

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2026] NZERA 107
3301300

BETWEEN AVINASH KUMAR GUPTA
Applicant

AND PANCHMUKHI CHEFS
LIMITED
Respondent

Member of Authority: Helen van Druten

Representatives: Avinash Kumar Gupta as the Applicant
Mamta Dave, advocate for the Respondent

Investigation Meeting: On the papers

Submissions received: Up to 9 July 2025 from the Applicant
Up to 8 December 2025 from the Respondent

Determination: 26 February 2026

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Avinash Kumar Gupta claims that between 5 March 2021 and 24 December 2023 he worked at a restaurant owned by Panchmukhi Chefs Limited as an employee and is therefore owed wages, public holiday pay and leave entitlements for that period. He also claims that he was unjustifiably dismissed on 24 December 2023.

[2] Panchmukhi Chefs Limited (PCL) claim that Mr Gupta worked intermittently in the restaurant in his capacity as a director, not as an employee. They further claim that this employment relationship problem is lodged by Mr Gupta in retaliation for the decision to remove his wife as a director on 24 December 2023 and have lodged a counterclaim for costs and damages and to dismiss the application.

[3] The preliminary matter for investigation is a jurisdictional issue. The Authority only has jurisdiction over Mr Gupta's claims under s 103(1)(a) of the Employment Relations Act 2000 (the Act) where he was an employee and therefore entitled to the rights and obligations of employees under the Act.

[4] If Mr Gupta was working in the restaurant as an employee as he has claimed, then his grievance and claims regarding wages and other entitlements can be investigated and determined. If not, then those matters are outside the scope of the Authority and will be declined.

The Authority's investigation

[5] As discussed with the parties, the Authority's investigation is limited to employment related matters. Several other concerns regarding Mr Gupta's conduct were raised by PCL, and, in turn raised by Mr Gupta about the directors. These concerns need to be raised and addressed with the appropriate entities and are not within the scope of the Authority's jurisdiction. They were only investigated and considered to the extent necessary to determine Mr Gupta's employment status and the counterclaim.

[6] PCL lodged a counterclaim for dismissal of these proceedings, all expenses incurred in defending this claim and additional damages for wasted time and mental harassment on the basis that this was a vexatious claim.¹ PCL says that Mr Gupta failed to provide any supporting evidence for his claims and intended only to mislead the Authority, create a financial burden for PCL and cause mental distress to PCL directors. As this counterclaim was lodged soon after the statement in reply, I accepted this without the requirement for a separate application and filing fee. This counterclaim is considered within this determination.

[7] For the Authority's investigation written witness statements were lodged from Mr Gupta and Mr Rajendra Singh. Mr Gupta also provided statements from two ex-employees of the restaurant. Three customers also provided statements supporting Mr Gupta's work at the restaurant. These statements were later withdrawn by all three customers (by statutory declaration), stating the letters were not written for the purposes of these proceedings and were requested from Mr Gupta for another purpose.

¹ Employment Relations Act 2000, Schedule 2, cl. 12A.

[8] The parties agreed that the preliminary determination of Mr Gupta's employment status could be determined on the papers.

[9] I also investigated the application to dismiss the employment relationship problem on the papers, that is I received written submissions and considered these.

[10] Following a case management call on 18 March 2025, the parties were directed to provide specific information to the Authority. This material was either not received, was not relevant to the issues or was incomplete. By further direction of the Authority on 18 June 2025, the parties were advised that there was not sufficient information to determine the preliminary jurisdictional issue so the direction was resent to the parties and the date for submission extended to 30 June 2025.

[11] The investigation of this matter had further substantial and repeated delays with the directors and Mr Gupta working through a number of other issues alongside this employment relationship problem. Additionally, the Authority received substantial unnumbered documents in multiple emails which created further delays. After several extensions and resubmissions of material, the Authority set down an investigation meeting by audio-visual link with the parties on 3 November 2025 to ask specific questions of both parties. The parties were also given an opportunity to ask questions of the witnesses.

[12] Both parties were advised of the potential liability for costs during the case management call, in writing on 18 March 2025 and in the investigation meeting.

[13] As permitted by s 174E of 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

[14] The preliminary issues requiring investigation and determination were:

- (a) Whether Mr Gupta was an employee (or not) between 5 March 2021 and 24 December 2023.
- (b) Should this matter be dismissed as vexatious pursuant to Schedule 2, cl 12 of the Act? If so, should the Authority order payment of costs and expenses against Mr Gupta?

[15] If the Authority determines that Mr Gupta was an employee during that period, then the issues remaining for investigation and determination would be:

- (a) is he entitled to unpaid wages and statutory leave entitlements for that period?
- (b) was he unjustifiably dismissed from his employment on 24 December 2023?
- (c) If Panchmukhi Chefs Ltd's actions were not justified (by dismissing Mr Gupta), what remedies should be awarded and should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Gupta that contributed to the situation giving rise to his grievance?

Costs

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

[16] Based on the current information before the Authority, Mr Gupta raised his grievance claim on 9 May 2024, outside the required 90-day notification period in the Act. That claim cannot succeed unless Mr Gupta is found to be an employee and compliance with s 114 of the Act is first established.

Background information

[17] Panchmukhi Chefs Ltd was formed in 2013 by three partners with a loan from a third-party investor to start a restaurant. At that time Mr Gupta was the sole director.

[18] In 2020, the other two business partners raised concerns regarding Mr Gupta's business practices. They joined as directors and formally raised their concerns with Mr Gupta. On 5 March 2021, Mr Gupta ceased as director and transferred his shares to his wife, Manisha Shah, who was then director in his place.

[19] PCL says that Ms Shah was a director in name only, with Mr Gupta continuing to have a controlling interest in the business through his wife. Specifically, PCL claim that they had no real contact with Ms Shah, Mr Gupta would come into the business as he wished, received all business emails for Ms Shah as director, retained access to accounts and managed financial matters in the restaurant as if he was a director and as he had done previously. Though Mr Gupta denied this, I was persuaded on the limited evidence available, that this was most likely the case.

[20] When the third-party investor sought repayment of his loan in October 2023 and Mr Gupta did not repay his portion of the loan amount, the two directors removed Ms Shah as director on 22 December 2023 and looked to recover the outstanding loan portion from her. The relationship between Mr Gupta and the other directors continued to deteriorate.

[21] A special meeting of the shareholders on 22 December 2023 recorded that if Mr Gupta attempts to enter the premises the on-duty manager would call the police and a trespass notice would be issued.

[22] Mr Gupta claims that he was dismissed as an employee on 24 December 2023.

[23] On 9 May 2024, Mr Gupta sent a “letter of demand” to PCL claiming \$87,600.40 (being \$20,000 for hurt, humiliation and emotional stress, \$34,013 as wage arrears, \$11,025 as statutory days unpaid, \$16,682.40 as unpaid holiday pay and \$5,880 as four weeks’ notice). This letter of demand was modified to \$78,188 by email to the Authority on 12 November 2025 following a query during the investigation.

Relevant law

[24] Section 6 of the Act defines an employee and is relevantly set out as follows:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, *employee*—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority—

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

...

[25] The application of s 6 of the Act is set out in *Bryson v Three Foot Six Ltd*² and the decision of the Court of Appeal in *Rasier Operations BV v E Tu Incorporated*.³ Those tests are well known:

- (a) Firstly, I must look at the written and oral terms of employment which may indicate the nature of the relationship.
- (b) Second, I must consider how the work was carried out in practice, looking at the real nature of the relationship.
- (c) Third, based on how the work was carried out in practice, I must apply three relevant common law tests:
 - i. Control, being an analysis of who decides what work is done and how it is done;
 - ii. Integration, being an analysis of how integrated the individual is into the business of the alleged employer; and
 - iii. The fundamental test, being an analysis of whether the individual is in business on their own account.

[26] The statements by the parties are relevant but not determinative.⁴

[27] Section 6 does not require anything in writing before a person may be regarded as an employee or require agreement in advance. As in *Arachchige v Rasier New Zealand Ltd & Ors*,⁵ it was only when the employment was terminated that the employee sought to define the nature of that employment. I apply the same approach here, where Mr Gupta sought wage arrears as an employee for the period of his wife's directorship.

Application to dismiss

[28] PCL applied to have Mr Gupta's claim dismissed pursuant to clause 12A of Schedule 2 of the Act. This clause provides:

12A Power to dismiss frivolous or vexatious proceedings

- (1) The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.

² *Bryson v Three Foot Six Ltd* [2003] ERNZ 581 (EmpC); and *Bryson v Three Foot Six Ltd (No 2)* [2005] NZSC 34.

³ *Rasier Operations BV v E Tu Incorporated* [2024] NZSC 177.

⁴ Employment Relations Act 2000, ss 6(2) and (3).

⁵ *Arachchige v Rasier New Zealand Limited & Ors* [2020] NZEmpC 230 at [46].

- (2) In any such case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.

[26] The power to dismiss a matter pursuant to clause 12A of Schedule 2 of the Act has been considered by the Employment Court in *Lumsden v Sky City Management Ltd and Gapuzan v Pratt & Whitney Air New Zealand Services*.⁶ This case law indicates that when considering an application to dismiss a matter the following is relevant:

- a. All parts of the matter, that is all the component parts of the employment relationship problem, must be either frivolous or vexatious to dismiss a matter.
- b. For the claims to be frivolous they must trifle with the Authority's processes - as an example a matter may be said to trifle with the Authority's processes if it is impossible to take seriously.
- c. For the claims to be vexatious they must be extreme claims made without reasonable or probable cause or excuse, they are harassing or annoying, vexing a respondent beyond what is normal in a claim, or they might contain scandalous or unjustified allegations, and they have an improper purpose.
- d. There is a high threshold, and I should not take the step of dismissing a matter lightly.

[27] I have reviewed the relevant material. I accept the allegations made by Mr Gupta are only part of a larger picture relating to the disputes between the parties. Taking the high threshold as a guide, I do not find the employment relationship problem as lodged to be harassing or annoying and with an evident improper purpose. Therefore, I do not find that the employment relationship problem is vexatious as defined within the Act.

Was Mr Gupta an employee?

[29] It is not disputed that Mr Gupta worked in the restaurant from 2019 when he was a director until his wife became a director on 5 March 2021. He does not claim earnings as an employee for that period. Mr Gupta is claiming that from 5 March 2021 he became an employee as he was no longer a director.

⁶ *Lumsden v Sky City Management Ltd* [2015] NZEmpC 225; and *Gapuzan v Pratt & Whitney Air New Zealand Services* [2014] NZEmpC 206 and as in the recent *Knowler v CablePrice (NZ) Ltd* [2026] NZERA 15 at [14].

[30] PCL agree that Mr Gupta worked at the restaurant from time to time after 5 March 2021 until 24 December 2023, carrying out responsibilities either as a duty manager, as a chef or as he wished. Both directors claim that they also worked, to a lesser extent than Mr Gupta, but he worked in place of his wife who was a director but did not work in the business.

[31] A director is not precluded from working in their business and drawing a wage or salary from that business. However, to be an employment relationship it must still meet the common law tests outlined in *Rasier*.⁷

Application of the common law tests

[32] There was no written or oral evidence presented to suggest an employment relationship between the parties despite the Authority providing repeated opportunities for Mr Gupta to provide evidence to support his claim. Specifically:

- (a) There was no written employment agreement between the parties;
- (b) No evidence was presented to indicate any verbal or written discussions or communication between Mr Gupta and other directors about any employment terms or conditions;
- (c) No position description was provided;
- (d) Monthly IRD employee lists provided for the period from 16 Jan 2022 to June 2023 (excluding December 2022 which was not provided) do not list Mr Gupta as an employee of PCL;
- (e) A selection of 27 handwritten fortnightly rosters for the period in question (54 weeks) were provided in evidence. None of these rosters had Mr Gupta rostered to work;
- (f) In the Authority directions issued, Mr Gupta was asked to provide “detail of some amounts [paid] as wages as stated in his letter of demand to the director’s dated 9 May 2024”. Mr Gupta did not provide detail of the specific days and/or hours he claims to have worked at PCL. The detail provided to the Authority provided a summary total of days only; and

⁷ Above at n. 3.

- (g) There was no evidence that public holiday or leave entitlements have ever been paid to Mr Gupta since the company began or were requested by him prior to his letter of demand.

[33] Based on the evidence before the Authority, Mr Gupta clearly thought of himself as an owner and acted as an owner after 5 March 2021 even though he was no longer a director of the company. PCL provided written evidence that on at least one occasion Mr Gupta quoted in writing for a birthday party on 19 March 2023, calling himself “Restaurant Owner” and received a \$200 deposit for the booking.

[34] Other than on the Companies Register and in company documents, no information was placed before the Authority to show any change in Mr Gupta’s conduct within and relating to the business before and after 5 March 2021.

Control test

[35] Turning to the control test, this involves looking at who decides what work is done and how it is done. I conclude that Mr Gupta was fully in control of his own work in the restaurant. Mr Gupta claims that he was rostered from 3pm to 10pm every day when the restaurant was open for business. When asked why he was not on the roster, he says that as his hours were the same every week, he was not included in the roster.

[36] That explanation conflicts with the examples of other employees rostered to work. Some worked regular hours yet were still listed on the roster with their hours specified. Based on the examples given, and in the absence of any roster information provided by Mr Gupta, he chose when he worked and what work he did in the restaurant. When he was there, he was in a managerial capacity and I did not see any evidence that he was required to follow others’ orders or instruction. There was no evidence to suggest that PCL or the other directors required Mr Gupta to work at any specific time or had any control or expectation of a specific number of hours to be worked or to be physically present in the restaurant.

Integration test

[37] The third test outlined in *Bryson*, looks at whether the work the employee does is fundamental to the employer’s business. I consider that Mr Gupta’s work as a chef or as a duty manager was useful but not integral to the operation of the restaurant. He presented extensive evidence that he handled orders and coordinated deliveries with

customers. Various emails showed that Mr Gupta also ordered product and liaised with council on some matters.

[38] However, this test also considers who benefits from the work undertaken. While Mr Gupta did not benefit directly from the work undertaken, any profit or benefit to the restaurant did benefit his wife as a director of PCL. His efforts to ensure a profitable business would increase the value of the business and ultimately the return on her investment.

Fundamental / economic reality test

[39] Lastly, I must consider the fundamental/economic reality test and take a whole of business approach to the hours worked by Mr Gupta. The evidence does not paint a picture of an employee. I am satisfied that Mr Gupta intermittently took money from the business that he saw as “wages” and he acknowledges that he did not pay PAYE on those amounts. He also refunded the company GST refund into his personal account in September 2023. The extent that he, or others, withdrew money from the till as wages payments cannot be quantified.

[40] I also conclude that the transfer of the directorship from Mr Gupta to Ms Shah was in name only and evidence of Mr Gupta’s actions after 5 March 2021 show that he never stopped seeing himself as an owner / director of PCL. PCL has maintained that Ms Shah had no interest in the business and all emails sent to her in her capacity as director went to Mr Gupta’s email address. Additionally, PCL provided evidence that Mr Gupta had access to the PCL bank accounts and withdrew money two days after Ms Shah was removed as director.

Other considerations

[41] Based on the calculation attached to his letter of demand, Mr Gupta claims the following:

<i>Dates claimed</i>	<i>Duration</i>	<i>Days/week</i>	<i>Hours /day</i>	<i>Days not worked</i>
6 March to 31 March 2021	25 days		7	1/25
1 April 2021 to 31 March 2022	52 weeks	6 days then 7 days from 1 January 2022	7	39/365
1 April 2022 to 31 March 2023	52 weeks	7	7	0

1 April to 24 December 2023	268 days		7	0
Total claimed	976 days			

[42] Objectively, the claim seems very unlikely. Mr Gupta is claiming that he worked almost every day for two and a half years between 6 March 2021 and 24 December 2023 without drawing any wage or raising any wage payment conversation with the other directors.

[43] If Mr Gupta genuinely thought of himself as an employee since he resigned his directorship in March 2021, I would expect him to raise this as a concern with the directors well before May 2024.

Conclusion

[44] Based on all the evidence, I conclude that the work Mr Gupta did in the restaurant was not as an employee. He had control over where and when he worked, if he worked at all and what tasks he undertook in the restaurant. While I accept that seeking to define the relationship at the end doesn't preclude a finding of employee / employer, I consider it very surprising that until May 2024, Mr Gupta did not seek any payment for the extensive hours he claims were worked as an employee.

[45] Both parties (and supporting witness statements) acknowledge that Mr Gupta worked in the restaurant, with Mr Rajendra Singh stating that Mr Gupta "managed all the financial and employment transactions for the company". While this was not as an employee, it is for the parties to determine whether this was as a director, contractor or agent for Ms Shah.

[46] As Mr Gupta is not considered an employee and therefore his claims are outside the Authority jurisdiction, his remaining claims before the Authority are unsuccessful.

Counterclaim

[47] PCL submitted an original counterclaim on 22 April 2025 with an amended claim on 30 June 2025 on the basis that Mr Gupta failed to provide any supporting evidence for his claims and intended only to mislead the Authority, create a financial burden for PCL and cause mental distress to PCL directors. PCL seeks full legal costs of \$46,000 and an additional \$20,000 in damages for wasted time and mental harassment caused by false claims.

[48] Mr Gupta provided a response to the statement of counterclaim on 9 July 2025. Following allegations made about Mr Gupta by PCL in their original response to the substantive matter, Mr Gupta outlined his concerns regarding the business practices of Mr Laxman Singh and Mr Rajendra Singh as directors. I do not consider it relevant to go into detail on any of the allegations. He did not provide any submission in response to costs other than leaving it “up to the ERA to determine the validity of evidence”.

Remedies

[49] I do not consider it appropriate to award a penalty under s 4 of the Act for a false claim or misleading the Authority or to award damages. PCL knew that Mr Gupta worked in the restaurant after he ceased being a director in March 2021 and had an opportunity to either prevent him entering the business or negotiate a written agreement with him to continue working. Neither occurred and that failure to address his actions in the restaurant much earlier has significantly, if not almost entirely, contributed to the matter now before the Authority.

[50] As Mr Gupta is not an employee, the counterclaim for return of money allegedly taken from the business is not an employment matter and is outside the jurisdiction of the Authority.

Costs

[51] PCL successfully defended the claims against them. Costs should follow that event and therefore they are entitled to a contribution of the costs incurred.

[52] Given the deterioration of the relationship between the parties, I consider it unlikely that costs will be agreed between the parties. The Authority’s discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁸ that costs are modest and that they normally follow the event. Other principles guiding the Authority’s approach to costs include:

- (a) the statutory jurisdiction to award costs is consistent with the Authority’s equity and good conscience jurisdiction.
- (b) equity and good conscience is to be considered on a case by case basis.

⁸ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

- (c) costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- (d) frequently costs are judged against a notional daily tariff.

[53] The Authority's general approach is to apply a notional daily rate and only adjust that rate if persuaded that circumstances or other factors require an upward or downward adjustment.⁹ The current full daily rate is \$4,500 for the first day of an investigation meeting.

[54] The daily tariff can be adjusted for relevant factors. This matter was determined on the papers and took approximately a half day, though failure by Mr Gupta to provide the detail requested by the Authority in its directions did delay effective resolution of this matter. This was not sufficient to justify any uplift in costs.

[55] As representative for PCL, Ms Dave has claimed \$46,000 in general legal costs despite the Authority's written instruction that costs claimed are to be restricted to matters related to the determination of Mr Gupta's application to the Authority. As that claim includes a number of legal matters between the parties outside the scope of the Authority, I disregard that figure. The investigation meeting took approximately three hours and there was a substantial amount of information provided to the Authority by Mr Gupta (including confidential information) that increased the costs to PCL in reviewing that material. Considering the principles for awarding costs and the notional tariff, I consider that a reasonable contribution to costs of \$3,000 is appropriate.

[56] Mr Gupta must pay Panchmukhi Chefs Limited the amount of \$3,000 in costs within 28 days of the date of this determination. For clarity, this resolves the employment matters before the Authority. Any further action by the parties for monetary reimbursement or related to other matters must be lodged with the appropriate legal entity.

Helen van Druten
Member of the Employment Relations Authority

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