IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE

[2023] NZERA 571
3137200

	BETWEEN	SIMARJIT KAUR Applicant
	AND	KAITERITERI PROPERTIES LIMITED Respondent

Member of Authority:	Antoinette Baker
Representatives:	Nick Mason, counsel for the Applicant Anjela Sharma, counsel for the Respondent
Investigation Meeting:	9, 10 May 2023 at Nelson
Submissions received: Further information:	On the day 22 August 2023 from the Respondent 23 August 2023 from the Applicant
Determination:	2 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent (KPL) runs a hospitality venue business that includes a lodge and bar that caters to the seasonal tourism industry. Ms Kaur was employed by KPL from January 2018 until her role was made redundant by KPL on 29 June 2018.

[2] Ms Kaur claims she was unjustifiably dismissed because of a hasty and non-genuine redundancy. She also claims she was disadvantaged in her employment through KPL's unjustified actions which included allegedly having to work longer hours than she was paid for and for being 'on call'; that she was required against her preference to live on-site in unacceptable accommodation and this impacted her personal life; that she was treated poorly by a manager and KPL did nothing to address her complaint about this; and that she was required to carry out duties not in her job

description. Ms Kaur also claims that the result of her unpaid hours may have breached the minimum wage rates at the time.

[3] KPL denies all of the claims and says Ms Kaur did not work the hours she says she did either in addition to those she recorded or those she says were 'on call.' It says any 'passive' hours were in exchange for the free accommodation package she had agreed to from February 2018 when her role became permanent. KPL says that Ms Kaur's disadvantage claims are out of time and if they are not, they are refuted and she only raised them, and the wage arrears claim, upon the event of the redundancy which she was unhappy about. KPL says Ms Kaur was employed throughout her employment in the bar and the lodge for $19.00 gross per hour doing bar manager and housekeeping using a 'banked hours' arrangement. KPL says Ms Kaur agreed to this so that she could present a higher rate of pay ($25.00 per hour) and a description of a more senior management role for immigration purposes. KPL says it did not know exactly what new visa Ms Kaur was seeking and denies knowing she was granted a new visa to work only for KPL about a month before KPL made her role redundant.

[4] Ms Kaur claims compensation, lost earnings for the grievances, a wage arrears claim and costs.

The Authority's investigation

[5] An investigation meeting was held. Briefs of evidence were lodged before the meeting by Ms Kaur and her partner Mr Mukinder Singh; and by the two directors of KPL, brothers, Mr Anthony Jones (hereafter called Mr Jones) and Mr Kendall Jones. All witnesses swore or affirmed their evidence and were cross examined. I heard oral submissions from both counsel at the end of the investigation meeting. I asked and received further clarifying information from the parties after the investigation meeting about a message sequence in December 2017 and before this Determination was finalised.

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

[7] This determination has been issued outside the statutory period of three months. When I advised the Chief of the Authority this would occur, he decided, as he is permitted by s174D(3) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174D(2) of the Act. After the extension was granted there was then a need to obtain the above mentioned further information from the parties.

The issues

[8] The issues requiring investigation and determination are:

a. What was agreed about role, hours of work, pay and the 'accommodation package' for Ms Kaur's period of employment with KPL?
b. Was Ms Kaur unjustifiably dismissed due to a redundancy that was unfair as to process and or not genuine as to the reason to disestablish her role?
c. Was Ms Kaur disadvantaged in her employment by unjust actions of her employer and are there any claims not raised within time?
d. Has Ms Kaur shown she worked longer hours than she was to be contractually paid for including hours for being 'on call' during her employment?
e. Depending on the above what remedies are to be awarded?
f. If remedies are awarded, should they be reduced under s124 of the Act for blameworthy conduct by Ms Kaur that contributed to the situation giving rise to her grievance(s)?
g. Is either party to contribute to the costs of the other?

What was agreed about role, hours of work, pay and the 'accommodation package' for Ms Kaur's period of employment with KPL?

[9] I will first consider what the parties agreed about Ms Kaur's employment. This will assist me to better consider the remaining issues. In doing this I will rely on evidence openly provided by the parties that they have all seen and had the opportunity to comment on. I do not make any conclusions about obligations that either party may or may not have outside of this jurisdiction.

[10] There are three individual written employment agreements (IEA) in evidence before me and a claim by KPL there was a 'side agreement' that as noted above

allegedly reflected the reality of the employment as to pay and hours throughout the employment.

The 'side agreement'

[11] I am satisfied that Ms Kaur was employed by KPL after having discussions about her immigration situation with Mr Jones. I find it more likely than not that these discussions occurred in December 2017, before Ms Kaur started working for KPL in January 2018 and before she signed the first IEA on 4 January 2018. This evidence was provided by both parties but in different segments of the same messaging (messaging). The parties exchanged positions through counsel (after the Investigation Meeting) about reasons why all messaging has not been provided. I make no finding about this. I find the 17 December 2017 messaging helps me to consider whether a 'side agreement' was likely agreed to.

[12] The messaging shows that the 'assistant lodge manager' had resigned from KPL by December 2017. I accept KPL's evidence that this was right on the busy season. I find this consistent with Mr Jones' messaging to Ms Kaur that KPL needed someone to start 'asap.' I find this can be reasonably taken that KPL looked to replace that role or at least the work that the resigning person was doing. I find it likely that role including bar work, housekeeping duties and reception: assisting with some checking in and out of guests, responding to guesteeds, and taking and processing bookings. The messaging shows that Mr Jones offered the position as 'two roles,' being 'housekeeping and bar'. This is consistent with the dual timesheets filled in by Ms Kaur for her varied hours during the course of her employment. This was not as I understand a large workplace and I find a likelihood that duties could become fluid and responsive to guest demand.

[13] Further, I find that Ms Kaur put forward in the messaging to Mr Jones in quite emotive terms that she would give him her 'own words' for him to put to New Zealand Immigration (INZ) and that this would be a 'secret'. The messaging shows me that Ms Kaur then leaves it to Messrs Jones to work something out when she was told by Mr Jones that the role being offered was not worth the rate, she said she required for immigration purposes. The messaging reflecting this is:

Mr Jones:

> OK I have spoken with my brother and we would like to employ you, but as we talked about this position is not a $23.50 per hour job, so we need to talk about that and also inz requirements.
>
> … if you do the minimum of 30 hours @ $24.50, the actual hours worked would be 38.5 @ $19.00". Broadly speaking the maths here works out at $19.00 per hour.

To the above Ms Kaur responds with:

> Yes exactly. If you can do that That will be great.

[14] There is further support for the above arrangement in Ms Kaur's written evidence: 'We [Ms Kaur and Messers Jones] talked all about the hours, and we agreed that I would be put on a salary, and that I would work extra hours in summer during the busy season, and less hours in the winter, and that my salary payments would remain consistent despite my fluctuating hours week to week.'[1] By this time Ms Kaur had clarified to KPL that INZ required $25.00 per hour.

[15] KPL acknowledges it signed the second IEA on 8 February 2018. It records hours 'at a minimum of 30 and a maximum of 60 per week.' However, despite this KPL's evidence includes that it agreed with Ms Kaur that it would record her salary as $52,000.00, 'being equivalent to an hourly rate of $25 gross, and a 40-hour week …to satisfy the applicants [Ms Kaur's] INZ requirements.'[2] This is consistent with the third IEA signed the same day (that I return to below) that departs from the 30 hours minimum to saying the hours were to be 40 hours per week on the $52,000.00.

Banked hours

[16] Further to the above is the evidence of a 'banked hours' arrangement. KPL has provided a 'banked hours' table although I note that Mr Jones in his oral evidence struggled to be clear how it was calculated or when it was created. Ms Kaur appeared vague as to her knowledge of the actual table. It appears Mr Jones relied on an administration employee of KPL to keep a track of the banked hours arrangement.

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[1] Brief of Evidence of Simarjit Kaur dated February 2023 at [7].
[2] Joint Brief of Evidence of Anthony and Kendall Jones dated 27 April 20203 at [13].

[17] I have considered the table against KPL's electronic pay records, and Ms Kaur's time sheets (albeit not quite a complete set) that have been provided. In short, the table reflects what Mr Jones says Ms Kaur agreed to. For the last 21 weeks of her employment, she was paid $1,000.00 gross per week for 40 hours. The 'banked hours' table then tallies an unders and overs equating hours worked (as per timesheets) against 52 hours per week at $19.00 gross per hour. KPL in the final pay deducted from Ms Kaur's pay 112.50 hours to square up her recorded hours of work at $19.00 gross per hour. This deduction totalled a gross of $2,806.26.

[18] This is a significant deduction from a final pay although I note that it was not claimed by Ms Kaur as an illegal deduction[3] by virtue of being without her consent. I take then that this deduction was not in dispute. It is sizeable and any employee would have been expected to challenge this if it was not consented to. This adds support to Mr Jones's oral evidence that Ms Kaur knew about the 'banked hours' arrangement and had agreed with it.

[19] Further support that there was a 'side agreement' is in Ms Kaur's own written evidence in that she says she met with Messers Jones and they agreed she would work extra hours in the summer and less in the winter and would remain on a salary[4]. This combined with the messaging in December 2017 and the evidence from KPL that there was the side agreement satisfies me that Ms Kaur agreed to terms and conditions for pay and hours that were different to those she agreed to in written documentation and this was likely the arrangement I have set out above.

The first employment agreement

[20] I turn now to the employment agreements that the parties signed. Ms Kaur signed a first individual employment agreement with KPL dated 4 January 2018 (first IEA). It was headed 'Casual Employment for Accommodation Agreement' and included what is often referred to as an 'as and when required' description of the employment.[5] The hourly rate was $19.00 gross per hour and the role described as 'bar

[3] Section 4 Wages Protection Act 1983 requires written consent for deductions from pay.
[4] As above at 1.
[5] Clause 3 of the first IEA dated 4 January 2018.

managing and housekeeping duties'. In her evidence she describes being on a 'training rate' of $19.00 per hour initially and then being employed as per the second IEA from 8 February 2018, an increase to $25.00 per hour and for a more senior role. KPL says she did not change what she was doing after signing the first IEA, she remained on $19.00 per hour but just got more hours.

[21] After considering KPL's electronic pay records for Ms Kaur I am satisfied she started working according to the first IEA for $19.00 gross per hour. Payment at this hourly rate continued according to hours she recorded on corresponding KPL timesheets for bar and housekeeping (lodge) duties until and including the week ending 8 February 2018. The hours in this period are consistent with what could reasonably be accepted as the height of the busy holiday season. Ms Kaur was certainly on the face of it recording very long hours worked with split shifts that I take it were housekeeping hours in the morning and the bar at night interspersed with duties on reception. I find that apart from the first week of employment which was only 13 hours in that week (likely 'training' on reception duties that Ms Kaur explained in her oral evidence) the weeks in her first part of employment to week ending 15 February 2018 ranged from at the lowest 58.5 hours to at the highest 80.5 hours per week, all paid directly to her at $19.00 gross per hour worked.

The second employment agreement

[22] Ms Kaur signed a second individual employment agreement with KPL dated 8 February 2018 (the second IEA) being the same day that marked (according to payroll records) [6] the last payment week that she was paid $19.00 per every hour she worked.

[23] The second IEA is in the same type of template format as the first IEA and records Ms Kaur's job description at Schedule A as 'bar managing and housekeeping duties' and at Schedule C 'Position Title - Bar Manager: Hours per week as required' and under 'Position and Duties' 'Accommodation and Hospitality Manager'.

[24] Ms Kaur gave oral evidence that the reference to 'bar managing and housekeeping duties' is a mistake in the second IEA. I find it is likely a mistake but

[6] According to KPL's 'banked' record of hours it appears to mistakenly record this week paid at $25.00

only to the extent that the parties intended to put the role of 'Accommodation and Hospitality manager' into the agreement for 'immigration purposes' as was the likely 'side agreement' in place. KPL says that the role Ms Kaur started on, 'bar and housekeeping' with some reception duties, was what Ms Kaur in reality continued to do.

[25] I find further support for KPL's position. The second IEA includes a job description for the 'Accommodation and Hospitality manager' role. I asked Ms Kaur about the duties and responsibilities listed and I am satisfied she did not perform all of these during her employment. She did not review policies and procedures or appear to have managerial duties over other staff. She did not purchase and arrange supplies for the lodge including the kitchen nor did she likely manage, develop, and mentor all staff including their training. The description she gave of her usual day of work in oral evidence[7] was that she would start by dealing with check out duties at 6 am, then undertake cleaning duties and finish at 2.30 to 3.00pm, then that she would 'sometimes' go to the restaurant to work with a 'minimal break' and without the ability to get food or be provided with food and then would work in the bar finishing at 11 to 12.30pm at night.' I find that none of this is likely consistent with a role that is overall managing the lodge and bar as the duties set out in the second IEA. They are consistent with Ms Kaur likely continuing to work in the 'dual role' she was offered in the December 2017 messaging, as KPL says.

[26] I found plausible and straight forward the evidence of Mr Jones that he was the overall manager of the business and that he lived closely adjacent to the lodge. Mr Kendall Jones supported this situation and described himself as doing the financial side of the business. I might liken the brothers to having front facing (Anthony) and back room (Kendall) management of the business.

[27] Ms Kaur's contention that she had a higher-level role is also inconsistent with her timesheets recording her work per hour in the bar and the lodge. This type of hourly recording is not consistent with a salaried managerial position. I find it likely that Ms Kaur continued to work on housekeeping and bar duties with various guest responsiveness duties that I do not find likely married up with the duties expressed in

[7] Answer to Mr Mason during re exmainiation when Ms Kaur was asked what a 'typical day' at KPL was.

the second IEA, at page 17. While the messaging in December 2017 did not refer explicitly to a higher role being presented to INZ, I have already found that KPL wanted to replace its 'assistant lodge manager role' describing it as dual housekeeping and bar.

[28] The second IEA further records '$52,000 pa with hours of work described in Schedule A as:

> Flexible hours as required by the employer. Hours may vary from week to week. Minimum engagement of 30 hours per week maximum 60 hrs average

and, that

> the 'ordinary hours of work would not normally exceed fifty five (55) hours in any one week or 12 hours in any one day and may be worked on no more than five days of the week, Monday to Sunday inclusive, the employer agreeing to provide at least 2 hours per shift of work.

[29] The wording is consistent with the position becoming permanent. The parties appear to have agreed that the hours expressed here applied. What complicates things is that the second IEA included terms about free accommodation in exchange for work duties that appear to form part of what Ms Kaur says falls into the category of 'on call' extra work that I will return to below.

What was likely agreed about the accommodation 'package'

[30] From the time of signing the second IEA Ms Kaur began to live on-site in a guest room. The second IEA at Schedule A included the following about an 'accommodation package':

> The role includes free accommodation, free Wi-Fi and laundry for which the employee lives on site to ensure the health and safety and compliance of house rules. The role includes checking the communal areas to ensure they are clean and guests are not disturbing other guests in the evenings and external lights are turned off, all the fire doors are kept closed and the external exits are secure. It is the employees responsibility to inform the Director if they are not on site and available to perform these duties on any given day. (This includes days off and annual leave).

[31] Ms Kaur says the accommodation was free and was not attached to her salary. I do not accept that position because it ignores the wording in the accommodation package wording in schedule A that she signed. I will return to the issue of non-recording of an agreed value of that accommodation when I consider the claim for extra hours worked.

[32] Ms Kaur varied in her oral evidence about the accommodation agreement when I asked her why she said it was 'free' (in her written evidence) and not in exchange for the evening duties as is recorded in the second IEA that she signed. She initially said there was no discussion about an 'exchange' and then conceded that she did agree and sign the second IEA with the accommodation package wording but that she was not then happy with the accommodation. I will return to that issue later.

[33] I do not accept Ms Kaur's further claim that she was pressured into accepting the 'accommodation package' based on wanting to get support for her visa application. Mr Jones rejects that he made this a condition. If however there was a discussion of this sort, I find a likelihood that reference to 'supporting' Ms Kaur and what that entailed appeared not to have been discussed in any detail. In my view both parties contributed to this lack of clear communication in the context of Ms Kaur being driven to want to stay in New Zealand (I refer below to her evidence of not wanting to return to India) and KPL being desperate for someone to work in the lodge and bar particularly after a resignation at the height of the busy season. At best there was a talking past each other, at worst each party had their own agenda and did not sensibly consider the consequences of creating the mess of recording what they actually agreed to.

[34] In saying that she did not want to live on site and that Mr Jones pressured her to do so, Ms Kaur has put forward that he told her he would not support her 'Essential Skills Work Visa Application [the sponsored visa] unless she agreed to live at the Lodge' meaning her visa was tied to her employment and that 'there was little she could do to object [to having to live on site] without the risk of jeopardising her position and therefore her immigration status.'[8] I do not accept this was an exploitation type situation where Ms Kaur was forced to live on site due to being attached to an existing visa with the employer. Ms Kaur was on an open work visa at the time, and it was due to expire

[8] Statement of Problem at paragraph 2 (s) and (t).

in June 2018. That document is referenced and attached to the first IEA and was known to both parties.

[35] According to INZ documentation, Ms Kaur did not apply for the sponsored visa until April 2018 and even then, the application must have been incomplete because Mr Jones (despite saying he took no notice of what he signed) did not sign the supplementary employer form until May 2018. The sponsored visa was then not granted until 24 May 2018 by which time Ms Kaur had been working and living on site since February 2018. The sponsored visa changed things for Ms Kaur who otherwise had to leave New Zealand in June 2018 on the expiry of her open work visa. This effectively gave Ms Kaur a further two years to remain in New Zealand, something she was clearly wanting to do based on her own evidence of her description of family pressuring her to return to India and her not wanting to do so. Ms Kaur's strong urge to remain in New Zealand is evidenced in the messaging in December 2017 referred to above. It is consistent with KPL's evidence that she was driving the process for the application, albeit with Mr Jones not focused on the detail of what he was signing KPL for.

[36] Standing back and considering the above I find it likely that the accommodation package as set out in Schedule A of the second IEA was agreed to and was not pressured onto Ms Kaur. I will however return later to the 'accommodation package' as it relates to Ms Kaur's wage claim.

The third IEA

[37] Complicating matters is the third IEA and set of documents obtained by KPL from INZ in relation to Ms Kaur's application for the sponsored visa.[9] This third IEA and a 'formal offer of employment' to Ms Kaur for the position of 'Accommodation and Hospitality manager' are both dated 8 February 2018. KPL disputes having seen these before. The letter of offer indicates 40 hours per week at $25.00 per hour, the position being 'full time permanent'.

[9] Obtained for KPL under an Official Information Act 1982 request.

[38] The third IEA does not differ in content greatly from the second but is in an entirely different format and has no reference to the above referred 'accommodation package' or the flexible nature of the hours per week being between 30 and 60 hours.

[39] As already noted above, KPL's evidence is that it agreed with Ms Kaur that it would record her salary as $52,000.00, 'being equivalent to an hourly rate of $25 gross, and a 40-hour week …to satisfy the applicants [Ms Kaur's] INZ requirements.'[10] This is what is recorded on the third IEA.

[40] I find it likely that the third IEA was 'redone' for the purpose of Ms Kaur's application for the sponsored visa and likely back dated. That it excludes the 'accommodation package' wording is not surprising given the lack of clarity about the value of the accommodation in that wording. I do not intend to make findings further about this but overall, I find that KPL put itself in a position whereby Mr Jones knew there was to be a presentation of a different pay and hours to what the reality was.

[41] In short, the parties have made a very poor job of recording what they agreed to about Ms Kaur's terms and conditions of employment and I find this was to satisfy their respective interests. KPL of course cannot then be said to be an employer that has accurately kept records as it claims in its evidence[11] both in terms of an IEA and pay records that it is statutorily obliged to do.

[42] Doing the best from what I have before me I now summarise what I find the parties likely agreed to, irrespective of what they may have recorded in writing. Ms Kaur was employed in a role that included:

a. housekeeping, bar work (she held a duty manager certificate) and some reception duties with additional night duties in exchange for a free 'accommodation package';
b. a pay rate of $19.00 gross per hour;
c. after the beginning of February 2018, Ms Kaur was paid a standard $1,000.00 gross per week (variation where weeks included public holidays notwithstanding) expressed in pay records as $25.00 per

[10] Joint Brief of Evidence of Anthony and Kendall Jones dated 27 April 20203 at [13].
[11] As above at paragraph 36.

hour at 40 hours per week but with a side record kept to reconcile 'banked hours' at the end of her employment to equate her rate to one of $19.00 per hour

[43] I will now consider the issues.

Was Ms Kaur unjustifiably dismissed due to a redundancy that was unfair as to process and or not genuine as to the reason to disestablish her role?

[44] Ms Kaur's employment ended when KPL decided that it would make one role redundant out of its staff. That role was called 'Accommodation and Hospitality Manager.'[12] This is the role referred to in the second and third IEAs which I have found above was likely a title for the purpose of Ms Kaur's application for a new visa application and did not reflect the true role she was performing.

[45] Under s 103A of the Act I need to consider whether KPL's decision to make the role called 'Accommodation and Hospitality Manager' surplus to requirements (redundant) and how it went about arriving at that decision were objectively what a fair and reasonable employer could have done in all the circumstances at the time of the decision to make the role redundant.

[46] The Court of Appeal[13] has confirmed that an employer needs to show that the decision to make an employee redundant is genuine and based on business requirements. If the answer is yes to both and the role made redundant is surplus to the employer's needs, it is not then for the Authority to replace the employer's business judgment for that of the employer. In addition, s 4 of the Act requires the parties to deal with each other in good faith when restructuring. This includes providing affected employees with access to information relevant to the continuation of their employment and an opportunity to comment on that information before the decision is made.

[47] I accept that KPL presented to its employees a situation that it faced financial problems due to a nearby competitor taking business from KPL by opening more nights than previously, and another competitor diverting bus tourism from KPL. The first letter

[12] Undated letter from KPL to Ms Kaur but agreed to be 28 June 2018, advising of her redundancy.
[13] *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 (CA).

proposing a restructuring said that KPL was considering making one role redundant. There was nothing about what roles existed in the workplace or the current or proposed structure. The second letter was sent directly to Ms Kaur noting she had been at a meeting on 22 June and again on 25 June and referred to her having given feedback by that time. Ms Kaur says her feedback came after this. Either way there are responses to her feedback that appear to have been considered by KPL albeit it is unclear if they were communicated to Ms Kaur before a decision to make her role redundant was arrived at.

[48] Ms Kaur's evidence is that her feedback was only given about an hour before the decision. She says her feedback was not genuinely considered and she lost an opportunity to feedback about other staff because she was not given the information provided in these proceedings about reduced hours that eventuated for those staff rather than for her the one redundancy.

[49] I accept Ms Kaur's evidence and the submissions for her that the process was very rushed and she had no opportunity to consider KPL's proposal as to all staff and how the structure might overall justify her one position being made redundant rather than a reduction of hours as KPL says eventuated for others.

[50] On its own the feedback Ms Kaur gave may not in my view have made a big difference given the responses from KPL. I do accept however it was a significant flaw that KPL did not provide transparent material about how it decided to cut back on staffing overall.

[51] I note further that the second letter indicates that financial information was available for staff to see in the office to support the financial reduction from a comparative previous season. I find this supports that KPL consulted or made available information to staff to review. Ms Kaur in cross examination accepted she did not review this information.

[52] I also find a significant flaw in KPL's decision to make Ms Kaur's role redundant is that she was not in fact performing the role she was made redundant from. Ms Kaur says that her role was essential which I take she means it was pivotal due to

its seniority and overall management of the lodge and bar. However, I have already found above that she was not likely doing this role.

[53] I note further that the reference KPL wrote for Ms Kaur dated 11 July 2018 referred to Ms Kaur working at KPL from January 2018 to July 2018 as a 'bar manager and housekeeper'. It included that her responsibilities were 'working in our busy seasonal restaurant and bar as a waitress and bar person, also reception and housekeeping in our accommodation and being on duty in the evenings to oversee the in-house guests.' It is difficult to then see how the role of 'Accommodation and Hospitality Manager' was genuinely disestablished when in fact it did not exist or was not what Ms Kaur did.

[54] In these circumstances, I find the redundancy decision to disestablish the role lacks genuineness. Messers Jones both refer to having got assistance to make sure the redundancy process was correct. I do not know if the advisors were fully acquainted with the complicated situation created by the 'side agreement'.

[55] Much has been made of whether KPL or Ms Kaur proposed that instead of making her role redundant she continued to work for KPL after a trip back to India for several months. Ms Kaur says she proposed this and KPL rejected it. KPL says it proposed this after Ms Kaur became so distraught about the redundancy decision, but that Ms Kaur rejected the idea. I prefer KPL's evidence because Ms Kaur's written evidence includes that she did not want to go back to India feeling various pressures from her family. At the very least I am satisfied that this discussion happened after the redundancy decision was made and when Ms Kaur had a very distressed reaction to the decision to make her role redundant and her concerns that she may have to leave the country.

[56] Based on the above I do not find that Ms Kaur's dismissal by way of redundancy was genuine, and it follows that I do not find that bringing her employment to an end was justified in all the circumstances at the time.

[57] I find KPL's claim that it knew nothing of Ms Kaur's sponsored visa likely but accept the submission for Ms Kaur that Mr Jones was 'willfully blind' to what he was signing KPL up for when he signed the declaration for from the employer for that

application in May 2018. There has been much made of Ms Kaur's obligation to tell him what he was signing. However, Mr Jones confirmed in cross examination he had been in business for some years and his claim not to have read a document that makes a declaration that the remainder of the document is correct flies in the face of that claimed good business experience. This weighs into my decision here because KPL ought to have known it had sponsored Ms Kaur's employment or at least supported that application. It then very soon after, through a rushed process that did not fully consult about the structure of other staffing, made her role redundant, a role that was effectively the one the parties agreed would only be used to support Ms Kaur's visa application. I find this is not what a fair and reasonable employer could have done in the circumstances.

[58] I will consider remedies after first considering the other parts of Ms Kaur's claim.

Has Ms Kaur shown she worked longer hours than she was to be contractually paid for including hours for being 'on call' during her employment?

[59] There are two parts to Ms Kaur's wage arrears claim. She says she worked hours longer than what she was paid for and then that there were hours that she should be paid for because she was 'on call'.

On call

[60] There are cases commonly called 'sleepover' cases where it has been found that employees in jobs where they are 'on call' are entitled to be paid for the hours (at minimum wage rates) where they remain available to work even if they don't actually get called to work. The question has been described as one of 'mixed fact and law' as to whether employees on such sleepovers could be regarded as 'working'.[14]

[61] The Court of Appeal[15] considered three factors that apply in these types of cases:

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[14] *Victoria Law v Board of Trustees of Woodford House* [2014] NZEmpC 25 at [5].

[15] *Idea Services Ltd v Dickson* [2011] 2 NZLR 522 later applied in the above in the school boarding house context.

a. significant constraints on the employee's freedoms
b. employees had significant and extensive responsibilities (for example sleeping in a house where it was necessary to respond to those with disabilities or students to whom the employer had a high level of pastoral care and welfare responsibilities)
c. the 'sleep over' role was beneficial to the employer because it met other obligations it had to meet such as care and welfare to live-in young students or disabled clients with high needs.

[62] The restrictions on the employee's personal freedoms and whether the role to be responded to is one that is consistent with a type of 'sleeping with one eye open' do not appear to relate to the situation Ms Kaur describes here. I have no rosters for the 'night' duties before me and I doubt they exist given the informality of the arrangement beyond the wording in the IEA. However, I do not accept this was a situation where Ms Kaur could never leave the premises as she says. Messaging at the time between herself and Mr Jones, that I will return to, does not support this situation.

[63] The greatest impediment Ms Kaur has in this claim is her lack of evidence to support the significant hours she says she was 'on call' which she says were virtually all the time.

[64] When I asked Ms Kaur about what the on-call duties were, she explained she had to take the phone with her every night. She said she would receive calls in the early hours of the morning. Mr Jones doubted this would happen and explained that there had never been an expectation that Ms Kaur would have the phone and he says it could be diverted to him. While Mr Singh recalls the phone with Ms Kaur and recalls it ringing, he could not be more specific than that and I am satisfied he was not always with Ms Kaur in the evenings. In short, I have no idea what times the phone rang or more importantly how often it did so.

[65] I also had no evidence before me as to how it was important that Ms Kaur remained responsive (with 'one eye open while sleeping') to the needs of the KPL business. The needs of guests in a tourist type lodge are not the same as the 'sleep over' case situations where the needs of the employer's clients were significant in terms of safety and health. If I look at the listed duties on the 'accommodation package' in the

second IEA they mainly relate to securing down the property in the evening and being responsive to any emergency or disturbance with guests making (say) a noise at night.

[66] Mr Jones lived adjacent and, in the messaging I discuss below, there are examples of him observing if the lights were on or observing when the fire alarm once went off. In other words, he was also present at or near the premises. At best there may have been a time when he was away that Ms Kaur felt the weight of being responsible for the place. However, Ms Kaur has not assisted me with evidence to consider as to how often she may have had to actually respond from what was effectively her place of living, rather than a place she had to go to from her home.

[67] I accept there was a likely issue for Ms Kaur when Mr Jones challenged the times Mr Singh stayed. I find it likely Mr Jones objected to Mr Singh staying 'free'. Mr Singh worked one night in KPL's kitchen which was in response to this, a type of exchange that shows me there was some discussion about this. However, messaging shows that Ms Kaur did in fact leave the premises overnight and it was not objected to by Mr Jones. In one example Ms Kaur had four nights away in a week in March 2018. Mr Jones did question this and suggested a roster. However, he also reminds Ms Kaur to let him know if she is not going to be present overnight and suggests another employee can be shown what to do with the evening duties. When Ms Kaur then asks for this to happen a few days later the response is a thumbs up emoji from Mr Jones. In other words, the few messages I have been provided with do not reflect a situation where Ms Kaur could not be away from the premises overnight.

[68] In summary, and mainly because of the insufficient evidence before me, I do not accept Ms Kaur's claim that she worked 'on call' to the extent that she should be reimbursed for the continuous overnight hours she has claimed in the same way as a 'sleep over' type situation.

Were additional hours actually worked beyond those Ms Kaur recorded in timesheets and has she been rewarded for these?

[69] As with the above 'on call' claim there needs to be evidence to support this. I have little other than general contentions from Ms Kaur. She says she worked a month in the winter (not further specified as to when) when she was 'performing duties or on

call 24 hours per day' and that throughout her employment she estimated she worked over 70 hours per week. Ms Kaur in her oral evidence and my questioning of her could not provide me with any further evidence or assistance in understanding this significant claim.

[70] Mr Singh, Ms Kaur's partner was also general in his evidence and could only refer to times he may have been present which I find was not all of the time Ms Kaur claims she worked extra hours. It was submitted for Ms Kaur that she gave compelling evidence to support her wage claim. I do not agree.

[71] KPL says it would not have been possible for her to have worked the extra hours she claims. I find some merit in this submission especially when the tourist season dropped off and I understand there would not have been the lodge guests or the extra holiday makers in the restaurant. The timesheets show that Ms Kaur worked significant weekly hours from the week in mid-January to approximately mid-April 2018. These weekly hours are as much as 80 hours and average between 60 to 70 hours. The weekly hours noticeably drop down to 40 and below from about April which is consistent with the winter season. This again is consistent with Ms Kaur's evidence that she would work longer hours in summer and less in winter for a 'salary'. [16]

[72] In oral evidence Ms Kaur said she also worked longer hours during the day than what was on her timesheets, a claim I had not identified before the investigation meeting. Ms Kaur also questioned aspects of the timesheets provided saying they may have been altered. I did not find her answers to my questions about these claims persuasive. Mr Jones denies altering time sheets and I accept this as plausible.

[73] Ms Kaur says she was told by other staff she was not to record additional hours of work because she was on a 'salary.' Ms Kaur could not be clear who said this or when. Again, her claim suffers from a lack of evidence to support the extra hours she says she worked unpaid as a result of under recording her hours on timesheets. I also have no evidence of her raising this issue with Mr Jones and he denies knowing it was an issue. As I have already referred to, Ms Kaur's written evidence also refers to an agreement reached with her and Messers Jones that she would be on a 'salary' and that

[16] As above at 1.

‘I would work extra hours in summer during the busy season, and less hours in winter, and that my salary payments would stay the same.’[17]

Evening duties

[74] I have touched on the evening duties in my consideration of the claim to be on call. However, I accept that Ms Kaur would have completed some extra duties that were not recorded due to them being in exchange for the ‘accommodation package’ she agreed to. The only evidence other than what Ms Kaur and Mr Jones say are some few messages between them both across the time of Ms Kaur’s employment. I have touched on these already. The messaging is largely friendly. However, Mr Jones reiterates what was in the second IEA being that Ms Kaur needed to say if she was not going to be on the premises in the evenings or overnight. Then on 5 March 2018 when Ms Kaur indicates she would not be overnight for two nights at the premises either side of her rostered day off he responds firmly that she had four nights away that week and that ‘we will discuss a roster of when you are staying here and when you are not.’ Ms Kaur responds with “ok sweet that’s fine…’.

[75] On 21 March 2018, Mr Jones notes that the lights were out early, and he suggests that another staff member can be shown what to do if she wanted to have an early night. On 28 March 2018, Ms Kaur then asks Mr Jones if he could show the other staff member how to turn off the lights at night because she would be staying in Nelson that night. The response was a thumbs up emoji from Mr Jones. It is difficult to equate these interchanges with the picture that Ms Kaur wants me to accept.

[76] If the situation changed and there were communications where Mr Jones refused to let Ms Kaur leave the premises and became verbally aggressive with her I do not have that evidence clearly before me and it is inconsistent with the tone and content of the above messaging. KPL’s evidence is that Ms Kaur was happy in her employment. Mr Jones suggested it was only once Ms Kaur was made redundant that she appeared to challenge the terms of her hours worked and what she was paid for.

[17] As above.

[77] Standing back from the above and accepting at the very least the descriptions that Ms Kaur gave to me about 'extra' work done, I find a likelihood that she did perform extra duties in the evenings likely in accordance with those described in the second IEA but that were in exchange for the free accommodation. There may also have been some responsive tasks for guests and some morning check out duties. Taking a pragmatic approach, I accept KPL's estimate of 10 'passive hours' that may have applied to the extra duties Ms Kaur performed. I do not necessarily accept they were 'passive'. I find this likely consistent with the description of lock up type duties in the evenings and also because I do not have anything close to sufficient evidence to support other additional work done and not recorded.

[78] If Ms Kaur can be said to have worked an extra ten hours per week, then the next question is what value can be ascribed for this work. Ten hours extra per week at $19.00 per hour would have been $190.00 gross per week of wages on the hourly rate that Ms Kaur agreed to work for. KPL have given me various values for the accommodation. I find it likely the parties did not turn their minds to this value when the second IEA was signed. Mr Jones in oral evidence said the 'accommodation package' was valued at $200.00 to $250.00 per week. KPL's Statement in Reply estimated $15,000.00 per year and $21 per week for Wi Fi[18] or that the 'accommodation' included meals[19] which would be approximately $288.00 per week value to Ms Kaur. KPL have said the room tariff could have been $150.00 or $180.00 per night to a paying guest[20]. I have no further evidence to support these stated values but make a pragmatic estimate that the value of the accommodation likely more than equated to the extra duties that Ms Kaur likely performed each week as part of the 'accommodation package.'

[79] The outcome of this finding is that I do not find Ms Kaur has shown she has a wage claim beyond what she has already been paid by KPL during her employment. In coming to this conclusion, I rely in part on s 157 (1) of the Act which allows me to consider the merits of a case without regard to technicalities to bring an end to an employment relationship problem that arose five years ago.

[18] Statement in Reply at paragraphs 58 and 62.
[19] Joint Brief of Evidence, Anthony Jones and Kendall Jones dated 27 Aril 2023 at paragraph 48.
[20] As above at [23] and [48].

Was Ms Kaur disadvantaged in her employment by unjust actions of her employer and are there any claims not raised within time?

Working longer unpaid hours in the context of being exploited

[80] If this issue was one of exploitation, I am likely to have been persuaded that it was the type of matter that continued to the end of Ms Kaur's employment as submitted for Ms Kaur.[21] However I have already dealt with the issue of whether Ms Kaur was in fact exploited, particularly her claim that she had no option but to agree to live on site and work hours in exchange. It should be evident, on the same evidence before me, that I do not accept she has shown she has been disadvantaged in her employment.

Having to live on site in inadequate accommodation

[81] For the same reasons as immediately above I do not find this is a matter that has disadvantaged Ms Kaur.

KPL not dealing with alleged treatment by a manager

[82] Ms Kaur has claimed a manager treated her poorly and KPL did nothing to address these issues. I find it likely these actions occurred outside the time for raising a grievance and that are not in the category that could have culminated at the end of Ms Kaur's employment. There is no consent to raising out of time and no application to raise under exceptional circumstances.

Unacceptable accommodation

[83] I accept that the accommodation was lived in by Ms Kaur until the end of her employment and as such the raising of her grievance is accepted within time based on the letter raising dated 24 September 2018 with proof of service on Mr Jones dated the same day.[22] Ms Kaur's employment was terminated on 29 June 2018 and she was paid out notice although there is a dispute about how long she stayed in the accommodation at KPL and on what basis. Either way I am satisfied that given her accommodation

[21] *Premier Events Group Ltd v Beattie (No 3) [2012]* NZEmpC 79 (2012) 10 NZELC.
[22] Statement of Problem, attachments G and H.

existed until she left the premises then the raising of the grievance was within the requisite 90 days.[23]

[84] There is a dispute of fact about what room Ms Kaur ended up staying in during the most part of her employment with KPL. She says there was a hot air vent, not enough light and smells from cooking. Mr Jones gave plausible evidence that he recalled the room Ms Kaur was in as room 6 because there was a particular crisis (that I do not need to record) that occurred relating to this room and that Ms Kaur was living in it at the time that has helped him remember this. I have been presented with photos of what I accept was 'room 6'. I am not satisfied the room looks to be substandard for a tourist lodge. I am not satisfied Ms Kaur has shown she was disadvantaged by the inadequate room she was living in.

Required to carry out duties not in her job description.

[85] On the same basis as immediately above, I find this matter was raised within time as it related to the period of employment culminating at the end. However, I do not accept Ms Kaur has made out her grievance that she was disadvantaged by being required to undertake duties outside of her job description. As I have already found above, Ms Kaur was working the role of housekeeping and bar duties with some reception. This was what I have found was the 'side agreement' and likely continued throughout her employment. Her claim here relates to the more senior role I have found she was not carrying out.

Depending on the above what remedies are to be awarded?

[86] I have not accepted Ms Kaur has proven her wage claims or the claims as to disadvantage. She has been successful in showing that the redundancy of her role was not justified and for this I will turn to remedies.

[23] Employment Relations Act 2000, s 114.

Compensation

[87] Ms Kaur has given evidence about the impact of loosing her job at KPL. She refers to feeling there was a stigma attached. At the heart of the matter is that the role she was made redundant from is the role that 'officially' she was working in and enabled her to remain in New Zealand for a further two years. Ms Kaur sets out in her evidence how distressed she was that the redundancy meant she no longer had that visa. Mr Sigh refers to this distress, as does Ms Jones who with his brother gave evidence that they then suggested to Ms Kaur that she could go on holiday back to India and then come back in the busy season. I have already found that it is likely this was not suitable to Ms Kaur because she had real concerns about returning home. I also accept her evidence that she wanted to make a go of life in New Zealand. I understand how losing the job at KPL would then have been distressing due to these consequences.

[88] Ms Kaur refers to being unable to apply for work due to being depressed and this evidence is supported by Mr Singh who says he supported them both until Ms Kaur got a job.

[89] KPL says it believes Ms Kaur did get further employment soon after leaving KPL but that evidence is inconsistent with the Inland Revenue records produced. However, what seems to be inconsistent with Ms Kaur's evidence about being incapacitated for months by the effects of losing her job is the messaging exchanges that occurred after she had left her employment. For example, on the 2 July 2018 Ms Kaur having already asked in friendly terms for a reference told Mr Jones she had applied for a job in Nelson 'hotels.'

[90] Standing back, I find that compensation of $6,000.00 is appropriate.

Lost earnings

[91] Ms Kaur claims lost earnings under s 123(1)(b) of the Act which is for 'reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance.' In terms of that 'reimbursement' s 128 (1) (a) and (2) of the Act allows for the Authority to reimburse

the employee ‘a sum equal to that lost renumeration or to 3 months’ ordinary time renumeration.’

[92] KPL has given evidence that Mr Jones believes he saw Ms Kaur working at a café in Nelson Airport soon after she left her employment with KPL. She denies this and the IRD records provided do not support that she earnt declared earnings before June 2019. Mr Singh says he supported her financially after she left KPL and this created a stressful environment for them.

[93] KPL have questioned why it took so long (until November 2018) for Ms Kaur to be granted a new visa and for her visa connecting her to KPL to be cancelled. If Ms Kaur somehow delayed in obtaining a further visa then this would count against her mitigating her loss. When I asked Ms Kaur about this length of time, she said it is how long it took. There is some further explanation in her written evidence in that she was considering a partnership visa through Mr Singh, and this could have taken some time.

[94] Standing back from the above I find that I am prepared to give Ms Sigh the benefit of the doubt in terms of her lost earnings claim and whether she mitigated her loss.

[95] I award three months lost earnings reimbursement because of the unjustified end of her employment with KPL. I calculate this based on my findings that she worked for $19.00 per hour for 40 hours per week. I cannot arrive at an exact calculation and make this based on the reduced hours likely in the winter months that would likely have occurred and any additional evening duties which although I have accepted could have been ten hours per week were likely reliant on the number of guests. In other words, the three months post-employment would not have been the busy tourist season.

[96] Again taking a pragmatic approach, I find that lost wages for three months after employment are to be reimbursed to Ms Kaur being (40 x $19.00) x12 weeks = $9,120.00 gross.

If remedies are awarded, should they be reduced under s124 of the Act for blameworthy conduct by Ms Kaur that contributed to the situation giving rise to her grievance(s)?

[97] While much has been made in this matter about Ms Kaur wanting to present a different picture of what the reality was about her employment at KPL, she cannot be blamed for contributing to the factors that gave rise to the grievance. I therefore do not find Ms Kaur should have the remedies for her unjustified dismissal reduced.

Is either party to contribute to the costs of the other?

[98] There has been mixed success in this matter. Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[99] If they are not able to do so and an Authority determination on costs is needed Ms Kaur may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum KPL would then have 14 days to lodge any reply to memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[100] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless circumstances required an upward or downward adjustment of that tariff.[24]

Antoinette Baker
Member of the Employment Relations Authority

[24] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].