

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 368
3003440**

BETWEEN NARASIMHA REDDY ALLU
Applicant

AND SAHANA INZ LIMITED
First Respondent

SASIKALA KRISHNASAMY
Second Respondent

Member of Authority: Eleanor Robinson

Representatives: May Moncur, Advocate for Applicant
Maxwell Rusero, Counsel for Respondent

Investigation Meeting: 19 October 2017 at Auckland

Submissions received: 19 October 2017 from Applicant and from Respondent

Further information received: 20 October 2017 from Applicant
24 October 2017 from Respondent

Determination: 24 November 2017

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Narasimha Reddy Allu, claims that he was not paid for the hours he worked for the Respondent, Sahana INZ Limited (Sahana), nor did he receive holiday pay or payment for working on a statutory holiday.

[2] Mr Allu further claims that he was unjustifiably dismissed by Sahana and unjustifiably disadvantaged due to the non-provision of an employment agreement.

[3] Mr Allu also claims that the Second Respondent, Ms Sasikala Krishnasamy, sole director and shareholder of Sahana, aided and abetted the breach of his statutory wage and holiday entitlements.

[4] Sahana and Ms Krishnasamy deny that Mr Allu is owed outstanding wages by Sahana, and deny that he was unjustifiably dismissed or disadvantaged.

Issues

[5] The issues for determination are whether or not Mr Allu:

- Was unjustifiably dismissed by Sahana
- Is owed any monies in respect of unpaid wages for the hours he worked for Sahana
- Is owed any monies in respect of unpaid annual leave and statutory leave entitlement
- Was unjustifiably disadvantaged as a result of not being provided by a written individual employment agreement by Sahana
- Whether or not Ms Krishnasamy aided and abetted Sahana in respect of the non-payment of wages and holiday payment
- Penalties should be awarded in respect of breaches of the Minimum Wage Act 1983 and Holiday Pay 2003

Background Facts

[6] Sahana is an Indian restaurant based in Auckland. Ms Krishnasamy is the sole director and shareholder. The restaurant opened on or about December 2016 and had 4 employees including Ms Krishnasamy at the time Mr Allu was employed.

[7] Mr Allu responded to an advertisement placed by Sahana and was interviewed by Ms Krishnasamy. He said that during the interview Ms Krishnasamy agreed to pay him \$19.00 per hour for working 6 days a week Tuesday to Sunday.

Work Visa

[8] At the time Mr Allu applied for the position at Sahana he had a Work Visa which stated: “*The holder may work as a Restaurant Manager for The Elephant Thai Cuisine in Howick*”. The visa duration date was stated as starting on 25 August 2016 and expiring on 6 May 2018.

[9] Mr Allu confirmed, when questioned at the Investigation Meeting, that he had been aware that he required a Visa Variation before he could commence employment legally with an employer other than the employer stated on the Work Visa, but he had taken no steps to obtain a Visa Variation prior to applying for work at Sahana.

[10] Mr Allu also stated during cross examination at the Investigation Meeting that it would have been difficult for him to apply for a Visa Variation if the rate of pay offered was less than he had been receiving in the job to which the Work Visa related.

[11] Mr Allu said that Ms Krishnasamy said she would support him in applying for a Visa Variation to allow him to work legally in New Zealand, and that he had told her he would need a written individual employment agreement in order to make such an application.

[12] He said that he was aware that obtaining a Work Visa Variation normally took some time, but Ms Krishnasamy had asked him to start working at Sahana immediately, and to deal with the visa issue later.

[13] Ms Krishnasamy said she had been aware that prospective employees required a valid Work Visa before commencing employment, and she had checked Mr Allu's documentation including his passport and the Work Visa it contained before employing him. She said that she had no knowledge that a Visa Variation was required before he could legally commence employment with a different employer to that stated on the Work Visa, and Mr Allu had not informed her of this prior to the commencement of employment.

[14] Mr Allu commenced employment at Sahana on 18 December 2016 without having obtained a Work Visa Variation and was therefore working illegally in New Zealand.

Employment Agreement

[15] Ms Krishnasamy said that the rate of remuneration discussed with Mr Allu at the interview was \$16.25 per hour. However Mr Allu told her he needed a higher rate of pay. She had explained to him that because Sahana was a new venture she could not afford to offer a higher rate of pay, at least initially.

[16] Mr Allu said he had given Ms Krishnasamy a piece of paper on which he had written his bank account details and IRD number. No copy was provided to the Authority.

[17] After Mr Allu commenced employment at Sahana, Ms Krishnasamy she said she had asked him for his IRD number and bank account details, but he had explained that he would

not provide these as he needed to obtain a Visa Variation and until that time, he did not want Immigration New Zealand to discover that he was working without a valid Work Visa.

[18] Mr Allu said that Ms Krishnasamy continuously delayed issuing him with an employment agreement despite his requesting one on numerous occasions. At the investigation meeting he said that Ms Krishnasamy had shown him another employee's employment agreement, but had not provided him with one.

[19] Ms Krishnasamy said she had provided Mr Allu with a written individual terms of employment (the Employment Agreement) which included the following clauses:

Position: Duty Manager

Trial Period:

A trial period will apply for a period of NOT EXCEEDING 90 CALENDAR DAYS employment to assess and confirm suitability for the position. ...

Hours of work:

Full time Hours with an obligation to perform overtime as necessary but without extra payment.

The Employee's normal hours of work shall be 40 hours per week in 6 days rosters between the hours of 10.30 – 14.30 & 17.30 – 22.30 on Tuesday – Sunday. ...

Wages/Salary/allowances

- ***Annual Salary***
- *The Employee's salary shall be \$33,800 per annum; which shall be paid weekly on Thursday into a bank account nominated by the Employee.*

[20] She said she had advised Mr Allu to take the Employment Agreement away with him, and read and consider it before signing and returning it to her. However Mr Allu had not returned it.

[21] The Employment Agreement provided to the Authority had not been signed by either Mr Allu or Ms Krishnasamy.

Hours of Work and Time Sheets

[22] Mr Allu said he had worked for 7 days during the first week of his employment following his commencement date of 18 December 2016. The lunch service was between 11.30 a.m. and 2.30 p.m. and dinner service was between 5.30 and 10.30 p.m. In addition there was one hour of cleaning to be completed after 10.30 p.m. so it was after 11.30 p.m. before he was able to leave Sahana's premises.

[23] He also claimed that he worked on public holidays 25 December 2016 and 1 January 2017.

[24] In total, Mr Allu said he had worked 405 hours during the period of his employment at Sahana, working at least 9 hours per day. He confirmed that he had not completed a timesheet during his employment, nor had he kept a written record of the hours he had worked at Sahana.

[25] Ms Krishnasamy said that Sahana was closed on Mondays. She confirmed that cleaning was required at the end of the days when Sahana was open, but that this had not taken long as Sahana had not been busy during December 2016 and January 2017, it had been a new venture and did not have many customers during this period when Mr Allu was employed. There was therefore time during the evening service period to tidy the restaurant and she has assisted in that process. It was therefore brief.

[26] Ms Krishnasamy provided copies of timesheets in respect of the Sahana employees, including Mr Allu. The timesheets represent a weekly record of the hours worked by Mr Allu and show a variable number of hours being worked daily, but totalling 40 per week.

[27] Ms Krishnasamy said Sahana had opened on both 25 December 2016 and 1 January 2017, but only for 2 hours in the evening on those days. The timesheets for those dates show that Mr Allu worked 3 hours on 25 December 2016 and 4 hours on 1 January 2017.

[28] The timesheets provided to the Authority have not been signed by either the employee to whom they relate, or Ms Krishnasamy.

Remuneration

[29] Mr Allu said that he had received no payment in respect of the hours he worked at Sahana.

[30] Ms Krishnasamy said she had asked Mr Allu for his bank account and IRD details shortly after his employment commenced, however he told her that he required a visa variation first and as a result she needed to pay him in cash.

[31] Ms Krishnasamy said she paid Mr Allu his wages in cash each Sunday evening, taking the cash from the Sahana business float, but had not asked Mr Allu to sign a receipt confirming payment had occurred. At the date when employment ended, Ms Krishnasamy said Mr Allu had been paid a total sum of \$4,550.00 in cash.

[32] Ms Krishnasamy said that another employee, Mr Ahamed Sulaiman, was usually present when she paid Mr Allu as he gave Mr Allu a lift at the end of their evening shift. One Sunday evening when Mr Allu and Mr Sulaiman had left Sahana before she had given Mr Allu his wages, she had driven after Mr Sulaiman's car, stopped it and given Mr Allu his wages.

[33] I found Mr Sulaiman not to be a credible witness which may be explained by the suggestion that he had been threatened by Mr Allu which he denied at the Investigation Meeting. He had needed to be summonsed to attend the Investigation Meeting, and was reluctant to answer questions when he did so.

[34] However he did confirm when questioned that he recalled the incident of Ms Krishnasamy driving after and stopping his car, and seeing her handing something to Mr Allu, although he was not certain what it had been.

Visa Variation Enquiries

[35] Ms Krishnasamy said as a result of what Mr Allu told her concerning his Work Visa, she arranged for him to meet with a lawyer who specialised in immigration law to assist him as she had little understanding of visa variation. As the Christmas/New Year period was approaching, this meeting did not take place until 12 January 2017.

[36] Mr Allu confirmed that Ms Krishnasamy had arranged a meeting with an immigration lawyer to discuss the Visa Variation with him, and when they had met on 12 January 2017 the immigration lawyer had examined his passport, informed him that he was working illegally, and that he needed to obtain a Visa Variation.

[37] When he returned from the meeting, Ms Krishnasamy said Mr Allu told her he did not wish to incur costs by having the immigration lawyer assist him, and he was experienced enough to deal with this issue himself.

[38] Mr Allu confirmed the matters relating to the Work Visa Variations under cross-examination at the Investigation Meeting.

[39] Mr Allu sent Ms Krishnasamy a text message on 6 February 2017 which stated:

Hi Aunty

May I please check with you about the contract. It's 2 months I have left the previous job. I don't want to delay anymore. Now the immigration rules are very strict. If you are not happy please tell me and I'll look for another place. Please say one word YES or NO.

Thanks

[40] Ms Krishnasamy responded: “*Reddy, As I told you we will finalise this week. Thx*”

[41] Mr Allu said he had sent the text message because he had been very concerned at the delay in being provided with a written employment agreement.

[42] Ms Krishnasamy said that she knew Mr Allu wanted her to alter the Employment Agreement which she claimed she had given him and enter a higher rate of pay, and she had wanted to delay the confrontation.

Meeting 7 February 2017

[43] Mr Allu said he had attended for work on Tuesday 7 February 2017, and as it was not busy during the lunch service he had taken the opportunity to ask Ms Krishnasamy about a written employment agreement. He said he had not mentioned the payment of his wages as he was desperate to get the Work Visa issue resolved first. He said he had been firm in his request.

[44] In response Ms Krishnasamy had told him she would give him a written employment agreement, but his hourly rate would be \$16.25. Mr Allu said he had disputed that, pointing out that at the interview she had agreed to pay him \$19.00 per hour, but Ms Krishnasamy had told him she was only prepared to pay \$16.25 per hour and provide a written employment agreement which stated that hourly rate of pay.

[45] Mr Allu said that the meeting had then become heated and that Ms Krishnasamy had told him she no longer needed him and he was to leave immediately.

[46] Ms Krishnasamy said that during the meeting Mr Allu had told her he could not obtain a Visa Variation unless he was paid more money than she had offered. She had explained that she could not afford to pay more and at that point he had become very angry and said he wanted to leave.

[47] She had asked him to take time to think about the situation but he had become threatening towards her so she had told him: “*take your business to the Employment Relations Authority*” and he had left.

[48] Ms Krishnasamy said she had not contacted Mr Allu after this date.

Determination

Was Mr Allu was unjustifiably dismissed?

[49] Mr Allu was an employee during the period of time that he worked at Sahana. During that period he was working illegally in New Zealand because his Work Visa was restricted to employment with another employer.

[50] It is also clear from his evidence that Mr Allu was fully aware that he could not legally work at Sahana without a Visa Variation being granted, but he had taken no steps to obtain one prior to his application for employment at Sahana. Nor had he done so despite having been advised by an immigration lawyer at the meeting on 12 January 2017 that he was working illegally.

[51] Ms Krishnasamy said that she had checked that Mr Allu had a valid Work Visa, prior to his commencing employment, and had not understood the situation regarding him requiring a Visa Variation.

[52] Employers in New Zealand are expected and considered to know the minimum legal requirements in respect of their employees, and to adhere to them. Ignorance of the law is no defence.

[53] Moreover, whilst Ms Krishnasamy claims ignorance of the law regarding Work Visas and variations, she was fully aware that Mr Allu was working illegally after 12 January 2017 but the employment continued after that date.

[54] Whilst both employer and employee in this case were at fault in that both failed to comply with the requirements of s 350 of the Immigration Act 2009 as regards employment and the visa stipulations, this determination addresses only the issues arising out of the employment situation.

[55] Mr Allu claims that he was not provided with a written employment agreement and that this lead to the argument with Ms Krishnasamy which resulted in the termination of his employment with Sahana on 7 February 2017.

[56] The Employment Agreement provided to the Authority states the rate of pay as being \$33,800.00 per annum (\$16.25 per hour for a 40 hour week). Whilst this had not been signed by either party, I observe that Mr Allu was aware that having a lower rate of pay in any

alternative employment would create difficulties for him in applying for a Work Visa Variation and he had told Ms Krishnasamy of his concerns.

[57] I find this consideration to support Ms Krishnasamy's evidence that Mr Allu refused to sign the Employment Agreement given to him unless the rate of pay was increased to more than \$16.25 per hour.

[58] The argument between Mr Allu and Ms Krishnasamy related to the Employment Agreement more specifically and the rate of pay it stated. I find this was the pivotal point the argument that ensued.

[59] During the altercation, Mr Allu left Sahana's premises. This was an action taken when emotions between him and Ms Krishnasamy were running high.

[60] Sahana denies that Mr Allu was dismissed and claims that he left its employment of his own accord, in other words that he abandoned his employment

[61] The Court of Appeal in *E N Ramsbottom Ltd v Chambers*¹ accepted a submission that an employer must be cautious in drawing the inference that an employee has abandoned their employment and that it faces a high threshold if contending that the employment ended at the employee's initiative.

[62] I note that clause in the Employment Agreement headed '*Abandonment of Employment*' which states:

In the event the employee is absent from work for more than 3 days without any notification to the employer, and the employer has made reasonable efforts to contact the employee, this agreement shall automatically terminate on the expiry of the third day without the need for notice of termination of employment.

[63] If Ms Krishnasamy believed that Mr Allu had abandoned his employment, the onus was on Sahana to ascertain the reason why he had not subsequently attended for work by making a determined effort to contact him. There is no evidence that it did so. Nor did Ms Krishnasamy write to Mr Allu confirming the final payment details. Therefore Sahana cannot rely on the abandonment of employment clause in the Employment Agreement.

¹ [2000] 2 ERNZ 97

[64] I consider that Sahana's actions were not consistent with those of an employer holding the belief that the employee had abandoned their employment, and I find that Sahana terminated Mr Allu's employment. Mr Allu was dismissed on 7 February 2017.

Remedies

Lost Wages

[65] Mr Allu stated that he obtained an offer of alternative employment and applied for a Work Visa Variation. His alternative employment did not commence until sometime later due to the fact that Immigration New Zealand, having become aware of the situation regarding his illegal employment at Sahana, refused to issue a Work Visa Variation for a 3 month period of time as a sanction in respect of the Immigration law breach.

[66] Employees are under a duty to mitigate their loss following the unjustifiable termination of their employment. I find in this case, Mr Allu's failure to obtain alternative work was entirely due to the fact that he did not have a Work Visa entitling him to work legally in New Zealand as a result of sanctions imposed by Immigration New Zealand.

[67] This situation was caused or contributed to by Mr Allu's failure to obtain a Work Visa Variation allowing him to be legally employed prior to, during, and after his employment with Sahana.

[68] In the circumstances I decline to order lost wages.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[69] Mr Allu said he had felt distressed by what had occurred at Sahana and had to apply for alternative employment elsewhere, however I find that the fact that he was knowingly working illegally in New Zealand and in all probability open to sanction by the Immigration Authorities would be a major contribution to any distress.

[70] However I accept that Mr Allu felt distressed by what occurred between him and Ms Krishnasamy on 7 February 2017.

[71] I order Sahana to pay Mr Allu the sum of \$2,500.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[72] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[73] Mr Allu was aware from the outset of his employment relationship with Sahana that he was being employed without any legal entitlement to work there, and I find that this underpinned his need to have a written employment agreement confirming that his new employment was at a higher rate of pay to justify any application for a Work Visa Variation.

[74] It was the refusal of Ms Krishnasamy to provide such an employment agreement that resulted in the heated altercation between them on 7 February 2017 which in turn resulted in the termination of his employment.

[75] The Employment Court in *Xtreme Dining Limited v Dewar* considered the matter of contributory conduct by an employee and concluded that it was only situations involving behaviour involving misconduct: “*so egregious*” that no remedy at all should be granted. The Court stated:²

We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with “equity and good conscience”. The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[76] I do not find in this case that there was conduct so egregious as to extinguish any remedy, however I do find significant contribution by Mr Allu to the situation which resulted in the termination of his employment.

[77] **I reduce the amount ordered to be paid to Mr Allu by Shana as compensation to be reduced by 50% pursuant to s.123(1)(c)(i) of the Act.**

² *Xtreme Dining Limited v Dewar* [2016] NZEmpC at [216]

Is Mr Allu owed any monies in respect of unpaid wages for the hours he worked for Sahana?

[78] Mr Allu claimed that he had not received any payment in respect of wages during his employment at Sahana. Ms Krishnasamy claims that she paid him in cash at his request each Sunday evening, and that Mr Sulaiman would have witnessed this occurring. Mr Allu said he had not discussed the fact that he was not receiving any wages during his employment at Sahana, preferring to keep that information private.

[79] I find the following to support Ms Krishnasamy's evidence that she paid Mr Allu his wages in cash:

- Despite the fact that I found Mr Sulaiman not to be a credible witness I find his oral evidence supported Ms Krishnasamy's evidence that in his presence she had given something to Mr Allu one Sunday evening which I find was more likely than not to be a cash payment in respect of wages;
- Sahana's bank statements confirm that other employees were paid by direct transfer to their bank accounts;
- In his written evidence Mr Allu stated that during the meeting on 7 February 2017 Ms Krishnasamy told him his hourly rate was to be reduced to \$16.25. This infers that he had been receiving some payment during his employment, and as there was no reference to this being paid to a bank account in Sahana's bank statements, implies it was a cash payment.

[80] In accordance with the evidence of Ms Krishnasamy and as stated in the Employment Agreement provided to the Authority, Mr Allu's hourly rate of pay was \$16.25 per hour. The Employment Agreement stated in the clause headed *Hours of Work* that Mr Allu was obliged to perform overtime as required: "*but without extra payment*".

[81] During the period Mr Allu was employed at Sahana and based on the timesheets as submitted, Mr Allu worked 289.5 hours. The period Mr Allu worked included two public holidays in respect of which he worked a total of 6 hours and which attracted payment at time and a half, plus an alternative day. This equates to a gross payment of \$4793.75. He was paid \$4,550.00 in cash and monies in respect of PAYE were remitted to the IRD.

[82] The PAYE records as supplied initially to the Authority were not helpful in determining this matter. I accept on the basis of further information received that the correct amount of PAYE in respect of Mr Allu's remuneration during the period he was employed at Sahana has now been remitted in full to the IRD.

[83] Should this not be the case the parties are granted leave to remit this matter to the Authority.

[84] I observe that the payments made to Mr Allu were gross payments totalling \$4,500.00 and that in fact he should have received \$4,793.75 gross. This is a shortfall of \$293.75 gross. Had Sahana been paying Mr Allu his wages in a correct manner, such payments as he received would have been net payments. I note that Sahana has remitted a total payment in respect of PAYE on Mr Allu's behalf of \$1,043.46.

[85] The total payments made by Sahana are therefore an overpayment of the amount to which Mr Allu was entitled as remuneration for the period he worked at Sahana.

[86] **I determine that Mr Allu was paid in cash and is not owed any monies in respect of unpaid wages for the hours he worked for Sahana.**

Is Mr Allu owed any monies in respect of unpaid annual leave and statutory leave entitlement?

[87] Mr Allu worked on 25 December 2016 and 1 January 2017, but did not receive payment at time and a half, or an alternative day. Whilst Sahana employed accountancy services at the time Mr Allu was employed, I understand that his calculations may not have been accurate and a new accountant engaged by Sahana has since recalculated the amounts pertaining to Mr Allu.

[88] I accept that the subsequent calculations are accurate.

[89] The amount of annual holiday pay has also been recalculated.

[90] Ms Krishnasamy said she had not paid Mr Allu monies in respect of unpaid annual leave entitlement at the date of his leaving employment because due to the circumstances in which he left, she had no bank account into which to make a payment.

[91] If an employee leaves within 12 months, they are to be paid 8% of the gross earnings during that period pursuant to s 23 and s 27 of the Holidays Act 2003.

[92] Mr Allu was therefore entitled to a payment of \$383.50 gross in respect of total holiday pay entitlement.

[93] Sahana paid Mr Allu the sum of \$540.03 gross on 5 April 2017 in respect of holiday pay entitlement. It is my understanding that this amount is in excess of that to which Mr Allu was entitled in respect of annual and statutory leave entitlements. Should this not be the case the parties may remit this matter back to the Authority with submissions and supporting evidence.

[94] **I determine that Mr Allu is not owed monies in respect of holiday pay entitlement.**

Was Mr Allu unjustifiably disadvantaged as a result of not being provided by a written individual employment agreement by Sahana?

[95] Pursuant to s 64 of the Act, employers must:

(1) ... retain a signed copy of the employee's individual employment agreement or the current terms and conditions of employment that make up the employee's individual terms and conditions of employment (as the case may be).

(2) If an employer has provided an employee with an intended agreement under section 63A(2)(a), the employer must retain a copy of that intended agreement even if the employee has not—

(a) signed the intended agreement; or

(b) agreed to any of the terms and conditions specified in the intended agreement.

[96] In accordance with clause 64(2) of the Act Ms Krishnasamy provided the Authority with a copy of the Employment Agreement which she said she had provided to Mr Allu at the commencement of his employment.

[97] Subsequent to the Investigation Meeting Ms Krishnasamy also provided to the Authority copies of the written employment agreements which had been issued to the other Sahana employees, and which had been signed and dated by them.

[98] I find this to support her evidence that Mr Allu had been provided with a written employment agreement as required by s 63 of the Act.

[99] **I determine that Mr Allu was provided with a written individual employment agreement by Sahana, there was no unjustifiable disadvantage.**

Did Ms Krishnasamy aid and abet Sahana in respect of the non-payment of wages and holiday payment?

[100] I have not found that Mr Allu was not paid wages by Sahana, and therefore Ms Krishnasamy did not aid and abet any default in this respect.

[101] There was a non-payment of annual leave entitlement at the date when Mr Allu's employment at Sahana terminated, however I find that he had created a situation in which Ms Krishnasamy had no bank account details into which to make payment.

[102] Mr Allu was subsequently paid a sum of money by Sahana in respect of annual and statutory Holiday payments, and as noted above there may not be any shortfall in that respect.

[103] **I therefore determine that Ms Krishnasamy did not aid and abet Sahana in respect of the non-payment of wages and holiday payment.**

Penalties

[104] Mr Allu is seeking penalties in respect of breaches of the Minimum Wage Act 1983 and the Holidays Act 2003.

Minimum Wage Act 1983

[105] Pursuant to s 6 of the Minimum Wage Act 1983 (MWA):

Payment of minimum wages

Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[106] I have found that Mr Allu did not work more than 40 hours in any week of his employment. He received cash payments in respect of the hours he worked at the rate of \$16.25 per hour which is both above the pertinent minimum wage rate at that time, and his

working hours did not exceed a level which would have resulted in a shortfall and payment below the minimum wage rate.

[107] I therefore award no penalty in respect of a breach of the MWA.

Holidays Act 2003

[108] Mr Allu was not paid his holiday entitlement at the time of leaving his employment at Sahana. Whilst I note that Sahana subsequently made a payment in respect of Mr Allu's annual and statutory holiday entitlement, its failure to do so at the time Mr Allu's employment ended was a breach of the Holidays Act 2003 (HA). I also note the comments above to the effect that there may still be a shortfall.

[109] By not paying Mr Allu his holiday entitlement at the date he was employed, I find that Sahana was in breach of the HA.

[110] I find that Mr Allu was not made a payment in respect of the termination of his employment at the time it occurred, namely on 7 February 2017. Whilst the late payment of the owing amount was subsequently made, he was still deprived use of that money for some time.

[111] It was a breach of the HA for Sahana not to pay the monies to which Mr Allu was entitled under the HA at the date his employment at Sahana altered. However I do not find that the breach to have been flagrant and deliberate.

[112] Nonetheless employers are expected to adhere to the law.

[113] **Sahana is ordered to pay a penalty of \$500.00 to the Crown in respect of the breach of the HA employment agreement.**

Summary of Orders

[114] Sahana is ordered to pay:

- **Mr Allu the sum of \$2,500.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act. That amount is to be reduced by 50% pursuant to s.124 of the Act.**
- **Sahana is ordered to pay a penalty of \$500.00 to the Crown in respect of the breach of the HA employment agreement.**

- **Payments are to be made within 28 days of the date of this determination.**

[115] My understanding is that all monies in respect of outstanding PAYE in respect of Mr Allu have been paid to the IRD. Should this not be the case, payment is to be made within 28 Days.

Costs

[116] Costs are reserved. Given the extent to which both parties have been successful, I consider that this is an appropriate case for letting costs lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve the matter between them.

[117] If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[118] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority