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Kumar v Punjabi Dhaba Limited (Christchurch) [2017] NZERA 1144; [2017] NZERA Christchurch 144 (30 August 2017)

Last Updated: 10 September 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 144
5638163

BETWEEN RAJ KUMAR Applicant

A N D PUNJABI DHABA LIMITED Respondent

Member of Authority: David Appleton

Representatives: Mohammed Shahadat, Advocate for Applicant

David Beck, Counsel for Respondent

Investigation Meeting: 20 January 2017 at Christchurch

Submissions Received: 24 July 2017, from the Applicant

8 August 2017, from the Respondent

Date of Determination: 30 August 2017

DETERMINATION OF THE AUTHORITY

- A. The respondent is to pay to Mr Kumar the net sum of \$15,512.09 in respect of arrears of pay, holiday pay and statutory holiday pay.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Kumar claims that he has been underpaid wages, holiday pay and statutory holiday pay amounting to the net sum of \$18,388.1. The respondent denies that Mr Kumar is owed any money and claims that he has in fact been overpaid because of

advances of salary made over many years of employment, and that he owes the

1 The original sum claimed in the statement of problem was the net sum of \$29,814.

respondent a significant sum of money. However, the respondent confirmed at the investigation meeting that it does not seek to recover this purported overpayment by way of a counterclaim.

[2] The respondent also says that the restaurants in which Mr Kumar says he worked most of the statutory holidays were closed on statutory holidays.

[3] Although the Authority's investigation meeting took place in January 2017, further information needed to be produced by the respondent, which took some time because of retrieval difficulties. Once this information was produced, both parties

wished to give further evidence about it, which they did by affidavit. Hence, it was not until late July 2017 that the parties were able to give their submissions.

Background

[4] Mr Kumar has worked on and off for the respondent company since 1997 as a chef. The respondent owns and operates Indian restaurants in Auckland and Christchurch. Mr Kumar worked in both Auckland and Christchurch.

[5] The evidence of Mr Kumar, which was given with the assistance of an interpreter of the Hindi language, states that he was paid on an ad hoc basis between

10 December 2010 and 30 March 2013 (the first period), at which point his visa

expired and he was forced to return to India. When he eventually obtained a new visa and started working for the respondent again with effect from 2 August 2014 until he left on 8 March 2015 (the second period), Mr Kumar received regular payments.

[6] Between 10 December 2010 and 30 March 2013, Mr Kumar was employed on an individual employment agreement which stated that his salary was \$38,000 per year, to be paid monthly. When Mr Kumar returned to New Zealand in August 2014 after his stay in India, he was moved to an hourly rate of \$18.

[7] The Authority saw various documents, including:

(a) Copies of Mr Kumar's bank statements for the two periods of employment in question;

2 [Section 142](#) of the [Employment Relations Act 2000](#) provides that no action may be commenced in the Authority in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose. The statement of problem was lodged on 15 August 2016, so the arrears of wages claimed all fall within the limitation period.

(b) Copies of Mr Kumar's tax records for the two periods in question;

(c) A copy of a notebook kept by Mr Kumar for the period from July 2005 until August 2014 showing payments received by him (this notebook was produced by Mr Kumar for the first time on the day of the investigation meeting);

(d) Written statements signed by Mr Kumar which the respondent company says showed Mr Kumar acknowledging that he owed the respondent company sums of money, and that he was not owed any salary payments or holiday payments.

[8] Mr Kumar's evidence was somewhat confused and contradictory in places. I attribute this to limitations in his understanding and recollection rather than a deliberate desire to mislead. Evidence was given on behalf of the respondent by Mr Hardeep Singh, one of the directors of the respondent company. His evidence was more coherent. Putting together the evidence of Mr Kumar and Mr Singh, I understand that the following occurred.

[9] Since early on in Mr Kumar's employment with the respondent company, dating back to 1997 or thereabouts, the respondent company would make payments to Mr Kumar (and apparently to other employees) to enable Mr Kumar to make purchases, send money back to India and to buy an investment property in Mr Kumar's hometown in India. Whilst these payments were characterised as loans in Mr Singh's written brief of evidence, in his oral evidence they were described as advances of salary. On balance, I believe that the arrangement was capable of constituting advances of salary rather than loans because it is unlikely that Mr Kumar had any collateral against which Mr Singh would have had his company lend him money. I believe that the arrangement was for Mr Kumar to take an advance of salary which was to be paid off later by his working as a chef. However, as will be seen below, not all of the payments can be characterised as advances of salary.

[10] The matter is more complicated, however, because the respondent also paid for Mr Kumar's airfares, his credit card bills and other expenses. In addition to this, it appears that Mr Kumar asked Mr Singh to buy him a gold chain and a gold bracelet at separate points during his employment, as an investment, which Mr Singh tallied against the debt that Mr Kumar was accruing, but without always attributing a dollar

value to them. However, a dollar value was eventually attributed to these two items on 12 August 2014 in accordance with the weight of the gold, and the price of gold on or around that date, rather than the cost to Mr Singh of the two items when he bought them some years earlier. By 2014 the price of gold was internationally much higher than it had been in earlier years.

[11] A further complication appears to be that some of the moneys paid to Mr Kumar were paid in Indian rupees (when, I believe, Mr Kumar was in India) and, in addition, Mr Kumar liked to think of his New Zealand salary as a rupee amount rather than a dollar amount. There were therefore, at various points of time, conversions carried out by Mr Singh of the amount owed by Mr Kumar from New Zealand dollars to Indian rupees, at an exchange rate that was prevailing at the point when that conversion was calculated.

[12] The evidence also shows that Mr Singh would carry out a reconciliation from time to time taking account of the sums that

Mr Singh says had been paid to Mr Kumar and the work he had done. His calculations would include holiday pay that Mr Singh says had accrued in favour of Mr Kumar. The Authority saw these reconciliations written in Mr Kumar's notebook and, on each occasion, the reconciliation showed Mr Kumar owing the respondent a significant sum.

[13] The Authority saw a copy of a handwritten document bearing the date

12 August 2014 which set out a number of items that Mr Singh said represented moneys owed by Mr Kumar to the respondent company, totalling \$47,541.84. Mr Singh also calculated on this document holiday pay that he said was owed to Mr Kumar, coming to a total of \$26,100. Deducting that sum from the \$47,541.84 purportedly owed by Mr Kumar leaves the sum of \$21,441.84. Under that sum is stated the following:

Raj Kumar has to pay P[unjabi].D[haba]. or Hardeep Singh.

To consider airfare credit after 1 year of service and behaviour.

Till Date all my Holiday Pay and other Dues are clear with Punjabi

Dhaba and I owe Punjabi Dhaba \$21441.84 which I clear till 2015.

[14] This document had been signed by Mr Singh and by Mr Kumar.

[15] Mr Kumar said in his evidence that he did not understand what the document was saying and simply accepted the calculations made by Mr Singh.

[16] A second document was produced to the Authority which bore the date

8 March 2015. This set out the number of days of leave that Mr Singh had calculated had been accrued to Mr Kumar between 22 June 2012 and 22 February 2013. The sum shows a total of 19 days' holiday. The document also stated that Mr Kumar had taken two weeks off in December 2014, and had worked evenings only in January

2015 and that "covers all holiday pay". This page had been signed by Mr Singh and Mr Kumar. Mr Singh explained in his oral evidence that this reference was separate to the 19 days' holiday that was owed to Mr Kumar and that Mr Kumar had been paid in full for the two weeks he had taken off in December 2014 and for the period when he was only working evenings.

[17] Another sheet of paper bearing the same date stated the following:

Raj Kumar/Hardeep Singh

Regarding our dues with Punjabi Dhaba till 8/3/2015 are all cleared that includes Holiday Pay. No other dues are owed by Punjabi

Dhaba. I owe Punjabi Dhaba Personal Loan, which was given to me

while I was in India in 2013 to 2014.

Raj Kumar to pay Hardeep Singh/Punjabi Dhaba

\$21,441-84

less 19 days' pay \$1,470-00

Balance \$19,971-84

Received \$1,000 on 10/3/15 \$1,000

Bank transfer

To be paid by Raj Kumar \$20,971.84

This is to be paid back weekly \$250 minimum from March 25, 2015 into our bank A/c.

Punjabi Dhaba – [account number redacted] by A/P

Any delay in weekly Payment will incur Charges. All Cleared and

Explained.

[18] This document was also signed by Mr Singh and Mr Kumar. Again, in his evidence, Mr Kumar said that he did not understand the document and just accepted Mr Singh's calculations.

[19] The Authority also saw a document headed up "Affidavit cum undertaking" which had been executed in Chandigarh in

India on 30 July 2014 and in which Mr Kumar “affirmed and declared” the following:

1. That I was the employee of restaurant namely PUNJABI DHABA

at Auckland in New Zealand.

2. That I returned back to India in March, 2013 due my visa expiry and I had taken friendly loan from Sh. Hardeep Singh S/o Sh.

Rajinder Singh of Punjabi Dhaba, Auckland to the tune of

NZ\$13900 (NZ Dollars thirteen thousand nine hundred) from

time to time since my return to India which comes to

Rs.7,08,900/- in India Rupees as on date.

3. That I undertake to return/repay the said loan amount within a period of one and half year (1½ year) to Sh. Hardeep Singh from

the date of this undertaking.

4. That in case I fail to repay the said loan amount I may be prosecuted in accordance with the law.

[20] With respect to Mr Kumar’s claim that he worked statutory holidays and was not paid for doing so, it is Mr Singh’s evidence that he stopped opening his restaurants on statutory holidays because of the extra cost incurred. Mr Singh produced a copy of an email from a former manager of the respondent company, Avneet Singh, which stated that he worked for the respondent primarily in the Botany South branch as a restaurant manager for the period of around three years four months from February 2010 to June 2013. In this email, Mr Singh writes that the restaurant remained closed on almost all public holidays, including Christmas Day, New Year’s Day, Good Friday and Easter Monday, with some exceptions for outdoor catering.

[21] The same statement was contained in an email produced by Mr Singh from an individual called Nimerjit Kaur who stated that he worked in the Botany South branch as a restaurant manager from August 2014 to March 2016. Another email was produced from a Preet Kanwal Kaur which stated that he had worked in the Christchurch branch of the respondent as a restaurant manager and that the restaurant was closed for public holidays/statutory holidays, and that the restaurant was closed for two weeks during Christmas holidays. None of these statements were in affidavit form, and so carry little weight.

[22] However, after the Authority’s investigation meeting Mr Singh produced in May four original diaries for 2009 (in relation to the Cockle Bay restaurant), 2011 (Cockle Bay), 2014 (Botany South), 2015 (Botany South) and a notebook for

18 January 2010 to the week ending 24 April 2011 for the Cockle Bay, Botany South and Mount Wellington restaurants. He also produced a bank statement apparently showing payments made to Mr Kumar. As the diary entries were not entirely clear as to their meaning, Mr Singh was asked to give evidence explaining them. This he did by affidavit.

[23] In his affidavit Mr Singh deposed that on 21 of the statutory days on which Mr Kumar says he worked the restaurant in question was either closed, or Mr Kumar did not work. He could not recall whether Mr Kumar worked on one other day.

Mr Singh also deposed that he paid Mr Kumar an advance of salary of \$2,500 on

1 October 2010 and assisted Mr Kumar financially in November and December 2013, and May 2014, paying him (via another chef) a total of \$1,700. Mr Singh also deposed that he paid off the first instalment of Mr Kumar’s credit card debts in August 2014, but he did not recall the amount.

[24] During cross-examination of Mr Kumar, he conceded that there was a mistake in his brief of evidence when he said that he had worked 7.08 hours on each of

26 December 2013, 1 January 2015 and 2 January 2015. This was because his own bank records showed that he had been in Auckland during those dates, even though he was at this time employed in Christchurch. The Authority also saw a copy of rosters which showed that the Christchurch restaurant had been closed between 22 December

2014 and 4 January 2015, and that Mr Kumar had been off work on 5, 6 and 7 January

2015.

[25] In Mr Kumar’s affidavit in reply to Mr Singh’s affidavit he accepts that he did

not work on 18 of the days that Mr Singh says he did not but worked on the remaining

4 days, namely 22 April 2011, 6 April 2012 and 1 and 2 January 2013. He also says he received \$1,500 on 3 October 2010, but that falls outside of the period of his claim, which is correct.

[26] Mr Kumar also says that moneys he received via the other chef were not wage payments but “personal advances”, which he got while he was in India. These also fall outside of the period of the claim, as Mr Kumar was not employed during this period (and could not have been, as he had no right to work in New Zealand at that time).

[27] Mr Singh states in his written brief of evidence that he accepts that the respondent company did not keep detailed holiday records. Although Mr Kumar kept fairly accurate records of money he received (until he went onto an hourly rate), he did not keep a record of his holidays. He said in evidence, however, that he never took any holidays apart from when he was in India. Mr Singh refutes this, however, citing as an example an occasion when he and Mr Kumar had gone to Timaru together.

[28] Although both Mr Kumar and Mr Singh said that, up until the end of March

2013, the payments received by Mr Kumar from the respondent company were ad hoc

and varied in amounts, the tax records for that period show regular sums being reported as having been received.

Furthermore, there is a discrepancy between the total amount of net pay shown to have been received over the calendar years encompassed by Mr Kumar’s claim on the one hand and the amounts shown to have been received in his notebook and his bank statements on the other hand. In turn, these sums differ from the amounts that Mr Kumar claims to have received during the same periods.

[29] In my view, the most accurate records of payments received are the bank statements of Mr Kumar and his notebook (which Mr Kumar said shows all payments received, although this does not appear to be true as they do not show all payments shown to be received by the bank statements). Whilst I cannot be certain that the notebook shows every payment received, it is likely to be the most accurate record of payments received by Mr Kumar.

[30] It is not possible to trace the advances of salary that have been made to Mr Kumar over the years because they commenced prior to 2005, the date when the notebook that the Authority has seen commences.

The main underlying legal principles

[31] Mr Shahadat does not specify what statutory provisions Mr Kumar relies on, but that is not a prerequisite to Mr Kumar’s claim for recovery of arrears of pay. [Sections 1303 to 132](#) of the [Employment Relations Act 2000](#) (the Act) provide as follows:

130 Wages and time record

(1) Every employer must at all times keep a record (called the

wages and time record) showing, in the case of each employee employed by that employer,—

(a) the name of the employee:

(b) the employee’s age, if under 20 years of age: (c) the employee’s postal address:

(d) the kind of work on which the employee is usually employed: (e) whether the employee is employed under an individual employment agreement or a collective agreement:

(f) in the case of an employee employed under a collective agreement, the title and expiry date of the agreement,

and the employee’s classification under it:

(g) where necessary for the purpose of calculating the employee’s

pay, the hours between which the employee is

employed on each day, and the days of the employee’s

3 The version applicable at the material time.

employment during each pay period:

(h) the wages paid to the employee each pay period and the method of calculation:

(i) details of any employment relations education leave taken under [Part 7](#):

(j) such other particulars as may be prescribed.

(2) Every employer must, upon request by an employee or by a person authorised under [section 236](#) to represent an employee,

provide that employee or person immediately with access to or a copy of or an extract from any part or all of the wages and

time record relating to the employment of the employee by

the employer at any time in the preceding 6 years at which the employer was obliged to keep such a record.

(3) Where an employer keeps a wages and time record in accordance with any other Act, that employer is not required to keep a wages and time record under this Act in respect of the same matters.

(4) Every employer who fails to comply with any requirement of this section is liable to a penalty imposed by the Authority.

131 Arrears

(1) Where—

(a) there has been default in payment to an employee of any wages or other money payable by an employer to an employee under an employment agreement or a contract of apprenticeship; or

(b) any payments of any such wages or other money has been made at a rate lower than that legally payable,—

the whole or any part, as the case may require, of any such wages or

other money may be recovered by the employee by action commenced in the prescribed manner in the Authority.

(1A) The Authority may order payment of the wages or other

money to the employee by instalments, but only if the financial position of the employer requires it.

(2) Subsection (1) applies despite the acceptance by the employee of

any payment at a lower rate or any express or implied agreement to the contrary.

(3) Subsection (1) does not affect any other remedies for the recovery of wages or other money payable by an employer to any employee under an employment agreement or a contract of

apprenticeship.

132 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.

(3) A defendant may not use as evidence any wages and time record that would be inadmissible under [section 232\(3\)](#).

[32] [Section 4](#) of the [Wages Protection Act 1983](#) (the 1983 Act) states as follows:

4 No deductions from wages except in accordance with Act Subject to sections 5(1) and [6\(2\)](#), an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

[33] Section 5 of the 1983 Act states that an employer may, for any lawful purpose, with the written consent of a worker, or on the written request of a worker, make deductions from wages payable to that worker.

The issues

[34] The following are the issues that need to be determined by the Authority: (a) How much was owed to Mr Kumar during the

material periods? (b) How much was paid to Mr Kumar during the material periods?

(c) Can the respondent rely upon the advances of salary made to

Mr Kumar to argue that he has been paid all that is due?

(d) Are the “discharges” signed by Mr Kumar effective in dispensing with his right to receive holiday pay?

How much was owed to Mr Kumar during the material periods?

The first period

[35] It is relatively easy to work out what was due to Mr Kumar in terms of salary for the first period, as he was on a salary of \$38,000 a year, before deductions. This equates to a gross weekly pay of \$730.77. The first period amounts to 120 weeks and two days.

[36] However, there is a dispute as to how many weeks Mr Kumar worked during the first period, as the respondent submits that Mr Kumar finished working at the end of October 2011, and then went away for a trip to India, returning to work on or around 10 January 2012. This is supported by the fact that the IRD records show no income declared for November 2011 and December 2011, although they also show no income declared for October 2011.

[37] This assertion by Mr Beck in his submissions was not supported by evidence from Mr Singh, and there are no holiday and leave records to support the assertion. On the other hand, Mr Shahadat chose not to challenge the assertion by way of submissions in response. On balance, I believe that Mr Kumar probably was away on holiday in India during November and December 2011, returning in the second week of January 2012, and so I deduct ten weeks from the calculation. This amounts to a total of 110 working weeks in the first period.

[38] Mr Beck also stated in his submissions that Mr Kumar’s work visa expired on

13 January 2013, and he had stopped working on 4 January 2013 before he went to India on 1 April 2013. Therefore, another three months should be deducted he asserts. The Authority did see a copy of Mr Kumar’s visa for this period, which did expire on

13 January 2013. There is no evidence Mr Kumar ceased working on 4 January 2013 though, and, strangely, Mr Kumar did receive payments of various amounts until

30 March 2013.

[39] I accept that it would therefore not have been legal for Mr Kumar to have worked beyond 13 January 2013 (until his new visa was granted) and so it is appropriate to deduct a further 11 weeks from the weeks worked. That leaves a total number of weeks worked in the first period as 99. At \$730.77 a week, he should have been paid \$72,346.19 gross.

[40] Mr Shahadat assumed a tax deduction at 17% in his calculation, but this is too blunt, as it ignores the fact that the first \$14,000 of earnings is taxed at a lower rate, and that the tax rates changed after 31 March 2011. I set out in the table at the end of this determination the tax calculations, but the total net due to Mr Kumar during the first period (excluding holiday and statutory holiday pay) would have been

\$62,347.14.

[41] In respect of statutory holidays worked in the first period, there are four days in dispute. I accept one of those days was worked; namely, 22 April 2011. I accept Mr Singh’s evidence that the Botany South restaurant was closed on the three other days claimed. 22 April 2011 was a Friday, which was a day on which Mr Kumar

usually worked. He is therefore entitled to be paid at time and a half for this day⁴, as

4 Pursuant to [s 50](#) of the [Holidays Act 2003](#)

well as receive an alternative holiday⁵. Using a gross hourly rate of \$16.246, Mr Kumar should have been paid \$182.70 gross for working on 22 April 2011, and received a further \$121.80 for the alternative holiday. Deducting 17.5% tax results in a total net amount of \$251.21.

[42] In respect of holiday pay, no leave and holiday records have been kept, and so it is not possible to ascertain exactly how many holidays have been taken in the first period (excluding Mr Kumar’s holiday in India, for which time has been deducted). I shall adopt the approach advocated by Mr Shahadat and multiply the total gross salary due in the first period by 8%. This results in the sum of gross \$5,812.06. This equates to \$4,794.95 net deducting tax at 17.5%.

[43] The total net sum due to Mr Kumar during the first period was \$67,142.09.

[44] During this period, using Mr Kumar’s note book and his bank statements, it appears that Mr Kumar received a total of

\$51,630, either in cash, which I shall treat as a net receipt, or into his bank. In deciding which payments to treat as wages, I have excluded “odd amounts” which do not appear to equate to salary payments, but rather expense reimbursements.

[45] This means that Mr Kumar is owed a total of \$15,512.09, net of tax for the first period, subject to any deduction for advances of salary.

The second period

[46] During the second period, Mr Kumar was paid \$18 an hour. He says he worked 42.5 hours a week, and started work on 2 August 2014, leaving on 8 March

2015. However, Mr Beck states in his submissions that Mr Singh recalls that

Mr Kumar did not start until 12 August 2014, and only worked 38 hours a week.

[47] I believe that Mr Kumar returned to work on Tuesday 5 August 2014. This is because he produced a document showing “weekly staff hours” which indicated he started work on that day, having the Monday off, as was his habit. That makes a period of 30 weeks and 6 days.

⁵ Pursuant to [s 56](#) of the [Holidays Act](#).

⁶ \$730.77 divided by 45 hours a week

[48] This document also shows all the hours Mr Kumar worked during the second period. They add up to 1,046.5 hours, which, at \$18 an hour, equates to a gross total of \$18,837.

[49] Mr Kumar does not claim any statutory holidays worked during this period. He would, however, be entitled to holiday pay. The hours document does not show any holidays taken, so a straight 8% should be applied to the gross total above, which amounts to the gross figure of \$1,506.96. Mr Kumar was therefore entitled to have been paid a gross total of \$20,343.96 during the second period, and a net total of

\$17,763.777. However, during this period, it appears that Mr Kumar was paid a net

total of \$20,269.60.

[50] The reason for this apparent overpayment is not readily ascertainable, given that, during the second period, Mr Kumar was paid directly into his bank account the weekly sum of \$642.32, apart from on 11 March 2015, when he was paid \$1,000. Even discounting this irregular payment, Mr Kumar appears to have been paid more than he was due, and is not owed anything in arrears, in respect of this period.

Can the respondent rely upon the advances of salary made to Mr Kumar to argue that he has been paid all that is due?

[51] This raises two questions. The first is whether all of the payments made to Mr Kumar which are claimed to be advances of salary by the respondent can properly be characterised as such. The second question is whether advances of salary can be relied upon by the respondent to argue that it has not breached the [Wages Protection Act](#).

Were all the payments to Mr Kumar advances in salary?

[52] I note that a significant sum of money was loaned to Mr Kumar when he was in India between the first and second periods, after his New Zealand visa had expired. He was obviously not working for the respondent at that time under the employment agreement that I have seen. In addition, the affidavit he signed while in India states that the “friendly loan” of \$13,900 was from Sh. Hardeep Singh, not Punjabi Dhaba

Limited. Therefore, I am satisfied that this sum of \$13,900 was not an advance of

⁷ Taxing the first \$14,000 at 10.5% and the remainder at 17.5%

salary. Deducting this sum from the \$20,971.84 Mr Singh says was owed at the end of the employment by Mr Kumar to the respondent leaves \$7,071.84.

[53] In addition, buying a chain and a bracelet for Mr Kumar cannot be an advance of salary, given that Mr Singh did not quantify the cost of these items until 2014, several years after the items had been purchased (and after the price of gold had risen substantially). Therefore, it is necessary to deduct a further \$2,820.85 from the sum that the respondent says is owed in respect of an advance of salary, leaving \$4,250.99.

[54] Can the payment of air fares and credit card bills be an advance of salary? I believe that they can be, provided they occurred while Mr Kumar was employed by the respondent. However, I note that the written agreement stated 12 August 2014 states the following:

RK received while in India

2013 – 2014

\$26,500.00

+ \$400.00

\$26,900

[55] This suggests that a greater sum was received by Mr Kumar when he was in India between the first and second periods, and therefore when he was not employed by the respondent, than the respondent says is owed by way of advance of salary.

[56] This therefore causes a problem in determining how much of the sum that the respondent says was owed when Mr Kumar left the employment of the respondent related to genuine advances of salary as opposed to personal loans made to Mr Kumar when he was not an employee of the respondent.

[57] If full accounts had been kept by either party of the sums advanced, and how they were paid off, it may have been possible to untangle the picture. However, the records are patchy, and the personal loans have been comingled with the advances of salary. I therefore have no sure way of knowing whether Mr Kumar caught up with the advances of salary made to him or not before he left the employment of the respondent.

[58] For this reason, I cannot safely assume that any advances of salary remain to be repaid by Mr Kumar. Therefore, it is not necessary to answer the second question.

Are the “discharges” signed by Mr Kumar effective in dispensing with his right to receive holiday pay?

[59] Mr Singh appears to have persuaded Mr Kumar to sign documents by which he agreed that his holiday pay due was discharged against sums purportedly owed by him. Under [s 86](#) of the [Holidays Act](#), holiday pay and leave pay payable by an employer to an employee is to be treated as salary or wages earned by the employee and subject to deductions that the employer is required or entitled to make from salaries or wages for the purpose of income tax or any other purpose.

[60] [Section 5](#) of the [Wages Protection Act 1983](#) allowed an employer, for a lawful purpose, with the written consent of a worker, or on the written request of a worker, to make deductions from wages payable to that worker.

[61] Mr Kumar said in evidence that he did not understand what he was signing when he signed the agreements referred to above. I accept that evidence, as Mr Kumar clearly had a limited understanding of English. As he did not understand the contents of the documents, he cannot have given his consent, as uninformed consent cannot be consent at all. I therefore find that the documents in question do not act as valid acceptances by Mr Kumar that he was not owed holiday pay, and that his holiday pay could be set off against loans made to him by the respondent or Mr Singh.

Conclusion

[62] The respondent owes to Mr Kumar the net sum of \$15,512.09.

Orders

[63] I order the respondent to pay to Mr Kumar within 14 days of the date of this determination the net sum of \$15,512.09.

Costs

[64] Costs are reserved. The parties are directed to seek to agree how costs are to be dealt with between them. However, if they are unable to do so within 14 days of

the date of this determination, then either party seeking a contribution towards their

8 In the version applicable at the material time

costs must serve and lodge a memorandum of counsel within a further 14 days and any response must be served and lodged within a further 14 days.

David Appleton

Member of the Employment Relations Authority

Arrears calculation for first period

Period	Tax rate	Weeks	Gross pay	Net pay due	Total net
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worked		worked	due @ \$730 a week		pay due
10 Dec 2010 to 31 March 2011	11.5% up to \$14,000 19.25% \$14,001 to \$48k	16	\$11,692.32	\$10,347.70	\$10,347.70
1 April 2011 to 31 March 2012	10.5% up to \$14,000 17.5% \$14,001 to \$48k	31	\$22,653.86	\$12,530 @ 10.5% \$7,139.44 @ 17.5%	\$19,669.44
1 April 2012 to 30 March 2013	10.5% up to \$14,000 17.5% \$14,001 to \$48k	52	\$38,000	\$12,530 @ 10.5% \$19,800 @ 17.5%	\$32,330
TOTAL		99	\$72,346.19		\$62,347.14