

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 418
3082667

BETWEEN RAJWINDER KAUR
Applicant

A N D HENDERSON TRAVELS
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Jo Douglas and Suzie England-Hall, counsel for the
Applicant
Jo Bigham, advocate for the Respondent

Investigation Meeting: 8 April 2021

Submissions Received: 22 April 2021, 29 April 2021 and 6 August 2021 from the
Applicant
22 April 2021, 29 April 2021 and 12 August 2021 from the
Respondent

Date of Determination: 27 September 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In November 2018, Rajwinder Kaur accepted an offer of employment as a manager with Henderson Travels Limited in its travel business.

[2] Ms Kaur claims that despite being employed to work as a manager in the travel business and obtaining a work visa based on this she was initially required to work in a restaurant. Then when Ms Kaur did transfer to the travel business she says there were a number of issues with her employment. These issues included, that she worked additional hours for which she was not paid, she was told to repay some of her wages and on one occasion did pay money to

Henderson Travels and then when she did not pay back further amounts demanded she was dismissed under the guise of a redundancy.

[3] These allegations form the basis of Ms Kaur's claim that she lodged in the Authority, seeking:

- (a) Payment of wage arrears for overtime worked but not paid by Henderson Travels and a penalty for breach of her employment agreement and/or breach of the Minimum Wage Act 1983.
- (b) Payment of holiday pay for working on a public holiday, which Henderson Travels did not pay correctly and a penalty for breach of the Holidays Act 2003.
- (c) A penalty for breaches of the Wages Protection Act 1983 for the repayment of wages by her and additionally for the further payment demanded by Henderson Travels.
- (d) Remedies for a personal grievance of unjustifiable action causing disadvantage arising out of her working at the restaurant rather than the travel business and a penalty for breach of Ms Kaur's employment agreement in requiring her to work at the restaurant.
- (e) Remedies for a personal grievance for unjustified dismissal.

[4] Henderson Travels says in response:

- (a) Ms Kaur was not required to work overtime and did not work any additional hours so no additional wages are due to her.
- (b) Ms Kaur was not required to work on public holidays and she was paid correctly in respect of the public holidays observed during her employment.
- (c) It did not demand repayment of any wages from Ms Kaur and the one payment she did make was not to Henderson Travels but rather one of its directors, Vyom Sikri, and that was to pay back a personal loan he had made to Ms Kaur.

(d) It did not act unjustifiably in relation to Ms Kaur working at a restaurant initially, this was done on her request as she preferred to work there rather than in the travel business.

(e) It was justified in dismissing Ms Kaur as this arose out of a restructure of the travel business, over which it consulted with Ms Kaur before it decided to terminate her employment.

The Authority's investigation

[5] These disputed claims were the subject of my investigation conducted through, receiving written evidence and documents, an investigation meeting on 8 April 2021 and written submissions.

[6] I received written witness statements from Ms Kaur, a friend of Ms Kaur, Mr Sikri, Preeti Sikri, the other director of Henderson Travels and Reema Patel, another manager employed by Henderson Travels. In my investigation meeting, under oath or affirmation, each witness confirmed their statement and gave further oral evidence in answer to questions from me and then the parties' representatives.

[7] The parties' representatives then provided written submissions on the facts and law after the investigation meeting.

[8] As permitted by 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; rather I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Assessing the claims

[9] I will set out my analysis of Ms Kaur's claims in the following order:

(a) Wage arrears for overtime and holiday pay in relation to public holidays. This involves an analysis of the evidence to determine what hours Ms Kaur actually worked including any public holidays and then assessing what she should have been paid for that work, based on Ms Kaur's employment agreement and the Holidays Act 2003, against what she was actually paid. From this I will

determine if there are any wages payable for overtime and/or work on public holidays. I will also decide if there has been a breach of Ms Kaur's employment agreement, the Minimum Wage Act 1983 and/or the Holidays Act, which will inform my subsequent assessment of penalties.

- (b) Breach of the Wages Protection Act 1983. This involves a factual assessment as to whether demands were made for repayment of wages by Henderson Travels and whether Ms Kaur made any payments. Based on this I will determine if there has been a breach of the Wages Protection Act 1983, which will then inform my assessment of penalties.
- (c) Penalties. If I conclude that Henderson Travels has breached Ms Kaur's employment agreement, the Minimum Wage Act, the Holidays Act and/or the Wages Protection Act, I will then assess what penalties, if any should be imposed on Henderson Travels for these breaches.
- (d) Unjustifiable action causing disadvantage. This involves assessing if Ms Kaur was required to work at the restaurant rather than in the travel business. If she was then I must assess if this caused a disadvantage to her employment. If it did I must then assess if Henderson Travels' action, in requiring Ms Kaur to work in the restaurant was justified.
- (e) Unjustified dismissal. This involves assessing if Henderson Travels' actions in dismissing Ms Kaur were justified both in terms of the procedure followed and the justification for the decision to dismiss.
- (f) Remedies. If Ms Kaur is successful in either personal grievance I will then assess what remedies she is entitled to.

Assessing the evidence

[10] A large part of my analysis of the claims involves assessing the evidence to determine what occurred. In this regard much of what is alleged to have occurred is disputed and the written and oral evidence of the witnesses conflicts; so I have had to assess the credibility of the witness evidence and decide whose evidence I prefer in order to establish what occurred.

[11] As I have done in the past when considering conflicting evidence and making a decision on which witness' evidence is more credible, I have relied 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 Court.¹ This involves considering the following:

- (a) What each witness said – reviewing how each witness expressed his evidence both orally and in writing, considering what was said and how it was said.
- (b) Consistency – looking at whether the witness's evidence was consistent throughout; and whether the witness's evidence was consistent with other evidence such as contemporaneous documents or agreed or known facts.
- (c) Reliability – considering whether the witness appears reliable and was accurate in their perceptions and recall of events.
- (d) Concessions – looking at whether the witness made appropriate concessions.
- (e) How plausible – asking, overall, how reasonable, plausible or probable the witness's evidence was; and whether the witness's evidence hangs together and has a degree of truth or is persuasive.
- (f) Demeanour – considering the witness's bearing, appearance and attitude but noting that this is limited as genuine witnesses may be mistaken in their memory and those who do not tell the truth can still be convincing, i.e. looks can be deceiving.

[12] I have also considered the likelihood that witnesses might be mistaken and their recollection subject to confirmation bias or whether witnesses might, in fact, be lying under oath or affirmation.

[13] The key aspect of the assessment I have undertaken is set out below; based on this I have concluded that I prefer the evidence of Ms Kaur.

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

[14] Mr Sikri and Mrs Sikri's evidence was inconsistent in terms of their own evidence, between their evidence and in contrast to some of the documentary evidence. There were many instances of this in the written and oral evidence, and three examples are:

- (a) Mr Sikri's evidence about the additional work Ms Kaur says she undertook was inconsistent in relation to his assertion that the work was not required because the ticket issuing Ms Kaur says she was doing was not required and not done by her.
- (b) Mr Sikri and Mrs Sikri gave conflicting evidence about whether Henderson Travels accepted that Ms Kaur had in fact worked additional hours; Mr Sikri continuing to assert Ms Kaur was not required to do the additional work and Mrs Sikri saying Henderson Travels did accept she undertook some additional work and she was trying to quantify what additional payment should be made.
- (c) Both of Mr and Mrs Sikri's evidence on whether Henderson Travels sought repayment of wages from Ms Kaur was inconsistent with the transcript of a call between Ms Kaur and Mrs Sikri on 7 November 2019.

[15] These inconsistencies and the inaccuracies in the way some events were described by Mr Sikri and Mrs Sikri led me to conclude that Mr and Mrs Sikri were not reliable in their recollection of what occurred.

[16] Overall the evidence of Henderson Travels did not hang together or make logical sense in terms of the rationale for its version of the events. This applied to many aspects of the evidence including the work required to be done particularly in relation to payment for tickets and issuing of tickets, the overtime issue compared to the demand for repayment of wages issue and the timing and sequence of events for the decision to restructure the Henderson Travels business and then the decision to terminate Ms Kaur's employment as a consequence.

Wage arrears and holiday pay

[17] Ms Kaur was employed pursuant to terms set out in an employment agreement dated 10 November 2018. The employment agreement provided that Ms Kaur would work 35 hours per week and be paid \$21.00 per hour.

[18] In the course of my investigation there was a large amount of evidence about what work Ms Kaur was required to do for Henderson Travels and whether as a consequence she worked more than 35 hours per week. Henderson Travels' evidence was that Ms Kaur was not required to do additional work as this related to ticketing and was done by its India based business. The evidence about this was inconsistent and conflicting; Mr Sikri seemed to say the work was not required to be done by Ms Kaur so therefore she did not do it as alleged whilst Mrs Sikri accepted that additional work was done and she used these additional hours as part of her calculation she did relating to payment of wages, which she discussed with Ms Kaur on 7 November 2019. I note here that Mrs Sikri asserted the calculation was in fact assessing the extra hours worked to establish what additional wages should be paid by Henderson Travels for the overtime. Whatever the explanation for the calculation by Mrs Sikri (which I will assess later when dealing with the claim regarding a breach of the Wages Protection Act 1983) the end result is Henderson Travels accepted Ms Kaur undertook additional work and it follows therefore that its wage and time records, recording 35 hours per week are wrong.

[19] So I find Ms Kaur did work additional hours and I accept her records of those additional hours.

[20] Ms Kaur was paid the same amount each week calculated on 35 hours work at \$21.00 per hour. This is not disputed and is clearly evident from the wage slips for Ms Kaur.

[21] The difference between the hours worked by Ms Kaur, as recorded by her and the hours she was paid for (35 hours per week) is 346.1 hours which equates to \$7,268.10 in unpaid wages. Ms Kaur is entitled to payment for these unpaid wages.

[22] The other consequence of accepting Ms Kaur's record of the hours worked is that I find she did work on a public holiday, Waitangi Day 2019, as alleged and she was not paid correctly by Henderson Travels for this. Accordingly Ms Kaur is entitled to be paid \$267.75 as the additional payment due for working the public holiday and for a day in lieu which she was not paid, pursuant to the Holidays Act 2003.

Breach of the Wages Protection Act 1983

[23] As set out above, Ms Kaur was paid at a rate of \$21.00 per hour for 35 hours per week: this was \$615.01 after tax, each week. Ms Kaur says that Henderson Travels had decided that

despite this being recorded in her employment agreement and despite being paid the same amount each week, Henderson Travels decided she should only receive \$10.00 per hour, after tax, for the hours she actually worked. In order to effect this Henderson Travels wanted Ms Kaur to repay to it the difference between what she was paid, being \$615.00 per week and the amount it wanted to pay her based on \$10.00 per hour. Ms Kaur says that on many occasions Mr Sikri asked her to pay him money for the wages she had to repay to Henderson Travels.

[24] Ms Kaur says that in May 2019, when she returned from India and recommenced working for Henderson Travels she paid Mr Sikri \$860.00 for repayment of wages from earlier that year.

[25] Then Ms Kaur says, Mr Sikri started asking for further payments after she had been back working at Henderson Travels for a couple of months. This came to a head in October 2019 when Mrs Sikri began chasing Ms Kaur for repayment of wages and the two then had a telephone conversation on 7 November 2019. In that telephone conversation Mrs Sikri told Ms Kaur that she had calculated the amount to be repaid for wages to \$4,110.00 and she asked Ms Kaur to check the amount owed and then pay the amount the following week.

[26] Henderson Travels denies demanding any repayment of wages from Ms Kaur. It says Mr Sikri had loaned Ms Kaur some money and this is why she paid him \$860.00 in May 2019. And then it says that as Ms Kaur had been working more than 35 hours per week it accepted there was some overtime owing to her and this was what was discussed in the telephone conversation between Ms Kaur and Mrs Sikri on 7 November 2011.

[27] I have already indicated that I prefer Ms Kaur's evidence to that from Mr Sikri and Mrs Sikri and that is the case in terms of the evidence about whether Henderson Travels demanded repayment of wages from Ms Kaur. This is largely informed by a transcript of the 7 November 2019 telephone conversation, which Ms Kaur recorded.

[28] The first part of that transcript includes the following:

Mrs Sikri So what is your calculation? First tell me what is your calculation. When I came to Mt Albert that day, I told you that what you had given earlier, the 800 ... perhaps 880.. 850 you gave first

Ms Kaur Yes sister. Yes

Mrs Sikri Then I made it to zero till 6th, 12th May.

Ms Kaur Ok

[29] The part of the conversation confirms that a sum in the region of \$850.00 was paid by Ms Kaur, with Mrs Sikri then confirming this reduced the amount owed as at 12 May 2019 to zero. This is consistent with Ms Kaur's evidence.

[30] The next key part of the transcript includes the following:

Mrs Sikri So I have started after 13th May.

[31] So, what we see from this is Mrs Sikri calculates the amount owing from the week commencing 13 May 2019, as the amount owing at that stage is zero.

[32] The conversation then turns to the calculation by Mrs Sikri:

Mrs Sikri I have calculated your hours from July, 29th according to 43 hours just like you had done for a week.

Ms Kaur Yes.

Mrs Sikri Then I calculated 46 hours from 5th August to 11th August.

Ms Kaur Yes.

Mrs Sikri Then from 12th August onwards I have put 42 hours because I have put it according to your shifts from 10 to 6 then the extra that you started receiving from July, \$50 extra

Ms Kaur For afterhours

Mrs Sikri Yes, from July, \$50 for afterhours.

Ms Kaur Yes

Mrs Sikri So after calculating that my calculation has come out to be ... first it was 225 then from 1st July till 28th July is 175 and then it is 135 in which you did 43 hours.

Ms Kaur Yes.

Mrs Sikri 105 in which you did 46 hours.

Ms Kaur Yes

Mrs Sikri After that it is all 42 hours and plus your \$50. So it becomes 145, so the total calculation so far till 27th October is 4110 in total.

[33] The first part of Mrs Sikri's calculation is for the period 13 May 2019 until 1 July 2019. For this period Mrs Sikri says there is \$225.00 owed per week – this is what “first it was 225” refers to. The amount of \$225.00 owing per week is calculated as follows:

(a) Ms Kaur had recorded 39 hours per week; at \$10.00 per hour (the net amount Henderson Travels would pay Ms Kaur) this is \$390.00.

(b) Henderson Travels had already paid Ms Kaur \$615.00 (net) for each of these weeks so the balance to be repaid was the \$615.00 paid less the \$390.00 Henderson Travels was prepared to pay, which is \$225.00.

[34] The second part of Mrs Sikri's calculation is then based on the four weeks in July 2019 at \$175.00 per week. This is payment for 39 hours per week plus an additional payment of \$50.00 per week that Henderson Travels had agreed to pay for “afterhours work” being done by Ms Kaur. So, the calculation was 39 hours at \$10.00 per hour plus an additional \$50.00 per week, which is \$440.00 that Ms Kaur was to be paid. This is deducted from the \$615.00 already paid per week to give an overpayment of \$175.00; this is confirmed when Mrs Sikri says “then from 1st July till 28th July is 175”.

[35] The third part of the calculation is the week of 29 July 2019 to 4 August 2019; which Mrs Sikri says is 43 hours. The overpayment for this week is \$430.00 plus \$50.00, so \$480.00 payable to Ms Kaur, deducted from the \$615.00 already paid leaving a balance of \$135.00; this is confirmed when Mrs Sikri says “and then it is 135 in the week in which you did 43 hours.”

[36] The fourth part of the calculation is then the week of 5 August 2019 to 11 August 2019, in which Ms Kaur worked 46 hours. The overpayment for this week is \$460.00 plus \$50.00, so \$510.00 payable to Ms Kaur, deducted from the \$615.00 already paid leaving a balance of \$105.00; this is confirmed by Mrs Sikri when she says “105 in which you did 46 hours.”

[37] The final part of the calculation is then the balance of time at a rate of 42 hours per week. The overpayments for these weeks are \$420.00 plus \$50.00, so \$470.00 payable to Ms Kaur, deducted from the \$615.00 already paid leaving a balance of \$145.00; this is confirmed by Mrs Sikri when she says “After that it is all 42 hours and plus your \$50. So it becomes 145”.

[38] Taking each of these weekly amounts and applying them to the applicable weeks, the calculation is: $(\$225.00 \times 7) + (\$175.00 \times 4) + \$135.00 + \$105.00 + (\$145.00 \times 11) = \$4,110.00$. And this is the amount Mrs Sikri says is owed when she states “so the total calculation so far till 27th October is 4110 in total”.

[39] Mrs Sikri would not accept that the telephone conversation on 7 November 2019 was about the calculation of the amount of wages Henderson Travels wanted Ms Kaur to repay to it, rather she said it was about calculating the amount of overtime to be paid to Ms Kaur. I reject that explanation for two reasons: first, the calculation that I have set out based on Ms Kaur’s evidence, the transcript of the telephone call and my own analysis of the numbers, is credible and it adds up; and second, the numbers cannot represent payments for additional hours worked because the amounts calculated per week go down as the hours increase – that is an illogical output, as more hours should mean more pay not less.

[40] So, I am satisfied that Henderson Travels did demand repayment of some of the wages paid to Ms Kaur on at least two occasions. One demand led to Ms Kaur paying \$860.00 to Henderson Travels and the other demand was for \$4,110.00, which Ms Kaur did not pay.

[41] I am also satisfied that it was implicit in the demand for repayment of wages that Ms Kaur’s employment would only continue on this basis. And it follows that I accept this is a demand for payment of money for Ms Kaur’s employment which amounts to a premium being sought in breach of s 12A of the Wages Protection Act 1983.²

Repayment of \$860.00

[42] I accept Ms Kaur’s evidence in relation to payment of \$860.00 to Henderson Travels in repayment of wages. This is a premium in breach of s 12A of the Wages Protection Act and therefore Ms Kaur is entitled to an order for recovery of the payment pursuant to s 12A(2) of the Wages Protections Act.

Penalty

² *Kazemi v RightWay Ltd* [2019] NZEmpC 59.

[43] Ms Kaur seeks penalties for the breaches of her employment agreement, the Minimum Wage Act 1983, the Holidays Act 2003 and the Wages Protection Act 1983.

[44] I am not sure, on the basis of the statement of problem and counsel's submissions, that the penalty for the breach of the Wages Protection Act was sought within the requisite 12 month period but in any event it would, in my view, be appropriate to globalise the breach of the Wages Protection Act, the employment agreement and the Holidays Act as these relate to the same default; the failure to pay Ms Kaur for the actual hours she worked rather just paying her for the set amount of 35 hours per week.

[45] So for penalty purposes I have two defaults, failure to pay Ms Kaur for all of the hours she worked and demanding and receiving a premium for employment.

[46] Based on the factors set out in s 133A of the Act I am satisfied that a penalty is warranted for these two sets of breaches. And, my starting point for quantifying the amount of that penalty is \$40,000 being \$20,000 for each globalised breach.

[47] Applying s 133A of the Act and the relevant case law in relation to assessing quantum of penalties I record the following as being relevant factors:³

- (a) The breaches occurred over a long period of time and consequently relate to significant amounts of money owed and demanded – almost \$5,000 in premiums sought and over \$7,500.00 in wage arrears.
- (b) Ms Kaur was vulnerable and exploited as a migrant worker tied to Henderson Travels.
- (c) Henderson Travels has shown no remorse over its actions denying any wrongdoing.
- (d) There is no record to show any prior breaches of employment standards or obligations by Henderson Travels and I am not aware of any other complaints made against it.

³ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143; *A Labour Inspector v Parihar* [2019] NZEmpC 145; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12; and *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43.

(e) Ms Kaur suffered significantly as a result of these breaches including financial hardship and stress and anxiety.

[48] Based on this summary of the scope and extent of the breaches and the nature of the actions giving rise to the breaches as well as the impact on Ms Kaur, I assess the penalty to be \$12,000.00 and consider it appropriate that \$9,000.00 of that penalty be paid to Ms Kaur.⁴

Unjustifiable action causing disadvantage

[49] Section 103(1)(b) of the Act provides that an employee may have a personal grievance against their employer where that employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer.

[50] Section 103(1)(b) of the Act can be broken down into three parts:

- (a) What does the employee say the employer did and did the employer act as alleged?
- (b) If so, did these actions cause any disadvantage to the employee's employment or a condition of employment?
- (c) If so, were the employer's actions justifiable?

[51] My analysis of each of these parts as they relate to Ms Kaur's claim has been difficult as it is the one aspect of my investigation in which I found the evidence from both parties to be inconclusive.

[52] First, I need to be satisfied that based on the evidence the action complained of – that Ms Kaur was required to work in a restaurant rather than the travel business – occurred.

[53] There is no doubt Ms Kaur worked in a restaurant that was affiliated with Mr and Mrs Sikri at the commencement of her employment with Henderson Travels. So, in so far as Ms Kaur's claim, for unjustified action causing disadvantage, is based on this action occurring

⁴ Applying s 133A of the Employment Relations Act 2000 and *Maddigan v Director-General of Conservation* [2019] NZEmpC 67 at [55].

it did occur. However, it was not clear if this occurred because Henderson Travels instructed Ms Kaur to do this or whether she wanted to do it and did so by agreement.

[54] So I am unsure about this aspect.

[55] Second, I then need to find the action caused a disadvantage to Ms Kaur's employment. I accept there is a disadvantage for Ms Kaur in not being able to do the job she was employed to do. So this aspect of the claim is established.

[56] Third, if the action did happen and there was disadvantage then I need to be satisfied that the action was unjustified. In analysing this aspect of Ms Kaur's claim the question turns back to whether she carried out the work by agreement – which, again I am unsure of.

[57] Reflecting on the evidence and the legal issues for Ms Kaur's claim for unjustified action my conclusion is that, on balance, I am not satisfied that the claim is established.

Unjustified dismissal

[58] The question to be answered for an unjustified dismissal personal grievance is, was the dismissal justified? An analysis of justification starts with s 103A of the Act, which sets out the test for justification. In *Grace Team Accounting v Brake*, the Court of Appeal considered s 103A in a redundancy situation and said at [85]:⁵

If an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test.

[59] So, the question of whether a dismissal, in a redundancy situation, was justified in terms of s 103A of the Act turns on whether an employer can show that its decision to dismiss an employee for redundancy was genuine and in coming to that decision it met the notice and consultation requirements of the Act.

Was the restructure and decision to dismiss Ms Kaur genuine?

[60] The events leading up to the termination of Ms Kaur's employment start with the demand for repayment of wages made firstly by Mr Sikri and then by Mrs Sikri in the telephone

⁵ See *Grace Team Accounting Ltd v. Brake* [2014] NZCA 541.

call on 7 November 2019. With the demand for payment having been made and Ms Kaur then not making the payment in the days following it appears Henderson Travels decided to take matters into its own hands in terms of recouping payment.

[61] The first step was to not pay Ms Kaur on 21 November 2019 for her previous week's work. Mr Sikri says this was a payroll glitch but led no evidence to support this and, in fact, his response when Ms Kaur chased him up for payment was inconsistent with that.

[62] On 25 November 2019 Ms Kaur spoke to Mr Sikri about her pay and then sent an email the following day stating that she had not been paid and asking when she would be paid. Mr Kaur then turned up at the office after he had received the email. Ms Kaur recorded the conversation she had with Mr Sikri and whilst the recording was not clear in places, she produced a transcript, which I accept as being accurate.

[63] The conversation begins:

Mr Sikri	What did you email me?
Ms Kaur	Regarding pay
Mr Sikri	What I told you to email leave without pay, you had to write like I am going on unpaid leaves.
Ms Kaur	No sir, you told me I will not pay you
Mr Sikri	Yeah, otherwise clear the old balance, I told you my situation but still you are not doing

[64] This conversation shows that Henderson Travels had not paid Ms Kaur and Mr Sikri had told her he was not going to pay her unless she cleared the balance owing and that she was to send an email stating that she was taking the week, for which she had not been paid, as unpaid leave.

[65] In the course of the conversation Mr Sikri made various demands for payment and threatened Ms Kaur with redundancy:

Mr Sikri	... I give you this job just to support you. You told me when your husband starts working in New Zealand, we will together save some money to pay you then everything will be fine. That's what you said to me. You are an unnecessary expense for me.
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....

Mr Sikri ... But now you are going the wrong way. You can decide what you do but I can close my branch after today. I will give you redundancy notice. You are doing this to me.

....

Mr Sikri Yesterday you told me I will arrange some money but now you send me this type of email.

....

Mr Sikri But you can't be emailing me like this. If you want to go the other way then I have to inform immigration that this person is not responding me and I will start a redundancy process.

....

Mr Sikri I will issue you a redundancy and will transfer your pay after deducting the balance amount. Give me the laptop, keys and mobile

[66] Ms Kaur then left the office when the conversation ended, having handed back her work laptop, phone and keys and left believing her employment had been terminated.

[67] Mr Sikri said that Ms Kaur's transcript of the meeting was not accurate and that he had not dismissed her. He said he took Ms Kaur's work laptop and phone as he was upgrading the work computer and he asked for the keys because an electrician was going to undertake some work at the office.

[68] On 27 November 2019, Mr Sikri sent an email to Ms Kaur which purported to commence a restructuring process with her; he then went through the steps of carrying out consultation which ended up in Ms Kaur's employment being terminated.

[69] Based on Ms Kaur's evidence, including the transcript I am satisfied that Mr Sikri did in fact dismiss her on 26 November 2019 in response to her not paying the money Henderson Travels had demanded. Mr Sikri's subsequent actions were then merely an attempt to cover up what had occurred.

[70] As a result of this conclusion, I find that Ms Kaur's dismissal for redundancy was not genuine and amounts to an unjustified dismissal.

Was the process of consultation a fair one?

[71] As I have decided that Ms Kaur's redundancy was not genuine and her dismissal was unjustified I do not need to consider if the process was a fair one; however, for the record I note there was no consultation at all over Ms Kaur's dismissal and therefore it is also unjustified for this reason.

[72] It follows that Ms Kaur's dismissal was unjustified both procedurally and substantively.

Remedies

[73] As Ms Kaur was unjustifiably dismissed I may award any of the remedies provided for under s 123 of the Act; Ms Kaur seeks compensation and reimbursement.

Compensation

[74] Turning to compensation, this is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers and is made pursuant to s 123(1)(c)(i) of the Act.

[75] I must quantify the harm and loss caused by the humiliation, loss of dignity and injury to feelings. In doing this I must consider the effects of the dismissal on Ms Kaur, identifying the harm caused to her and the loss she suffered as a result. Then I must quantify that harm and loss by assessing where that sits on the spectrum of harm and loss suffered by those that have been unjustifiably dismissed and where that corresponds to the spectrum of quantum awarded as compensation.⁶

[76] Based on Ms Kaur's evidence I am satisfied that as a result of being dismissed she suffered with significant stress and anxiety, depression and panic attacks which manifested in feelings of helplessness and vulnerability. She also had difficulty sleeping. Ms Kaur sought medical assistance from her doctor to deal with the impact of the dismissal.

[77] Based on this harm and loss I assess the level of compensation to be \$21,000.00.

⁶ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132; and *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

Reimbursement

[78] Ms Kaur also seeks reimbursement for the earnings she has lost as a result of her unjustified dismissal pursuant to s 123(1)(b) of the Act. She also seeks payment for notice which was not paid by Henderson Travels, being two months remuneration.

[79] As I am satisfied that Ms Kaur has a personal grievance and she has lost remuneration as a result, then pursuant to s 128 of the Act my starting point is to award Ms Kaur at least the lesser of her lost remuneration or three months ordinary time remuneration.

[80] Three months ordinary time remuneration for Ms Kaur is \$9,555.00 and this is less than Ms Kaur's actual loss as she was unable to find new work for 12 months. So, three months ordinary time remuneration is my starting point but I can exercise my discretion to award more up to the full loss under s 128(3) of the Act.

[81] The exercise of the discretion under s 128(3) was considered by the Court of Appeal in *Sam's Fukuyama Food Services Ltd v Zhang*, where the Court concluded there is no automatic entitlement to full loss and set out the factors to consider in exercising the discretion to award an amount up to that full loss.⁷

[82] Applying *Zhang*, I am satisfied that I should exercise my discretion to award Ms Kaur more than three months ordinary time remuneration but not her full loss. My starting point is three months ordinary time remuneration plus two months ordinary time remuneration for the unpaid notice period, totalling five months remuneration. I think an appropriate amount to compensate Ms Kaur for lost remuneration is eight months.

Contribution

[83] As I have awarded remedies to Ms Kaur, I must now consider whether she contributed to the situation that gave rise to her dismissal and if so whether I should reduce her remedies.⁸ This means I must decide if Ms Kaur behaved in a manner that was culpable or blameworthy, and this behaviour contributed to her grievances.⁹

⁷ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

⁸ Section 124 of the Employment Relations Act 2000.

⁹ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

[84] I have reflected on what occurred to Ms Kaur and how she acted and I find that Ms Kaur did not act in a blameworthy or culpable manner; there was no contributory behaviour from Ms Kaur requiring a reduction in the remedies she has been awarded.

Outcome

[85] Henderson Travels has not paid Ms Kaur for all of the hours she worked and it must pay her \$7,268.10 in unpaid wages plus \$267.75 for working a public holiday. Ms Kaur is also entitled to be paid holiday pay on these amounts to be calculated at 8%.

[86] Ms Kaur is entitled to be paid \$860.00 for the amount she paid to Henderson Travels as a premium for employment, pursuant to s 12A of the Wages Protections Act 1983.

[87] Within 28 days of the date of this determination, Henderson Travels must pay Ms Kaur the sum of \$9,000.00 as part payment of the penalty imposed.

[88] Within 28 days of the date of this determination, Henderson Travels must pay to the Authority for transfer to a Crown Bank account the balance of the penalty imposed being \$3,000.00.

[89] Henderson Travels unjustifiably dismissed Ms Kaur. In satisfaction of this personal grievance it must pay Ms Kaur:

(a) \$21,000.00, without any deduction, for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

(b) \$25,480.00 (gross) for reimbursement pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000.

Costs

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

[91] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority