 142ZC and 142ZD as they relied on information from their accountant and HR/ER adviser, and took reasonable precautions and exercised due diligence, and took all reasonable and proper steps.

SKAL is liable for penalties

[83] I have found at paragraphs [60] and [67] above SKAL failed to keep records which complied with the wages and time record requirements under s 130 of the Act and that SKAL's actions in not paying Mr Singh's holiday entitlements by retaining those amounts was an unlawful deduction. I consider the record-keeping breaches, although they persisted throughout Mr Singh's employment can be globalised into one breach consistent with the Court's approach in *A Labour Inspector v Matangi Berry Farm Limited*.¹³ I also consider it appropriate to globalise the breaches in relation to non-payment of holiday entitlements and unlawful deductions into one breach. The maximum penalty against a company for each breach is \$20,000.¹⁴

[84] I do not consider the record-keeping breaches had significant impacts on Mr Singh, given my finding he has not established that he performed additional work to the extent he claimed. He did however appear to have not received full entitlements to time-and-a-half payments for work on public holidays, which compliant records would have identified.¹⁵ The Court has emphasised "longstanding and clear obligation on employers to maintain compliant time and wage records and employment agreement documentation for relevant employees" with a starting point for penalties of 50 per cent of the maximum for breaches of record-keeping obligations.¹⁶

[85] I consider the breaches in relation to non-payment of holiday entitlements and unlawful deductions had a more significant impact on Mr Singh, although this needs to be assessed in light of his acknowledged diverting of SKAL's funds to himself. SKAL considered it was entitled to recover this money and had taken advice which supported this position. While I do not accept SKAL's position was correct, I accept they relied on professional advice in withholding these payments. While I would also have applied a starting point of 50 per cent to this penalty, in the circumstances and considering the

¹³ *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43.

¹⁴ Section 135(2)(b) of the Act.

¹⁵ Under s 81 of the HA2003.

¹⁶ *Borsboom (Labour Inspector) v Preet PVT Ltd* above n 10 at [172] and [173].

Authority's equity and good conscience jurisdiction, I decline to impose a penalty in relation to these breaches.

[86] This leads to a provisional penalty of \$10,000 for SKAL.

[87] The respondents' asserted SKAL is in financial difficulties and provided some evidence supporting those claims, although it remains on the Companies Register. I do not consider there is sufficient evidence to make a reduction on ability to pay grounds. There was no information SKAL has previously been penalised for breaches of employment standards, which is a factor weighing in favour of a reduction.

[88] Standing back and including comparison to other cases and the relevant matters listed in s 133A of the Act, a fair penalty is \$4,000.

[89] Mr Singh in seeking an award of penalties, seeks all or a portion of any penalty be paid to him. Given Mr Singh's acknowledged diversion of SKAL's funds, and considering the Authority's equity and good conscience jurisdiction, I decline to order any part of the penalty be paid to Mr Singh.

[90] SKAL is to pay a penalty of \$4,000 to the Crown within 28 days of the date of this determination.

Were either or both Mr Naidu or Mrs Chetty a person involved in breaches of employment standards, as defined in s 142W of the Act?

[91] This claim applies in relation to the order that SKAL pay Mr Singh \$9,876.97 in relation to holidays entitlements¹⁷, which I have found at paragraph [67] SKAL unlawfully retained or deducted.

[92] Mr Singh claims Mr Naidu and Mrs Chetty were persons involved in breaches of employment standards as defined by s 142W of the Act and should be held liable under s 142Y of the Act to pay arrears should SKAL be unable to pay them.

[93] Sections 142W and 142Y of the Act provide for when a person involved in a breach of employment standards can be liable for such a breach. This includes specifying what actions the person must have taken, which types of person can be liable including reference to a person who "is in a position to exercise significant influence

¹⁷ This claim related to the net amount withheld, rather than the gross amount I have found Mr Singh to be entitled to be paid.

over the management or administration of the entity”. Recovery is only possible from a person involved in a breach where there has been a qualifying default and prior leave has been granted by the Authority or Court.

[94] Mr Singh said Mr Naidu was a person involved as he decided to make the deduction from his wages. Mrs Chetty was said to be a person involved due to her role in relation to wage payment arrangements and the recording of hours of work, which she passed on to Mr Mishra for payroll purposes.

[95] Mr Singh says the threshold for an order under s 142Y of the Act is met due to statements of financial difficulty from Mr Naidu and Mrs Chetty, and indications SKAL may not be able to make payments.

[96] The respondents did not address this issue in their submissions.

Finding

[97] I find Mr Naidu is a person involved in breaches of employment standards due to his role as the sole director of SKAL and as the person who was directly involved in the retention of Mr Singh’s holidays entitlements. Mr Naidu was the signatory to the letter advising Mr Singh these amounts would be retained and was directly involved in the decision to retain those amounts, which meets the requirements of “directly or indirectly, knowingly concerned in, or party to, the breach” in terms of s 142W(1)(c) of the Act.

[98] I consider the situation in relation to Mrs Chetty is less clear. While it is arguable she could be treated as an officer of SKAL due to her role in its administration, particularly in relation to recording hours of work and arranging payroll, it is not clear her role involved significant influence over SKAL. Neither is it clear Mrs Chetty’s actions meet the requirements of any of the limbs of ss 142W(1) of the Act. On balance, I am not convinced Mrs Chetty should be found to be a person involved in breaches of employment standards.

[99] Mr Singh sought an order under s 142Y of the Act that Mr Naidu and Mrs Chetty be held liable for the arrears claimed should SKAL unable to pay amounts ordered. To the extent SKAL is unable to pay the amounts ordered to be paid under paragraph [74] then Mr Singh has prior leave of the Authority under s 142Y(2) of the Act to recover

those amounts from Mr Naidu. Leave is not granted in relation to Mrs Chetty due to my not being satisfied she was a person involved in breaches of employment standards.

Counterclaims raised by respondents

[100] SKAL raised and proceeded with two counterclaims against Mr Singh, although as noted at paragraph [11] withdrew further counterclaims and claims for penalties. The following two counterclaims remain to be determined:

- (a) Did Mr Singh breach his duty of good faith to SKAL, breach the implied duty of trust and confidence or breach his employment agreement, with regard to the alleged theft as a servant / misappropriation of funds?
- (b) Did Mr Singh breach his employment agreement by failing to return SKAL's property when his employment with SKAL ended?

[101] These claims can be disposed of briefly. Mr Singh accepts he should not have collected money from the sales of batteries into his own bank account. This was the core fact which the respondents asserted also amounted to breaches of Mr Singh's IEA.

[102] I find Mr Singh breached his duty of good faith under s 4 of the Act to SKAL and breached obligations in his IEA to "act faithfully, honestly and diligently" (cl 4.2(b)), to deal with SKAL in good faith (cl 4.2(c)), to act in SKAL's best interests (cl 4.2(f)). I am not satisfied there is sufficient evidence that Mr Singh breached obligations under SKAL's employee handbook, as the clauses referred to in this claim appear to relate to matters other than the diversion of funds which Mr Singh admitted to.

[103] I am also not satisfied Mr Singh failed to return SKAL's property when his employment ended. He said he had returned all property and evidence about what property had been retained was inconclusive. The respondents did not present specific, clear evidence as to what property had been retained. I decline to make a finding on this counterclaim as I am not convinced on the balance of probabilities that Mr Singh had retained SKAL's property.

Non-publication orders

[104] I granted interim non-publication orders on 22 November 2023 on the following basis:

An interim non-publication order is granted in relation to the names and identifying details of all parties under cl 10 of sch 2 of the Employment

Relations Act 2000. Submissions are expected on whether permanent non-publication orders should be made as part of the investigation meeting. The parties should, however, have no expectation that such orders will be granted.

[105] The interim non-publication orders were sought by the former counsel for the respondents, with Mr Singh agreeing on the basis reciprocal orders be granted over his name and identifying details. I was satisfied interim orders were appropriate given the un-tested nature of the allegations about Mr Singh and the respondents' actions. The issue to be determined now is whether any permanent non-publication orders should be made.

[106] Mr Singh now objects to the respondents' names and identifying details being subject to non-publication, saying this would be inconsistent with the Court's approach in *MW v Spiga Ltd*¹⁸ and this is overwhelmingly a case where open justice should occur, given the allegations of failures to meet employment standards. In addition, Mr Naidu was said not to have identified any particular reason why his future job prospects might be limited.

[107] The respondents sought non-publication of Mr Naidu's name and identifying details, saying he was concerned about the potential impacts on his ability to apply for future employment opportunities. The respondents provided supporting letters from a financial adviser and medical practitioner which included references to financial pressures and the stress this matter was causing Mr Naidu and Mrs Chetty.

[108] I do not consider the respondents have established "specific adverse consequences could reasonably be expected to occur"¹⁹ if the names and identifying details for the parties are published. In terms of the other factors which the Court has said are relevant²⁰, Mr Singh did not seek permanent non-publication of his details, which would have raised issues of equity and good conscience given the actions which he admitted to.

[109] I therefore decline to make the permanent non-publication orders requested on behalf of Mr Naidu. I do, however, make an interim order prohibiting the publication

¹⁸ *MW v Spiga Ltd* [2024] NZEmpC 147.

¹⁹ *Ibid* at [88].

²⁰ *Ibid* at [94].

of the names of the parties and witnesses for a period of 28 days from the date of this determination at paragraph [111] below.

Orders

[110] For the above reasons I order SK Autos Limited to pay within 28 days of the date of this determination:

- a. Jaswinder Singh \$18,089.06 gross for unpaid holidays entitlements; and
- b. The Crown a penalty of \$4,000.

[111] Under clause 10 of Schedule 2 of the Act I make an interim non-publication order over the names of the parties and witnesses for a period of 28 days from the date of this determination. At the end of the 28 days, unless there is a further order of the Authority or Court, this interim order will lapse and there will be no restriction on publication. This determination will not be published until the end of the 28-day period or further order of the Authority or Court.

Costs

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

[113] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Singh 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.

[114] 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.²¹

[115] As the investigation meeting for this matter occurred over three days, however, the first day commenced late and the third day finished at approximately 12.45pm. My

²¹ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

preliminary view is the notional daily rate for two days is the appropriate starting point for a determination of costs.

Shane Kinley
Member of the Employment Relations Authority