

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 400
3035251

BETWEEN

RISHABH KHANNA
Applicant

AND

GOLDEN NECTAR LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Greg Bennett, for the Applicant
Mike Harrison, for the Respondent

Investigation Meeting: 30 November 2018

Submissions and further information received: 01 December 2018 from Applicant
03 December 2018 from Respondent

Date of Determination: 13 December 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Golden Nectar Limited operates the Nectar Café in Whangarei. Mr Khanna was employed by Golden Nectar from 16 April 2018 to 10 July 2018 as its Café Manager.

[2] Mr Khanna claims that during his employment he suffered an unjustified disadvantage when he was not paid his wages as they fell due. In addition he claims he was unjustifiably dismissed. He seeks recovery of wage arrears and asks the Authority to award him compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for humiliation, loss of dignity and injury to his feelings.

[3] Golden Nectar denies that Mr Khanna suffered an unjustified disadvantage and denies he was unjustifiably dismissed. It accepts that it did not pay Mr Khanna some of his wages as they fell due but challenges the amount claimed.

[4] As permitted by 174E of 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 but has not recorded all evidence and submissions received.

The issues

[5] The issues requiring investigation and determination were:

- a) Did Mr Khanna suffer an unjustified disadvantage to his employment as a result of an alleged failure to pay wages?
- b) Was Mr Khanna unjustifiably dismissed?
- c) If Mr Khanna was unjustifiably dismissed should the Authority award him compensation under s 123(1)(c)(i) of the Act?
- d) If any remedies are awarded, should they be reduced for blameworthy conduct by Mr Khanna that contributed to the situation giving rise to his grievance?
- e) Are wage arrears owing to Mr Khanna?
- f) Should either party contribute to the costs of representation of the other party?

Relevant Background

[6] Golden Nectar Limited was incorporated on 15 February 2018. Its sole director is Sunpreet Singh. Mr Singh and Mr Khanna were acquaintances before Mr Khanna commenced working at the Nectar Café as its Manager.

[7] The terms of Mr Khanna's employment were contained in an individual employment agreement (IEA) that was executed by the parties on 22 and 23 March 2018. The material terms were these:

6. Hours of Work

The Employee's hours of work shall be minimum 40 Hours per week basis.

7.1 Wages

The Employee's wages shall be \$22.40 per hour, which shall be paid fortnightly into a bank account.

10.1 General Termination

The Employer may terminate this agreement for cause, by providing 3 weeks' notice in writing to the Employee. Likewise the Employee is required to give 3 weeks' notice of resignation.' The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.

10.2 Termination for Serious Misconduct

Notwithstanding any other provision in this agreement; the Employer may terminate this agreement summarily and without notice for serious misconduct on the part of the Employee. Serious misconduct includes, but is not limited to:

- (i) Theft;
- (ii) Dishonesty;
- (iii) Harassment of a work colleague or customer;
- (iv) Serious or repeated failure to follow a reasonable instruction;
- (v) Deliberate destruction of any property belonging to the Employer;
- (vi) Actions which seriously damage the Employer's reputation.

10.4 Abandonment of Employment

In the event the Employee has been absent from work for three consecutive working days without any notification to the Employer, and the Employer has made reasonable efforts to contact the Employee, this agreement shall automatically terminate on the expiry of the third day without the need for notice of termination of employment.

The commencement of employment

[8] Mr Khanna commenced work on 16 April 2018.

[9] On 19 April 2018 he was issued with an amended work visa naming the Nectar Café as his employer. Mr Khanna was not paid for the time he worked between 16 April and 19 April 2018.

[10] For the week commencing 23 April 2018 the Nectar Café was closed. Mr Singh advised Mr Khanna that as the Café was closed he did not have to work. Mr Khanna was not paid for this week.

[11] On 28 May 2018 Mr Khanna tendered his notice of resignation. This advised that his last day of employment would be 18 June 2018 and went on to thank Mr Singh “for the many opportunities I have had with Nectar Café.”

[12] Mr Khanna did not receive payment for his wages for the week commencing 11 June 2018.

[13] On 17 June 2018 Mr Khanna notified Mr Singh by text message that he was withdrawing his resignation. His text apologised for any inconvenience caused and went on to state:

The conditions surrounding my resignation have changed and I would appreciate the opportunity to resume my job. I undertake to perform to the best of my abilities. Although I realise the process may not be that straightforward, I will await your reply. I enjoy working at the company and hope to make a positive contribution to the team. Thank you for considering the withdrawal.

[14] Mr Singh accepted Mr Khanna's explanation and agreed to him continuing on in the position of Manager of the Café.

The text messages of 5 and 7 July 2018

[15] On 5 July 2018 Mr Khanna sent Mr Singh the following text message:

Brother come here look after your café yourself please I cant do anymore sorry All the keys and cards I handover to Sammy, I am done please don't try to call me now. Am leaving Whangarei or may be India. And am taking all the cash from last 4 days because that's my hard work. I know that's wrong but I don't think so you guys doing right to me. Text Helen to open ur café tomorrow if u want, Thanks paaji. And sorry you make me mad My cell is off now so please don't disturb me.

[16] Upon receipt of this text message Mr Singh phoned Mr Khanna to obtain his explanation for the text message. What transpired during that phone call is in dispute. Having heard from the parties, I am satisfied the following was discussed:

- a. Mr Khanna said he wanted his wage arrears paid.
- b. Mr Singh agreed to pay these but needed more time.
- c. Mr Khanna apologised to Mr Singh for the text message.

[17] On 7 July 2018 Mr Khanna sent another text message to Mr Singh that advised "I am leaving that's 100% final but I won't let you know when."

[18] Mr Singh spoke with Mr Khanna about this text that day. There had been a disagreement between Mr Singh and the chef. This was resolved however Mr Khanna said he told Mr Singh that he still intended on resigning. He explained to the

Authority that he had spent 3 months working for the Nectar Café and knew the position wasn't right for him. He said he also asked Mr Singh for the money that he was owed for wage arrears and Mr Singh said he needed time to pay. Mr Singh denies any discussion about wage arrears.

Applicant fails to turn up for work

[19] At around 9 pm on 10 July 2018 Mr Khanna phoned Mr Singh and asked him for money. He said Mr Singh told him he would discuss it with him when he came to the Café on the following Saturday. Mr Singh denies this conversation. Mr Khanna said it was following this conversation that he decided that he would not open the Café the following day.

[20] On 11 July 2018 Mr Khanna did not show up to unlock the Café. The chef and staff were unable to get into the Café and had to wait outside. Mr Singh, being based in Auckland, was unable to open the Café and the other employee who had a key, Mr Sharma, was away. Mr Singh made multiple attempts to contact Mr Khanna without success. Eventually he had to travel to Whangarei to open the Café.

[21] Throughout the day Mr Singh continued to try and contact Mr Khanna. His phone went straight to answerphone. He did not return the calls or the 10 text messages Mr Singh sent him. This was despite being seen to be active on WhatsApp Messenger. WhatsApp Messenger is a messaging service that allows the sending of text messages and voice calls, as well as video calls, images and other media, documents, and user location via the internet.

[22] At 9.18 pm on 11 July 2018, Mr Khanna sent the following WhatsApp text:

Sorry I am going through family issues at the moment will get back to as soon as I can and unfortunately I am not in a state to work for few days so sorry for inconvenience. Regards Rishabh.

[23] Mr Khanna explained during the investigation that he had not responded earlier as he was deeply depressed because he had just broken up with his fiancé. He said he had gone to Auckland to see his sister as he was suicidal. After speaking with her he decided that he could not continue working for the Café.

[24] It was about this time that Mr Singh discovered that Mr Khanna had removed his belongings from the hostel room he shared with Mr Sharma. Mr Singh sent a

message via WhatsApp asking Mr Khanna to “Please return the Café keys and companies credit cards ASAP. Thanks”.

[25] Mr Singh replied:

Sure Sp I will return the keys and all the company property by tomorrow but I just wanted to understand are you in an impression to terminate my contract or will you be ok for me to take off for a few days

[26] Mr Singh did not reply.

The meeting on 12 July 2018

[27] On 12 July 2018 Mr Khanna sent a resignation letter to Mr Singh. This advised:

I was really excited to work with you in the Cafe as it was a new business and I had great deal to deliver my expertise of running a Café and taking up on the challenges of accomplishing a new business.

But unfortunately my experience was far from my expectation and working at the Cafe ended up been mentally & emotionally upsetting. The Café was short staffed and the existing staff failed to follow simple instructions and just don't bother to listen to me. I had brought this to your notice on several occasions but there was no action taken.

To add to this I haven't being paid my weekly wages for the weeks that I have worked dated 23/4/18 - 29/4/18; 11/6/18 - 17/6/18; 2/7/18 - 8/7/18 which has been financially stressful.

I had spoken to you regarding the same in the past a couple of times and had also given a formal resignation on 27th May 2018 which was not accepted and I was persuaded to stay in anticipation that the business and staff behavior will improve in due course.

But now I have come to a stage that it is beyond my capacity to work in such a stressful environment and would like to resign.
I will return to the Café today afternoon at 2 pm to return the keys and the credit card.

As I do not wish to work in such a stressful environment, I would like to resign from my current role of Cafe Manager with effect from today Thursday 12th July 2018.

I will serve the notice period of 3 weeks as per my contract and my last working day will be 1/8/18.

Looking forward to your cooperation and a smooth exit.

[28] At 2.30 pm on 12 July 2018 Mr Khanna met with Mr Singh at the Café. What transpired during that meeting initially appeared in dispute but during questioning the parties' recollections were similar in terms of the following evidence:

- a. Mr Singh asked Mr Khanna why he had not shown up for work on 11 July.
- b. Mr Khanna told him he did not turn up because he was stressed and he hadn't been paid his wages. I pause here to note Mr Khanna's evidence was that when he expressed concern about the non-payment of wages he was concerned about the non-payment of his wages for the weeks ended 23 April 2018 and 11 June 2018. He was not concerned about any non-payment of overtime.
- c. Mr Singh explained the implications of Mr Khanna not turning up. Particularly that the chef and staff had been left waiting, that the chilled deliveries were waiting outside, that they had to take groceries to the chef's house to be chilled, and that the business had suffered loss in terms of lost wages, sales and food.
- d. Mr Khanna then said he had resigned and had emailed Mr Singh a letter. Mr Singh said he had not seen this letter and would look at this.
- e. Mr Khanna returned the Café Key and the Company credit card.

[29] The only point of difference between the parties' evidence was the requirement for Mr Khanna to attend work for the remainder of the week. Mr Khanna said he asked Mr Singh to put him on the roster for the next day and Mr Singh then told him there was no need to come in for the rest of the week. Mr Singh denies any discussion about Mr Khanna working. I found the evidence of both men unconvincing.

[30] It is unlikely that Mr Khanna would have asked to be put back on the roster the following day. The text messages show him asking for a few days off as he was "not in a state to work". He told me he was suicidal and deeply depressed. I also find it unlikely that Mr Singh would not have discussed Mr Khanna's request for time off, especially in light of his text request, his text messages on 5 and 7 July, and his not turning up on 11 July.

[31] To resolve the conflict I have relied on the documentary evidence. Particularly the text message exchange of 11 July 2018 and an email sent by Mr Khanna to Mr Singh following the meeting on 12 July 2018. I find it more likely than not that the men discussed Mr Khanna having a few days off as per his text request. As the meeting took place on a Thursday that meant Mr Khanna was not required to attend the workplace for the remainder of the week.

The termination

[32] On 13, 14 and 15 July 2018 Mr Khanna did not attend work. Neither he nor Mr Singh made any attempt to contact each other during this period. This is consistent with an understanding that he was not required to work.

[33] On 15 July 2018 Mr Singh sent Mr Khanna a letter terminating his employment without notice on the grounds of serious misconduct. The letter advised (verbatim):

This letter confirms my advice to you that you are summary dismissed. This means that your employment ends immediately.

In our meeting on 12/07/2018, we discussed your NO SHOW at work on Wednesday 11/07/18.

As discussed during the meeting, your conduct during that incident was absolutely unacceptable which has resulted into immediate termination {as per NZ Employment Act & your employment agreement clause 10,2(4)} from the position of Café Manager at Nectar Cafe, 88 Bank Street, Whangarei.

- What you did was wilful, deliberate and unprofessional by not turning up to the work without notice which has resulted in loss of business sales, business reputation, head chef and staff waiting outside the cafe and simultaneously calling you (which you did not reply) and delivery companies delivering order supplies outside the café which was very embarrassing for a business in trade not opened in the commercial block on working day during the week, at the same time it was a breach of trust between the employer and employee, even Owner tried to contact you a number of times via phone & WhatsApp texting but in vain. Next day, Owner had to come to Whangarei from Auckland to let the business going. What you did was predetermined, knowingly that Owner is based in Auckland and there were no other Café keys around.

You intimidated owner via text, on 05/07/18 at 3.33pm, that All the keys and cards I handover to Sammy, f am done please don't try to call me now. Am leaving whangarei or may b India. And am taking all the cash from last 4 days because that's my hard work. I know that's wrong but I don't think so you guys doing right to me. Text

Helen to open ur cafe tomorrow if u want, Thanks paaji. My cell is off now so please don't disturb me.

On 07/07/2018 at 8.47am, you texted again that I am leaving that's 100% final but I won't let you know, when? {ORIGINAL TEXT IN HINDI:-Mera jana final hai, 100% kab yhae ab Ni btaunga me, thanks}.

- As per your job description, you were having responsibility to hire, train and supervise staff but you were not able hire suitable staff by yourself, Owner had to organise interviews with the applicants to get the business going as the number of staff hired by you didn't last long because of your unprofessional approach to all of them. Owner was called in for the weekly meetings by rest of the team that you were rude & not working as a team, only you had a lot of issues with Head chef, sous chef, Kitchen hand and FOH wait staff as well. They observed, you were abusing them and their town (Whangarei) in your own language many times.
- You don't have good communications skills which you accepted by texting me on 09/05/18 and after we had a meeting regarding that on 12/05/18. I had to write an email for you to communicate to flaming fires for a quote on 27/05/18. In return you send a resignation in on the same date. We had a meeting over the next weekend, you were given a chance to improve on your skills and you were happy to work on the feedback thereafter you withdrew your resignation on 17/06/18 by undertaking to perform to the best of your abilities.
- As per your claim in the meeting, you were not being paid your weekly wage for the week that you have worked dated 23/04/18-29/04/18; which led you to resign on 27/05/18, which is irrelevant because you got your immigration status approved as Cafe Manager on 19/04/18 and there was no business operation & café was closed during 23/04/18-29/04/18 so how did you work?

I notified you that my preliminary view was that I considered your actions to be serious misconduct justifying your immediate termination.

I have taken your feedback into account and have decided that it is appropriate to dismiss you without notice based on your serious misconduct. This letter is formal notice that your employment has been terminated as of 11/07/2018.

I confirm that you have returned the company cards and café keys, but you still need to clear your dues including cellphone's payment, monthly usage bill of your mobile number since 23/04/2018 and your trade me account was credited on 24/04/2018 from company account.

You will be paid any entitlements and outstanding remuneration, including your outstanding weekly wages for the week that you have worked dated 11/06/18-17/06/18 & 02/07/18-10/07/18, superannuation and holiday pay up to 10/07/2018 on 30/07/2018.

Please note Immigration NZ has already been informed.

I wish you well for the future.

[34] During the investigation meeting Mr Singh accepted he did not provide a preliminary view to Mr Khanna that his actions amounted to serious misconduct as he had indicated in this letter.

[35] On 30 July 2018 Mr Khanna received payment of his final wages together with his outstanding wages for the weeks commencing 23 April 2018 and 11 June 2018.

Issue One: Unjustified Disadvantage?

[36] Under s 103(1)(b) an employee may commence a personal grievance claim while still employed or after the employment has terminated. This is if one or more of the conditions of employment has been affected to the employee's disadvantage by an unjustifiable action by the employer.

[37] The Statement of Problem pleads that Mr Khanna suffered an unjustifiable disadvantage to his employment when he was not paid his wages on time for the weeks commencing 11 June and 2 July 2018 and when he was not paid his final pay until 30 July 2018.

[38] There is no dispute that Mr Khanna did not receive payment of wages for these weeks until 30 July 2018. I am satisfied that this was to his disadvantage. These were not the actions of a fair and reasonable employer in the circumstances. There was no good reason for Mr Khanna's wages not to be paid in a timely way and in accordance with the terms of his IEA.

[39] Mr Khanna suffered an unjustified disadvantage to his employment but as no claim for remedies was pleaded no award is made.

Issue Two: Unjustified Dismissal?

[40] The onus falls upon Golden Nectar to prove that its actions in dismissing Mr Khanna on 15 July 2018 were justified.

[41] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of Golden Nectar, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[42] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[43] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.¹

[44] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

Analysis

[45] Golden Nectar maintains that there were three reasons why it terminated Mr Khanna's employment. Firstly, his failure to turn up to work on 11 July 2018. Secondly, the performance concerns raised in the dismissal letter of 15 July 2018. Thirdly, it considered Mr Khanna had abandoned his employment.

[46] In terms of the first of these reasons, I am satisfied that Mr Khanna was aware of Golden Nectar's concerns about him not turning up to work on 11 July 2018 and he had a reasonable opportunity to respond. However, this was not the case in terms of the performance concerns or those of abandonment.

[47] Golden Nectar's failure to put all of its concerns to Mr Khanna, so as to enable him to respond was not what a notional fair and reasonable employer could have done in all the circumstances at the time. I do not accept Mr Singh's evidence that Mr Khanna had abandoned his job rendering a fair process impossible.

[48] A fair and reasonable employer could not have concluded Mr Khanna had abandoned his employment in the circumstances known at the time, namely:

¹ Section 103A(5), Employment Relations Act 2000.

- a. I have already found, on balance, that the parties had agreed that Mr Khanna could have this time off work.
- b. Even if this was not the case, Clause 10.2 of the IEA, and Golden Nectar's good faith obligations, required Golden Nectar to contact Mr Khanna to clarify his intentions before dismissal. It did not do so.
- c. An employer cannot ignore information that suggests an employee has not abandoned their employment.² Mr Khanna's text message asking for a few days off, his resignation providing 3 weeks' notice, and his email of 12 July 2018 all pointed towards Mr Khanna not abandoning his employment.

Finding

[49] There were a number of serious defects in the process followed by Golden Nectar that resulted in Mr Khanna being treated unfairly in terms of s 103A(5) of the Act. There was no rising of all concerns before dismissal. There was no opportunity afforded to Mr Khanna to respond to all concerns before dismissal. There was no investigation or genuine consideration of any explanation before dismissal. These defects were not minor and did result in Mr Khanna being treated unfairly.

[50] Mr Khanna was unjustifiably dismissed from his employment.

Issue Three: Remedies

[51] Mr Khanna claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) in the sum of \$15,000. There is no claim for lost wages.

[52] Mr Khanna gave limited evidence of the effects that the dismissal had on him. He said that the dismissal was unexpected and as a result he suffered financially and had to sleep in his car. He said he was already stressed, having broken up with his fiancé and owing debts in the region of \$25,000, and his dismissal made matters worse. He also complained that the dismissal had resulted in him being deported from the country by NZ Immigration.

² *Lwin v A Honest International Co Ltd* [2003] 1 ERNZ 387 at [33].

[53] While I have some empathy for the situation Mr Khanna found himself in, there are several factors in play in this case that do not warrant an award of compensation to the level that he claims.

[54] Mr Khanna had been employed by Golden Nectar for less than 3 months at the time of his dismissal. He had resigned, having made the decision at least two weeks prior to his dismissal, and had been actively seeking alternative employment. This included attending at least one interview on 13 or 14 July 2018. He was offered and accepted a new job, with his former employer, within 10 days of his dismissal. At best he was out of work for just over 2 weeks more than he had expected.

[55] Any distress Mr Khanna endured as a result of NZ Immigration delaying the grant of an amended work visa, or threatening to deport him from NZ was, on balance, not connected with his dismissal. I am fortified in this finding by Mr Khanna's failure to comply with my direction to provide me with a copy of his work visa and any documentation from NZ Immigration withdrawing that visa. Having heard from Mr Khanna I find it more likely than not that his reason for leaving New Zealand was because his sister was getting married. He said he had already booked his ticket to the wedding before he was terminated and returned to New Zealand after two weeks.

[56] Taking into account the short duration of Mr Khanna's employment, his ability to find work within a short period, the circumstances of his dismissal, and there being no evidence of any on-going distress, I find the evidence warrants a low award of compensation under s 123(1)(c)(i) of the Act in the sum of \$5,000.

Issue Four: Contributory conduct

[57] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.³

³ S 124.

[58] I am satisfied that Mr Khanna contributed to the situation that gave rise to his personal grievance. The duty to deal in good faith is a mutual one. Employees have the same duties as employers to be active and constructive in maintaining the employment relationship. Mr Khanna's actions in sending the text messages on 5 and 7 July 2018, and then not turning up to work on 11 July 2018 did not meet his duties of good faith and ultimately led to his termination.

[59] I am satisfied Mr Khanna's conduct warrants a contribution finding of 30%.

[60] Taking into account this finding, I order Golden Nectar to pay to Mr Khanna the sum of \$3,500 under s 123(1)(c)(i) of the Act. Payment of this sum must be made within 14 days of the date of this determination.

Issue Five: Wage Arrears?

The Claim

[61] Mr Khanna's Statement of Problem seeks recovery of wage arrears for the difference between the hours that he worked and the hours that he was paid. In his closing submissions he also claimed holiday pay arrears. As holiday pay was not claimed in his Statement of Problem, this claim has not been considered.

[62] Mr Khanna claims that during his employment Golden Nectar defaulted in payment for the hours he worked on multiple occasions. He said he discussed this with Mr Singh and it was agreed that he would be paid for the additional hours he was working when the Café became profitable. This is denied by Mr Singh. He says Mr Khanna was paid for the hours that he worked except for his first week of employment where he acknowledges that he underpaid Mr Khanna based on a misunderstanding.

Analysis

[63] Where there has been default in payment to an employee of any wages or other money payable under an individual employment agreement, those monies may be recovered by the employee.⁴ This is the case regardless of any acceptance by Mr Khanna of any payment at a lower rate or any express or implied agreement to the contrary.

⁴ Section 131 Employment Relations Act 2000.

[64] To enable a determination as to whether or not an underpayment of wages occurred, Golden Nectar was directed to produce all of Mr Khanna's wage and time records. This information was not provided. While a copy of Mr Khanna's payslips were provided by Golden Nectar, these did not show the hours and days that he worked each week.

[65] Golden Nectar's failure to produce any wage and time records has prejudiced Mr Khanna's ability to bring an accurate claim under s 131 of the Act. Section 132 provides:

Failure to keep or produce records

- (1) Where any claim is brought before the Authority under section 131 to recover wages or other money payable to an employee, the employee may call evidence to show that—
 - a. the defendant employer failed to keep or produce a wages and time record in respect of that employee as required by this Act; and
 - b. that failure prejudiced the employee's ability to bring an accurate claim under section 131.
- (2) 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.

[66] To assess what wage arrears are owing to Mr Khanna I have taken into account the evidence of the witnesses as well as Mr Khanna's payslips and the timesheets of other employees who worked at the Café at material times.

[67] For convenience I address each time period separately.

Week ending 22/04/18

[68] Mr Singh said that as Mr Khanna did not obtain the applicable work visa until 19 April 2018 he did not believe he had to pay him for the time he worked on 16, 17 and 18 April 2018. He acknowledged during the investigation meeting, and in his representative's submissions, that this was a mistake. He now acknowledges Golden Nectar must pay Mr Khanna for this period.

[69] There is no dispute that Mr Khanna worked from 7 am to 2 pm on 16, 17 and 18 April 2018. He was not paid for these days. A total of 21 hours.

[70] There is a dispute as to Mr Khanna's start time on 19 and 20 April 2018. He says he commenced at 6.30 am whereas Golden Nectar maintains his start time was 7 am. I prefer the evidence of Golden Nectar. During this period Mr Khanna was being trained by Golden Nectar's former manager. This manager had a key and started at 7 am. There was no reason for Mr Khanna to start earlier during this period. I find on balance that on 19 and 20 April Mr Khanna worked from 7 am to 3.30 pm. A total of 17 hours.

[71] There is no dispute that Mr Khanna worked from 8 am to 1 pm on 21 April 2018. A total of 5 hours.

[72] For the week ending 22 April 2018 Mr Khanna was paid for 12 hours of work. Deducting this from the hours worked (43) leaves 31 hours unpaid. 31 hours multiplied by his hourly rate of \$22.40 equals \$694.40 gross.

Weeks ending 06/05/18 to 03/06/18

[73] Mr Khanna claims he worked weekdays during this period from 6.30 am to 3.30 pm and on a Saturday from 8 am to 3.30 pm. Golden Nectar maintains he worked 40 hours per week during opening hours of the Café.

[74] Having reviewed the evidence I find it is more likely than not that Mr Khanna's ordinary hours of work during this period were weekdays from 7 am to 3.30 pm and on a Saturday from 8 am to 1 pm. I am fortified in this finding by the following:

- a. The Café was open weekdays from 7 am to 2.30 pm and on a Saturday from 8 am to 1 pm.
- b. There was no reason for Mr Khanna to be at the Café prior to the Café's opening time:
 - i. Mr Sharma, Mr Khanna's flatmate, said Mr Khanna started at 7 am. He (Mr Sharma) started at 6.30 am and opened the café doors.

- ii. The coffee machine was left on so there was no need for it to be switched on 15-20 minutes prior to opening as Mr Khanna said.
- iii. Any cleaning up was undertaken at the end of the day so that the Café was ready for opening the following morning.
- c. On weekdays Mr Khanna was required to attend to some matters after closing. Mr Singh accepted that he would talk with Mr Khanna for approximately 15-30 minutes around closing time each weekday. He also accepted that Mr Khanna would have to cash up at the end of day, send a picture of the shop to him and would sometimes have to go shopping up to 2 times each week for urgent supplies. I find any work Mr Khanna was required to attend to afterhours was able to be completed within the hour between closing time and his departure.
- d. Mr Khanna was not required to attend to work matters after closing time on a Saturday. Mr Singh attended the Café on a Saturday and attended to closing up. After closing the parties would have lunch together and do some shopping. I find this was as friends, Mr Khanna was not working.

[75] For the weeks ending 06/05/18 to 03/06/18 Mr Khanna was paid for 40 hours of work each week. A shortfall of 7.5 hours per week. Multiplying this shortfall by the number of weeks (5) I find there was an underpayment for 37.5 hours. Multiplying 37.5 hours by Mr Khanna's hourly rate of \$22.40 is \$840 gross.

Weeks ending 10/06/18 – 08/07/18

[76] The parties were uncertain when the Café started opening on Sundays. My review of the timesheets produced by Golden Nectar for its other employees establishes, on balance, that this started in the week ending 10 June 2018.

[77] Mr Khanna said he worked every Sunday from 8 am to 7 pm. Mr Singh disputed this. He said Mr Khanna worked 1 or 2 Sundays from 9 am to 1 pm when he couldn't find staff to work. He could not recall the dates.

[78] In the absence of time and wage records I find it proven that Mr Khanna worked every Sunday from 10 June 2018. I do not accept however Mr Khanna's evidence that he worked until 7 pm. The Café closed at 1 pm. Mr Singh attended to

closing the Café and therefore there was no need for Mr Khanna to continue working. I find, on balance, Mr Khanna worked every Sunday from 10 June 2018 from 8 am to 1 pm. His total weekly normal hours of work from that point were 52.5 hours.

[79] The following underpayments arise for the weeks ending 10/06/18 – 08/07/18.

Week ending	Hours worked	Hours paid	Shortfall
10/06/18	51.5	38	13.5
17/06/18	52.5	40	12.5
24/06/18	52.5	40	12.5
01/07/18	52.5	40	12.5
08/07/18	52.5	40	12.5
			63.5

[80] The foregoing calculations take into account shorter hours worked by Mr Khanna on the Queen's Birthday, 4 June 2018. On this day he said he worked from 8 am to 3.30 pm.

[81] Multiplying the shortfall of 63.5 hours by Mr Khanna's hourly rate of \$22.40 I reach \$1,422.40 gross.

Week ending 15/07/18

[82] Mr Khanna worked on the Monday and Tuesday of this week. He did not work the remainder of the week. I have already found this was at his request. He was not entitled to be paid for the days he was absent.

[83] In the week ending 15 July 2018 Mr Khanna worked 17 hours. He was paid for 16 hours. A shortfall of 1 hour equating to \$22.40.

Findings

[84] Combining the wage arrears figures of \$694.40, \$840, \$1,422.40 and \$22.40 I reach a figure of \$2,979.20 gross.

[85] Golden Nectar is ordered to pay to Mr Khanna the sum of \$2,979.20 gross within 14 days of the date of this determination.

Issue 6: Costs

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

[87] If they are not able to do so, and an Authority determination on costs is needed, Mr Khanna 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. This must include evidence of the costs that he has incurred.

[88] From the date of service of that memorandum Golden Nectar will 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.

[89] 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.⁵

Outcome

[90] The overall outcome is:

- a. Rishabh Khanna suffered an unjustified disadvantage to his employment but as no claim for remedies was pleaded no award is made.
- b. Rishabh Khanna was unjustifiably dismissed from his employment with Golden Nectar Limited.
- c. Golden Nectar Limited is ordered to pay to Rishabh Khanna the following amounts within 14 days of the date of this determination:
 - i. The sum of \$3,500 as compensation for humiliation, loss of dignity and injury to feelings, such sum taking into account a 30% reduction for his contributory conduct.

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

ii. The sum of \$2,979.20 gross for wage arrears.

Jenni-Maree Trotman
Member of the Employment Relations Authority