

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2025] NZERA 442
3286340

BETWEEN

RAJESH KUMAR
Applicant

AND

JK HOSPITALITY NZ
LIMITED
Respondent

Member of Authority: Claire English

Representatives: Rajesh Kumar in person
Daler Singh in person

Investigation Meeting: 2 April 2025 in Tauranga

Submissions received: Up to 17 July 2025 from Applicant
Up to 16 July 2025 from Respondent

Determination: 23 July 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Rajesh Kumar was employed by JK Hospitality NZ Limited to work in Mr Singh's hospitality business. He resigned his employment on 14 February 2024. He says that he was overworked, did not have any breaks, and was not paid correctly for three public holidays. In addition, he complains he was not provided with an employment agreement.

[2] He says he was constructively dismissed for all these reasons and seeks compensation of \$7,200 or actual lost remuneration to April 2024 when he found new employment. He also seeks reimbursement as he was not paid at the rate of time-and-

a-half for working on certain public holidays or alternative holidays, and a penalty in relation to the non-provision of an employment agreement.

[3] Mr Singh denies the claims and says that Mr Kumar resigned voluntarily. He says that Mr Kumar was paid his agreed hourly rate for all hours he worked, and that these are recorded on hand-written timesheets created by Mr Kumar.

[4] He denies that Mr Kumar could not take breaks. He states that Mr Kumar was employed as a manager, there were other staff who could have helped him take breaks and Mr Kumar was authorised to hire help if needed. He says that Mr Kumar never told him (by marking the time sheet appropriately) that extra payment was needed in respect of certain public holidays.

[5] Mr Singh also says that he gave Mr Kumar an employment agreement which was signed by them both, but the hard copy has since been lost and he did not take a digital copy.

The Authority's investigation

[6] For the Authority's investigation written statements were lodged from both Mr Kumar and Mr Singh. Both parties attended the investigation meeting in person, provide copies of documents, and answered questions under affirmation. They also gave closing statements.

[7] 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.

The issues

[8] The issues requiring investigation and determination were:

- (a) Was Mr Kumar (unjustifiably) constructively dismissed?
- (b) If the employer's actions were not justified, what remedies should be awarded, considering Mr Kumar's claim for lost wages in light of his evidence as to when he found new employment?

- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Kumar that contributed to the situation giving rise to his grievance?
- (d) Is Mr Kumar owed any monies in respect of time-and-a-half pay for work on a public holiday, or payment for alternative holidays?
- (e) Do any issues arise in respect of any failure to provide an employment agreement?

The Identity of the Employer

[9] Mr Kumar's original claim was brought against Mr Singh personally. His payslips showed "JK Hospitality NZ Limited" as the employer. Mr Singh is the sole director and shareholder of that company. When asked about this, Mr Kumar explained that he knew about the company but that the company was owned by Mr Singh, and Mr Singh was his manager, therefore he believed it was the same thing, which was why he had brought his claim against Mr Singh.

[10] Mr Singh's view was that the company was the employer. There was no employment agreement provided to clarify this matter. However, payslips showed that JK Hospitality NZ Limited was the employer, and in addition to the payslips, Mr Singh provided documents showing JK Hospitality NZ Limited was registered with Inland Revenue and remitted PAYE tax on behalf of Mr Singh.

[11] The in-person evidence of Mr Singh, confirmed by the information on the payslips and supporting tax records, satisfies me that the employer of Mr Kumar was JK Hospitality NZ Limited. The intituling of this determination and the orders made in it reflect this.

Background

[12] Mr Kumar was employed by JK Hospitality as of either 11 December 2023 or 12 December 2023. Nothing turns the disagreement as to the exact start date. Mr Singh had recently purchased a tavern, and hired Mr Kumar on a full-time permanent basis to manage it. Shortly after Mr Kumar was hired, Mr Singh returned to India on a planned trip to visit family. Due to family reasons, he needed to leave a few days earlier than planned, in the first week of January. He was scheduled to return on 24 February 2024.

[13] Mr Kumar states that he was employed as a Duty Manager to run the bar, restaurant, and gambling machines. The business was open from Tuesday to Sunday and closed on Mondays. He says that he had insufficient support or trained cover, and that he was required to work between 60 and 80 or more hours each week. He says his duties were to open and close the business, run the bar as Duty Manager, manage staff and security when needed, order stock, liaise with tradespeople, manage customers and the gambling machines, and work in the kitchen as a chef.

[14] He says he could not take breaks, as although there were other staff, they did not start until later in the day, meaning that for part of every day he was without cover, and even when other staff were present, he could not take breaks as he was the only Duty Manager.

[15] Mr Singh accepts that Mr Kumar had a wide range of duties, and he also accepts that in some weeks, Mr Kumar worked long hours. This is reflected in the timesheets and payslips, which show Mr Kumar working up to 88 hours in a week. There is no dispute between the parties that the timesheets are an accurate reflection of hours worked, and that Mr Kumar was paid for all hours recorded on the timesheets.

[16] Mr Singh does not accept that Mr Kumar could not take breaks. He says that during the day, there were few if any customers which he knew through till receipts and security camera footage of the bar. He provided text messages between him and Mr Kumar while he was in India, showing he had wanted to close the bar on Tuesdays and Wednesdays during the day due to lack of customers. Mr Kumar rejected this, saying that as he was paid hourly, this would have reduced his income and this was not acceptable to him. Mr Singh also took the view that Mr Kumar was employed as the Manager of the business, not just as a Duty Manager, and had the authority to hire staff (or give existing staff more hours) if he had felt this was necessary.

[17] Mr Kumar told Mr Singh he would resign if Mr Singh reduced his hours, and Mr Singh agreed to leave things as they were. His evidence was that he did not have any choice in the matter, as he was unable to communicate effectively with Mr Kumar while he was overseas, and was not able to travel quickly back to New Zealand if Mr Kumar had resigned.

[18] Mr Kumar referred to a text message from him saying he would “start Thursday onwards” and explained that by this, he meant to suggest a potential compromise

whereby he would not work at all on Tuesdays or Wednesdays, thus leaving him free to find other part-time work on Mondays, Tuesdays, and Wednesdays to increase his earnings. However, he accepts that he and Mr Singh never talked about this possibility.

[19] In the end, Mr Kumar resigned on 14 February 2024. His text message stated: “I am resigning my position today, last day would be 28/92/2024 [sic] [eg 28 February 2024]. Thanks for opportunity but its time to move on for new challenges. Thank you.”

[20] Mr Singh replied that he was “sad to know about it”, and that if Mr Kumar wanted to come back, he could talk at any time.

[21] Mr Singh then became concerned that he would not be able to return to New Zealand as planned, due to the possibility that his travel would be disrupted by protests in India. He asked Mr Kumar to stay on until about 10 March, by which time he anticipated he would be back in New Zealand even if his travel was delayed. In the end, he was able to catch his original flight and returned to New Zealand on 24 February 2024.

[22] On 23 February 2024, the business’s temporary liquor licence expired, and the business was required to close.

[23] This was the last day that Mr Kumar worked in the business, and he was paid up to this date.

[24] Mr Singh asked Mr Kumar to accompany him to a meeting about the liquor licence on 28 February, which Mr Kumar did. A licencing hearing was held on 14 March 2024, which Mr Singh and Mr Kumar also attended. No further liquor licence was granted, and the business never re-opened. Mr Singh advises he is still paying off the debts incurred as a result.

Was Mr Kumar constructively dismissed?

[25] I must now consider if Mr Kumar was constructively dismissed. For there to be a constructive dismissal, there must not only be a breach of duty by the employer, but also the breach must be of such a nature as to make the employee’s resignation reasonably foreseeable.¹

¹ See *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140, (2011) 8 NZELR 604.

[26] Not every breach of contract will lead to constructive dismissal. There must be “a breach of a sufficiently serious nature to bring a reasonable employee to the conclusion that the employer does not intend to be bound by the contract and, therefore, cannot be relied upon to perform it fully or consistently in the future.”²

[27] Mr Kumar is clear that his claim stems from a lack of support and in particular, the lack of what he says is any ability to take breaks. As well as the timesheets showing long hours worked by Mr Kumar, further information about how the business was run is set out in the decision of the Tauranga District Licensing Committee dated 17 March 2024 records as follows:

The business has been operated largely by Rajesh Kumar, a certified manager who has regularly been working 55 – 88 hour weeks according to timesheets produced at the hearing [at para 4]

[Mr Singh] agreed that the Duty Manager should not be out the back cooking food when they are the Duty Manager. [at para 14]

He acknowledged that Rajesh was largely running the business on his own and had been working up to 88 hours a week...and conceded that Rajesh had not been getting the dedicated breaks that he was entitled to. [at para 15].

We acknowledge and respect the reasons for Mr Singh’s attendances in India. However...he should not have left Rajesh Kumar to struggle on alone in such a high risk environment. [at para 32]

[28] Taking into account the documentary evidence, as well as the in-person evidence of both parties, I conclude that Mr Kumar was overworked, was not able to take proper breaks, and lacked support.

[29] I acknowledge the difficulties faced by Mr Singh in attempting to manage Mr Kumar and the needs of the business from India, and the difficulties in communication and the working relationship that had never had time to mature as Mr Kumar had only been employed for three weeks before Mr Singh left. Whether Mr Kumar and Mr Singh might have resolved this matter and continued Mr Kumar’s employment under different terms will never be known, as by the time Mr Singh returned from India, the business had closed due to the lack of a liquor licence and it never re-opened.

[30] However, the evidence shows that Mr Kumar was overworked and could not take breaks. Mr Singh’s evidence is that he offered to reduce Mr Kumar’s working

² *NZ Woollen Workers IUOW v Distinctive Knitwear NZ Ltd* (1990) ERNZ Sel Cas 791 (LC) at 803.

hours by closing the bar during the day on Tuesdays and Wednesdays. However, this was not to provide Mr Kumar with more or more predictable breaks, but to save money as there was no point being open without customers. This would have had the effect of reducing Mr Kumar's pay without putting any plan in place for him to have predicable and reliable breaks when he was working, which could often be from 10 to 12 hours at a time.

[31] I find that a failure to provide breaks and/or practical support under these circumstances was a breach of duty by the employer, and it was sufficiently serious to justify resignation. Mr Kumar's claim of constructive dismissal is made out.

[32] Mr Kumar has succeeded in his personal grievance claim of unjustified dismissal and is entitled to remedies accordingly.

[33] He has claimed a single remedy, being either three month's lost wages, or the sum of \$7,200 gross. When asked how he had calculated this sum, he said that this was his own estimate of lost wages at the time of filing. He had subsequently found a job, which he had started on either 1 April or a week or two later. Mr Kumar accepted that his claim for three month's lost wages would be reduced if he had not in fact been out of work for three months.

[34] Mr Kumar was paid up to 23 February 2024 when the business was closed. He found limited casual work on an orchard and at another restaurant, before finding another permanent job later in April. In the circumstances, I prefer his initial evidence suggesting that the date of 1 April is the correct date for calculation of his actual losses, and therefore that he spent 9 weeks without work.

[35] Both Mr Singh and Mr Kumar agreed that Mr Kumar's average weekly wage over the 11 weeks of his employment was approximately \$1,800 per week. Mr Kumar's final payslip showed his gross earnings as being \$20,743.50. Averaged over the 11 weeks of Mr Kumar's employment, this amounts to \$1,885.77 gross per week. I consider it appropriate to use Mr Kumar's actual average weekly rate of \$1,885.77. Lost remuneration for nine weeks is therefore \$16,971.95 gross. Orders are made accordingly.

Is Mr Kumar owed further sums in respect of work done on public holidays?

[36] Mr Kumar says that he worked on three public holidays, and has been underpaid in respect of these days. I will go through these three dates in turn:

- a. Mr Kumar says he did not work on Boxing Day, being Tuesday 26 Dec 2023, and he was paid for 8 hours, but that his average hours would have been longer than 8 hours, and he should have been paid more.
- b. Mr Kumar says he worked for three hours on New Years Day, being Monday 1 Jan 2024, and was only paid his usual rate (not time and a half) and has not received an alternative day.
- c. Mr Kumar says he worked 16 hours on the Day After New Year's Day, being Tuesday 2 Jan 2024 and was only paid his usual rate.

[37] Mr Singh referred to the relevant time sheets, and says that:

- a. Mr Kumar was paid 8 hours for Boxing Day, as this was his hours for that day.
- b. He was not aware that Mr Kumar had worked on New Year's Day at all, and he should not have done so as this was a Monday when the business was ordinarily closed. He further noted that Mr Kumar had not included a notation on the relevant time sheet that the relevant entry was for a public holiday or naming the public holiday, as was present on other time sheets. Therefore the day had been processed by payroll as an ordinary working day, without any allowance for time and a half or an alternative day.
- c. Although Mr Kumar may have worked 16 hours on Tuesday 2 January, again, the relevant time sheet did not note that this was a public holiday, so again, payroll had processed it as being an ordinary working day.

[38] Payment for public holidays is governed by the Holidays Act 2003 (Holidays Act). Section 49 of the Holidays Act requires that:

If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay or average daily pay for that day.

[39] This applies to the work done by Mr Kumar on Boxing Day 2023. Tuesdays were a normal working day for him, and because it was a public holiday, he did not work on that day. He is therefore entitled to receive either his relevant daily pay or average daily pay.

[40] Relevant daily pay is defined in s 9 of the Holidays Act. It means "means the amount of pay that the employee would have received had the employee worked on the day concerned".

[41] Mr Kumar's time sheets show that prior to Boxing Day, he had worked for 2 weeks. On those two Tuesdays, he worked for nine hours and nine-and-a-half hours. This suggests that he would have received 9 hours pay if he had worked on that day.

[42] His average hours over those two weeks suggest a daily average of 11 hours, however, Mr Kumar did not work 11 hours on Tuesdays, as the bar closed earlier on that day of the week. My view is that a fair assessment of what Mr Kumar would have earned had he worked on a Tuesday is 9 hours, which is supported by the subsequent timesheets.

[43] An order for the payment of 1 additional hour's pay is made accordingly, calculated at Mr Kumar's agreed hourly rate of \$30.00/hour.

[44] In respect of 1 and 2 January, the timesheets and payslips support Mr Kumar's claim that he worked on these days, and was paid his usual hourly rate for that time. Mr Singh responsibly acknowledged this. Mr Kumar is still owed the "half" component of the statutory time-and-a-half pay for work done on those two public holidays in accordance with s 50 of the Holidays Act 2003. This means that Mr Kumar is owed a further 1.5 hours pay for work done on New Year's Day, and a further 8 hours pay for work done on 2 January. Payment will be calculated at Mr Kumar's agreed hourly rate of \$30/hour. Orders are made accordingly.

[45] I have considered whether Mr Kumar was properly paid for alternative holidays in respect of the public holidays that he worked. This was discussed with the parties. Mr Singh said that all alternative holidays had been paid, and referred to Mr Kumar's

last pay slip in support. Mr Kumar said he had not received any alternative holidays, and referred to his last two payslips, pointing out that the final payslip dated 23 July 2024 showed payment of his annual leave only³, and his second-to-last payslip dated 27 February 2024 showed payment only of the hours worked in the previous week.

[46] In addition, a comparison with the relevant timesheet shows that Mr Kumar was underpaid by 1.5 hours. Orders will be made for payment of this time, as this appears to be an oversight. All other payslips showed payment only for hours worked.

[47] For avoidance of doubt, I do not accept suggestions by Mr Kumar that he was otherwise systemically underpaid for the hours that he worked. The timesheets, payslips, and till records are all consistent as to the hours worked and paid for.

[48] Contrary to Mr Singh's submissions, there is no evidence that Mr Kumar was ever paid for alternative holidays. Based on the evidence before me, I conclude that Mr Kumar was not paid for alternative holidays in respect of work done on New Year's day and 2 January. He is owed an alternative holiday for working on each of these days in accordance with s 56 of the Holidays Act 2003. This remains outstanding and needs to be paid to him, as s 56 of the Holidays Act 2003 provides that this entitlement remains outstanding until taken or paid, with payment to be calculated in accordance with either s 60(2) or 61 of that Act as the case may be.

[49] Section 60 of the Holidays Act 2003 provides that when an employee has left employment, payment for an alternative holiday is to be calculated at the rate of either relevant daily pay or average daily pay for the last day of employment.

[50] Mr Kumar's hours and pay varied from day to day and from week to week. Accordingly, I consider it appropriate and necessary to use average daily pay to calculate the amount he was owed for the two alternative holidays that remained outstanding at the end of his employment.

[51] Using the formula set out in s 9A of the Holidays Act 2003, Mr Kumar's gross earnings as at his last pay period is \$20,743.50, which is as set out in his final payslip. The number of whole or part days during which Mr Kumar earned those gross earnings

³ The payment shown on this payslip was for a sum that amounted to 8% of Mr Kumar's total gross earnings as shown on the prior payslip, and both parties agreed this represented payment of Mr Kumar's holiday pay.

is 55, which Mr Singh accepts is the correct number to be used for this calculation. The number of whole or part days are set out in the timesheets provide to me, and for the two weeks for which time sheets were no longer available, till records show the days of the week on which the business was open. Applying the formula in s 9A, Mr Kumar's average daily pay as at the time his employment came to an end is therefore \$377.15 gross. He is entitled to payment for two outstanding alternative holidays calculated at this rate, being \$754.31 gross. Orders are made accordingly.

[52] I have considered if any actions by Mr Kumar contributed towards the situation that occurred, and if any reductions in his remedies should be made. There is no evidence of any such contributory conduct. The business Mr Kumar was employed in came to an end for a number of reasons none of which were connected to his actions. No reduction needs to be made.

[53] Mr Kumar also raised concerns that he was not provided with a written employment agreement. Mr Singh disputes this, saying that an employment agreement was provided, but he no longer had this document which had been mislaid in the aftermath of the business closing down. I have considered whether it might be appropriate to impose a penalty for a failure to provide a written employment agreement or a failure to retain a copy of that agreement, as the case may be. I decline to do so in all the circumstances. None of Mr Kumar's claims stemmed from a dispute about his terms and conditions of employment, nor did the lack of that document make it more difficult to pursue or resolve his claims. The only difficulty that might be said to arise was the need to ascertain the identity of the employer given that Mr Kumar had raised a claim against Mr Singh. Mr Singh was able to produce other employment records which satisfied me on that point, as I have already recorded. In these circumstances, a penalty is not warranted. No orders are made.

Orders

[54] Mr Rajesh Kumar has a personal grievance in that he was unjustifiably dismissed.

[55] JK Hospitality NZ Limited is ordered to pay to Rajesh Kumar within 28 days of the date of this determination:

- a. The sum of \$16,971.95 gross as compensation for lost remuneration;

- b. The sum of \$30.00 gross, being payment of 1 hour's short payment owed for Boxing Day in accordance with s 49 of the Holidays Act 2003;
- c. The sum of \$285.00 gross, being a total payment 9.5 hour's short payment owed for work done on New Year's Day and 2 January in accordance with s 50 of the Holiday Act 2003;
- d. The sum of \$754.31 gross, being payment for two outstanding alternative holidays; and
- e. The sum of \$45.00 gross, being reimbursement for an underpayment of wages of 1.5 hours for the final week of Mr Kumar's employment.

Costs

[56] As neither party was represented, there is no issue as to costs.

Claire English
Member of the Employment Relations Authority