

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 3
5424524

BETWEEN	KULBIR KAUR Applicant
AND	AJIT SINGH TRADING AS CURRY PLANET RESTUARANT Respondent

Member of Authority:	P R Stapp
Representatives:	Graeme Ogilvie advocate for the Applicant Ajit Singh in person and Nikhil (Interpreter)
Investigation Meeting:	14 November 2013 and 5 December 2013
Further submissions and replies:	5, 6, and 12 December 2013
Determination:	10 January 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Kaur has a number of claims in regard to unpaid wages against Mr Singh. The claims are for unpaid wages having regard to two calculations of pay rates during her continuous employment with Mr Singh, the payment of public holidays, annual leave and leave for the incomplete year of service and days in lieu for work on public holidays. Ms Kaur has also claimed that she was required to pay Mr Singh during her employment, money for his personal use.

[2] Until the investigation meeting held on 14 November 2013 Mr Singh had not provided any wage time and holiday records, despite requests for any such documents and records to be filed before the Authority's investigation meeting. His accountant's summary provided does not meet the statutory requirements for a wage time and

holiday record. Mr Singh informed me that he was advised by his legal representative at the time not to produce his wage book for Ms Kaur before the Authority's investigation meeting. I could accept that the legal representative might say that in regard to the original wage book, but there has been no proper explanation as to why Mr Singh could not have reasonably produced copies before the investigation meeting as requested. Indeed Mr Singh provided the above explanation for the first time at the Authority's investigation meeting and never alerted the Authority at all to the existence of the wage book before the investigation meeting. This has caused a delay because of an adjournment of the investigation meeting and resumption later.

[3] Mr Singh denies the applicant's claims and specifically denies requiring Ms Kaur to pay him during her employment. In addition, he claims that a black diary with details of the hours of work, applications from the applicant for annual leave and sick leave have been stolen from his desk in his office. There is no explanation for the missing diary.

[4] The investigation meeting held on 5 December 2013 was adjourned to enable Mr Singh to have time to read and reply to written submissions presented in writing by Mr Ogilvie because English is Mr Singh's second language.

Issues

[5] What if any wages are owed by Mr Singh (eleven weeks allegedly not paid and extra hours of work not included in wage calculations) for Ms Kaur, and is there any holiday pay (annual leave, public holidays and days in lieu) owed by Mr Singh to Ms Kaur?

[6] Did Mr Singh require Ms Kaur to pay him during her employment?

The facts

[7] Ms Kaur was employed by Mr Singh in his business the Curry Planet restaurant, which trades as a restaurant in Porirua city. Because Mr Singh is a sole trader he has personal liability. Ms Kaur was employed as an assistant restaurant manager, at the time on an open work visa and student visa. There was an

employment agreement signed off and initialled commencing on 2 January 2012. Apparently a copy of the original employment agreement was given to the New Zealand Immigration service. The minimum hours to be worked were 30 hours per week. Details of the agreed hours provided for in the agreement meant that the hours could amount to 70 hours per week. Also there was provision for flexible start and finish arrangements. Mr Singh says the hours for the restaurant were up to 45 hours per week that he worked, and that Ms Kaur was paid for the 30 hours per week that he says she worked under the terms of their employment agreement.

[8] The hourly rate of pay started at \$13.50 and increased to \$14 per hour during the employment, thus there are two calculations required to calculate Ms Kaur's claims.

[9] Ms Kaur says that at the outset of her employment Mr Singh paid her in cash and subsequently her wages were paid by cheque, and deposited by Ms Kaur in her bank account at various times. She claims Mr Singh paid her \$150 cash at least twice, and she produced her bank accounts that have \$150 cash deposits that purportedly were for wages. Mr Singh denies ever paying wages by cash. However Ms Kaur does acknowledge that the proof of such deposits may not be sufficient to prove that she was paid cash as she has claimed, as Mr Singh has denied making any such cash payments. Ms Kaur says that there were eleven (11) weeks where there was no pay at all during her employment. First her calculations for the 11 weeks not paid has been based on 30 hours per week that Mr Singh claims that she would have worked (4 weeks at \$13.50 per hour (\$405 per week at 30 hours per week) and 7 weeks at \$14 per hour (\$420 per week at 30 hours)). She has tried to establish this from her bank statements involving direct payments and showing weeks where there were no payments made. She has recalculated her claims without the cash claim component, as it is problematic given Mr Singh's denial of the claim and that she has conceded that she may not have sufficient proof to support her claim. She has claimed \$4,570 gross unpaid wages for 11 weeks.

[10] Ms Kaur says that she worked more hours than the 30 hours required in the employment agreement, and estimates she worked at least 55 hour per week. Mr Singh denies the claim, and claims that Ms Kaur has been inconsistent by claiming different amounts of hours since commencing her employment relationship problem

(in the SOP and correspondence). This may be explained by her having to rely on her memory as she has no records of her start time, finish time and any breaks.

[11] There is no explanation as to the whereabouts of the so called black diary. Ultimately it is the employer's responsibility to ensure the security of the timesheets, and thus he is responsible for the diary. Mr Singh says that he left the diary in a drawer at the restaurant counter, and he has not been able to find it there. He has not been able to prove the existence of the diary and his allegation that it was stolen by Ms Kaur.

[12] Ms Kaur has accepted that Mr Singh calculated the wages based on a thirty (30) hour week (which is what he has done according to the wages booklet), but she says that she worked seven days per week for at least 55 hours (and more) per week, and not paid for the extra hours. Both parties are in dispute about the start and finish times for work, based on Ms Kaur saying she started and finished before and after the restaurant opening and closing times, and Mr Singh says that she could only work from and until the opening and closing times and that as he was the head chef, he was there the whole time and he recorded the working hours (written submission dated 10 December 2013). She claims the balance for her hours of work amounts to \$21,137.50 based on the two calculations of \$13.50 per week and \$14 per week.

[13] No loading of time and one half was made for the hours worked on statutory holidays. Instead it appears Ms Kaur was paid her hours at the usual rate. There is no claim for the correct holiday pay for the hours worked on the statutory holidays because of the lack of records and the complication of undertaking the calculation by the applicant.

[14] Ms Kaur provided two weeks' notice of an intention to leave for another job. Her finish date at the Curry Planet restaurant was 8 March 2013. There is no reconciliation of holiday pay at the end of the employment.

[15] The claim for public holidays worked amounts to 12 days being an amount of \$1,470 gross. The public holidays the applicant believes she worked in 2012 were: 2 January, Wellington anniversary day, Waitangi Day, Easter Monday, Anzac Day, Queens Birthday, Labour Day, Boxing Day. In 2013 she says she worked public holidays on: 1 January, 2 January Wellington anniversary day and Waitangi Day. Some of the days involved hours being worked according to Mr Singh's wage time

and holiday record, but he has disputed Ms Kaur's version of her times. Ms Kaur is claiming 12 days and the wage book shows that there were 8 days where work occurred.

[16] In addition she claims \$2,712.50 plus \$544.40 holiday pay for annual leave and the balance of leave for the incomplete year before she left.

[17] Ms Kaur is also claiming back \$16,525 net money that she says she was required to pay personally to Mr Singh during her employment. Mr Singh adamantly denies the claim.

[18] Mr Singh has provided some details using IRD summaries to explain the payments made, and he has belatedly produced a wages book for Ms Kaur.

[19] The parties have not been able to settle their employment relationship problem and it falls to the Authority to determine the issues that are outstanding between them.

Determination

[20] Mr Singh has a number of criticisms of the applicant's performance at work and says that he helped her when she was sick, that there were relationship difficulties in the business and in their private life and he says that there are a number of personal issues between different people involved with her outside of work, but I hold that these do not assist me in determining who is telling the truth in regard to the wages and holiday pay and the issue of whether or not Mr Singh demanded that Ms Kaur pay him money for his personal use during her employment. There is potentially a complicated matter of credibility between one or both parties, where only one of the parties and/or the other can be believed. Their evidence is so divergent and in conflict that the matter needs to be treated with care. Mr Singh was asked to produce wage time and holiday records by Ms Kaur's representative first (and then by an order of the Authority issued on 22 October 2013), and he did not properly comply. There are no time sheets and there are no details of the start and finish times for work available from the black diary because its whereabouts is unknown, and unexplained. There is absolutely no proof put before the Authority to support Mr Singh's allegation that Ms Kaur stole the diary. Whatever happened to it, if it existed, remains unexplained. In any event Ms Kaur denies signing in and out of work, but instead just turned up and

worked as required for 55 hours per week. She relies on her memory without any notes, personal diary and any other records of the times that she claims to have worked, except for the information she has given her representatives and recorded in the correspondence involved in the matter. Mr Singh's late production of the wage records has resulted in Ms Kaur and her representative needing to have some more time to look it over and to respond and reconcile any calculations and to decide on any rebuttal. Ms Kaur steadfastly stands by her claims. Mr Singh has accused Ms Kaur of not telling the truth and fabricating the situation for her own advantage to get more money from him. Given the conflicting evidence there is insufficient evidence that supports the hours being less than what Ms Kaur has claimed and to support Mr Singh's claim she only worked 30 hours per week. There has been no analysis and detail of the restaurant's opening and closing times on any day. Moreover there is no direct evidence of any factors affecting the opening and closing times over the Christmas and New Year period, except Mr Singh's assertions of there being a need for business reasons to restrict the hours at certain times. There was not enough evidence to support such assertions.

[21] The Authority can rely on s 132 of the Employment Relations Act that makes provision where an employer fails to keep and produce records to accept as proved all claims made by the employee in respect of the wages actually paid, the hours, days and time worked by the employee. But for the late production by Mr Singh of the wage book the Act would apply. However, the records are incomplete and fail to meet the statutory requirements under the Employment Relations Act and the Holidays Act. This is a major difficulty for Mr Singh despite the existence of the wage book he has produced late.

[22] Ms Kaur's record of hours of work for her wages due is calculated in paragraph 5 of her statement of evidence and recalculated at paragraphs 15-17 of her evidence in reply. She has amended her claim in a statement of evidence in reply for accuracy having regard to the information based on her own bank details. The bank statements show no money for wages being paid for eleven weeks when wages are paid at other times and Mr Singh has denied that he paid her any cash at any time. There is no record keeping and no independent proof from either party for the cash sums that were allegedly paid. Indeed it is more likely than not that the wages were only paid by cheque, according to the documents. Ms Kaur's bank statements are

only useful as evidence of deposits and withdrawals, and except for the cheques and the cheque butts from the Curry Planet restaurant for wages; there is no proof of what the withdrawals relate to. There is no proof of whether or not the deposits for \$150 actually related to any cash payments for wages as Mr Singh has denied paying any cash. The payments made by cheque support this conclusion. Also no one has given any evidence of directly seeing the cash sums being paid and there are no witnesses of any conversations between Ms Kaur and Mr Singh. Therefore I hold that there is not enough proof to support Ms Kaur's claim that she was paid in cash, and therefore I accept the revised calculations that exclude the cash payments claimed.

[23] Ms Kaur's claim has been adduced from a sheet of calculations provided through Mr Ogilvie, and he has relied solely on the documents available to provide his calculations. His calculations are based on the information available to him from Ms Kaur and her instructions about her hours. There is no doubt that cheques were cashed from an account of the Curry Planet restaurant because they are included in Ms Kaur's bank statements and there are cheque butts. The cheques were issued at different times based on copies of the cheque butts. The banking of the cheques and the accountant's summary are consistent. Also, she has produced the original employment agreement filed with the New Zealand Immigration service that contains the total hours she was required to work and the core work hours required if necessary, and this permitted more than just core hours. It is more likely than not that the hours were not changed by any agreement during the employment, I hold. This conclusion is based on the employment agreement filed with the Immigration service being the most reliable document given that Ms Kaur has contested the copy of an employment agreement produced by Mr Singh that has changes made to the hours to fit the 30 hours Mr Singh says Ms Kaur worked and which Ms Kaur denies any knowledge of. She did not sign any variation other than initialling the change of commencement date. Indeed Mr Singh's explanation is that the alterations were made and writing put on the agreement later, but there is no explanation for such changes because he said that he did not know. I accept Ms Kaur's hours worked were 55 hours per week because:

- i. Ms Kaur says she worked the hours.

- ii. Ms Kaur adamantly says that she has not seen Mr Singh's wage book before, and it was not disclosed and referred to in any detail before the Authority's investigation meeting.
- iii. Mr Singh produced the wage and holiday book on the first day of the Authority's investigation meeting. Given the lateness of it being produced I am not satisfied it is a reliable document. A copy of the details in the booklet was not reasonably provided when requested earlier. The book looks well used and authentic, but that cannot give me any confidence that the book is reliable in regard to its accuracy as the hours were not counter signed and no wages were counter signed by Ms Kaur. There are no start and finish times for work. Ms Kaur has provided evidence that suggests she could not have gone to Auckland for 14 days. There are no supporting documents for Mr Singh's recorded absences (recorded as "A") for Ms Kaur during her employment.
- iv. Mr Singh's witnesses do not contradict Ms Kaur's claim. Some of them never saw anything connected to the employment occurring and no one had any knowledge of the employment arrangements between Ms Kaur and Mr Singh.
- v. Mr Singh's lack of knowledge of the requirements for the payment of public holidays calls into question the reliability of the record and the employer's understanding of the requirements at least under the Holidays Act to pay for time worked on public holidays and to provide lieu days. Mr Singh is not assisted by failing to complete a proper holiday reconciliation at the end of Ms Kaur's employment.
- vi. Ms Kaur has made a number of claims in regard to the hours she believes she is entitled to be paid for, and has genuinely had calculations done on the information that is available. The fact that she has changed her position on the amount of hours claimed I hold is not fatal to her claim given the poor records kept by Mr Singh, and I accept that Ms Kaur was entitled to try and reconstruct her claim based on the information available to her and the late documents produced by Mr Singh. I am not convinced by the explanation from Mr Singh that the hours worked related to opening and closing times. The

simple explanation for the position that Ms Kaur found herself in is that she has had to reconstruct and calculate her hours of work from different sources. This has involved some difficulties because the employer has kept such poor records and the records produced have been filed unreasonably late. Also the record is not correct because of omissions. For example the T1/2 for public holidays has not been included in the payments properly, and not identified. Ms Kaur has claimed fewer hours instead of the complete hours available to work under the employment agreement, albeit more than the minimum 30 hours. Any mistakes and errors about the hours worked should offset the correct payment for the hours worked on public holidays.

- vii. There was no direct and independent evidence linking the hours of work with the opening and closing times of the restaurant and the licencing hours. There was no evidence about licencing hours that the applicant had a chance to give evidence on and to reply to. There was no direct evidence, other than from Mr Singh that the hours he worked were 45 per week and therefore Ms Kaur could not have worked more than this. Also Mr Singh has not been able to provide details of any flexible hours that Ms Kaur allegedly may have worked as he has alleged and that hours needed to be based on the local business needs including any other premises being shut.
- viii. There are alterations and additions to the hours of work in the contracts that are confusing, but I hold that such changes were not in the contract given to Ms Kaur and which she retrieved from Immigration. Furthermore she did not initial the changes as she did for the change of the commencement date. It is more likely than not the Mr Singh made the alterations and additions for his own reasons including the possibility of trying to explain the hours worked based on opening and closing times and any flexible arrangements. This is also affected by the lack of proper documents.
- ix. That the dates that Mr Singh claims were holidays at Christmas New Year and include four (4) public holidays not properly paid. At the same time Ms Kaur received and banked two (2) cheques issued after the date she went on leave in that period.

- x. That there was no evidence from Mr Singh to explain why the hours recorded for each day bears any relationship to the opening hours or the days he wrote onto the employment agreement as her work hours.
- xi. That there is insufficient proof that the absences (“A”) in the wage booklet actually occurred and what they were for. Thus, I reject Mr Singh’s explanation that any details are missing with the black diary.

[24] I accept that Ms Kaur is owed 11 weeks wages (\$4,570) and the balance of hours of work (\$21,137.50) as claimed.

[25] Next, Ms Kaur’s annual leave is calculated at paragraph 10 of her statement of evidence. The calculation is based on what she believes she is due and based on her claim of only taking three days leave during her employment. Mr Singh’s record shows that there were more absences from work, including 14 days in Auckland. I hold that Ms Kaur is more likely than not to be correct because she has been able to prove that she probably was in Porirua and Rotorua over 3 days at the time that Mr Singh claimed she was in Auckland. The absences and reasons for them are not supported by any details including if any sick leave was taken. On balance I prefer Ms Kaur’s evidence on this to that of Mr Singh and his reliance on his wage book. My reasons are:

- (i) That the wage book has not been counter-signed by Ms Kaur (not that it has to be counter-signed, but without such an arrangement and the document being produced late without any prior knowledge being provided of its existence, means that it cannot be given much weight). There are no back up documents supporting it.
- (ii) That Mr Singh has not proved that Ms Kaur is in any way responsible for the missing diary. His suggestions and inferences are not enough to prove his allegations, I hold.
- (iii) That no one else has been able to attest to the accuracy of the wage book.

- (iv) That the accountant's summary is consistent with Ms Kaur's bank statements and the cheque deposits.
- (v) That Ms Kaur has bank statements of withdrawals made on her account in Rotorua and Porirua at the time Mr Singh says she was in Auckland.
- (vi) That Mr Singh's witnesses did not have any details about the employment arrangements.
- (vii) That the wage book was not presented until 14 November 2013. It had been requested much earlier and there was not even any notice until then that the book even existed.

[26] Ms Kaur's alternative twelve days in lieu for working on public holidays have been recalled from her memory without taking time off from her work. She could not say on what day and in what month the public holidays fell. She has relied on her memory as best as she could. Mr Singh's wage record shows that she did work on at least eight public holidays. She claims \$1,470 gross. My conclusion is that since she worked on some days and has not been properly paid for the days then it is more than likely that she worked on the other days she has claimed. Her evidence has been more consistent than that of Mr Singh.

[27] Also, she is entitled to 4 weeks holiday pay in the sum of \$2,712.50 for the balance owing for the first complete year of service plus \$554.40 for the incomplete year. There is no evidence of any holidays being taken, except for the three days Ms Kaur accepts that she took. There is no reliable information for any sick leave taken. There was no reconciliation of holidays at the end of the employment. She provided an explanation rejecting Mr Singh's claim that she took 14 days off to go to Auckland and she used documents to support her evidence.

[28] In summary I hold that Ms Kaur is entitled to her annual leave and the leave for the incomplete year that she worked because Mr Singh has not been able to properly and reliably complete a reconciliation of any leave taken and it being paid.

[29] I now turn to the claim for repayment of money Ms Kaur says she had to withdraw and pay to Mr Singh. This is a credibility issue. My conclusion is:

- (i) That Ms Kaur's evidence from her bank statements supports withdrawals were made from the ATMs and EFTPOS machine at the restaurant, but is not proof of what the withdrawals were for and that they were made to Mr Singh, as he has denied receiving any such payments. There were no witnesses that could say they witnessed any money being handed over.
- (ii) That Ms Kaur has not been able to corroborate sufficiently her evidence, which includes the evidence from her brother that has not assisted her because he did not see anything. She had no other witnesses.
- (iii) That Ms Kaur's changes to her visa requirements are not properly explained. It is strange that she would want an open visa changed to a specific one relating only to Curry Planet restaurant. There has been no explanation and no documents from Immigration that might explain why such a change occurred. Any such documents have not been produced and have not been requested.

[30] Mr Singh called a former flatmate and landlord of the applicant's to attest to Ms Kaur's behaviour, and honesty. The former alluded to overhearing conversations attributed to Ms Kaur and her brother about getting money out of Mr Singh, and said that there was an issue about Ms Kaur's honesty. This was denied by Ms Kaur, who says she was shocked to read her former flatmate's evidence, and I hold that because the allegations are very serious that more evidence and details would have been needed to be provided by that witness to give the evidence any significant weight.

[31] On balance Ms Kaur has not established that there was any premium required in her employment. This is because the threshold is much higher than her evidence as presented.

Costs

[32] Ms Kaur is entitled to costs because she has been successful in the main part of her claim. There have been inexcusable delays caused by the respondent not

reasonably producing copies of the wage record earlier than the first day of the investigation meeting. It was reasonable for the applicant to get representation, and I accept that she required expert attention in regard to the calculations of her claim and entitlements. English is Mr Singh's second language, but that I am satisfied he understood the nature of the claim and the issues that he had to address, and that he took the opportunity prior to the investigation meeting to provide information to assist, although much of it has not been relevant (in regard to performance matters). Also the arrangements he made for assistance at the Authority's investigation meeting helped prevent any further undue delays and ensured the hearing occurred reasonably efficiently. I would apply the daily tariff to cover the two half days for the investigation meeting time and preparation and the need for written submissions. This would be \$3,500 costs and the filing fee of \$71.56.

[33] Costs are reserved for any variation under clause 15 of Schedule 2 of the Employment Relations Act 2000 if necessary by memorandum from Mr Ogilvie.

Summary of the Authority's orders in the matter

[34] Mr Singh is required to pay Ms Kaur:

- i \$4,570 gross total wages for 11 unpaid weeks;
- ii \$21,137.50 gross for the balance of unpaid hours;
- iii \$4,736.90 gross total for holiday pay (annual leave and statutory holidays and days in lieu).
- iv \$3,500 costs and \$71.56 filing fee (including leave for a variation if necessary).