IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 126
5448996

	BETWEEN	MOHAMMED IRFAN ALI Applicant
	A N D	ABHISEK QUALITY FOODS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Robert M Thompson, Advocate for Applicant Paul McBride, Counsel for Respondent
Investigation Meeting:	Determined on the papers by consent
Submissions Received:	1 July and 29 July 2014 from Applicant 15 July 2014 from Respondent
Date of Determination:	19 August 2014

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

A. Mr Ali's annual remuneration was intended to cover all work carried out by him, including work expressed to be overtime work.

B. The parties are directed to attend mediation in good faith.

C. Costs are reserved.

Employment relationship problem

[1] Mr Ali was employed by the respondent, which trades as the Bombay Palace Indian Restaurant in Wanaka, as a tandoori/curry chef. He claims that he is owed the sum of $43,774.99, after tax, in respect of unpaid wages together with unpaid holiday

pay. He also claims that he was unjustifiably disadvantaged in his employment and that the respondent has unlawfully retained property belonging to him. Mr Ali also claims compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) together with a penalty to be imposed upon the respondent for not maintaining and providing wage and time records.

[2] The respondent resists these claims and counterclaims against Mr Ali in the sum of $1,920, being the sum that it says Mr Ali misappropriated.

[3] This determination relates to a preliminary matter involving the interpretation of Mr Ali's individual employment agreement with the respondent company. It is Mr Ali's case that, under the terms of his employment agreement:

(i) His annualised salary of $30,048 was based on 48 weeks;

(ii) His normal work week hours were fixed at a maximum of 42 hours;

(iii) As a result, his usual wage rate was $14.90 per hour;

(iv) Accordingly, every hour worked in excess of 42 hours in a week was overtime; and

(v) Mr Ali was to be paid the hourly rate of $14.90 for every overtime hour worked above 42 hours a week.

[4] It is the respondent's position that the relevant terms of Mr Ali's employment agreement did not either expressly or impliedly import an hourly rate and that references in the employment agreement to *wage rate* means Mr Ali's annual salary, together with an accommodation allowance of $5,200 per annum. Accordingly, the respondent submits that Mr Ali's contractual entitlement for all hours worked was limited to his base annual salary of $30,048 per annum, plus $100 per week accommodation allowance, plus 8% in respect of holiday entitlement, amounting to a total of $38,067.84 per annum.

The relevant terms

[5] The employment agreement signed by the parties consisted of ten pages of standard terms, together with a one page document headed up *Individual Terms.* The material individual terms were as follows:

1. *Your Individual Employment is comprised of these individual terms. The Standard Terms and your job description.*

2. *Position: Tandoor/Curry Chef.*

3. *Type of Employment: Full Time.*

4. *The parties to this agreement acknowledge that flexibility is essential to providing staff to cover variable demands. You will be required to work as set out in the roster on any day Monday to Sunday guaranteed at least 35 hours to 42 hours per week.*

5. *Your annual wage is $30,048 per annum excluding your 8% holiday pay. This sum is subject to appropriate income tax at source. Hours worked over your normal hours will be paid at your usual wage rate. There will be no different wage rate for overtime. In addition to the above, a sum of $100 per week will be given as accommodation allowance and this also will be subject to usual income tax at source.*

[6] Mr Ali also relies upon the contents of a letter received by the respondent from Immigration New Zealand (INZ), dated 17 October 2011. This gave approval in principle to the respondent company to recruit a total of two tandoori/curry chefs to work until 17 October 2013. This letter included the following text:

> *You may recruit Chefs who have the following:*
>
> - *A minimum of 3 years experience as a Chef:*
>
> *The terms and conditions of employment for the Chef must be the same as those submitted with your Approval in Principle application, including:*
>
> - *A guarantee of at least 30 hours per week at a rate of $14.45 per hour. A total of $433.50 per week.*
> - *The employee will receive an accommodation allowance of $100 per week.*

The Issue to be determined

[7] The issues to be determined by the Authority are:

a. Does the meaning of clause 5 of the individual terms of the employment agreement, and in particular the sentence *hours worked over your normal hours will be paid at your usual wage rate*, entitle Mr Ali to be paid for working overtime?

b. If so, what hours constitute the threshold over which overtime will be worked, and at what pay rate should overtime be paid?

The principles of contractual interpretation

[8] Both Mr Thompson and Mr McBride provided extensive submissions on the principles to be adopted by the Authority in interpreting a contract of employment. These principles are well settled and the parties do not disagree on them, although unsurprisingly, they emphasise different points to support their respective positions. Judge Ford set these principles out in the Employment Court case of *Progressive Meats Limited v. Pohio & Ors* [2012] NZEmpC 103 where, at [29], he cited the five principles of contractual interpretation articulated by Lord Hoffmann in the UK House of Lords case of *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1997] UKHL 28. His Honour stated as follows:

> *There was no dispute between counsel as to the applicable legal principles in the interpretation of collective agreements. Mr Cleary referred to the well-known five principles of contractual interpretation articulated by Lord Hoffmann in Investors Compensation Scheme Limited v West Bromwich Building Society which were adopted in New Zealand in Boat Park Ltd v Hutchinson*[1] *and recently reaffirmed in Vector Gas Ltd v Bay of Plenty Energy Limited.*[2] *As both counsel relied on the stated principles, I set them out in full:*
>
> > *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.*
> > *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
> > *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
> > *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as a meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between*

[1] [1999] 2 NZLR 74.
[2] [2012] NZSC 5

> *the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945)*
> *(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera SA v Salen Rederierna AB [1985] 1 AC 191,201:*
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> > *"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.".*

[9] I also refer to the Court of Appeal case of *Silver Fern Farms Limited v. New Zealand Meat Workers & Related Trade Unions Inc.* [2010] NZCA 317 in which it confirmed that extrinsic material can be used to clarify an agreement's meaning, even if the terms were unambiguous.

The parties' submissions

[10] Mr Ali's starting point is that, pursuant to s.11B(1) of the Minimum Wage Act 1983 every employment agreement must fix at not more than 40 the maximum number of hours (exclusive of overtime) to be worked in any week by any worker bound by that employment agreement. Section 11B(2) of the Minimum Wage Act provides that the maximum number of hours, exclusive of overtime, fixed by an employment agreement to be worked by any worker in any week may be fixed at a number greater than 40 if the parties to the agreement agree.

[11] Mr Thompson submits on behalf of Mr Ali that paragraph 4 of the employment agreement provides that Mr Ali's normal work week hours are no less than 35 and no more than 42. He states that this is because:

> *The phrase "at least" has the ordinary and plain meaning of no less than or smallest in amount, thus ensuring the IEA phrase "at least 35 hours" complies with the minimum workweek requirement stated in the INZ letter;*
>
> *The phrase "to 42 hours" has the ordinary and plain meaning that 42 is the upper limit of the workweek and fixes the maximum weekly hours as required under s.11B of the MWA;*

> *When read together, and in the context of the entire paragraph, the Applicant contends that his normal workweek was to be no less than 35 hours and no more than 42 hours.*

[12] Mr Thompson also submits that paragraph 5 of the employment agreement is clear and unambiguous and that the hours worked over 42 hours in a week are overtime hours which will be paid at Mr Ali's *usual wage rate*. Mr Thompson submits that the phrase *you will be paid* creates a contractual type obligation on the respondent to pay Mr Ali the hourly rate for all hours worked in excess of 42 in any week, but not as a penal rate. Mr Thompson relies on the use of the phrase *will be paid* throughout the employment agreement where, for example, it is stated that sick leave and bereavement leave *will be paid* and that the employee will be paid for working on public holidays or not working on public holidays.

[13] Mr Thompson submits that the employment agreement does not have any of the standard and specific language of an employment agreement that does not allow payment for working overtime. For example, the employment agreement does not state that the gross wages are inclusive of overtime or that Mr Ali will not be paid for working overtime. Mr Thompson submits that the plain and ordinary language used in the paragraphs 4 and 5 of the employment agreement clearly anticipates that there will be required overtime hours because *flexibility is essential to … cover variable demands* and *you will be required to work … no any day Monday to Sunday* and *hours worked over your normal hours will be paid.*

[14] Turning to the issue of what is meant by the phrases *usual wage rate* and *ordinary rate*, Mr Thompson submits that both phrases are synonymous to *rate of wages* and all three phrases are different ways of defining the same thing, being *the amount of money payable to a worker for each unit of time,* as referred to in the Employment Court case *Idea Services Limited v. Dixon* [2009] ERNZ 372. Mr Thompson contends that both phrases *usual wage rate* and *ordinary rate* mean the hourly rate because, when the employment agreement is subjectively read in its entirety, while taking into account all the surrounding circumstances, it is obvious that this is the only meaning that makes sense and gives efficacy to the employment agreement.

[15] Mr Thompson submits that, since the employment agreement does not specifically define *usual wage rate* and *ordinary rate*, it is a fair and reasonable

approach to look to the INZ letter as extrinsic evidence. This confirms that Mr Ali is to be paid at a rate of $14.45 per hour and that the individual employment agreement is to accurately reflect this pay rate. Mr Thompson appears to be saying, though, that the correct hourly rate is $14.90 based on the information summarised at [3] above.

[16] Mr Thompson submits that Mr Ali's individual employment agreement is not a typical employment agreement because of the mandated remuneration terms in other employment agreements required by the INZ. He says that this results in the need to give the INZ letter appropriate weight as extrinsic material when interpreting the employment agreement. Mr Thompson says that the INZ letter is *the very foundation on which the IEA could be legally executed.* Mr Thompson submits that, to allow an interpretation of the employment agreement that violates that INZ letter would flout business common sense and ordinary contract principles and could subject to the respondent (and to some degree Mr Ali) to possible INZ disciplinary action.

[17] With respect to the Holidays Act 2003, Mr Thompson submits that the 8% holiday payment stated in paragraph 4 of the employment agreement cannot replace Mr Ali's entitlement to physically taking his holiday and being paid his average weekly earnings for the four weeks. Mr Thompson submits that, since the gross wage has specifically excluded holiday pay, then the only objectively reasonable interpretation is that the gross wages are based on 48 weeks.

[18] Finally, Mr Thompson submits that, if the Authority finds that the payment of wages clauses in the employment agreement are vague and ambiguous, then the *contra proferentem* rule should apply, so that the ambiguity should be construed strictly against the respondent and that the respondent should not be entitled to rely upon an agreement that other documents can have a contractual effect.

[19] Mr McBride, on behalf of the respondent, submits that Mr Ali is neither able to point to any express contractual entitlement to be paid additional amounts for any hours worked over and above 35 (or 42) hours per week, nor any express or certain amount of any such payment.

[20] Mr McBride states that clause 4 of the employment agreement requires Mr Ali to work *at least 35 hours to 42 hours per week* and that neither of those figures is set as a maximum. To the extent required, the roster would set that maximum. Mr McBride states that Mr Ali's reference to s.11B of the Minimum Wage Act does

not assist Mr Ali's argument because the parties had, in fact, agreed maximum hours in excess of 40 per week (and exclusive of any overtime). Mr McBride goes on to say that clause 5 sets a total annual wage, which is the remuneration. Reference to the standard terms include the hours and days of work being as rostered, and those being over seven days in a week. Hours worked above normal hours are to be worked at *the usual wage rate* which is defined as the *annual wage rate.*

[21] Mr McBride states that the employment agreement does not expressly or by necessary implication import an hourly rate at all, let alone in relation to any additional hours.

[22] Mr McBride says that the references in the agreement to *ordinary rates* in the context of leave refer to the ordinary rate paid under remuneration set out in the individual terms; namely, an annual rate. Mr McBride refers to the requirement, at page 10 of the standard terms, for any variations to the terms and conditions set out in the employment agreement to be recorded in writing.

[23] With respect to the letter from INZ, Mr McBride says that it cannot properly be used to import a new term into a contract that was not agreed to between the parties. Mr McBride says the INZ letter set out a guaranteed minimum pay of $433.50 per week but that the respondent paid Mr Ali well in excess of that sum. Mr McBride says that there was no evidence that Mr Ali was aware of the INZ letter at the time of the formation of the agreement, which is the point in time that the intention of the parties is relevant. Therefore, the letter could not impact on the interpretation of the other document.

[24] Mr Thompson, in response to this particular submission, stated that Mr Ali had in fact been sent a copy of the letter together with the agreement for signature. I required Mr Ali to swear an affidavit to confirm this. In the affidavit Mr Ali deposed that he had received his individual employment agreement, together with the INZ letter, from the respondent's director while still living and working in the Cook Islands, and so, presumably, prior to travelling to New Zealand. Mr Anand swore an affidavit in response on behalf of the respondent in which he stated that he cannot say with absolute certainty that he did not send a copy of the letter to Mr Ali but that he did not believe that he would have done so.

[25] Mr McBride also states that the requirement on page 10 of the standard terms, which specifies that the agreement is a complete record of the terms and conditions, excludes the possibility of the INZ letter importing any different terms on hours of remuneration into the employment agreement. Mr McBride submits that Mr Thompson is asking the Authority to re-write the employment agreement and not merely to interpret it.

[26] On the issue of the INZ letter, I conclude that Mr Ali was sent a copy of it, because it states in it that chefs need to provide a copy of the letter when applying for a work visa to work for that employer. However, I am not convinced that the letter greatly assists either party. It provides a set of minimum terms below which the employer's terms of employment of migrant workers were not to fall. Simply because it makes reference to a minimum hourly rate of pay and minimum hours of work per week does not mean that those terms and conditions are incorporated into an individual employment agreement. The letter gives permission for the employer to employ two tandoori/curry chefs. It does not dictate what the terms of employment are, save for setting out certain minimum criteria.

Determination

Does clause 5 of the individual terms entitle Mr Ali to be paid for working overtime?

[27] Adopting the approach summarised by Chief Judge Colgan in *Association of Staff in Tertiary Education Inc. v. Hampton* [2002] 1 ERNZ 491, it is necessary first to look at the words *used* and then at the surrounding circumstances, to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words.

[28] Clause 4 refers to the essential need for flexibility so that the variable demands of the respondent's trade can be met by the provision of staff. This sentence sets the context for the following sentence which establishes a requirement upon Mr Ali to work the hours set out in a roster to be provided. It also sets out a requirement to work on any day of the week. It finally sets out a guarantee that the hours will be no less than 35 hours a week.

[29] The phrase … *guaranteed at least 35 hours to 42 hours per week* is arguably ambiguous in that it may have one of two meanings:

1. The hours to be worked should be no less than 35 hours, and no more than 42 hours per week; or

2. The hours to be worked should be no less than any number of hours from 35 to 42 hours per week inclusive.

[30] The second possible interpretation is a strained one from a semantic point of view, as the words *to 42 hours* would not be necessary. The words *at least* sets the minimum number of hours to be worked every week (namely, 35) and stipulating that the minimum may vary from week to week is tautological. However, that is the meaning that the syntax of the sentence invites one to understand.

[31] The first possible meaning of the sentence is a more logical reading, as it is normal for employment agreements to either set out the standard number of hours to be worked per week (e.g. 40) or the minimum and maximum number of hours per week. However, this is not the meaning that the syntax of the sentence readily invites. One would expect to see, instead, wording such as *will be required to work … between 35 hours and 42 hours per week*, or some similar construction.

[32] Interpretation of this sentence cannot be done in isolation, however. It is therefore necessary to look at the rest of the agreement, both the individual and the standard terms, to ascertain whether they favour one interpretation over another. The most important term is clause 5 of the individual terms. The first sentence states that Mr Ali would be paid an annual pay of $30,048, excluding 8% holiday pay.[3] The second sentence allows deduction for income tax at source. The third sentence contemplates that there is a maximum number of *normal hours* that Mr Ali may be required to work. It also stipulates that such work will be paid at the employee's *usual wage rate.* The fourth sentence emphasises that the usual wage rate will be the rate of remuneration for working overtime.

[33] When one reads the final sentence of clause 4 of the individual terms together with the third sentence of clause 5, it leads one to conclude that there is a maximum number of hours per week that constitutes Mr Ali's normal hours; namely, 42. The rest of the terms of the employment agreement do not appear to add anything more to the interpretation of the third sentence of clause 4 of the individual terms.

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[3] The legitimacy of this treatment of holiday pay will be considered below.

[34] The terms of the INZ letter also do not assist in interpreting this sentence. No other evidence has been provided of other extrinsic material that could be called upon to interpret the employment agreement.

[35] Therefore, in conclusion, I determine that, under the terms of the individual employment agreement entered into by Mr Ali, the maximum number of hours he was required to work per week was 42, and that this was the threshold number of hours per week above which would be considered *overtime*.

At what rate was overtime working to be paid?

[36] The next question to determine is the rate at which such overtime was to be paid. It is common ground that no penal rate would apply. The question is, does the annual salary of $30,048 together with the $100 per week accommodation allowance constitute the total remuneration (excluding the 8% holiday pay) payable to Mr Ali, regardless of the number of hours per week he worked or was he entitled to be paid additional remuneration when he worked more than 42 hours in a week?

[37] First, the respondent accepts that, even where an employee is paid a salary, the Minimum Wage Act still applies to their employment. This was confirmed by the Chief Judge of the Employment Court in *Law & Ors v. Board of Trustees of Woodford House & Ors* [2014] NZEmpC 25.

[38] It is certainly the case that, subject to the respondent's obligations under the Minimum Wage Act, employees receiving an annual salary may lawfully be required to work hours above their normal hours (which may be called *overtime*) whilst receiving no extra remuneration other than their annualised salary.

[39] It would appear that the difficulty of interpreting clause 5 arises from the fact that wording has been used to stipulate how overtime is to be paid, which would work perfectly if Mr Ali's remuneration had been expressed as an hourly rate. However, expressing his remuneration as an annual salary renders it necessary to look outside of the wording of clause 5 to seek assistance.

[40] First, no hourly rate is expressed anywhere in the employment agreement. The INZ letter stipulates that the wage rate must be at least $14.45 per hour. This does not, however, assist Mr Ali as it sets a floor below which the wage rate must not fall. It does not stipulate the wage rate that must be paid.

[41] Mr Thompson has calculated that the correct hourly wage rate is $14.90 per hour. He derives his figure by dividing the annual salary by 48 weeks and further dividing the weekly gross amount by 42 hours.

[42] In order to ascertain the intentions of the parties, in the absence of extrinsic materials which assist, it is necessary to fall back on the terms of the employment agreement itself. Mr Thompson submits that the respondent is unable to refer to, or rely on any definition clause, word, phrase, or term of the individual employment agreement, or any other document, to support his view that *annual wage* has the same meaning as *usual wage rate,* or *ordinary rate.* He states that it is clear that *annual wage* has a different meaning and a different monetary value than the rate phrases, and when the overall context of the agreement is viewed objectively and pragmatically, it is the only correct interpretation that could be made.

[43] Mr Thompson also states that the respondent is unable to refer to, or rely on any word, phrase, or term of the employment agreement to support its view that the phrase *will be paid* has a double meaning within the employment agreement and that Mr Ali is not entitled to be paid for the overtime hours he worked but is entitled to be paid for working public holidays, sick leave, bereavement leave etc.

[44] Turning to a consideration of the references in the standard terms of the individual employment agreement to occasions when the phrase *will be paid* is used, I am not convinced that these assist Mr Ali in determining the rate at which his overtime should be remunerated. For example, under the heading *Public Holidays,* the standard terms set out what is the statutory position in respect of public holidays. They also make reference to what Mr Ali would be paid for working on the day in question.

[45] With reference to sick leave, the standard terms state that sick leave will be paid *at ordinary rates.* This does not in any way assist in calculating what the hourly rate would be. That would entirely depend on what the hourly rate that at the stipulated, if at all, in the individual terms. A similar point may be made with respect to bereavement leave.

[46] When I examine the rationale for Mr Thompson's calculating the appropriate hourly rate at $14.90 per hour, I am not persuaded that it is correct to conclude that the appropriate divisor is 42 hours per week. Whilst it is clear that he has chosen this

divisor because it is the threshold above which overtime hours would be worked, it does not follow that that would be the appropriate rate when paying, for example, bereavement leave or sick leave. This is because Mr Ali's working week consisted of any number of hours from 35 to 42 per week. The terms of Mr Ali's employment agreement stipulates that he would be paid bereavement leave *at ordinary rates.* Subject to the provisions of s.71 of the Holidays Act 2003, which requires that an employer must pay an amount that is equivalent to the employer's daily rate or average daily pay for each day of sick leave or bereavement leave taken by the employee that would otherwise be a working day for the employee, there is nothing to prevent an employer paying bereavement leave at a higher rate than the relevant daily pay or average daily pay.

[47] The *ordinary rate* that Mr Ali would be paid in respect of sick leave or bereavement leave would be calculated by reference to a day's pay. I accept the submission of Mr McBride that many employees are employed on an annual salary, and the Holidays Act provides entitlements for employees to be paid on that basis.

[48] Mr McBride stated in his submissions that the fact that Mr Ali was paid the same amount of money every month, even months when the restaurant opened for fewer than 35 hours per week, further supports the contention that he was remunerated in accordance with an annual salary rather than an hourly rate. I asked for affidavit evidence to support this contention. Both Mr Ali and Mr Anand dealt with this assertion in their affidavit evidence. Whilst it is clear that Mr Ali was often paid the same amount every month, this was not inevitably the case, and there is no evidence to link the regular monthly payments to the corresponding monthly hours worked by Mr Ali. I do not believe that I can draw any useful conclusion either way.

[49] When I apply to the phrase *usual wage rate* a meaning expressed in terms of an annual salary, I do not find that such a meaning is inconsistent with the term *usual wage rate*. It is clearly possible, and very common, for employees receiving an annual salary to have their remuneration cover all hours worked, including hours expressed to be overtime hours.

Conclusion

[50] I accept the position of the respondent that Mr Ali's annual remuneration was intended to cover all work carried out by him, including work expressed to be overtime work.

Mr Ali's rights to holiday pay

[51] I note that clause 5 states that Mr Ali would receive 8% holiday pay. I also note at page 2 of the standard terms the following:

> *Casual employees' holiday entitlement is calculated at 8 per cent of gross earnings and will be paid fortnightly as part of the employees' wage.*

[52] Section 28 of the Holidays Act provides that an employer may regularly pay annual holiday pay with an employee's pay if the employee is employed in accordance with s.66 of the Employment Relations Act 2000 (the Act) on a fixed term agreement to work for less than 12 months or he works for the employer on the basis that it is so intermittent or irregular that it is impracticable for the employer to provide the employee with four weeks annual holidays under s.16.

[53] It is certainly not the case that the individual employment agreement entered into by Mr Ali is a fixed term agreement that complies with s.66 of the Act. Indeed, there is no reference to a fixed term in either the individual or standard terms. The only assistance of any kind as to the possible term of the employment is contained in the INZ letter which gave the respondent approval in principle to recruit a total of two tandoori/curry chefs to work until 17 October 2013 (a period of two years from the date of the letter).

[54] Accordingly, if Mr Ali has been paid 8% holiday pay with his ordinary pay, that would appear to be in breach of s.28 of the Holidays Act. The parties may wish to consider what effect this has on Mr Ali's claims.

Direction

[55] The substantive investigation into this matter has been set down for 7 and 8 October 2014 in Queenstown. However, although the parties have already attempted to settle their differences using Mediation Services provided by MBIE, in

view of the Authority's preliminary determination, which will limit the scope of the substantive investigation, I direct the parties to attend further mediation prior to the substantive investigation meeting. The date set down for the substantive investigation shall remain, subject to the result of the mediation and any further case management conference directions.

Costs

[56] Costs are reserved until the conclusion of the substantive investigation into Mr Ali's claims and the respondent's counterclaim.

David Appleton
Member of the Employment Relations Authority