

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 128/10
5152187

BETWEEN MOHAMMED FIROZ
 Applicant

A N D LAST TRAIN TO INDIA
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Mohammed Shahadat, for Applicant
 Robert Thompson, for Respondent

Investigation Meeting: 24 February 2010 and 2 March 2010 at Christchurch

Submissions Received: 9 March 2010 from Applicant
 18 March 2010 from Respondent

Determination: 31 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mohammed Firoz commenced his employment with Last Train to India Limited (Last Train) on 17 December 2007 as a Chef and he worked there until, he says he was unjustifiably dismissed, on 25 November 2008.

[2] He claims compensation in the sum of \$10,000, and wages for hours that he says he worked and was not paid. Mohammed Firoz also says that he worked eight statutory days but was not paid at time and a half and did not receive a corresponding day off in lieu for working on the statutory days. Both parties agree that holiday pay is still outstanding.

[3] Mohammed Firoz speaks limited English and has difficulty reading English. A Hindi interpreter was therefore available at the investigation meeting. Translation in this matter was not without its difficulties with several concerns raised by the main witnesses for the respondent who speak Hindi about the completeness of the

translation. The Authority however was satisfied that any difficulties were able to be overcome.

[4] Last Train does not accept that it dismissed Mohammed Firoz or, if it did, that such dismissal was justified. Further, it strenuously denies that he worked the hours he claims he did as it says there was no need for two Chefs to be available for all those hours. Last Train does accept that it has no records as to whether Mohammed Firoz worked or did not work on the statutory days and that when he did work there were no alternative days provided or taken.

The issues

[5] The Authority is required to determine the following matters:

- Was Mohammed Firoz warned during his employment;
- Was Mohammed Firoz dismissed from his employment;
- If Mohammed Firoz was dismissed from his employment, then was the dismissal justified applying the test under s.103A of the Employment Relations Act 2000;
- If the dismissal was unjustified, then what remedies should Mohammed Firoz be awarded and are there issues of contribution in this matter;
- Is Mohammed Firoz owed any money by way of wages and other statutory entitlements;
- What holiday pay is owing?

The start of the relationship and its terms and conditions

[6] Mohammed Firoz was recruited by Last Train to work in New Zealand at its food outlet in the food court of South City Mall in Christchurch. His family remained in India and throughout his employment with Last Train he sent money back home to support them.

[7] Ginny Randhawa is the sole director of Last Train and she arranged the necessary work permit for Mohammed Firoz when he was first employed which was valid until 15 November 2008. Ms Randhawa runs the business with her brother,

Alok Sandhu and the Authority heard evidence from Ms Randhawa and Mr Sandhu at the investigation meeting.

[8] It was accepted by both parties that, although unsigned, the terms and conditions Mohammed Firoz was employed under initially were set out in an individual employment agreement that was expressed to commence on 15 September 2007 until 15 September 2010. His position was described in the employment agreement as a Chef of Indian Cuisine.

[9] Clause 6 provided:

Hours of Work:

You must work 48 hours per week with six working days in a week at such time as are required by us. However, Reasonable extra hours and days over and above those already specified must be worked when required by the employer or to ensure that the job is done.

[10] Clause 7 provided:

7.1 *We will pay you on a weekly rate of \$550 /week (gross).*

7.2 *Free boarding will be provided by the employer.*

[11] When Mohammed Firoz arrived in New Zealand he boarded with another Chef who was also working at the Last Train, Kunal Mukherjee. Last Train paid for the room for both Chefs. There was a dispute raised by Ms Randhawa about boarding. Her evidence was that it was agreed with Mohammed Firoz that this only included food. I find that the room was paid by Last Train and that that reflects that how the parties intended boarding to be under the employment agreement. I am not satisfied of the restricted definition that Ms Randhawa now seeks to place on that matter. Certain adjustments were made to the pay slips and no doubt in Last Train tax returns to reflect the payment made.

[12] It is common ground that for the entire period of his employment Mohammed Firoz was paid \$400 by way usually of deposit into his bank account, and he was also given \$50 in cash.

[13] The pay slips that were eventually provided by Last Train some 13 months after they were requested did not reflect the gross payment to be made each week. The pay slips show Mohammed Firoz receiving a gross sum of \$500. I have relied on

the payments of \$450 net that were made and are therefore satisfied that the requirement under the employment agreement to pay \$550 gross per week was complied with. While I have put the pay slips to one side in terms of that matter I have had regard to them when I have come to assess whether Mohammed Firoz worked statutory days and other such matters. There were no holiday and leave records kept that complied with s. 81 of the Holidays Act 2003. This has caused difficulty in assessing statutory entitlements with a high degree of accuracy.

[14] I heard from Adrian Robinson who undertook the book keeping for Last Train and compiled the pay slips on advice from Ms Randhawa. I accept that Mr Robinson was simply preparing the pay slips from advice given to him.

[15] Ms Randhawa said in terms of the \$50 cash paid to Mohammed Firoz that it was a loan and at one point that it covered holiday pay. Mohammed Firoz was entitled to receive \$550 per week gross and I have simply taken that payment into account in terms of that obligation.

[16] The Mall in which the food outlet was based was open to the public from 9am to 6pm Monday to Thursday and on Saturday. On Friday there were extended hours from 9am to 8pm and on Sunday from 10am to 5pm.

[17] Mohammed Firoz worked six days a week and usually had Mondays off. I shall return later in this determination to assessing his claim with respect to the hours that he worked over those six days.

Was Mohammed Firoz warned during his employment?

[18] On or about 26 August 2008 Ms Randhawa completed an application for a renewal of Mohammed Firoz's work permit. Neither party commented on anything of concern until after this period.

[19] From that date Ms Randhawa says that she noted Mohammed Firoz's work performance and behaviour deteriorated. She described him as becoming careless, negligent and his attitude changing. She says that this was because Mohammed Firoz felt that he was indispensable because Last Train was so dependent on him and the work permit process was underway.

[20] Last Train say that there were three warnings given to Mohammed Firoz in writing between 31 August 2008 and 8 October 2008. These warnings were produced by Last Train and they related to three different concerns. The first warning dated 31 August 2008 was about arriving late for work. The second warning dated 1 October 2008 was about the cooking of chicken dishes incorrectly; and the final warning was about Mohammed Firoz taking home cooked lamb and marinated chicken without authorisation.

[21] Mohammed Firoz completely denies receiving any written warnings during his employment and says that the first he knew of their existence was some months after the employment relationship ended. He says that he was never talked to about under-cooked chicken or alleged removal of meat from the premises. He accepted that he was talked to probably on two occasions about being late for work but he did not put the conversations as occurring in August.

[22] Ms Randhawa was supported in her evidence that the written warnings were given by the evidence of Mr Sandhu. I also heard from Ian Rivers who provided Ms Randhawa and Mr Sandhu with some voluntary business mentoring for the food court and restaurant business. He recalls Ms Randhawa expressing concern that food was going missing from the food court kitchen and that takings were down. He said that he explained to Ms Randhawa and Mr Sandhu about the need for warning letters in terms of any performance issues and he gave evidence that he understood the warning letters had been written and indeed there was a final letter. I found Mr Rivers to be a straightforward and helpful witness, although he did not actually see copies of the warning letters that were written. His view was that there was no reason for Ms Randhawa not to follow his advice that included on being advised Mohammed Firoz had taken home meat belonging to the kitchen that he be dismissed.

[23] I accept, because there is independent evidence to confirm this, that there were some discussions with Mohammed Firoz about his timeliness in terms of his arrival to work and about some dissatisfaction with the dishes. There are, however, some matters that lead me to conclude that it is less likely these issues were reduced to writing. For completeness there was no evidence of any procedural fairness in terms of the warnings verbal or otherwise.

[24] All three warnings are signed by Ms Randhawa. The first warning contains internal inconsistencies. The first paragraph sets out the concern that having been told

to report for work at 8am *for the past 10 days you are continuously reporting to work between 9.00-9.15am* but the second paragraph asks that Mohammed Firoz report to work on time *at 9.00am*. That leads me to conclude that it is less likely a written warning would have been provided in this form.

[25] This matter was not seen as precluding the signing of a second employment agreement on 1 September 2008 between the parties for a further two years, albeit as explained, for immigration purposes.

[26] I accept that it is likely there was then some discussion about a concern with the dishes Mohammed Firoz was preparing. That was a serious concern because it involved undercooked chicken. I am not satisfied however a warning was put in writing.

[27] Mrs Randhawa advised the Department of Immigration by email dated 19 November 2008 that she could not support Mohammed Firoz's work permit and said the following to Immigration Officer, Marion Fink:

There has been a noticeable decline in his performance over the last two month period. In spite of repeated reminders and verbal warnings on many occasions, he has failed to perform his duties to a satisfactory level. This has been detrimental to the organisation and has completely eroded my confidence in him as a member of our team. In the light of the above said matter I would like to withdraw his visa application as an employee.

[28] Although there is reference within that email to repeated reminders and verbal warnings, there is no such reference to written warnings. The absence of any reference to written warnings in that important email supports that it is less likely Mohammed Firoz was given written warnings. Mohammed Firoz had only a limited ability to read English. It seemed to me in those circumstances that it also would be unlikely that any verbal reprimands would be reduced to writing in English.

[29] I turn finally to the allegation that Mohammed Firoz was found with products from the kitchen in his backpack. That is the sort of conduct that if investigated properly and established would amount to serious misconduct in the eyes of most employers. Mohammed Firoz denies that he took product from the kitchen. There is no mention of that matter (theft) in the email to Ms Fink but I consider it unlikely that Ms Randhawa and Mr Sandhu would simply make that up even if it is less likely that the allegation and the conclusion about it were reduced to writing.

[30] Having carefully considered the evidence I accept Ms Randhawa and Mr Sandhu confronted Mohammed Firoz about the contents of his bag on or about 7 October 2008. I find that he denied that the product therein belonged to Last Train saying he had bought it from a supermarket. They did not, it appears, believe him but surprisingly in those circumstances continued to keep him in employment. Ms Randhawa said that she did not think she had a choice in terms of the work permit and she and Mr Sandhu referred to the difficulties of finding Chefs.

[31] I do not find the conclusion that there were written warnings issued to Mr Mohammed Firoz, but I accept that he was spoken to about the issues of concern contained in the warnings.

Was Mr Mohammed Firoz dismissed from his employment?

[32] Ms Randhawa and Mr Sandhu say that Mohammed Firoz advised that had obtained another position but refused to elaborate further about that. Ms Randhawa put the date of this conversation at 1 November 2008. Ms Randhawa said that Mohammed Firoz indicated that he would leave as soon as he got his work permit because he secured new employment. Mr Sandhu described Mohammed Firoz as *muttering* something along the lines of he was not going to stay and that he had another job.

[33] Mohammed Firoz denies that he said he was leaving or that he had another job. I accept Mr Shahadat's evidence that it is less than likely that someone who is waiting for the renewal of a work permit would jeopardise that by saying to his employer before it was renewed that he either had another job or would leave once the permit it was granted to get one.

[34] Ms Fink who was the Immigration Officer processing Mohammed Firoz's work application telephoned Ms Randhawa on 18 November 2008 at 10.53am. She wanted to clarify with Ms Randhawa the pay rate that Mohammed Firoz was receiving. The file note confirms that Ms Randhawa advised it was \$16 per hour. I accept that the confusion about this had arisen because of the discrepancy about pay rates contained in the Employer supplementary form and the second employment agreement that I shall refer to shortly.

[35] During that conversation Ms Randhawa advised Marion Fink that Mohammed Firoz did not want to stay in his position and that she wished to withdraw the job

offer. Ms Randhawa says that she did this because Ms Fink assisted her to understand the obligations of sponsoring an applicant. This exchange is documented with others in a series of Immigration service file notes that were provided to Mohammed Firoz when he made a request for personal information that was held with respect to his application. There is mention of the pay rate but no mention of a discussion about the obligations of sponsoring an applicant for a work permit.

[36] The file note records that Ms Fink then contacted Mohammed Firoz who advised her that he did want the position. The file note makes it clear that in all likelihood there was a further telephone call that day with Ms Randhawa who confirmed that she wanted the offer withdrawn and that she would email Ms Fink confirmation of that. That is the email I have earlier set out.

[37] There is a dispute in the evidence as to whether Mrs Randhawa advised Mohammed Firoz between that conversation with Ms Fink and the sending of her email that Last Train was withdrawing its support for his work permit. Mr Sandhu said that he overheard a discussion between Ms Randhawa and Mohammed Firoz about this but Mohammed Firoz did not confirm the situation with another position.

[38] I find it less likely that there was such a conversation in circumstances where Mohammed Firoz had made it clear to Ms Fink that same day that he wanted to stay at Last Train. Even if that had been referred to there was no evidence of any ability on Mohammed Firoz's part to influence the outcome. I accept that Mohammed Firoz was confused as to why support for the work permit was being withdrawn. He attended at the Immigration Office on 20 November 2008 and was given a letter from the Immigration Department advising that his employer had confirmed that it wished to withdraw her offer of a position. Mr Mohammed Firoz then took three days sick leave until 25 November 2008 when he returned to work and worked as usual.

[39] Some further support that Mohammed Firoz had no idea that the offer was being withdrawn is found in another file entry of Ms Fink's on 1 December 2008 in which he is recorded as saying he was not aware of the previous employer's withdrawal of offer until he had received the letter, presumably on 20 November 2008.

[40] I do not find, as submitted by Mr Thompson, that the employment relationship was frustrated either because of Mohammed Firoz's sick leave or the situation with

the work permit. The employment ended at the initiative of Last Train when it withdrew an offer of work to Mohammed Firoz thereby leaving him in a position where he did not have a role at the Last Train and did not in all probability meet Immigration policy.

[41] In the afternoon of 25 November 2008 Mohammed Firoz received a call from a travel agent advising of flight details for him to travel back to India. Ms Randhawa had, believing it was her responsibility, organised a ticket back to India for Mohammed Firoz. I find that Mohammed Firoz that day then tried to have a discussion with Ms Randhawa about her view of his employment situation. I accept his evidence that no such discussion with Mrs Randhawa took place that day, although she had indicated to him by telephone that she would attend at different times in the early evening to enable a discussion to take place but did not in fact do so.

[42] On 25 November 2008 Mr Sandhu advised Mohammed Firoz that he should pick up his ticket and go back to India because his visa application had expired and he was in effect an overstayer. I find it likely there was a discussion the next day, 26 November 2008 between Mohammed Firoz and Ms Randhawa in which he was, before he could start work, advised that he could not continue to work at the food court. He asked about wages and holiday pay but no payment was forthcoming.

[43] There is no evidence to support that Mohammed Firoz abandoned or resigned from his employment. I do not accept the submission that the employment relationship was frustrated. I find that Mr Mohammed Firoz was dismissed from his employment when the offer of work was withdrawn by Last Train.

Was the dismissal justified applying the test under s.103A of the Employment Relations Act 2000?

[44] A fair and reasonable employer would deal with an employee in good faith. Good faith requires an employer who is proposing to make a decision that will have an adverse effect on an employee to provide them with access to the information about the continuation of their employment and an opportunity to comment on it – s4(1A) (c) Employment Relations Act 2000.

[45] A fair and reasonable employer would have met with and discussed with Mohammed Firoz the situation with respect to his work permit, confirmed whether he wanted to stay or not and discussed any ongoing performance concerns. A fair and

reasonable employer would have given him an opportunity to respond to these matters and would not before doing this simply withdraw the job offer and purchase a ticket for Mohammed Firoz back to India. I note that later action is inconsistent with a genuine belief that Mohammed Firoz had another job.

[46] I find that the actions of Last Train leading up to and including the withdrawal of the offer of his position were not what a fair and reasonable employer would have done in all the circumstances.

[47] I find in conclusion that the dismissal was unjustified.

What remedies should Mr Mohammed Firoz be awarded and are there issues of contribution?

Contribution

[48] I am not satisfied that Mohammed Firoz clearly advised his employer that he had another role so that they could rely on that. I have already referred to the purchase of the ticket to India being inconsistent with a genuine belief in that respect and when asked, he made it clear to Ms Fink that he still wanted his role with Last Train. This was in turn advised to Ms Randhawa who then moved away from that matter and to performance concerns. Performance issues to 8 October 2008 had already been dealt with short of dismissal and if they were of an ongoing nature and the earlier matters intended to be relied on there was no evidence of any fair process about that before the work offer was withdrawn. I do not find that Mohammed Firoz could be seen to have contributed to the withdrawal of his job offer in those circumstances. I am not satisfied that he contributed to the personal grievance that he was unjustifiably dismissed.

Lost Wages

[49] Mohammed Firoz was fortunate enough to secure other employment which he started on 1 December 2008. He does not claim lost wages.

[50] I do not accept as submitted by Mr Thompson that there was no evidence of humiliation or hurt. There was evidence that I accept that Mohammed Firoz was confused and hurt about what was happening to his position on 25 and 26 November 2008. He could not understand the advice received about the ticket to India. He had a very real and urgent need because of the circumstances with his work permit and his

desire to stay New Zealand to find other employment. In those circumstances I find evidence of a high level of confusion, hurt and concern but fortunately only for a short period. I take into account that days later there was a new job and therefore the award I go on to make reflects that.

[51] I find that a fair and reasonable award for compensation would be the sum of \$5,000.

[52] I order Last Train to India Limited to pay to Mohammed Firoz the sum of \$5,000 without deduction under s.123 (1) (c) (i) of the Employment Relations Act 2000.

Is Mohammed Firoz owed any additional payment by way of wages?

[53] During the period leading up to the investigation meeting the amounts claimed by Mohammed Firoz for hours that he says he worked in excess of 48 per week changed several times. I was handed a final claim for wages on the first day of the investigation meeting.

[54] Mohammed Firoz said that he started at the food court every day at 8.30am and finished for four days at 6.30pm, one day at 5.30pm and one day at 8.30pm. Mohammed Firoz said that during the day he did not take any breaks aside from a 15 minute break for his midday meal. He was supported in his evidence by Mr Mukherjee who worked with Mohammed Firoz until about 24 September 2008 and by Jitendra Tiwary, who owns and operates another food outlet in the South City Mall next to Last Train, known as the Mediterranean.

[55] Mr Tiwary said that he used to start work at 8.50am or 9.00am and would see both Mohammed Firoz and Mr Mukherjee at work when he arrived. His evidence was that they finished around 6.00 to 6.30pm in the evening. Mr Tiwary worked away from his business two days a week at another establishment but said that he could not recall Mohammed Firoz taking a break.

[56] Ms Randhawa did not accept that two Chefs were necessary or indeed both worked for the morning shift and at the end of the day. She gave evidence that the busy period was from about 11.30am to 2.30pm and that there was an arrangement to stagger the Chefs during the day to deal with this period, with one Chef working it the

morning and one Chef cleaning up in the evening. Ms Randhawa denied that the food court restaurant was so busy that there was no opportunity to take a break.

[57] Ms Randhawa went further in her written evidence and suggested that Mohammed Firoz was being dishonest. She was supported in her evidence by Mr Sandhu and also another part time employee who had worked from October 2007 to about February 2008 over the luncheon shift, Habib Ullah. Mr Ullah was contacted during the investigation meeting by telephone. He said that the Chefs did take breaks and that they staggered their start from what he could recall if he ever had to work in the morning. He recalled one coming earlier into work and the other between 10.30am to 11.00am.

Conclusion about hours worked: 17 December 2007 to 1 September 2008

[58] As earlier set out, the pay slips eventually supplied by Last Train did not reflect the provisions of the employment agreement. The pay slips, for example, show Mohammed Firoz being paid \$12.50 for a 40 hour week. At one stage, no doubt for tax purposes, they show a higher hourly rate, but rent of \$85 being deducted.

[59] In terms of some of these matters then, I am required to assess as best I can whether additional monies are owed to Mohammed Firoz and indeed what he actually received.

[60] It is sufficient for my purposes to conclude in relation to what was received that Mr Mohammed Firoz accepted he generally received \$450 per week. I find that it was expected that Mr Mohammed Firoz worked 48 hours a week. His employment agreement described this as something he *must* do. There was a basis for Last Train stating the hours required were 48 hours. I find it was in all probability calculated on the hours the Mall was open to the public and took into account 2 less hours on a Sunday and 2 more on a Friday. I accept that outside of those hours there would be some requirement for a slightly earlier starting time in order to set out the food and sometimes a later finishing time. Equally, however, I accept Ms Randhawa's evidence that was likely some of the clean-up was done enabling a finish time of 6pm or soon thereafter. I also find that probably there were some times when Mohammed Firoz did not attend until 9am.

[61] For working those hours, he was paid \$10 over the minimum wage as set out in the Minimum Wage Order 2007 made pursuant to s.4 of the Minimum Wage Act

1983. That was an adult wage of \$450 gross per week and then \$11.25 per hour for the hours that exceeded 40 hours.

[62] I am satisfied in terms of breaks, the Last Train was able to establish by virtue of Mohammed Firoz's bank records on at least eight days he visited a business which was open between 9am and 5pm and also attended to other business during work hours. I need to be satisfied on the balance of probabilities that there was no opportunity for a break during the day.

[63] I find that from the evidence that Mohammed Firoz was able to conduct some business outside of work during work hours and also of cover being available that he was able if he wanted to take a break.

[64] I am satisfied; therefore, that Mr Mohammed Firoz was able to take breaks during the day.

[65] Taking all matters into account, I am not satisfied on the balance of probabilities that Mohammed Firoz worked more than 48 hours per week. He was paid up to 31 March 2008 for the hours that he did work at slightly more than the minimum wage. I do not consider that s.7 of the Minimum Wage Act 1993 applies in terms of board or lodging because these were not deducted from the wage paid to Mohammed Firoz.

[66] After 1 April 2008 there was an increase in the Minimum Wage Order to \$480 per week and \$12 for each hour exceeding a 40 hour week. Mr Mohammed Firoz therefore received less than the minimum rate by \$26 per week.

[67] Between 1 April 2008 and 31 August 2008 that is a period of 22 weeks. Mohammed Firoz is therefore owed the sum of \$572 gross in payments made to him at less than the minimum wage for hours worked during that period.

[68] I order Last Train to India Limited to pay Mohammed Firoz the sum of \$572 gross being reimbursement to him for wages paid under the minimum wage rate between 1 April 2008 and 31 August 2008.

Second Employment Agreement 1 September 2008

[69] There was a second employment agreement entered into between Last Train and Mr Mohammed Firoz that was expressed to commence on 1 September 2008 and

end on 1 September 2010. I accept the evidence of Ms Randhawa that this was an agreement prepared for the Immigration Department for work permit purposes.

[70] Mr Thompson, on behalf of Last Train, urges me in his final submissions to simply disregard the agreement because he says that what both parties intended was that the previous arrangement continued until after the work permit was granted. That was not the evidence of Mr Mohammed Firoz.

[71] The second agreement was quite different in nature to the first agreement. The agreement was put to the Immigration Department showing as the agreement to apply between the parties from 1 September 2008. Ms Randhawa advised when asked by Ms Fink on 18 November 2008 that the salary was \$16 per hour as under that second agreement. The second agreement was expressed as an entire agreement and any variation was to be in writing and signed.

[72] I do accept Mr Thompson's submission that for all intents and purposes nothing really changed. Mohammed Firoz continued to be paid the same amount each week based on \$550 gross. There is no reason to conclude that he did not continue to perform the same hours of 48 per week. I find however that from 1 September 2008 that second agreement is the one that contained the terms and conditions of Mohammed Firoz's employment and either party could have insisted on compliance with its terms and conditions.

[73] I find the following provisions in the second agreement were not complied with. The second agreement was to commence, I find, on 1 September 2008, and contained a rate of pay of \$16 per hour. The agreement also provided that there would be a deduction of \$77.50 per week for the accommodation that had been organised and that for each hour of overtime Mr Mohammed Firoz would be paid \$16.

[74] The hours of work also changed to a minimum of 40 hours per week and there was also reference to a lunch break of 2 hours and a tea break of 1 hour although no evidence of breaks of that nature whatsoever.

[75] In practice I do not find that Mr Mohammed Firoz's hours of work decreased and I simply intend to calculate whether he was paid correctly on the basis of 48 hours per week for his work.

[76] The period between 1 September and Mr Mohammed Firoz's last day of work, being 25 November 2008, was a 12 week period. Mr Mohammed Firoz was paid for that period \$6,600 gross on the basis of \$550 per week or \$11.46 per hour. Mr Mohammed Firoz should have been paid at the rate of \$16 per hour or \$768 per week. From that amount there has to be deducted the sum of \$77.50 per week for accommodation. When done this leaves a balance of \$690.50 gross per week for 12 weeks. That is a total sum of \$8,286 less that already paid of \$6,600, leaving a balance due and owing of \$1,686 gross.

[77] I order Last Train to India Limited to pay Mohammed Firoz the sum of \$1686 gross being reimbursement to him for wages underpaid between 1 September 2008 and 25 November 2008.

Statutory and alternative days

[78] Mohammed Firoz claims that he worked the following statutory days and was not paid at time and a half. The days claimed are Boxing Day 2007, 2 January 2008, Waitangi Day, Easter Monday, Anzac Day, Queen's Birthday, Labour Day and the Canterbury Anniversary.

[79] I note that the pay advice slip for the period ending 30 December 2007 reflects ordinary time of 32 hours and one public holiday of 8 hours. I have taken that to be payment for Christmas Day. The pay slip also shows one day at time and a half, which I accept was Boxing Day.

[80] A difficulty then presents itself in that until January 2008 Mr Mohammed Firoz did not have an operating bank account and was simply paid in cash. Relying, however, on the pay slip, I conclude that Mr Mohammed Firoz was paid correctly at time and a half for Boxing Day 2007. Likewise, I have reached a similar conclusion in terms of the 2 January 2008 claim. The pay advice slip for the period ending 6 January 2008 shows a payment of ordinary time of 32 hours and for one public holiday that I have taken as New Years day at 8 hours. The pay slip also shows time and a half for an 8 hour period which I have taken as 2 January 2008.

[81] There is no record on a pay slip advice regarding Waitangi Day (Wednesday) in the week ending 10 February 2008. In circumstances where there are no other records to assist me, I accept that this was a day worked by Mohammed Firoz. I have calculated time and a half on an 8 hour day at \$17.18 to arrive at a total sum of

\$137.49. I accept that Mr Mohammed Firoz was paid ordinary time or \$91.68 and that leaves a balance due to him for that day of \$45.81.

[82] There are no records that Mohammed Firoz either worked or did not work Easter Monday. I have considered carefully whether, as this was a Monday, and Mr Mohammed Firoz normally had Mondays off, he would have worked or not. There is no evidence to satisfy me that he was asked to and did work this day. I am not satisfied that it was other than his usual day off and he is not entitled to payment or an alternative day.

[83] From the pay slip advice I am not satisfied that Mr Mohammed Firoz worked Anzac Day because, compared to others, it seems to me to be in line with him being paid for a public holiday not worked, so I make no additional award for that day and there is no corresponding day in lieu owing.

[84] There is no pay slip advice record as to what occurred on Queen's Birthday. I find myself again considering the evidence whether Mohammed Firoz simply had this day off as it fell on the Monday. I am not satisfied that it was other than his usual day off for which he is not entitled to payment or an alternative day.

[85] There are no records of any payments being made for Labour Day, again a Monday and Canterbury Anniversary Day a Friday. Monday was usually Mohamed Firoz's day off. I do not find on the balance of probabilities that this was a day worked. I accept that Mohammed Firoz in all likelihood worked Canterbury Anniversary day. This day is to be calculated on the basis of time and a half for an 8 hour day at \$24 that is \$192 less the sum of \$91.68, leaving a balance of \$64 owing.

[86] I find, therefore, there are four alternative days owing to Mr Mohammed Firoz for the statutory days I have found he in all probability worked and for those he should receive payment. That is 32 hours at the hourly rate of \$16 per hour being a total sum of \$512 gross.

[87] I order Last Train to India Limited to pay Mohammed Firoz the sum of \$109.81 being statutory days I have found he worked but was not paid at time and a half and \$512 gross for four alternative days for statutory holidays worked.

Holiday pay

[88] Last Train accepts that Mohammed Firoz was not paid holiday pay. The final pay advice dated 30 November 2008 shows a figure for holiday pay of \$2,074 gross. It also shows two days annual leave taken in advance.

[89] There was no satisfactory evidence from Last Train or indeed records about when that leave was taken. I have not, therefore, made any deductions under s.23 of the Holidays Act 2003 in calculating holiday pay.

[90] I am going to ask the parties to go away and consider one aspect of holiday pay, but to assist them I have set out what I consider is the most accurate starting figure that I can assess in the absence of proper records. I find that Mohammed Firoz received \$550 gross for the 48 weeks that he was employed by Last Train. That figure I have found varied in terms of two periods when he was paid for statutory days at time and a half. I have calculated the additional payment that he received for those two days at \$91.62. That amount will have to be added to \$26,400 gross.

[91] There are amounts that have to be added on in terms of wages I have found that are owing of \$572 and \$1,682. In addition to this, there is the amount that should have been paid for time and a half working on statutory days of \$109.81.

[92] I would like the parties to consider under s.14 of the Holidays Act 1983 the cash value of board and lodgings are to be included in any assessment of holiday pay in terms of gross amounts. Although it would appear that the sum of \$85 was paid at least for the first part of the employment for boarding, this is not consistently reflected in terms of some of the payslips. It may be, however, that this is the figure that can be agreed on. After 1 September 2008 I have deducted the board from wages I have assessed for Mohammed Firoz relying on the second agreement and there is no need to make an adjustment after that period.

[93] Once agreement is reached on the weekly cash value of the board and lodgings it is then a matter of adding that figure to the figures already set out above and multiplying by 8% to arrive a holiday pay figure.

[94] Leave is reserved for either party to return to the Authority if agreement cannot be reached about the issue.

Costs

[95] I reserve the issue of costs. Mr Shahadat has until 21 June 2010 to lodge and serve submissions as to costs and Mr Thompson has until 12 July to lodge and serve submissions in reply.

Summary of findings and orders made

- I have found that Mohammed Firoz was unjustifiably dismissed.
- I have awarded him the sum of \$5000 compensation with out deduction under s 123 (1) (c) (i) of the Employment Relations Act 2000.
- I have ordered Last Train to pay to Mohammed Firoz underpaid wages from 1 April 2008 to 31 August 2008 the sum of \$572 gross.
- I have ordered Last Train to pay to Mohammed Firoz underpaid wages from 1 September to 25 November 2008 in the sum of \$1686 gross.
- I have ordered Last Train to pay to Mohammed Firoz the sum of \$109.81 gross for statutory days he worked and was not paid at time and a half.
- I have ordered Last Train to pay to Mohammed Firoz the sum of \$512.00 gross for four alternative days for statutory holidays that he worked.
- I have set out most of the figures for the parties to calculate holiday pay on but have asked that they agree to a figure for board and lodgings until 1 September 2008 to be included in the gross earnings. Leave is reserved if there is difficulty experienced by either party in arriving at a figure for holiday pay to return to the Authority.
- I have reserved the issue of costs and set a timetable for an exchange.

Helen Doyle
Member of the Employment Relations Authority