

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 718  
3051033

BETWEEN                      HARMANJOT KAUR  
   Applicant  
  
AND                              LITTLE INDIA (NELSON)  
   LIMITED  
   Respondent

Member of Authority:        Robin Arthur  
  
Representatives:              Arunjeev Singh, counsel for the applicant  
   Hugh Matthews, counsel for the respondent  
  
Investigation Meeting:        4 and 5 September 2019  
  
Determination:                18 December 2019

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**DETERMINATION OF THE AUTHORITY**

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- A. By no later than 31 January 2020, Little India (Nelson) Limited (LINL) must pay Harmanjot Kaur the following sums as arrears of wages and holiday pay:**
- (i) \$7,916.94, less any applicable tax, as wages and holiday pay due for the period from January 2017 to January 2018.**
  - (ii) \$448.80, less any applicable tax, as holiday pay due for the period April to August 2018.**
- B. By no later than 31 January 2020 LINL must also pay to the Authority a penalty of \$2,000 for breach of s 130 of the Employment Relations Act 2000 and a penalty of \$2,000 for breach of s 81 and s 83 of the Holidays Act 2003. On recovery of the penalties the Authority must pay Ms Kaur \$2,000 and transfer the remainder to a Crown Account.**

**C. Ms Kaur's claim for personal grievances for unjustified disadvantage is dismissed.**

**D. Costs are reserved. A timetable for memoranda, if needed, is set.**

### **Employment Relationship Problem**

[1] Harmanjot Kaur worked in a restaurant operated by Little India (Nelson) Limited (LINL) from early 2015 to 18 August 2018. Her application to the Authority had three elements. Firstly, Ms Kaur sought orders for payment of arrears of wages, holiday pay and public holiday pay. Secondly, she sought penalties for failures by LINL to provide wage and time records when requested and to keep holiday and leave records. Thirdly, Ms Kaur said she had a personal grievance for unjustified disadvantage because LINL director Parminder Rai had made insulting comments to her and because LINL's failure to keep and provide proper pay and leave records hampered her ability to clearly ascertain and pursue her entitlements to wages and holiday pay. In the event she was found to have a grievance Ms Kaur sought an order for distress compensation.

[2] LINL's statement in reply to her claim said Ms Kaur was paid correctly and in full for hours worked. It said wages and time records were provided and Ms Kaur had suffered no unjustified disadvantage.

### **The Authority's investigation**

[3] For the Authority investigation written witness statements were lodged by:

- (i) Ms Kaur;
- (ii) Mr Rai;
- (iii) Simarjot Rai, a LINL shareholder and wife of Mr Rai;
- (iv) Little India Group (LIG) franchisor, Arjun Gill;
- (v) Cameron Arney, New Zealand general manager of MenuMate, the restaurant ordering and billing software system used on terminals in the restaurant; and
- (vi) Jenni Doak, a friend of Mrs Rai who provided private board to Ms Kaur for some of the time she had worked at the restaurant.

[4] Ms Kaur, Mr Rai, Mrs Rai and Mr Gill attended the investigation meeting on 4 September 2019 and, under oath or affirmation, answered questions from me and

the parties' representatives. An interpreter of Punjabi was available to assist Ms Kaur in answering questions, where needed. Neither Mr Arney nor Ms Doak attended or were contacted during the meeting. Mr Arney's statement explained some aspects of the operation of the MenuMate ordering software but had nothing of controversy that needed testing. Ms Doak's statement referred to some days Ms Kaur was off work sick and some nights when Ms Kaur was dropped home after work. However Ms Doak's statement said she was not able to recall times, which would have been useful and relevant information, so there was no need to hear from her.

[5] By telephone conference on 5 September 2019 the representatives provided oral closing submissions, speaking to written synopses about the issues for resolution.

[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. This determination has been issued outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed.<sup>1</sup>

### **The issues**

[7] The issues requiring investigation and determination were:

- (i) Was Ms Kaur owed any arrears of wages for hours worked but not paid for in the period from 24 January 2017 to 18 August 2018?
- (ii) Was Ms Kaur owed any further holiday pay and/or any additional amounts for work on public holidays?
- (iii) Did LINL fail to provide wage and time records when asked and fail to keep holiday and leave records for Ms Kaur and, if so, should penalties be imposed for those failures?
- (iv) Did LINL unjustifiably disadvantage Ms Kaur, by comments said to have been made to her by Mr Rai and/or by failing to provide wage and leave records so she was unable to ascertain her actual entitlements?
- (v) If Ms Kaur was unjustifiably disadvantaged, should an award of compensation be made to her under s 123(1)(c)(i) of the Act?

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<sup>1</sup> Employment Relations Act 2000, s 174C(4).

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

### **How Ms Kaur's claim arose**

[8] Ms Kaur began work as a waitress at the restaurant in February 2015. At the time she was studying at the Nelson Marlborough Institute of Technology. Under the terms of her student visa she was permitted to work up to 20 hours a week. She completed her studies in December 2016. She says that she began working full time at the restaurant from 24 January 2017, working 60 hours a week, seven days a week, until 24 January 2018. LINL disputed that description. It said, at her request, Ms Kaur did work more hours once her studies were finished but she did not work 60 hours a week and she remained a part-time employee. LINL's pay records showed she was usually paid between 30 and 35 hours a week during that year.

[9] When her visa expired in late January 2018 Ms Kaur stopped working at the restaurant, awaiting approval of her application for a new visa. The new visa was granted on 23 April 2018. Its conditions required her to work for LINL at its restaurant in Nelson. She began working at the restaurant again the next day.

[10] From 24 April to 18 August 2018 Ms Kaur was paid \$660 a week (\$554.18 net), which was pay for 40 hours a week at the then-applicable statutory minimum wage of \$16.50 an hour. However Ms Kaur said she actually worked 60 hours a week during that period.

[11] From early April until late August 2018 Mr Rai was in India attending to family matters. While he was away from New Zealand Ms Kaur was the only staff member with a duty manager's certificate, necessary for the sale of alcohol in the restaurant. She also carried out the role of sending Mr Rai weekly reports on the hours worked by restaurant staff so he could enter that information into the company's payroll system.

[12] By the time Mr Rai returned to New Zealand in late August Ms Kaur had left on a period of leave she took from 18 August. She told Mrs Rai she would return to work at the restaurant from 2 October. However in the intervening period she travelled to Christchurch, found a new job, arranged visa changes to allow her to work

for the new employer and was making plans to take up studies to pursue other career goals.

[13] Before leaving Nelson Ms Kaur asked, through Mrs Rai, for Mr Rai to agree to pay her for additional hours she had worked while he was away in India. By email on 23 August Mr Rai told her he would address what he called “confusion” about her hours once he returned to New Zealand. From 31 August and on several occasions during September Mr Rai attempted to contact Ms Kaur to discuss her request. By email sent to her on 28 September he confirmed Ms Kaur was entitled to \$4,164.88 for “overtime” and for work on two public holidays.

[14] This amount included an additional 20 hours pay for each of the weeks Ms Kaur worked during Mr Rai’s absence abroad. Her bank statement shows she was paid that amount on 2 October 2018.

[15] Ms Kaur’s application to the Authority pursued payment for additional unpaid hours she said she had worked from January 2017 to January 2018, along with amounts said to be outstanding for public holidays and days in lieu and for holiday pay on the additional sum of \$4,164.88 paid for her work in the period from April to August 2018.

### **Written employment agreements**

[16] Ms Kaur had two written employment agreements during the time she worked at the restaurant. Neither helped in resolving the issue of whether she was properly paid for all the hours she had worked. The first was for the position of waitress and dated February 2015. It said she was a part time employee with hours to be set by roster and that her times and days of work could be changed by LINL to “cover variable demands”.

[17] From April 2018 a new agreement, provided as part of the process for her application for a work visa, came into effect. This agreement, for the position of assistant manager, stated “agreed hours” of 40 a week but listed starting and finishing times between Tuesday and Saturday that totalled 45 hours each week. The agreed hours clause also stated “hours and days may fluctuate due to the demands of the business”.

### **The wage arrears claim**

[18] Ms Kaur said she worked 60 hours a week over seven days throughout the period from 24 January 2017 to 24 January 2018. She said she worked on the lunch service from 11.30am to 2.30pm and then on the dinner service from 5pm to 10.30pm on each of those days. This span of hours, if worked on each of the seven days in a week, totalled 59.5 hours.

[19] LINL was not able to provide wages and time records for Ms Kaur's work in this period that fully complied with the requirements of s 130 of the Act. Specifically, and crucially, it could not provide a record that showed the number of hours she worked each day in each pay period.

[20] For the weeks ending 29 January 2017 to 28 May 2017 it did have a spreadsheet showing a breakdown of hours recorded each day in those weeks. The spreadsheet was compiled from staff hours written in a diary kept in the restaurant. However, from the end of May 2017, LINL and other franchisees of the LIG began using a payroll system operated by an external commercial provider. Under that system Mr Rai took the hours recorded manually in the restaurant diary and entered them directly into the payroll software. The software recorded only weekly totals, not the number of hours recorded as worked each day.

[21] Mr Rai said he had destroyed the work diary for 2017 after the end of that year. He said he did still have the 2018 diary, which included a few of the relevant weeks, but had not provided it for the Authority investigation because it was "in a very bad condition".

[22] LINL could not rely on a provision at s 130(1B) of the Act that excuses recording of actual hours worked each day if those hours are agreed "usual hours" as recorded in the wages and time record, an employment agreement or a roster. In Ms Kaur's case, after May 2017, no usual daily hours were recorded because the payroll software only carried a weekly tally. The employment agreement applicable in 2017, signed in February 2015, only referred to a weekly roster and variable hours, no usual hours. And, according to Mr Rai, there were weekly rosters put up for staff in the restaurant but those were thrown away once the week was over. He also said that Ms Kaur had no fixed hours of work and her hours would vary depending on how busy the restaurant was.

[23] The evidence of Ms Kaur and Mr Rai established two factors referred to in s 132(1) of the Act regarding a failure to keep or produce wage and time records. Firstly, what Mr Rai said about destroying the 2017 restaurant diary and throwing away the weekly rosters meant (in the absence of any other record being kept of the number of hours worked each day) LINL had failed to keep wages and time records for Ms Kaur that complied with the Act. Secondly, Ms Kaur had not kept records of her own so LINL's failure had prejudiced her ability to bring an accurate claim for wages and holiday pay due to her. Consequently the following provision at s 132(2) of the Act applied to considering Ms Kaur's arrears claim:

Where evidence of the type referred to in subsection (1) is given, the Authority may, unless the defendant proves that those claims are incorrect, accept as proved all claims made by the employee in respect of—

- (a) the wages actually paid to the employee:
- (b) the hours, days, and time worked by the employee.

[24] The assumed proof of all claims made by a worker in this situation is subject to two qualifications expressed in the wording of s 132(2). Firstly, the assumption can be negated by positive proof from the employer that the claims are incorrect. Secondly, the use of the word “may” in the subsection reserves a discretion for the Authority not to accept some or all of a worker's evidence about wages paid and hours worked.<sup>2</sup> The standard of proof is the balance of probabilities.<sup>3</sup>

[25] A similar provision applies to accepting claims regarding holiday and leave claims where an employer has not complied with its obligations to keep and provide access to holiday and leave records.<sup>4</sup>

[26] These statutory provisions serve three general purposes. They help workers who are owed arrears but, through no fault of their own, are unable to precisely quantify the sum. They help the Authority in an area where satisfactory evidence is notoriously difficult to get. They act as a deterrent to employers who might otherwise seek to ignore those important requirements to keep and, when asked, provide those records.<sup>5</sup>

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<sup>2</sup> *Rainbow Falls Organic Farm Ltd v Rockell* [2014] NZEmpC 136 at [29].

<sup>3</sup> *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39 at [37].

<sup>4</sup> Holidays Act 2003, s 83(4).

<sup>5</sup> *Mazengarb's Employment Law* ERA 132.3

[27] Against that background it was necessary to assess the available evidence to see if, on the balance of probabilities, LINL had proved Ms Kaur's claim of having worked 60 hours a week was incorrect. Central to that assessment was information from the MenuMate software used in the restaurant and a contest between the parties about what that information really showed.

[28] The MenuMate software was provided to LINL as part of its franchise arrangement with LIG. Mr Gill explained the software does have a function that could be used for employees clocking in and clocking out but the franchised restaurants did not use it for that purpose. The restaurants, including the one operated by LINL, only used the functions for placing orders and preparing bills.

[29] Each employee who used the system was supposed to have his or her own password. When they entered an order for a dish or drink requested by a customer, the software recorded the details of the order, the date and time it was made, and the name of the employee who was logged in to the system as placing that order. The system was operated through two terminals in the restaurant, one used only for placing orders and the other which could be used to both place orders and to calculate and pay bills. The system 'timed out' after a certain period and anyone needing to use it had to enter their password to then open the system and place the order or complete a bill.

[30] The evidence of Mr Rai and Mrs Rai was that front of house staff, such as Ms Kaur, typically worked no later than 9.30pm on most nights, but left as early as 8.30pm on quiet nights or by no later than 10.30pm on a busy night after the restaurant had closed at 10pm. Mrs Rai said she sometimes gave employees, particularly female staff, a lift home if it was raining or cold. She said she would leave the restaurant between 9pm and 9.30pm to drive those employees home but they had usually finished their work 30 to 60 minutes earlier and were "on their own time, often on their phones" while they waited for the ride.

[31] Mrs Rai said she gave Ms Kaur a lift home "every day she worked for us" so knew Ms Kaur had not worked all the hours she claimed.

[32] However Ms Kaur, in support of her claim of working 60 hours a week, relied on information recorded by MenuMate to identify dates that she worked beyond

finishing times of 8.30 or 9.30pm and which took her working hours beyond the 30-35 hours for which she was paid each week by LINL during that year.

[33] The MenuMate data was available for the entire period but information from it for some randomly selected dates illustrated her point. On 7 April 2017 (a Friday night) entries recorded as being made by use of her password were timed at 10.32pm and 11.35 pm. The data for 22 June 2017 (a Thursday night) showed entries made under her name as late as 10:43pm and on 5 August 2017 (a Saturday night) up to 10.56 pm.

[34] Mr Rai and Mrs Rai denied Ms Kaur was at the restaurant and placing orders in the system at those times. Instead Mrs Rai said she made those entries because she sometimes used Ms Kaur's password when working in the restaurant, including after Ms Kaur had finished work and gone home. Mrs Rai insisted that Ms Kaur knew that she did so and had agreed to them working in that way. Ms Kaur accepted she knew Mrs Rai sometimes used Mr Rai's password, because Mrs Rai did not have a password of her own set up in the system, but denied that the entries at times later in the night were made by Mrs Rai rather than her.

[35] The likelihood that Mrs Rai did sometimes use Ms Kaur's password was supported by MenuMate data that showed entries under Ms Kaur's name in the period of January to April 2018 when she was not working in the restaurant. Those entries had to be made by someone else using Ms Kaur's password. Mrs Rai said it was her.

[36] However two factors weighed against Mrs Rai's evidence on this point being an entirely satisfactory explanation for the late night entries that Ms Kaur said were made by her and proved she worked longer hours than LINL admitted.

[37] Firstly, Mrs Rai's evidence said she also sometimes used Mr Rai's password as well as that of Ms Kaur. It was likely Mrs Rai did so when Ms Kaur was also working in the restaurant at the time and using her own password. Accordingly, this does not rule out Ms Kaur's explanation about the times she worked.

[38] Secondly, Mr Gill, whose evidence appeared candid and unvarnished throughout, said it was "unacceptable" for Mrs Rai to use the password of another staff member. Mr Gill said he was not aware Mrs Rai used the password of either Mr Rai or Ms Kaur until he became involved in looking at the data being provided as

part of the parties' preparation for the Authority investigation. He agreed that what Mrs Rai said about signing into the system with someone else's password undermined the integrity of the data and purpose of the system. Knowing which employee had placed orders or dealt with bills was necessary to accurately deal with customer complaints or food safety issues that might arise at some later time.

[39] The contest over Mrs Rai's claim that entries made in Ms Kaur's name later at night were hers and not Ms Kaur's required some assessment of the relative credibility of the explanation from both women.

[40] Some of Ms Kaur's later employment applications were among documents in the evidence before the Authority. In these she had described herself as "the manager" and "an assistant manager" of an Indian restaurant since 2015. Neither description was accurate, given her position as assistant manager for LINL's restaurant did not begin until April 2018. However this indicated a tendency to exaggerate, often found in job applications, rather than to entirely fabricate information.

[41] On the other hand, while there was nothing to confirm Mrs Rai's account regarding the password was untrue, neither was there anything to corroborate it. Given the potential financial consequences for the business on which her husband and she depended, Mrs Rai also had a motive for advancing an explanation that might not be entirely correct.

[42] On balance LINL had not proved Ms Kaur's claims about working more hours than she was paid for were incorrect. It had not met the threshold set by s 132(2) of the Act. However, exercise of the discretion given under that provision about accepting claims required some further analysis of what the MenuMate data showed.

[43] As part of the Authority's investigation of the available information, four weeks in 2017 were randomly selected for closer analysis of that data: the weeks ending 9 April, 11 June, 13 August and 10 December. From studying the dates and times of entries made under Ms Kaur's name during those weeks, some estimate could be made of the hours she was at the restaurant on those days. The assessment of her work during the lunch service hours was more difficult on days where there might be only one entry of an order that day or two orders entered within the space of

one hour. In those cases an estimate of only one hour's work on that service was made. This was not an issue for dinner service hours as more orders were typically entered over several hours.

[44] The span of hours estimated as worked, from that MenuMate data, was then compared with LINL's pay records and what they showed as the number of hours Ms Kaur was paid for her work on those weeks. This information was provided to the parties during the investigation meeting. In summary it showed the following differences between the hours Ms Kaur was paid and what she appeared to have worked in those four sample weeks:

Week ending	Hours paid: LINL records	Hours worked: MenuMate analysis	Shortfall between hours paid and hours worked
9 April 2017	31.5	37	5.5
11 June 2017	24	34.5	10.5
13 August 2017	31	34.5	3.5
10 December 2017	31.5	42	10.5

[45] The hours extracted from the MenuMate analysis may underestimate the actual hours of work because its entries only show the time of orders being entered and bills being paid. Restaurant work, for front of house staff such as Ms Kaur, may occur both before and after those events, including set up and clearing of tables.

[46] Taking that information and assessing, on the balance of probabilities, all the evidence, Ms Kaur had established she was not paid for all the hours she worked in that year. The evidence did not go so far, however, as to support her claim that the shortfall amounted to 20 hours a week for each of the 52 weeks. Rather, on a broad assessment, that shortfall more likely averaged between one and one-and-a-half hours a day, that is between seven and 10.5 hours a week.

[47] For the purposes of calculating what is due to Ms Kaur as wage arrears, the shortfall in her pay is to be taken as being nine hours a week. For nine weeks in that year, to 31 March 2017, the statutory minimum wage of \$15.25 applied. The total due for that period is \$1,235.25. For the remainder of the 52 week period, from 1 April 2017, the statutory minimum wage of \$15.75 an hour applied. For that 43 weeks, the total due is \$6,096.25. On the resulting total of \$7,330.50, the sum of \$586.44 must be paid as holiday pay. The total due as arrears is therefore \$7,916.94, less any applicable tax. LINL must pay Ms Kaur that amount by no later than 31 January 2020.

## **Holiday pay**

[48] On 25 October 2018 LINL paid Ms Kaur \$6,127.63 for holiday pay due to her at the end of her employment. She sought a further payment of holiday pay based on her claim of having working 60, not 40 hours, a week through the period from January 2017 to August 2018. The element of her claim relating to the period from January 2017 to January 2018 has already been dealt with in conclusions reached earlier in this determination about the wage arrears due. The amount ordered for payment for that year includes holiday pay.

[49] However Ms Kaur also sought holiday pay on the additional amount LINL had already paid her for extra hours worked from April to August 2018. During the investigation meeting LINL accepted that holiday pay was due on that amount. In closing submissions it provided a calculation of the relevant amount. It is \$448.80 gross (\$375.47). LINL must pay Ms Kaur that amount by no later than 31 January 2020.

[50] Ms Kaur also pursued payment for 18 days of public holiday or lieu days she said she was still owed. During the Authority investigation meeting it became clear from discussion of the breakdown set out in the payslip for the holiday payment made on 25 October 2018 that payment for those 18 days was included in the total amount paid then. No further order was necessary in respect of that aspect of Ms Kaur's claim.

## **Failure to keep and produce wages and time records: is a penalty required?**

[51] The evidence already canvassed established that LINL's business system did not result in the company keeping wages and time records that complied with the requirements of s 130 of the Act, at least for the period from May 2017 onwards when it stopped keeping a spreadsheet recording hours worked each day and once Mr Rai had destroyed the 2017 restaurant diary. As a result LINL was not able to comply with a request from Ms Kaur's representative to provide a copy of such wages and time records. Crucial information about the hours worked each day was not available.

[52] Under s 130(4) of the Act each employer who fails to comply with any requirement regarding the keeping and production of wages and time records is liable to a penalty.

[53] A similar liability to a penalty applies under the Holidays Act 2003 where an employer fails to keep and produce holiday and leave records.<sup>6</sup> LINL had not kept and produced adequate records of her holiday and leave entitlements.

[54] Ms Kaur sought the imposition of a penalty on LINL for the breaches of the requirements of both acts. She asked that half the value of any penalty imposed be awarded to her.

[55] LINL did not seriously contest its liability to penalties on those grounds. It only asked its steps of already having paid some substantial amounts of arrears and holiday pay in October 2018 should be taken into account and that no doubling up should occur by then also awarding compensation if a disadvantage grievance relating to the records was accepted.

[56] Both factors, about payments already made and no doubling up, were relevant in determining an appropriate penalty.

[57] LINL's maximum liability to penalties for the breaches was \$40,000.<sup>7</sup> Section 133A of the Act sets a number of factors to be weighed in setting the appropriate penalty within that upper limit. Having regard to the nature of the breaches of important employment standards and the considerable extra difficulty caused to Ms Kaur in establishing her entitlements, an appropriate penalty in this case was \$3,000 for each breach. This accorded broadly with the range of penalties imposed in similar cases concerning individual workers and a failure by their employer to keep proper records.<sup>8</sup> However one factor favoured a downward adjustment of that provisional level of penalty – it was the steps LINL took in the month after Ms Kaur raised her claim to remedy a large part of the shortfall in wages and holiday pay due to her. Accordingly the penalty is adjusted to \$2,000 for the breach of s 130 of the Act and to \$2,000 for breach of s 81 and s 83 of the Holidays Act 2003. LINL must

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<sup>6</sup> Holidays Act 2003, s 75(2)(e) and (f) and s 81 and s 83.

<sup>7</sup> Employment Relations Act 2000, s 135 and Holidays Act 2003, s 75.

<sup>8</sup> *Parker & Ors v PP Hawera Limited & Anor* [2019] NZERA 309 (\$5,000 for failure to provide when asked); *Downs v TMC Bloodstock Limited* [2019] NZERA 99 (\$2,000 for failure to keep a full and accurate record); *Hunter v New Zealand Diving and Salvage Limited* [2018] NZERA Auckland 385 (\$2,000 for failure to record hours of work each day); *Samuel Newman v Solid Roofing Limited* [2018] NZERA Auckland 214 (\$5,000 for failure to provide information when requested); *Ge v Y & S Holdings Limited* [2017] NZERA Christchurch 191 (\$2,000 for failure to provide records); and *Firman v Insyn Limited* [2016] NZERA Christchurch 227 (\$3,000 for failure to provide records).

pay those penalties, totalling \$4,000, to the Authority by no later than 31 January 2020.

[58] As Ms Kaur was the person who was directly affected by those two breaches, it was appropriate that she receive a portion of the penalty. This payment was also appropriate as her claim for compensation on the same grounds, for reasons given later in this determination, has not been accepted.

[59] On recovery of the penalty from LINL the Authority must pay \$2,000 to Ms Kaur. The remainder of \$2,000 is to be transferred to a Crown Account.

### **No personal grievance for insulting behaviour**

[60] Ms Kaur's evidence about insulting comments she said Mr Rai had made to her was not sufficient to accept her claim of a personal grievance for disadvantage on those grounds.

[61] She gave two instances. One was that Mr Rai had shouted at her when she put an incorrect order in the MenuMate system. Another was that she had once asked Mrs Rai if she could go home because she felt sick but Mr Rai refused to let her go home, saying there were guests in the restaurant and she was hired to clean the tables. Both instances were minor, in the course of employment that ran for more than three years. Both were denied by Mr Rai and lacked any corroborating evidence. Ms Kaur's claim on that ground is dismissed.

### **No grievance compensation for lack of records**

[62] There was an element of doubling up in Ms Kaur's claims regarding LINL's failure to keep and produce proper records of wages and leave. Penalties have already been imposed for that conduct, with part to be paid to her.

[63] While failure to keep records required by statute is an unjustifiable action and could, in some circumstances, cause distress warranting compensation of the type available for a personal grievance, Ms Kaur's evidence did not establish effects on her sufficient to support an award of that type in this case. Her claim on that ground is dismissed.

## Costs

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

[65] 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 28 days of the date of issue of this determination. From the date of service of that memorandum LINL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[66] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>9</sup>

[67] In closing submissions the representatives asked for a preliminary indication of a likely award of costs in light of whatever outcome was reached in the determination. Subject to what costs memoranda might say, if it were necessary to lodge them, the likely level of a costs award in this matter is \$3,000. This takes account of the relative degree of success of the parties in relation to the claims made and determined.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>9</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].