

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 373
3034211

BETWEEN PANKAJ SHARMA
Applicant

AND GRPL INTERNATIONAL
LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Applicant in person
P Khanna, for the Respondent

Investigation Meeting: 16 November 2018

Date of Determination: 27 November 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] GRPL International Limited (GRPL) operates the GAS Service Station in Waiuku. Pankaj Sharma was employed by GRPL as an assistant manager from 2 August 2016 until 10 March 2018.

[2] Mr Sharma claims that he is owed wage arrears and holiday pay. GRPL accepts it owes Mr Sharma holiday pay but denies any wage arrears are owing to him.

[3] As permitted by 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 but has not recorded all evidence and submissions received.

The issues

[4] The issues requiring investigation and determination were:

- a) Are any wage arrears owing to Mr Sharma?

- b) Did GRPL fail to comply with the Holidays Act in relation to:
 - i. Payments made for working public holidays?
 - ii. Payment for holiday pay due at termination of the employment relationship?
- c) If so, what monies are payable to Mr Sharma?

Issue One: Are any wage arrears owing to Mr Sharma?

[5] Mr Sharma claims that during his employment GRPL defaulted in payment for the hours he worked on multiple occasions. He said he raised this with Pankaj Khanna, GRPL's director, many times but never received payment. This is denied by Mr Khanna. He says Mr Sharma was paid for the hours that he worked and at no time prior to his resignation did Mr Sharma raise with him that he was working more hours than he was being paid.

[6] 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.¹ This is the case regardless of any acceptance by Mr Sharma of any payment at a lower rate or any express or implied agreement to the contrary.

[7] To enable a determination as to whether or not an underpayment of wages occurred GRPL was directed to produce all of Mr Sharma's wage and time records including his rosters. In breach of the Authority's directions, and despite repeated requests and extensions of time to do so, GRPL only produced some rosters and 4 of Mr Sharma's timesheets. For this reason it has been necessary to separately assess various time periods during Mr Sharma's employment.

Analysis

[8] The terms of Mr Sharma's employment were recorded in a written individual employment agreement dated 15 June 2016. The material terms were these (verbatim):

¹ Section 131 Employment Relations Act 2000

- 6.1 Rostered hours with no minimum hours of work to be provided overtime as necessary

The parties agree that the Employee's hours of work shall be set by the Employer. In setting the roaster (sic) the employer shall provide the employee minimum 1 day off, unless there are exceptional circumstances.

The Employee's hours of work shall be up to 40 hours per week and no less than 25 hours per week from Monday to Sunday, between the hours 5.30 am to 10 pm.

The Employee may also be required to perform such overtime as may be reasonably required by the Employer in order for the Employee to properly perform their duties. The Employee's salary fully compensates them for all hours worked.

- 6.3 Variation to Hours of Work

The Employee's hours of work may be varied as follows:

- (i) By mutual agreement between the Employee and the Employer; or
- (ii) If agreement cannot be reached, by the Employer, following consultation with the Employee, provided that the Employee's minimum hours of work are not reduced below 25 hours and that any increase in hours of work is reasonable.

When seeking to vary Employee's hours, the Employer shall act reasonably, and shall take into account the Employee's personal circumstances and commitments.

- 7.1 Hourly Rate

The Employee shall be paid \$17.00/hour, which shall be paid weekly on Friday into a bank account nominated by the Employee. The Employee will get overtime on normal wage rate i.e. \$15.25/hour.

[9] Mr Sharma's ordinary hourly rate was subsequently varied to \$17.50 per hour but the overtime rate remained at \$15.25. I understand this rate was set based on the applicable minimum hourly wage at the time the IEA was entered into. As of 1 April 2017 the minimum wage increased to \$15.75. For this reason, where I have determined wage arrears are owing to Mr Sharma for overtime undertaken, I have used the rate of \$15.75 per hour.

Period August 2016 to 25 December 2016

[10] GRPL produced rosters for this period. It claims that the hours recorded in these rosters reflect the hours worked by Mr Sharma and the other employees. Mr Sharma disputes the hours recorded on these rosters. However, he was unable to

provide the Authority with any clear detail as to how the roster was incorrect or the days and times he worked during this period.

[11] Faced with vague and unclear evidence from Mr Sharma, I have relied on the documentary evidence to ascertain if any wage arrears are due for this period. I have reviewed Mr Sharma's rostered hours, his payslips and his bank statements. I have also taken into account the 4 timesheets that were completed by Mr Sharma and produced by GRPL at the investigation meeting. These documents establish Mr Sharma was under-paid by 4 hours.

[12] Multiplying 4 hours by Mr Sharma's hourly rate of \$17.50 I find Mr Sharma is owed wage arrears of \$70 gross for the period August 2016 to 25 December 2016.

Period 26 December 2016 to 2 April 2017

[13] GRPL failed to produce any wage and time records for the period 26 December 2016 to 17 September 2017. GRPL's failure has prejudiced Mr Sharma'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.

[14] I accept as proven all claims made by Mr Sharma in respect of the hours, days and times he worked during this period.

[15] Mr Sharma said that from December 2016 to 2 April 2017 he worked, as a minimum, every Monday to Saturday for 8 hours and on a Friday for 14 hours. A total of 54 hours per week.

[16] Between 26 December 2016 and 2 April 2017 there were 14 weeks. For each of these weeks Mr Sharma was paid for 34 hours. Based on 54 hours of work this equals a difference of 20 hours each week. The first 6 hours of this difference was to be paid at Mr Sharma's hourly rate of \$17.50. The remaining 14 hours was to be paid at the rate of \$15.75 per hour. A combined shortfall of \$325.50 gross per week.

[17] Multiplying the sum of \$325.50 by 14 weeks I find Mr Sharma is owed wage arrears of \$4,557 gross for the period 26 December 2016 to 2 April 2017.

Period 3 April 2017 to 17 September 2017

[18] GRPL also failed to produce wage and time records for the period 2 April 2017 to 17 September 2017.

[19] I accept proven all claims made by Mr Sharma in respect of the hours, days and times he worked during this period.

[20] In early April 2017 Mr Sharma's hours changed due to another staff member resigning. From this time Mr Sharma said he worked, as a minimum, every Monday and Tuesday for a minimum of 10 hours each day and on Wednesdays through to Saturdays for a minimum of 7 hours each day. A total of 48 hours per week.

[21] Between 3 April and 17 September 2017 there were 24 weeks. For each of these weeks Mr Sharma was paid for 34 hours. Based on 48 hours of work this equals a difference of 14 hours each week. The first 6 hours of this difference was to be paid at Mr Sharma's hourly rate of \$17.50. The remaining 8 hours was to be paid at the rate of \$15.75 per hour. A combined shortfall of \$231 gross per week.

[22] Multiplying the sum of \$231 by 24 weeks I find Mr Sharma is owed wage arrears of \$5,544 gross for the period 2 April 2017 to 17 September 2017.

Period 18 September 2017 to 2 December 2017

[23] On the day of the investigation GRPL produced rosters for the period 18 September 2017 to 2 December 2017. Mr Sharma disputes these rosters accurately record the hours he worked.

[24] While I am doubtful that the rosters accurately record all hours worked by Mr Sharma, I find Mr Sharma has not established, on the balance of probabilities, that he is owed any wage arrears for the period 18 September 2017 to 2 December 2017.

[25] In reaching this finding I have taken into account the following:

- a) Mr Sharma claimed that during this period he worked on Mondays to Wednesdays from 7 am to 8 or 10 pm. In support of this claim he produced a text message from himself to Mr Khanna dated 21 October 2017 that stated *“I work every week from Monday to wed full day from 7 am to 8 or 10 pm without any break”*.
- b) This text message, and Mr Sharma’s evidence that he worked these hours without a break conflicted with the oral evidence provided during the investigation meeting.
- c) At the investigation meeting Mr Sharma acknowledged that in September 2017 a part-time school student, Ronin Priestley, was taken on. Mr Priestley worked Mondays to Wednesdays from 3.30 pm to 6.30 pm. Mr Sharma said Mr Priestley would “come and give me a break”. He could not say how long the breaks were for. The rosters show that Mr Sharma did not work for the period that Mr Priestley was engaged. Mr Priestley, and another part-time worker who worked during this period, said Mr Sharma sometimes worked with them for all or part of their shifts.
- d) Mr Sharma was vague and uncertain as to the hours he worked on other days during the week.

Period 3 December 2017 – 10 March 2018

[26] In December 2017 Mr Sharma decided that he needed to look for work elsewhere. In anticipation of leaving he began to document the days and hours that he

worked so that he would have evidence of the hours he had worked if GRPL refused to pay him his wage arrears.

[27] I have viewed Mr Sharma's notes for the period from 3 December 2017. I have also viewed multiple videos that he made at various points during the day to evidence he was working on particular days at particular times. Having reviewed this evidence, and having heard from the parties, I find that for the period from 3 December 2017 to 10 March 2018 the rosters produced by GRPL do not accurately record all of the hours and days worked by Mr Sharma. The video recordings clearly show that Mr Sharma worked more hours and days than the rosters show.

[28] However, I also find that the hours Mr Sharma says he worked cannot fully be relied upon. As I indicated to the parties during the investigation meeting, I consider the truth lies somewhere between what they were each telling me.

[29] To reach a finding I have carefully considered the timings on the video recordings and compared these with the rosters and the handwritten times recorded by Mr Sharma. In considering this evidence I have not accepted Mr Sharma's handwritten notes of start and finish times where those conflict with the video evidence. Nor have I accepted his evidence of working on days where the roster shows he did not work and there is insufficient video evidence of Mr Sharma working on the day alleged. For example, where there is only one recording that has been made prior to the opening time of the service station. Lastly, where there is no video evidence of Mr Sharma working on a particular day, I have taken the hours worked as those recorded on the roster.

[30] Taking into account these factors I find, on the balance of probabilities, that the following underpayments arise:

Week ended	Hours Worked	Hours Paid as per payslip	Difference (hours)
10/12/17	41	41	0
17/12/17	52	41	11 overtime
24/12/17	57.5	41	16.5 overtime
31/12/17	36	37.42	-1.42
07/01/18	40.5	37	3 plus 0.5 overtime

14/01/18	41	37	3 plus 1 overtime
21/01/18	43	37	3 plus 3 overtime
28/01/18	43.5	37	3 plus 3.5 overtime
04/02/18	49	37	3 plus 9 overtime
11/02/18	44	37	3 plus 4 overtime
18/02/18	42	37	3 plus 2 overtime
25/02/18	41.5	37	3 plus 1.5 overtime
04/03/18	48	37	3 plus 8 overtime
11/03/18	45.5	37	3 plus 5.5 overtime
			28.58 hours plus 65.5 overtime

[31] To calculate the amount of wage arrears owing to Mr Sharma I have multiplied the number of ordinary hours he was underpaid (30 hours less 1.42) by his hourly rate (\$17.50) to reach a figure of \$500.15. To this sum I have then added the number of overtime hours he was unpaid (65.5 hours) and multiplied this by \$15.75 to reach a figure of \$1,031.62. Combining these two figures together I reach a figure of \$1,531.77 gross.

[32] I find Mr Sharma is owed wage arrears of \$1,531.77 gross for the period 3 December 2017 – 10 March 2018.

Missing weekly payments

[33] Mr Sharma alleges he did not receive four of his weekly wage payments. To support his claim he refers to the payslips produced by GRPL and his bank statements for the period of his employment. He also refers to text messages sent to GRPL asking for payment. He said it is difficult to define which pay the underpayments arose as he was often paid late but, from text messages that were sent, he believes the underpayments arose between November 2016 and March 2017.

[34] GRPL acknowledges it has not paid Mr Sharma for three weeks' wages but denies not paying him for the fourth. It points to the bank statements and text messages that show it accidentally paid Mr Sharma twice in one week.

[35] To reach a finding I have compared Mr Sharma's payslips with his bank statements. For the 12 month period from 2 August 2016 these documents show that Mr Sharma regularly received his wages late, on two occasions he was not paid the amount stated on his payslips, and on two occasions he was double paid.

[36] Reconciling the payments and overpayments I find Mr Sharma was not paid wages for the weeks ending 11/09/16, 20/11/16, 26/02/17 and 09/04/17. For each of these weeks he was due, according to the payslips, a sum of \$595 gross.

[37] Multiplying the sum of \$595 gross by 4 weeks I find Mr Sharma is owed wage arrears of \$2,380 gross. This sum does not include any amount for hours undertaken over and above that stated on his payslips as these hours have been taken into account when I have determined his wage arrears for the applicable periods.

Finding on Issue One:

[38] I find GRPL has defaulted in payment of wages owed to Mr Sharma. The combined total of wage arrears for the period 2 August 2016 to 10 March 2017 is \$14,082.77 gross, which sum is calculated as follows:

a) Period August 2016 to 25 December 2016	\$70
b) 26 December 2016 to 2 April 2017	\$4,557
c) Period 3 April 2017 to 17 September 2017	\$5,544
d) Period 3 December 2017 – March 2018	\$1,531.77
e) Missing weekly payments	\$2,380
Total arrears	\$14,082.77

[39] I order GRPL to pay to Mr Sharma the combined sum of \$14,082.77 gross under s 131 of the Act. Payment of this sum must be made within 14 days of the date of this determination.

Issue Two: Did GRPL fail to comply with the Holidays Act?

Holiday pay due on termination

[40] There is no dispute that Mr Sharma was not paid holiday pay for the duration of his employment. Calculation of his annual leave entitlements must be made in accordance with s 24 of the Holidays Act 2003.

[41] Mr Sharma was employed by GRPL on 2 August 2016. For the period 2 August 2016 to 2 August 2017, Mr Sharma was entitled to receive four weeks' annual leave. To calculate the sum payable to Mr Sharma I must use the greater of his ordinary weekly pay at the end of his employment or his average weekly earnings during the 12 months immediately before the termination of his employment.² The greater of these two options is Mr Sharma's average weekly earnings.

[42] Using the average weekly earnings that Mr Sharma was paid during the 12 months immediately before the end of his employment, which sum includes the wage arrears owing for this period, I calculate his average weekly earnings to be \$768.37 gross. Multiplied by 4 weeks is \$3,073.48 gross.

[43] For the period 3 August 2017 to 10 March 2018 it is appropriate that holiday pay is calculated at the rate of 8%. During this period Mr Sharma's total wages, including the wage arrears owing for this period, were \$22,920.77 gross. 8% of this sum is \$1,833.66 gross.

[44] GRPL is ordered to pay Mr Sharma the combined sum of \$4,907.14 gross for outstanding holiday pay under s 24 of the Holidays Act 2003. Payment of this sum must be made within 14 days of the date of this determination.

Payment for Public Holidays

[45] GRPL was directed to produce Mr Sharma's holiday records. It failed to do so without excuse. Mr Kharna acknowledges Mr Sharma worked a number of public holidays. He could not recall which holidays were worked.

[46] Mr Sharma says he worked on 26 December 2016, 2 January 2017, 14 April 2017, 23 October 2017, 26 December 2017, 2 January 2018 and 6 February 2018. He accepts he was paid for the hours he worked on these days at his ordinary rate of pay.

² Section 24(2) Holidays Act 2003

However he did not receive half that amount again as required by s 50 of the Holidays Act.

26 December 2016, 2 January 2017 and 14 April 2017

[47] Mr Sharma was unable to tell me how many hours he worked on 26 December 2016, 2 January 2017 and 14 April 2017. In the absence of time records for these periods I therefore base my calculations on the time Mr Sharma would ordinarily have worked on these days.

Date	Hours Worked	0.5
26/12/16	10	5
02/01/17	10	5
14/04/17	7	3.5
		13.5 hours

23 October 2017

[48] Mr Sharma was unable to tell me how many hours he worked on 23 October 2017. I therefore rely on the hours recorded on the roster. These show he worked 6 hours on this day. Half of this is 3 hours.

26 December 2017, 2 January 2018 and 6 February 2018

[49] I have already found GRPL's rosters for this period to be unreliable. Considering the video footage I have viewed I am satisfied, on balance, that Mr Sharma worked the following days and times.

Date	Hours Worked	0.5
26/12/17	4	2
02/02/18	Did not work	
06/02/18	8	4
		6 hours

Finding

[50] Multiplying the number of hours Mr Sharma was short-paid (22.5 hours) by \$15.75 per hour I reach a figure of \$354.37 gross.

[51] GRPL is ordered to pay Mr Sharma the sum of \$354.37 gross under s 50 of the Holidays Act. Payment of this sum must be made within 14 days of the date of this determination.

Payment for Alternative Holidays

[52] I have already found Mr Sharma worked on 6 public holidays. It is agreed that he did not receive alternative holidays for any of these days prior to his termination. Mr Sharma is therefore entitled to receive payment for these days at the rate of his relevant daily pay or his average daily pay for his last day of employment³.

[53] To calculate Mr Sharma's average daily pay I have taken his gross earnings for the 52 calendar weeks before the end of his employment and then divided this by the number of days during which he earned those gross earnings. In the absence of wage records the average number of days has been based on Mr Sharma's evidence that he worked, on average, 6 days each week. I reach an average daily pay of \$128.06.

[54] Multiplying \$128.06 by 6 days I reach a sum of \$768.36 gross.

[55] GRPL is ordered to pay Mr Sharma the sum of \$768.36 gross under s 60 of the Holidays Act. Payment of this sum must be made within 14 days of the date of this determination.

Costs

[56] Mr Sharma was not represented and therefore does not claim legal costs. However, he is entitled to be reimbursed the fee of \$71.56 which he paid to lodge his application in the Authority.

[57] I order GRPL to pay the sum of \$71.56 to Mr Sharma within 14 days of the date of this determination.

³ Section 60(2), Holidays Act 2003

Outcome

[58] The overall outcome is:

- a) GRPL defaulted in payment to Mr Sharma of wages and holiday pay payable to him under the individual employment agreement.
- b) GRPL is ordered to pay to Mr Sharma the following amounts within 14 days of the date of this determination:
 - i. The sum of \$14,082.77 gross under s 131 of the Employment Relations Act 2000;
 - ii. The sum of \$4,907.14 gross under s 24 of the Holidays Act 2003;
 - iii. The sum of \$354.37 gross for under s 50 of the Holidays Act 2003;
 - iv. The sum of \$768.36 gross under s 60 of the Holidays Act.
 - v. The sum of \$71.56 for costs.

Jenni-Maree Trotman
Member of the Employment Relations Authority