



New Zealand Employment Relations Authority Decisions

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Bhatti v Aotearoa Smart Buy NZ Limited (Auckland) [2016] NZERA 351; [2016] NZERA Auckland 268 (9 August 2016)

Last Updated: 30 November 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 268
5586516

BETWEEN SUKHJINDER SINGH BHATTI

Applicant

AND AOTEAROA SMART BUY NZ LIMITED

First Respondent

AND SURENDER KUMAR Second Respondent

Member of Authority: Vicki Campbell

Representatives: May Moncur for Applicant

Yashveen Singh for Respondent

Investigation Meeting: 13 April and 23 June 2016

Submissions Received: 27 June and 1 July 2016 from Applicant

29 June 2016 from Respondent

Determination: 9 August 2016

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. The application for leave to raise personal grievances outside the requisite 90 day time period is declined.**
- B. Mr Bhatti's claim for unpaid wages is declined.**
- C. During the Authority's investigation process Aotearoa Smart Buy NZ Limited trading as Glen Innes Liquor Centre paid Mr Bhatti his outstanding holiday pay.**
- D. Aotearoa Smart Buy NZ Limited trading as Glen Innes Liquor Centre is ordered to pay to Mr Bhatti the sum of \$1,654.80**

gross

pursuant to [section 131](#) of the [Employment Relations Act 2000](#) relating to payment for public holidays worked within 28 days of the date of this determination.

- E. **Mr Bhatti's application under section 12A of the Wages Protection Act 1983 is declined.**
- F. **Aotearoa Smart Buy NZ Limited trading as Glen Innes Liquor Centre has breached a term of Mr Bhatti's employment agreement.**
- G. **Mr Bhatti's claim for a breach of good faith is declined.**
- H. **Aotearoa Smart Buy NZ Limited trading as Glen Innes Liquor Centre is ordered to pay to the Crown via the Authority a penalty of \$1,000.**
- I. **Mr Kumar has aided and abetted Aotearoa Smart Buy NZ Limited trading as Glen Innes Liquor Centre's breach of Mr Bhatti's employment agreement. No penalty has been imposed.**
- J. **The Authority has no jurisdiction to investigate and determine the counter-claim.**
- K. **Costs are reserved.**

Employment relationship problem

[1] Mr Sukhjinder Bhatti claims two personal grievances. He claims that one or more conditions of his employment were affected to his disadvantage by unjustified actions of Aotearoa Smart Buy NZ Limited trading as Glen Innes Liquor Centre (Glen Innes Liquor), and that he was unjustifiably dismissed. Glen Innes Liquor has raised an objection to Mr Bhatti raising his personal grievances outside the requisite 90 day period. Mr Bhatti has applied for leave to raise his grievances.

[2] Mr Bhatti also claims he is owed arrears of wages including holiday pay and payment for work carried out on public holidays.

[3] Mr Bhatti claims Glen Innes Liquor required him to pay a premium for his employment in breach of [section 12A](#) of the [Wages Protection Act 1983](#) and that Glen Innes Liquor has breached various clauses of the employment agreement and its obligations of good faith. Mr Bhatti claims Mr Surender Kumar aided and abetted all breaches.

[4] Mr Bhatti seeks penalties against Glen Innes Liquor for each alleged breach of the employment agreement and its breach of that statutory duty of good faith. He also seeks the imposition of penalties against Mr Kumar for aiding and abetting the alleged breaches of the employment agreement.

[5] Mr Kumar counter-claims against Mr Bhatti the sum of \$15,855 which is made up of a \$3,500 loan plus interest at the agreed rate of 25% per month on the borrowed amount.

[6] As permitted by [s 174E](#) of the [Employment Relations Act 2000](#) (the Act) this determination has not recorded all the evidence and submissions received from Mr Bhatti and Glen Innes Liquor but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Credibility

[7] 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.

[8] 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. I have found this very difficult as not one witness was more convincing in their telling of their stories and when I have reviewed the evidence from Mr Bhatti and Mr Kumar I have found areas of their evidence which simply do

not seem credible. Where there is a

dispute in the evidence I have preferred the evidence of Mr Amandeep Singh and Mr

Digvijay Singh as being, on balance, the most credible evidence.

Background

[9] Mr Bhatti commenced employment in December 2014 having previously signed a written employment agreement on or about 27 November 2014.

[10] At the time Mr Bhatti was in discussion with Mr Kumar about a possible employment opportunity, he was working for Countdown as a Manager. The employment agreement signed by the parties includes a job description which describes Mr Bhatti's role as that of Business Manager.

[11] Mr Kumar left New Zealand to travel to India in mid-February 2015, returning in mid-May 2015. Mr Kumar told me that during his absence, his cousin, Mr Digvijay Singh was managing the business.

[12] Shortly after Mr Kumar returned from India Mr Bhatti's employment ended.

Issues

[13] The issues for determination are:

a) Whether leave should be granted to raise the personal grievances out of time and if so:

i. Whether Mr Bhatti's employment was subjected to a disadvantage;

ii. Whether Mr Bhatti was unjustifiably dismissed; and

iii. If a personal grievance is found, what if any, remedies should be awarded.

b) Whether any outstanding wages including holiday pay and payment for public holidays is owing to Mr Bhatti;

c) Whether Glen Innes Liquor breached [section 12A](#) of the [Wages Protection Act 1983](#) and if so whether Mr Bhatti should recover that amount as a debt due to him and what, if any penalty should be imposed;

d) Whether Glen Innes Liquor has breached the terms of the employment agreement or its statutory obligations of good faith, and if so, what, if any, penalty should be imposed.

e) Whether Mr Kumar aided and abetted any breaches of the employment agreement and if so, what if any penalty should be imposed.

f) Whether the counter-claim against Mr Bhatti is proven and what, if any, orders should be made.

Application for leave to raise personal grievances

[14] Mr Bhatti claims he has two personal grievances, one for unjustified actions leading to his disadvantage and the second for unjustified dismissal. Mr Bhatti raised his personal grievances on 8 September 2015.

[15] Glen Innes Liquor denies Mr Bhatti's claims.

[16] Mr Bhatti has acknowledged that his personal grievances were raised outside the statutory 90 day period. Glen Innes Liquor did not consent to the raising of the grievances and for that reason, Mr Bhatti has applied for the leave of the Authority to raise the matters out of time pursuant to sections 114 and 115 of the Act.

[17] The relevant provisions of the Act relating to the raising of a personal grievance are as follows:

114 Raising personal grievance

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

(3) ...

(4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any)

as it thinks fit, if the Authority—

(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and

(b) considers it just to do so.

115 Further provision regarding exceptional circumstances under section 114

(1) For the purposes of section 114(4)(a), exceptional circumstances include—

(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or

(b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or

(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or

(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[18] Before granting leave I must be satisfied that the delay in raising the grievances were occasioned by exceptional circumstances. Mr Bhatti's employment ended on or about 18 May 2015. There is a dispute as to how the employment relationship ended. Mr Bhatti raised personal grievances on 8 September 2015. The

90 day period expired on 16 August 2015. When he raised his grievances on 8

September 2015 Mr Bhatti did so 22 days outside the requisite 90 day period.

[19] During a case management conference with the parties on 18 January 2016 I questioned the grounds on which the application for leave was made. The statement of problem lodged on 7 October 2015 relied on a purported failure of the employment agreement to specify that personal grievances must be raised within 90 days. I took the parties to the employment agreement attached to the statement of problem and in particular schedule E which sets out the processes to be followed where an employment relationship problem is alleged. This procedure includes notification that the employee must advise the company within 90 days of the date the grievance arose or came to the employee's attention.

[20] An amended statement of problem lodged in the Authority on 4 February 2016 appears to rely on section 115(1)(a) of the Act. This was clarified by the Authority on

1 March 2016 when it wrote to Ms Moncur and asked if that was the case. If it was I would like to hear from Mr Bhatti's doctor. Ms Moncur advised me that same day that Mr Bhatti did not rely on section 115(1)(a) of the Act in support of his application for leave.

[21] Mr Bhatti maintains that following his dismissal he became depressed. Despite this Mr Bhatti confirmed in his oral evidence that he sought legal advice about his situation in late May or early June 2015.

[22] In answer to questions at the investigation meeting Mr Bhatti confirmed he sought advice from Ms Moncur and that when he attended a meeting with her he had with him a copy of his employment agreement. Mr Bhatti's oral evidence at the Authority confirmed that he was not so traumatised that he could not seek the assistance of Ms Moncur at that early stage

[23] Mr Bhatti did not give Ms Moncur any instructions to raise a personal grievance at that meeting. Mr Bhatti's personal grievance was not raised until 8 September 2015.

[24] I am not satisfied exceptional circumstances have been established. Mr Bhatti sought advice from an experienced employment advocate in late May or early June

2015. It was open to him to have raised his grievances at that time and he failed to do so. Had he raised his grievances at that time he would have raised them well within the statutory 90 day period. Mr Bhatti's application for leave is declined and I will not be determining his personal grievances for unjustified disadvantage or unjustified dismissal.

Arrears of wages

Unpaid wages

[25] Mr Bhatti claims he did not receive all wages payable to him for all hours he worked for Glen Innes Liquor. He claims he was underpaid by \$9,517.75. This claim includes payment for what Mr Bhatti claims was the first two weeks of his employment.

[26] The store was open from 9am to 10pm each day except Christmas Day. Mr Bhatti claims he worked the entire 13 hours each day without a break seven days a week.

[27] Mr Bhatti's work visa allowing him to work at Glen Innes Liquor was issued to him on 11 December 2014. Mr Bhatti says he started work for Glen Innes Liquor on 15 December 2014. The records show that Mr Bhatti received his first weekly pay on 30 December 2014. Mr Kumar told me Mr Bhatti was supposed to have started work on 15 December 2014 but on that morning he came into the store and asked if he could start a week later, on 22 December 2014.

[28] Mr Amandeep Singh was working in the store at the time and has confirmed in his evidence that he heard Mr Bhatti asking to commence the following week as he had just left Countdown and wished to take a break before starting at Glen Innes Liquor.

[29] Receiving his first weekly pay from Glen Innes Liquor on 30 December 2014 is consistent with the evidence from Mr Kumar and Mr Amandeep Singh that Mr Bhatti started work on 22 December 2014. I have accepted their evidence on this point and find that Mr Bhatti was paid from the outset of his employment. His application for the payment of two weeks at the start of his employment is declined.

[30] Mr Bhatti's claim for unpaid hours is based on the minimum wage of \$14.25 per hour which was the applicable minimum wage rate at the time he worked at Glen Innes Liquor. This claim overlooks the fact that the employment agreement provided for payment of a salary of \$40,976 per annum which is equivalent to an hourly rate of

\$19.70 for a 40 hour working week.

[31] I am also not satisfied Mr Bhatti worked the hours he says he worked. In his oral evidence Mr Bhatti told me that on one day he would start at 9am and the next at

11am. This is inconsistent with his claim for arrears of wages where he claims that generally he started at 9am every day. Mr Bhatti's claim indicates that for two weeks at the end of February 2015 and during April and May he started at 11am. Mr Bhatti's claim does not take into account the time he spent at the chiropractor, seeking assistance with his immigration status or visiting various retail outlets.

[32] I am also not convinced the timesheets produced by Mr Kumar are an accurate reflection of the actual hours worked by Mr Bhatti. The timesheets were constructed by Mr Amandeep Singh and signed by him, but were never signed by Mr Bhatti or confirmed by him at the time of construction.

[33] Mr Kumar told me that Mr Digvijay Singh would often work at the store and in particular, when Mr Kumar was away in India from February to May 2015 Mr Digvijay Singh was overseeing the operations at the store in his absence.

[34] Mr Bhatti denied knowing Mr Digvijay Singh and denied he worked in the store. He told me he knows Mr Digvijay Singh did not work in the store because at that time he was working full time for Air New Zealand. This evidence is inconsistent with his own later evidence that he worked undertaking a stock take on Christmas Day 2014 with both Mr Amandeep Singh and Mr Digvijay Singh.

[35] Mr Digvijay Singh's evidence was that in the period when Mr Kumar was in India, he, Mr Bhatti, and Mr Amandeep Singh would share the hours to be worked by way of a roster. While Mr Digvijay Singh worked full time for Air New Zealand as an international flight attendant, he has provided evidence of his rosters during the period of Mr Bhatti's employment and I am satisfied that during the period 24

February 2015 to 22 May 2015 Mr Digvijay Singh was generally available to work at

Glen Innes Liquor with the exception of about 12 occasions only.

[36] I have accepted Mr Digvijay Singh's evidence that he often worked at the store and that for the period of Mr Kumar's absence from mid-February 2015 he worked regularly at the store. Mr Digvijay Singh told me that Mr Bhatti did not work all of the hours he now claims he worked.

[37] Further, I found Mr Amandeep Singh's evidence that Mr Bhatti did not work at all of the times he claims very compelling. His evidence, which I accept, was that he and Mr Bhatti sometimes worked together but not always. Mr Amandeep Singh established that he [Amandeep Singh] worked 20 or 40 hours each week in accordance with his visa.

[38] The evidence that Mr Bhatti did not work all of the hours he says he worked is consistent with transactions recorded in his bank statements which show he visited a number of retail shops during days on which he says he worked from 9am – 10pm

without a break. On one such day Mr Bhatti made a transaction at a retail store which did not open until 11am on the day in question.

[39] Mr Bhatti's written evidence is also inconsistent regarding the number of days he claims to have worked each week. In his written evidence Mr Bhatti told me that after the birth of Mr Kumar's son, he and Mr Amandeep Singh were both required to work six day rosters and they took turns taking one day off each week. The information provided by Mr Bhatti in respect of his claim for unpaid wages does not reflect this. Instead he claims he worked seven days each week.

[40] Mr Bhatti attempted to discredit Mr Digvijay Singh by highlighting his lack of a liquor licence. Both Mr Kumar and Mr Digvijay Singh gave evidence that on occasions when Mr Digvijay Singh was rostered to work in the store on his own he would take another cousin, referred to as Sam, with him. Sam had the requisite liquor licence.

[41] Mr Bhatti has not established his claim for arrears of wages to my satisfaction. I have concluded that the number of hours and the number of days he claims to have worked each week at Glen Innes Liquor is not accurate and is inconsistent with his own evidence. Mr Bhatti's claim for outstanding wages is declined.

Holiday Pay

[42] Mr Bhatti claims he was not paid holiday pay when his employment with Glen Innes Liquor ended. Mr Kumar says that he spoke to Mr Bhatti about the failure to give adequate notice that he was leaving and Mr Bhatti agreed to forego the payment of holiday pay.

[43] Mr Kumar had calculated that the payment of holiday pay due to Mr Bhatti was \$1,136.00. The parties have confirmed that this amount was paid to Mr Bhatti during the course of the investigation meeting.

[44] I am satisfied that while the payment has been made late, Mr Bhatti has received the holiday pay due to him and no further amounts are due.

Payment for working public holidays

[45] Mr Bhatti claims he has not been paid in accordance with his employment agreement for all the public holidays he says he worked for Glen Innes Liquor. Clause 7.2 of the employment agreement states:

7.2 Payment for work on a Public Holiday;

(a) The employee shall be entitled to be paid for the time actually worked on a Public Holiday at the rate of time and a half of their relevant daily pay.

(b) If the employee is otherwise required to work on a Public Holiday, the employee shall be entitled to an alternative holiday on pay.

[46] Mr Bhatti claims he worked on 8 public holidays during the period of his

employment. I have discounted Mr Bhatti's claim that he worked on Christmas Day

2014 as the store was closed. Mr Bhatti says he worked doing a stock take all day with Mr Amandeep Singh and Mr Digvijay Singh. I have accepted Mr Digvijay Singh and Mr Amandeep Singh's evidence that there was no stock take undertaken at the store on Christmas Day 2014.

[47] Mr Kumar denies Mr Bhatti worked on any of the public holidays falling within his period of employment. The difficulty I have with this statement is that Glen Innes Liquor has failed to provide any wage records or holiday records. For the reasons set out earlier I have serious concerns about the veracity of the timesheet documents provided to me.

[48] In the absence of any reliable evidence from Glen Innes Liquor to the contrary I have accepted on the balance of probability Mr Bhatti worked on seven public holidays and is entitled to receive payment for the hours worked at 0.5 of the ordinary rate (Mr Bhatti has already received payment at the ordinary rate) plus payment for the day in lieu.

[49] Due to the credibility issues raised earlier I have calculated the payment of the seven public holidays on the premise that Mr Bhatti worked 8 hours a day. The annual salary of \$40,976 is equivalent to an hourly rate of \$19.70 (based on a 40 hour week).

[50] Mr Bhatti is entitled to receive payment of \$1,103.20 gross for the alternate holiday plus \$551.60 being 0.5 of the ordinary rate for the hours worked on the public holidays.

[51] Aotearoa Smart Buy NZ Limited trading as Glen Innes Liquor Centre is ordered to pay to Mr Bhatti the sum of \$1,654.80 gross within 28 days of the date of this determination pursuant to section 131 of the Act.

Wages protection Act - Payment of a premium

[52] Mr Bhatti claims he was required to pay to Glen Innes Liquor the sum of

\$250.00 each week, increasing to \$293.80 totalling \$5,569.40 and seeks reimbursement of the full amount. Mr Bhatti says he paid the money to ensure his ongoing employment.

[53] Mr Bhatti's claim amounts to an allegation that he was required to pay a "premium" for his employment which is prohibited by [section 12A](#) of the [Wages Protection Act 1983](#).

[54] [Section 12A\(1\)](#) of the [Wages Protection Act 1983](#) provides:

No employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.

[55] In *Sears v Attorney-General* it was held:

"[i]n the normal understanding of the term a premium imports some consideration paid or demanded as a price of a contract."¹

[56] Mr Bhatti's bank statements do show withdrawals consistent with his evidence that he was paying Mr Kumar money after he received each pay. However, Mr Amandeep Singh told me in his evidence:

[Mr Bhatti] called me after his resignation and wanted to meet me. I met and at the meeting he said that he wanted to give evidence against the respondent and say that he was taking money from him for giving him a job, that he was overworking him, that he did not give him time off when he was sick. I refused as this was not true.

[Mr Bhatti] then started harassing me and following me and would pressure me into saying these things. He stalked me. I feared for my safety and had to take out a trespass notice against [Mr Bhatti].

[57] For the reasons set out earlier I have preferred the evidence of Mr Amandeep Singh over that of Mr Bhatti. Mr Amandeep Singh and Mr Bhatti were friends. Taking a trespass order against anyone is a difficult thing to do let alone someone who has been a friend.

¹ *Sears v Attorney-General* [1994] NZEmpC 130; [1994] 2 ERNZ 39 (EmpC) at 61.

[58] Further, this is not the only allegation I have received that Mr Bhatti was attempting to intimidate Mr Amandeep Singh. During the first day of my investigation I asked Mr Amandeep Singh to provide copies of his bank statements for March 2015. This is because Mr Bhatti claims he borrowed money from Mr Kumar in March 2015 to give to Mr Amandeep Singh. Because of the identified credibility issues I requested Mr Amandeep Singh to provide copies of his bank statements for the period in question in an effort to ascertain the truth of the matter.

[59] On 22 June 2016 I received a memorandum from Counsel for Glen Innes Liquor alleging that Mr Amandeep Singh had suffered from further intimidation by Mr Bhatti and could not be located. In response I advised both parties that I took any allegations of intimidation of witnesses extremely seriously and would not hesitate to act under section 196 of the Act.

[60] Mr Bhatti has provided me with photos taken of pages from a book in which he says the payments made to Mr Kumar were recorded. The difficulty I have with this evidence is that the payments recorded in this book are for \$140.00 and are not consistent with what Mr Bhatti says he was required to pay Glen Innes Liquor. Also, it was established during the investigation meeting that the payments were for the purchase of beer.

[61] I have also considered the dates of the payments recorded in the book compared to the withdrawals from Mr Bhatti's bank account. I have noted that a number of dates are not consistent with those withdrawals.

[62] In the absence of any reliable evidence I am not satisfied Mr Bhatti has established his claim.

[63] To be clear, if the evidence had been more reliable and if I had found a breach of [section 12A](#) of the [Wages Protection Act 1983](#), Glen Innes Liquor would have been held liable not just for the reimbursement of the full amount but also to a significant penalty.

Breaches of the employment agreement

[64] Mr Bhatti claims Glen Innes Liquor breached the terms of his employment agreement with respect to the failure to pay his salary, payment for public holidays

and for the implied term of providing a healthy and safe work place when he was required to work long hours.

[65] I have already found that Mr Bhatti has failed to establish a breach of the employment agreement with respect to the payment of his salary. I have, however, found that Glen Innes Liquor has breached the terms of the employment agreement when it failed to pay for public holidays in accordance with clause 7.2.

[66] Mr Bhatti also claims Glen Innes Liquor breached the implied term of his employment agreement by failing to provide a

healthy and safe working environment in respect of the hours he was required to work and he suffered from severe back strain.

[67] I have already found that the evidence about the hours Mr Bhatti says he was required to work is not reliable. Mr Bhatti has provided no evidence to support his claim that he suffered from any medical conditions related to his working hours. The only medical certificate produced by Mr Bhatti confirmed Mr Bhatti had attended his doctor on 28th August 2015. The doctor noted that Mr Bhatti told him he was suffering from extreme stress and that the stress stemmed from a dispute with his previous employer (Glen Innes Liquor) and noted that Mr Bhatti felt he was made to work under unfair conditions.

[68] Mr Bhatti has not established to my satisfaction that Glen Innes Liquor has breached its implied obligation to provide a healthy and safe work environment.

Breaches of good faith

[69] Mr Bhatti claims Glen Innes Liquor breached its obligations of good faith when he was disadvantaged in his employment and as a result of the exploitation he suffered. Mr Bhatti's claims relating to exploitation have not been established and neither has Mr Bhatti established that he was disadvantaged during his employment.

[70] I am not satisfied Mr Bhatti has established that Glen Innes Liquor acted in breach of its obligations of good faith.

Penalties

[71] Mr Bhatti seeks penalties for each of the claimed breaches to the maximum of

\$20,000 for each breach.

[72] Penalties are designed to punish and deter others from engaging in similar conduct.² I have found Glen Innes Liquor has breached the employment agreement when it failed to pay public holidays in accordance with the requirements of clause

7.2 of the employment agreement.

[73] Clause 7.2 of the employment agreement reflects the minimum standard required of employers regarding payment for work undertaken on public holidays. A breach of this clause of the employment agreement is also a breach of the minimum standards required. Such breaches by employers are serious.

[74] This was a sustained breach over the period of Mr Bhatti's employment. Mr Bhatti's ability to work in New Zealand was tied to his employment with Glen Innes Liquor and because of this he is considered to be a vulnerable employee. There has been no remorse shown by Glen Innes Liquor for its breach which I find to be deliberate.³

[75] I consider a penalty at the lower end of the scale to be appropriate in the circumstances.

[76] Aotearoa Smart Buy NZ Limited trading as Glen Innes Liquor Centre is ordered to pay to the Crown via the Authority a penalty of \$1,000.

Section 134 application

[77] Mr Bhatti claims under section 134(2) of the Act that Mr Kumar incited, instigated, aided or abetted the breach of clause 7.2 of the employment agreement.

[78] Mr Kumar as the sole director and shareholder of Glen Innes Liquor was responsible for the breach of Mr Bhatti's employment agreement. Mr Kumar was the business owner and decision maker. He was the person giving instructions regarding Bhatti's employment so I find that Mr Kumar did aid and/or abet the breach of Mr Bhatti's employment agreement when it failed to pay for public holidays in

accordance with clause 7.2.

² *Tan v Yang & Zhang* [2014] NZEmpC 65 followed.

³ [Employment Relations Act 2000, section 4A\(e\)](#).

[79] However, I have declined to impose a penalty against Mr Kumar for the breach on the basis that Mr Kumar was absent overseas during four of the six months Mr Bhatti was employed by Glen Innes Liquor.

Counter-claim

[80] Glen Innes Liquor originally claimed more than \$60,000 by way of counter-claim against Mr Bhatti. During the investigation meeting the bulk of these claims were withdrawn leaving only the claim that Mr Kumar loaned Mr Bhatti the sum of

\$3,500 on 12 March 2015. Mr Kumar has produced a document entitled "Promisory Note" which purports to set out the terms

under which Mr Bhatti borrowed the money and which states (verbatim):

I, Sukhhinder Singh Bhatti residing at [address not published], hereby promise to pay back in full the borrowed amount of \$3,500 to Surender Kumar residing at [address not published]. If I fail to pay the agreed amount within two weeks, Surender Kumar will be entitled to 25% of interest per month on the borrowed amount.

[81] The note is signed by Mr Bhatti and dated 12 March 2015.

[82] The Authority is a creature of statute and is only able to investigate employment relationship problems arising out of an employment relationship. The promissory note evidences an agreement between Mr Kumar personally and Mr Bhatti. There was no employment relationship between Mr Kumar and Mr Bhatti. Mr Bhatti was at all times employed by Aotearoa Smart Buy NZ Limited trading as Glen Innes Liquor Centre.⁴

[83] The Authority has no jurisdiction to investigate Mr Kumar's counter-claim against Mr Bhatti.

Costs

[84] Costs are reserved. The parties are invited to resolve the matter. Given the extent to which both parties have been successful I have formed the preliminary view

that costs should lie where they fall.

⁴ *JP Morgan Chase Bank NZ v Lewis* CA587/2013, [\[2015\] NZCA 255](#) followed.

[85] However, if the parties are unable to agree on the matter of costs Mr Bhatti shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Glen Innes Liquor shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell

Member of the Employment Relations Authority

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