



New Zealand Employment Relations Authority Decisions

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Singh v Choudhary's Holdings Limited (Auckland) [2018] NZERA 364; [2018] NZERA Auckland 364 (22 November 2018)

Last Updated: 28 November 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 364
3015171

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|---------|--|
| BETWEEN | DARSHAN SINGH Applicant |
| A N D | CHOUDHARYS HOLDINGS LIMITED Respondent |

Member of Authority: Anna Fitzgibbon

Representatives: May Moncur, advocate for the Applicant

Himanshu Trivedi, advocate for the Respondent Investigation Meeting: 25 and 26 October 2018 at Auckland

Submissions Received: 3 November 2018 from the Applicant

1 November 2018 from the Respondent

Date of Determination: 22 November 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. **The applicant, Mr Darshan Singh was not unjustifiably dismissed by the respondent, Choudharys Holdings Limited trading as Hawkeye Security (Hawkeye). Accordingly, he has no personal grievance and no remedies are payable to him.**
- B. **Hawkeye failed to pay Mr Singh holiday pay due to him upon the termination of his employment.**
- C. **I order Hawkeye to pay Mr Singh outstanding holiday pay together with interest at the rate of 5% from 12 March 2017 until the date of payment.**
- D. **I order a penalty of \$1000 to be paid by Hawkeye to Mr Singh for its breach of the Holidays Act 1993. The entire penalty is to be paid by Hawkeye to Mr Singh within 14 days of the date of this determination.**
- E. **Costs are reserved**

Employment Relationship Problem

[1] The respondent, Choudharys Holdings Limited (Choudharys) owns and operates Hawkeye Security ("Hawkeye"), a security services company. Mr Rajat Choudhary is the sole director and shareholder of Choudharys.

[2] Hawkeye is a small company which provides various security solutions to its clients in New Zealand.

Mr Singh's claims

[3] The applicant, Mr Darshan Singh is a migrant from India. He arrived in New Zealand in July 2014 to undertake a course of study. In May 2016, Mr Singh was employed at Hawkeye, as a patrol guard on a casual basis. In August 2016, Hawkeye employed Mr Singh in the role of Business Development Manager ("BDM").

[4] Mr Singh says Mr Choudhary promised to support him in obtaining a work visa in New Zealand and ensuring his future in New Zealand by providing him secure employment at Hawkeye.

[5] Mr Singh obtained his work visa on 22 August 2016. Mr Singh says Mr Choudhary demanded that he pay him \$40,000 for his support. Mr Singh says he was not able to pay Mr Choudhary \$40,000. Mr Choudhary then demanded that he work from 6pm to 6am, 7 days a week for which he would receive payment for just 30 hours a week. Mr Singh says he had no choice but to do as Mr Choudhary wanted.

[6] Mr Singh is seeking reimbursement of wages which he says are owing to him, being the difference in the 30 hours a week that he was paid for and the more than 60 hours a week that he says he actually worked.

[7] Mr Singh travelled to India in March 2017 to visit his sick mother. In early May 2017, while in India Mr Singh says he was informed by the Department of

Immigration in NZ (Immigration NZ) that his work visa had been revoked. The reason for the revocation of his work visa was because Immigration NZ had been informed that he had been dismissed from his employment at Hawkeye.

[8] Mr Singh says this came as a terrible shock to him. Mr Singh had purchased return tickets to New Zealand but was not able to use them. Mr Singh was not able to return to New Zealand until May 2018.

[9] Mr Singh says his dismissal was unjustified and he claims remedies from Hawkeye accordingly.

Hawkeye's response

[10] Mr Choudhary disputes Mr Singh's version of events. He says Mr Singh requested that he support his application for a work visa. Initially, he was not able to do so, as there was insufficient work for Mr Singh at Hawkeye. However, once the business was established, he was able to employ Mr Singh firstly as a patrol guard and then a Supervisor.

[11] In August 2016, Mr Singh was employed in the role of BDM pursuant to a written employment agreement. At this time, Mr Choudhary says he was able to and did support Mr Singh's application for a work visa. Mr Choudhary says at no stage did he seek a payment of \$40,000 from Mr Singh, or demand that he work for long hours and not be paid properly, in exchange for his support of Mr Singh's work visa.

[12] Mr Choudhary says as soon as Mr Singh obtained his work visa, he stopped communicating with him or coming to work. Mr Choudhary says he attempted to contact Mr Singh on a number of occasions but Mr Singh did not respond to his texts or voice messages.

[13] Meetings were subsequently arranged with Mr Singh. Mr Singh received both verbal and written warnings but there was no improvement in his performance. A formal meeting was held with Mr Singh on 27 February 2016 to discuss the issues further. Mr Singh was dismissed for poor performance. On 28 February 2016, Mr Choudhary sent Mr Singh a letter confirming his dismissal. Mr Singh was informed his dismissal was to take effect from 1 March 2016. Mr Singh was given 2 weeks notice, expiring on 12 March 2016 to enable him to look for other work.

[14] Mr Choudhary said Mr Singh knew that his employment had been terminated prior to his trip to India in March 2017. Mr Choudhary says he informed Immigration NZ of Mr Singh's dismissal, on Police advice, after receiving threats to his family from Mr Singh and after Mr Singh posted untrue and damaging statements on social media about him and his family. It was a step that Mr Choudhary says he did not want to take, but had to.

[15] Mr Choudhary disputes Mr Singh's claims that he was unjustifiably dismissed and is owed wage arrears. Mr

Choudhary does accept that Hawkeye owes Mr Singh holiday pay. The holiday pay was withheld by Mr Choudhary because Mr Singh has failed to return company property including a cell phone, keys for the company car and a uniform.

The investigation meeting

[16] The investigation meeting took two full days in the Authority. Mr Singh filed a witness statement. His friend, Mr Shubham Bajaj, did not file a witness statement but attended the Authority at Mr Singh's request to give evidence.

[17] For Hawkeye, Mr Choudhary and a former employee of Hawkeye, Mr Naveen Chaabra, both filed witness statements.

[18] Each of the witnesses giving evidence before the Authority confirmed either under oath or by affirmation that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[19] The Authority was assisted by an interpreter of the Hindi and Punjabi languages.

[20] As permitted under s 174 of the Act, this determination does not set out all the evidence and submissions received. The determination states findings of fact and law, and makes conclusions on issues necessary to dispose of the matter.

Issues

[21] The issues for determination by the Authority are as follows:

- (a) Was Mr Singh unjustifiably dismissed by Hawkeye?
- (b) If Mr Singh's dismissal was unjustified, what remedies are available to him?
- (c) If Mr Singh's dismissal was unjustified, was his conduct a contributing factor which requires a reduction in remedies awarded under s.124 of the Act?
- (d) Is Mr Singh entitled to outstanding wages and holiday pay? If Hawkeye has failed to comply with employment legislation, including the Holidays Act, is Hawkeye liable to pay penalties?

Relevant facts

[22] After arriving in New Zealand in July 2014, Mr Singh studied Applied Management at the Otago Polytechnic in Queen Street, Auckland for one year. Mr Singh graduated with a Diploma in Applied Management.

[23] Very soon after his arrival in New Zealand, Mr Singh met Mr Choudhary. They worked together at JAG Security, a security services company. Mr Singh subsequently got a job at Simply Security, another security company, at a better rate of pay than at JAG Security.

[24] Mr Singh remained at Simply Security for approximately four to five months before traveling to Wellington. Mr Singh remained in Wellington for a period of time in 2015. In February/March 2016, Mr Singh returned to Auckland where he obtained a customer service position at Gull Henderson Gas Station.

[25] Mr Singh says he and Mr Choudhary kept in touch after he left JAG Security. During the time he was in Wellington, Mr Singh says Mr Choudhary contacted him asking that he return to Auckland to manage a security services contract that Mr Choudhary's new company, Hawkeye, had obtained.

[26] Mr Singh says that Mr Choudhary's request for him to come back to Auckland and work for Hawkeye was "part of the plan". According to Mr Singh, the plan was that Mr Choudhary would assist him in obtaining a work visa and then after he successfully obtained it, would demand that he pay \$40,000 to secure his ongoing support for the work visa.

[27] Mr Choudhary denies Mr Singh's claim that he lured Mr Singh to Auckland as "part of a plan". Mr Choudhary says that it was Mr Singh who contacted him regularly while he was in Wellington, seeking that he support his

work visa in New Zealand. Mr Choudhary says Mr Singh knew that he had set up his own security company, Hawkeye, and thought he may be able to assist with his application for a work visa. He says Mr Singh was persistent and pleaded with him to provide support.

[28] Mr Choudhary says he was not able to offer Mr Singh work and did not offer him work while Mr Singh was in Wellington in 2015. He also says he did not encourage Mr Singh to travel back to Auckland for a job at Hawkeye.

[29] Mr Singh came back to Auckland in 2016 and gained employment at Gull Henderson Gas Station. In early May 2016, following discussions initiated by Mr Singh with Mr Choudhary about possibilities of employment at Hawkeye, Mr Choudhary agreed to employ Mr Singh as a patrol officer and then a supervisor, on a casual basis.

Offer of employment at Hawkeye – August 2016

[30] Mr Choudhary and Mr Singh had further discussions about employment opportunities at Hawkeye. In August 2016, Mr Choudhary offered Mr Singh employment in the role of Business Development Manager. Mr Choudhary says he wanted to grow the business, was aware that Mr Singh had a diploma in Applied Management and also had customer service experience from his work at Gull Gas Station. Mr Choudhary was interested in this experience. He felt that Mr Singh would be able to approach and secure gas station clients who at that time were facing significant security issues.

[31] They also discussed Mr Choudhary supporting Mr Singh's application for a work visa. Mr Choudhary agreed to support Mr Singh's application. Mr Choudhary says his support was not conditional on Mr Singh paying him \$40,000 or working long hours, for which he was not paid. Mr Choudhary employed Mr Singh to develop and grow Hawkeye's business.

Credibility issues

[32] This matter is to be determined on issues of credibility. I have carefully evaluated the evidence I heard and have considered how reasonable, plausible and probable the evidence is. I have also taken into account what corroboration there is and in particular what documentation exists to support one version or another.

[33] The onus of proof is the balance of probabilities. This means the Authority is required to determine which version of events is more likely than not. This was very difficult as on almost every key issue, Mr Singh disputed Mr Choudhary's version of events and Mr Choudhary disputed Mr Singh's version of events.

[34] During the investigation meeting, I found Mr Singh's evidence to be unconvincing and unreliable. Having reviewed the evidence I have found areas of Mr Singh's evidence which simply do not seem credible. Where there is a dispute in the evidence I have preferred the evidence of Mr Choudhary as being, on balance, the most credible evidence.

First Issue

Was Mr Singh unjustifiably dismissed by Hawkeye?

Initial employment

[35] Mr Singh was employed on a casual basis by Hawkeye from the end of May 2016. He started on a rate of \$15.25, the rate moved up to \$16 and then \$16.50 an hour. From the wages and time records provided, Mr Singh mainly worked 8 hour days, 5 days a week. The gross amounts paid to Mr Singh according to the wages and time records are the same as the gross amounts recorded as being paid to Mr Singh from his Inland Revenue Department (IRD) records for the relevant time periods. The amounts are also consistent with payments made by Hawkeye into Mr Singh's bank account.

Employment agreement 8 August 2016

[36] Mr Choudhary sent Mr Singh a letter on 5 August 2016 offering him employment as a BDM at Hawkeye. The letter enclosed a written employment agreement. Key terms included a commencement date of 8 August 2016, a 90 day

probationary period, hours of work of at least 30 a week, wages of \$20 gross an hour, together with usual conditions for holidays and leave.

[37] There was also a declaration clause in which Mr Singh declared that he had read and understood the conditions of employment and had been advised of his right to seek independent advice and a reasonable time to do so.

[38] Both Mr Singh and Mr Choudhary signed the employment agreement on 5 August 2016.

Mr Singh's work visa

[39] Mr Choudhary says Mr Singh's role as BDM was to generate business for the company. This work was typically most effective in the hours from approximately 10am to 3 or 4pm when target customers were available. Mr Singh was not expected to and did not work 12 hours a day for 7 days a week performing marketing and business development work.

[40] The job description attached to the employment agreement describes Mr Singh's duties as including developing and delivering strategies for new business development, marketing and communication for Hawkeye, developing and managing relationships with new and key clients. The job description focusses on the development and growth of Hawkeye's business and products and focussing on servicing its customers.

[41] Mr Singh applied for and obtained a 2 year work visa starting on 22 August 2016. The work visa stipulated that Mr Singh could only work "...as Business Development Manager for Choudhary Holdings Limited T/A HawkEye Security in Auckland".

Events at the time work visa issued

[42] Mr Choudhary says he had a telephone conversation with Mr Singh on about 20 August 2016. Mr Singh said he was sick. Mr Choudhary says he told Mr Singh to go to the Doctor and obtain a medical certificate and to rest. Mr Choudhary agreed to pay the costs of the Doctor's visit and the medical certificate.

[43] On 21 August 2016, Mr Choudhary says he received an email from Mr Singh as follows:

"Hi Boss

This email is in regards to let you know that I was not feeling well and due to some personal problems I was not able to inform [sic] you about me being sick. I had a burn on my feet and I was having fever as well. From last Monday 15th of Aug till the date I get back to work. I am sorry for inconvenience caused. As per our call discussion I will inform you as soon as I get well.

Thanks"

[44] An entry in the wages and time records shows a payment of \$100 net to Mr Singh on 23 August 2018. The narration records "Doctor's fees for medical".

[45] Mr Choudhary says that almost as soon as Mr Singh obtained the work visa, he did not come into the office to work, did not perform his duties and would not answer his phone calls or text messages. Mr Singh denies this.

Claim that Mr Choudhary sought a "bribe" from Mr Singh

[46] Mr Singh says Mr Singh stopped paying his wages after his work visa was issued. Mr Singh says Mr Choudhary began pressuring him to pay him \$40,000 for the support he gave Mr Singh to obtain his work visa. Mr Singh says he went to Mr Choudhary's house in Mt Wellington in August and met privately with Mr Choudhary. Mr Choudhary told him that he was getting married in October 2016 and needed money for his wedding. He demanded that Mr Singh pay him \$40,000 for the support he had given him to obtain his work visa. Mr Singh says Mr Choudhary told him that Mr Naveen Chaabra with whom they had both previously worked had paid him for

his support to get a work visa by paying Hawkeye's rent.

[47] Mr Choudhary disputes this. He says Mr Singh was not paid when he did not come to work for a number of weeks after his work visa was issued.

[48] Mr Choudhary says Mr Singh never came to his house and there was never a conversation about Mr Singh paying him \$40,000 for his support of his work visa.

[49] Mr Choudhary says he had money for his wedding, he did not need Mr Singh's money and did not ask for it. With regard to Mr Chaabra, he says Mr Chaabra was already working in NZ and already had a work visa when he came to work at Hawkeye. Mr Chaabra did not and has never paid Hawkeye's rent in return for Mr Choudhary's support for his work visa, as claimed by Mr Singh.

[50] Mr Choudhary says the first time he became aware of Mr Singh's allegations that he had asked him for a "bribe" for his visa was when Mr Singh filed his statement of problem in the Authority in July 2017. Mr Singh's amended statement of problem dated November 2017, was the first time Mr Choudhary had heard the claim that he had demanded \$40,000 from Mr Singh in return for his support for his visa. Mr Choudhary vehemently denies the allegations. Mr Chaabra said that he already had a work visa and did not need Mr Choudhary's support. He says he never paid Hawkeye's rent as contended by Mr Singh.

[51] It is my finding, on the balance of probabilities, that Mr Choudhary never sought a "bribe" or a premium from Mr Singh for his support in obtaining a work visa. This claim, in my view, was made up and raised by Mr Singh when he realised his work visa had been revoked and he was not able to return to New Zealand.

Letter of 30 August 2016

[52] Mr Choudhary says he became angry and frustrated about Mr Singh's behaviour. Mr Singh was not coming to work, had not provided a medical certificate so he did not know when he was coming back to work. Mr Choudhary says he had to send him a "termination letter". This, he hoped, would provoke a response from Mr Singh.

[53] Mr Choudhary says he wrote to Mr Singh on 30 August 2016 and relying on the probationary period in the employment agreement, stated:

"I am writing to you about your performance with our company. You havnt [sic] been turning up for work and moreover havnt[sic] even informed anyone about your reason for not coming to work since almost two weeks. We have bewn[sic]trying to contact you on your provided contact number but there hasn't been any answer from your side."

[54] The letter went on to refer to Mr Singh's poor performance, failure to tell Mr Choudhary about his health problem or provide a medical certificate. In all the circumstances, Mr Choudhary informed Mr Singh he was going to terminate his employment.

[55] The issue of whether or not the probationary period in the employment agreement was a valid one and whether it could be relied on by Mr Choudhary was

not a matter that was advanced by Mr Singh. In any event, the letter of 30 August 2016 was not acted upon, and no claims were made by Mr Singh in relation to it.

3 September 2016 – request for leave

[56] On 3 September 2016, Mr Singh sent an email to Mr Choudhary asking for leave "starting 9th August 2016 for at least three to four weeks. Due to some personal issues it has become necessary for me to fly back to India to my family ..."

[57] Mr Choudhary was concerned at the content of the email and why leave was being sought from 9 August 2016. In Mr Singh's email of 21 August 2016, he had requested leave from 15 August 2016 because he had burns on his feet and a fever. Mr Choudhary wanted an explanation for the differing reasons for seeking leave.

5 September 2016 meeting

[58] Following receipt of the email of 3 September 2016, Mr Choudhary requested a meeting with Mr Singh. Mr Choudhary says he called Mr Singh and managed to speak to him. He asked Mr Singh to attend a meeting with him on 5 September 2016, at Hawkeye's offices. Mr Choudhary says he told Mr Singh he wanted to talk to him about his poor performance and his lack of attendance at work. He says he told Mr Singh it was serious and he may receive a final written warning. Mr Singh was invited to bring a support person.

[59] A meeting between Mr Choudhary and Mr Singh was held on 5 September 2016. Mr Naveen Chaabra, the Customer Services Manager was at the meeting. Mr Singh did not bring a support person.

[60] At the meeting, Mr Choudhary went over the issues that he was having with Mr Singh, including his failure to return phone calls and texts and issues concerning his poor performance, failure to attend work and failure to provide a medical certificate.

[61] Mr Singh apologised for his behaviour and told Mr Choudhary and Mr Chaabra he had health issues. Mr Singh did not explain what the health issues were and could not explain why he had not phoned or returned Mr Choudhary's calls.

[62] At the end of the meeting, Mr Choudhary informed Mr Singh that he was going to issue him with a warning and it was his last chance.

[63] On 6 September 2016, Mr Choudhary sent Mr Singh a letter of warning as follows:

Subject: Warning Dear Darshan,

It is a matter of serious concern that you have been irregular to work and have been performing too poor despite repeated verbal warnings. On 21st August 2016 you sent an email in which you mentioned that you are not well and that's the reason for your absence from work. We tried reaching you several times after that and even tried to get in touch with you through calls and texts but there wasn't any response from your side. Neither any medical certificate was provided for the same. On sending you a Termination Letter on 30th August 2016 as you were absent for more than three consecutive days without any communication again, you got back with an email on 3rd September 2016 stating that you are having some personal issues and would like leave from 9th August 2016 which doesn't match at all with your previous reason of being sick and getting a burn on your feet. Please treat this letter as a warning for your unacceptable behaviour.

We would be left with no choice but to suspend or relieve you from work if this unethical behaviour continues. This Warning Letter is in force from now on until next twelve months.

We expect you to rectify your follies and observe good conduct from here on.

Regards.

Rajat Choudhary

[64] When Mr Singh came into the office on 6 September 2016, Mr Choudhary gave him the letter and asked him to sign it. A signed copy of the letter was provided to the Authority. Mr Singh says he did not sign the letter, rather he was asked to sign a blank piece of paper so that Mr Choudhary had his signature. I do not accept Mr Singh's version of events. Mr Choudhary's evidence is consistent and corroborated by Mr Chaabra who was at the meeting and witnessed him signing the letter.

[65] Mr Choudhary says following the issuing of the final written warning, Mr Singh's performance did not improve. There were further verbal warnings issued, culminating in a meeting with Mr Singh on 27 February 2017.

Termination meeting – 27 February 2017

[66] Mr Choudhary says he rang Mr Singh and informed him that due to his ongoing poor performance, a further meeting with him was necessary. Mr Singh was told the outcome of the meeting may be the termination of his employment. Mr Singh was invited to bring a support person.

[67] A meeting was held with Mr Singh at Hawkeye's offices on 27 February 2017. Mr Chaabra was also at the meeting. Mr Singh did not bring a support person. Mr Chaabra says, they discussed Mr Singh's performance since the warning of 6 September 2016, his failure to improve despite further discussions and verbal warnings. Mr Choudhary told Mr Singh that he had done all he could to help him with his performance and that the situation could not continue. Mr Singh was informed that his employment was going to be terminated and he that he would be given 2 weeks' notice so he could find another job. Mr Singh was asked to return any company property he had.

Letter of termination – 28 February 2017

[68] A letter of termination was written by Mr Choudhary on 28 February 2017. The letter states:

Subject: Termination of employment Dear Darshan

This letter is written to notify you that your employment with our company is terminated due to your poor performance. Though we regret to losing you from our team, we had to take this decision to safeguard company's interest. It is after careful evaluation of your performance for the past six months, we have observed that you have consistently failed to deliver to the basic minimum standards. This has resulted in non-achievement of set goals, which is a considerable loss to the company. Despite our regular discussions with you regarding your performance, you have not been able to justify the same, and the situation has only been deteriorating.

It is in this regards that we are forced to terminate your employment as a Business Development Manager effective from 1st March 2017 giving you a notice 'til 12th March 2017 so that you can look for other options. We thank you for your services to the company, and wish you a bright future ahead.

Sincerely

Rajat Choudhary

[69] Mr Singh was handed the letter on 28 February 2017 by Mr Choudhary in Mr Chaabra's presence.

[70] Mr Singh did not return Hawkeye's property.

Travel to India

[71] Mr Choudhary travelled to India on 15 March 2017. Mr Singh says he was not aware until he received notification from Immigration New Zealand in early May 2017, that he had been dismissed from his employment.

[72] I find this difficult to believe. Both Mr Choudhary and Mr Chaabra, who I found to be credible witnesses, gave evidence of the meeting on 27 February 2017 which resulted in Mr Singh's dismissal. Mr Singh was handed a letter of termination.

[73] Further on 4 April 2017, Mr Singh sent an email to Mr Choudhary asking for his holiday pay. Mr Singh sent another email to Mr Choudhary on 10 April 2017, this time to ask for an extension of leave from work "for another month or so" because he had suffered a "hairline fracture". The letter concluded that once Mr Singh would let Mr Choudhary know once he had booked his ticket to Auckland.

[74] Mr Choudhary says he never received the April emails and first became aware of them when Mr Singh filed his proceedings in the Authority. These 2 emails were sent by Mr Singh to an email address which Mr Choudhary had not been using for a very long time, it was no longer the email address being used by Mr Choudhary or Hawkeye and Mr Singh had not previously sent emails to that address. Mr Singh could not explain this to the Authority.

[75] On the balance of probabilities, I find that it is more likely than not that Mr Singh's employment was terminated by Hawkeye, with effect from 1 March 2017. The dismissal followed verbal warnings and a final written warning about Mr Singh's poor performance and failure to attend work without a satisfactory explanation. Mr Singh was aware of the dismissal at the time it occurred.

[76] Mr Singh did not raise a personal grievance in respect of the dismissal until he filed a Statement of problem in the Authority on 13 July 2017.

[77] I consider that on the evidence available to me, Mr Singh was dismissed justifiably by Hawkeye on 1 March

2017. Accordingly, he has no personal grievance and no remedies are payable to him.

[78] If I am incorrect in my finding, it is highly likely that Mr Singh's behaviour was a major contributing factor to his dismissal and no remedies would be granted.

Events following termination

[79] Mr Choudhary says that following Mr Singh's departure from Hawkeye and his travel to India, he became aware of posts about him and his family on social media. The posts were by Mr Singh. Mr Choudhary says the posts were abusive of him and his family and he blocked Mr Singh on Facebook.

[80] The social media posts produced to the Authority which Mr Singh accepts were his, were derogatory and highly abusive of Mr Choudhary and his family. Some of the posts threatened violence and death.

Advice to Immigration NZ of Mr Singh's dismissal by Hawkeye

[81] Mr Choudhary says it was after viewing the Facebook posts and out of concern for his family and his own reputation that he decided to inform the NZ Police of the posts. Mr Choudhary says he was told to inform Immigration NZ that Mr Singh's employment had been terminated. He says he did not want to spoil Mr Singh's future but felt he had no option to inform Immigration NZ that Mr Singh's employment with Hawkeye had been terminated.

Outstanding holiday Pay

[82] Mr Choudhary accepts that Hawkeye has not paid Mr Singh's holiday pay. I have calculated holiday pay owing to Mr Singh based on his Inland Revenue Department (IRD) records. Mr Singh earned \$23,688.00 gross while employed by Hawkeye. Holiday pay of 8% of that amount is \$1895.04 gross.

[83] Mr Choudhary said that it withheld payment of Mr Singh's holiday pay because Mr Singh had not returned company property. Clause 13.5 of Mr Singh's employment agreement specified that upon termination of employment, if requested,

Mr Singh was to "immediately return to the Employer all...property...either belonging to or the responsibility of the Employer...in the Employee's possession..."

[84] The employment agreement did not contain a provision that allowed Hawkeye to deduct or withhold payment of holiday pay to Mr Singh, in the event company property was not returned. Hawkeye was not entitled to withhold payment of holiday pay to Mr Singh.

[85] The Authority may, under clause 11 of the second schedule to the Act, if it thinks fit order the payment of interest at the rate prescribed under section 87(3) of the [Judicature Act 1908](#). I intend to do so from the time that holiday pay became due to Mr Singh on 12 March 2017, until the date of payment.

[86] I order Hawkeye to pay Mr Singh outstanding holiday pay owing to him totalling \$1895.04 gross together with interest at the rate of 5% from 12 March 2017 until the date of payment.

Penalty

[87] I am satisfied that Hawkeye failed to pay Mr Singh outstanding holiday pay owing to him in breach of the Holidays Act 1993. This failure warrants the imposition of a penalty. Hawkeye was aware of its obligation to pay holiday pay but chose not to pay it because Mr Singh had failed to return company property. Mr Singh was aware that under his employment agreement, he had to immediately return company property upon termination of his employment.

[88] I have considered Hawkeye's explanation for not paying Mr Singh his holiday pay, Mr Singh's obligations to return Hawkeye's property and the factors in *Borsboom v Preet PVT Limited*.¹

[89] I am of the view that an appropriate penalty in this case is \$1,000. Hawkeye is to pay the entire amount to Mr Singh within 14 days of the date of this determination.

1 [\[2016\] NZEmpC 143](#)

Costs

[90] Hawkeye has 14 days from the date of this determination to file a memorandum as to costs. Mr Singh has 14 days from receipt of Hawkeye's memorandum to file a memorandum as to costs in reply.

Anna Fitzgibbon

Member of the Employment Relations Authority

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