

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 181/10  
5296639, 5296646, 5296648

BETWEEN SRIKANTH DAMACHARLA

SATYANARAYANA RAJU  
UPPALAPATI

SUBBA RAO KOTHAPALLI  
Applicants

AND SOUTHERN ROCKS PACIFIC  
LTD  
Respondent

Member of Authority: P R Stapp

Representatives: Simon Parsons, Counsel for the Applicants  
Ruth Oakley, Counsel for the Respondent

Investigation Meeting: 31 May and 1 June 2010 at Palmerston North

Further information and Submissions/Telephone Conferences: 21, 25 and 29 June 2010 and 20 August and 10 September 2010

Interpreter: Ludhiya Priyadarshini

Determination: 8 November 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicants were employed by Southern Rocks Pacific Ltd (SRP). They have an issue with SRP in regard to the start date of their employment. They have raised a claim for unpaid wages and overtime during the course of their employment and personal grievances in regard to deciding to leave their employment when they were not paid. They also claim that SRP has not acted in good faith in accordance with the requirements of s 4 of the Employment Relations Act 2000 (the Act).

[2] The three applicants have also claimed that they left their employment because of the treatment they received during their employment at SRP.

[3] SRP has denied all the claims.

[4] SRP has accepted that it has failed to pay wages to the applicants on time during their employment. It has paid into trust sums calculated for any wages and holiday pay owing to Srikanth Damacharla, Subba Rao Kothapalli and Satyanarayana Raju Uppalapati. However, SRP HAS denied that it owes Satyanarayana Raju Uppalapati any holiday pay because he took time off to go back to India. It is denied it owes the applicants any overtime at all. It has opposed the claim for interest and penalties.

[5] The employment relationship problems for the applicants have been made more complicated due to the sheer volume of documents and number of witnesses. For completeness the documents from the applicants that have been referred to for their evidence is in their statements of problem and the attached index of documents 1-24, the amended statements of problem filed in the Authority and bundles B1-16, and the applicants' submissions.

[6] The respondent's documents were bundles 1-103. There were separate briefs of evidence examined.

### **The Issues**

[7] A number of issues have emerged during the investigation meeting and the submissions from all the parties. The relevant issues are:

- (a) When did the applicants start work for SRP? What days and time did the applicants work during their employment with SRP?
- (b) Are the applicants owed any arrears of wages (including overtime) and holiday pay?
- (c) How did the applicants' employment with SRP end, and for what reasons?

- (d) Is Satyanarayana Raju Uppalapati owed approximately \$7,333.33 other money he allegedly paid to Mr Ravikumar Gaddam, SRP's sole director, in India?
- (e) Is Subba Rao Kothapalli owed \$6,666.67 and any other money he paid to Mr Gaddam in India?
- (f) If the applicants have a personal grievance what remedies should apply?
- (g) Have there been any breaches of the applicants' employment agreements and the Employment Relations Act for penalties claimed for failing to keep and produce wage time and holiday records and for any breach of good faith?

### **The facts**

[8] The applicants lived in India and were recruited and employed by Southern Rocks Pacific Ltd, owned by Mr Gaddam. The start date for each of the applicants is in dispute. Srikanth Damacharla claimed that he started work on 15 September 2008. Satyanarayana Raju Uppalapati and Subba Rao Kothapalli say they started work on or about 1 October 2008. SRP claimed that the applicants started work on or about 16 January 2009.

[9] I hold that it is more likely that Srikanth Damacharla started work on 15 September 2008. Also it is more than likely that Satyanarayana Raju Uppalapati and Subba Rao Kothapalli started work on 1 October 2008. I am supported in making this finding by the existence of two employment agreements produced for Srikanth Damacharla and Satyanarayana Raju Uppalapati that were signed in January 2008 and both employment agreements had a start date of 17 March 2008. There was no employment agreement produced for Subba Rao Kothapalli although the parties agree that the other employees' employment agreements contained the terms that applied to him. All the agreements contain a start date 17 March 2008 (employer's documents). Indeed all three applicants had arrived in New Zealand before their start dates. In addition there were no terms agreed in regard to any pre-employment training and familiarisation for the work at SRP.

[10] The applicants were employed as stone masons at SRP's factory in Levin that produced granite kitchen benches. There is a dispute that the applicants' work involved some monument work. There is also a dispute that part of the duties for the applicants including driving and delivering around the North Island.

[11] First, it is common ground that Srikanth Damacharla did do some monument work, but the evidence supports SRP that it was no longer involved in that work as that part of the business had been sold on 13 December 2007 to another company: Monumental Imports Ltd or Astral Memorials Ltd. There was no evidence produced that there were any business arrangements existing between these companies and SRP.

[12] Second, SRP denied that Satyanarayana Raju Uppalapati's duties included driving and it has been claimed by SRP that he must have been working for another company when he was in those places driving and delivering. However, the employer's contention is likely to be doubtful when Satyanarayana Raju Uppalapati had a work permit that restricted him to work with SRP. This leaves any driving that Satyanarayana Raju Uppalapati did during his employment unexplained but more than likely he did some driving for SRP. This is because another worker lost his driver's licence.

[13] On 31 July 2009 Satyanarayana Raju Uppalapati returned to India. He has claimed that while he was in India Mr Gaddam agreed to give him money on the condition that he returned to New Zealand to work for SRP. He returned to New Zealand on 2 October 2009. He was away for approximately 10 weeks.

[14] There have been difficulties during the employment with payments not being made on time by SRP as required under the employment agreements. Witnesses did confirm late payments of wages. In addition various payments were made in cash and by cheque and made to some of the families in India. It is common ground that the applicants' signed off timesheets for 30 hours for 4 days per week before Mr Ramana Sonthi, the factory manager, decided they could stop. Mr Gaddam and Mr Sonthi say that these records were only for the purpose of recording wages and they both accepted that the records were not accurate. Two of the applicants say they filled out their own time sheets with help from another person but never handed them in and have only produced them for this investigation.

[15] Srikanth Damacharla has claimed that he is owed a total of \$54,913.29 after tax for arrears and holiday pay, and after making deductions (of \$14,745.96) for the payments he says he had received during his employment. This does not include the amount claimed for overtime. I will deal with that separately later.

[16] Satyanarayana Raju Uppalapati claimed that he is owed a total of \$36,366.67 for wage arrears and holiday pay after making deductions (of \$14,250) for the payments received during his employment. This does not include the claim for overtime. I will deal with that separately later.

[17] Subba Rao Kothapalli claimed that he is owed a total of \$46,621.75 after tax for arrears and holiday pay and after making deductions (of \$11,950). He also has claimed that he should be reimbursed the sum of \$6,666.67, that he had to pay Mr Gaddam to work in New Zealand, and has claimed \$2,000 that he had to Mr Gaddam for expenses he says. Again I have not included the claim for overtime, which I will deal with separately later.

[18] Mr Gaddam has given evidence that Srikanth Damacharla is owed \$8,391.40 (employer's document 17 and 19) arrears of wages and holiday pay based on a reassessment of the hours worked. Mr Gaddam has claimed that Srikanth Damacharla was paid \$16,979.00 in cash and by cheque and to his family in India. SRP accepts there is no record of any holiday being taken.

[19] Mr Gaddam says that Satyanarayana Raju Uppalapati is owed \$1,365.35 based on a reassessment of his hours worked. He says that the ten weeks holiday taken in India has been factored into this calculation for any holiday pay. Thus, he claims that Satyanarayana Raju Uppalapati is not entitled to any holiday pay. He claims that Satyanarayana Raju Uppalapati was paid \$22,429.33 in cash and cheque and to his family in India. SRP accepts that there is no record of any holiday being taken for this applicant.

[20] Mr Gaddam says that \$8,870.40 is owed to Subba Rao Kothapalli which includes holiday pay based on a reassessment of the hours worked. Mr Gaddam has claimed that Subba Rao Kothapalli was paid \$16,500 in cash and by cheque during his employment. There is no record of any holidays being taken for this applicant either.

[21] On 3 February 2009 Subba Rao Kothapalli sustained an injury and was off work for approximately three weeks he claims. In his statement of problem he has

claimed the first week's wages and 80% of his weekly wages for two weeks from SRP for the time he was off work. This claim had not been raised earlier in the 28 January letter raising a personal grievance. Nor was there a claim made by the applicant to ACC, despite going to the doctor and getting a medical certificate. There has been conflicting evidence given as to what the applicant did in the time he was injured, and whether or not he actually did go to work for some of the time. Also there is conflicting evidence about what was involved in the injury. SRP did not report the injury.

[22] Subba Rao Kothapalli's evidence about what he did during the time he was injured has been challenged by Mr Sonthi.

[23] The applicants ended their employment with SRP on or about 10 January 2010 when they decided not to return to work because they had not been paid. The applicants accept that Mr Sonthi made attempts to contact them to return to work. Mr Sonthi wrote a letter dated 19 January 2010 (SIR 14) to each of the applicants requesting them to make contact. There was no reply, but on 20 January 2010 the applicants' lawyer wrote a letter to SRP purporting to raise a personal grievance and making a claim for unpaid wages, overtime and holiday pay. Any contact between these parties became more difficult when Satyanarayana Raju Uppalapati and Subba Rao Kothapalli arranged a trespass notice against Mr Gaddam and Mr Sonthi.

[24] Subba Rao Kothapalli in his evidence (SOP) has alleged that Mr Gaddam became abusive during their employment. This allegation was not raised in any complaints before January 2010 and was never referred to by the applicant in his personal grievance letter.

[25] Also, Subba Rao Kothapalli's statement of problem raised, for the first time, an issue about a dangerous work place, which has been denied by Mr Gaddam and Mr Sonthi in the statement in reply. There was no claim made earlier by the applicant in regard to this matter. The same issue was raised also by Satyanarayana Raju Uppalapati, but again, in reply, the respondent denied that claim.

[26] Each of the applicants obtained another job in March 2010, eight weeks after leaving SRP.

[27] The parties attended mediation. It now falls on the Authority to make a determination of the issues.

**Credibility**

[28] The credibility of witnesses has been a feature of the parties' employment relationship problems as presented before me. The issues have meant that all the parties have competed with each other and escalated the matters by producing numerous witnesses and have produced large quantities of documents. On the matter of credibility I have decided that there has been nothing produced to suggest that witnesses have been dishonest and not told the truth in regard to the relevant issues, but their evidence is what they believe and understand from their experience as the truth, but because of the witnesses' roles, I find that this does not mean that their evidence happens to be reliably correct.

[29] For this reason I have relied on the employment agreements as the starting point, and the balance of probabilities as to what was more likely to have been the situation on the applicants' start dates in their employment with SRP.

[30] First, the applicants were working in New Zealand on work permits that stated their employer was Southern Rocks Pacific Ltd. There are at least two employment agreements and these set the terms of employment for Srikanth Damacharla and Satyanarayana Raju Uppalapati. Subba Rao Kothapalli did not have an employment agreement produced, but it is more than likely that the terms of these two agreements applied to Subba Rao Kothapalli also.

[31] Second, the applicants were each very dependent on SRP, as they were migrant workers on work permits and had never worked in New Zealand prior to this engagement. The employer has not been of much assistance by not keeping proper wage, time and holiday records, and I will refer to this again later.

[32] Third, there is evidence that showed some payments being made in September and December 2008. Also a document from IRD supports a payment of wages being made in December 2008.

[33] The arrangements for the applicants' employment were loosely managed and the documentation is a poor record in regard to being a reliable indicator of the applicants' attendance and payments for work.

[34] Initially I was going to detail the evidence relied upon by both parties, but because of the volume and intricacies that they have placed on this evidence and such

a wide ranging number of issues (some of which are not directly relevant or even helpful), I have decided not to do that, and instead I summarise that my conclusions are based on the general factors that include:

- (a) The employment agreements that have been produced for two of the applicants are a useful starting reference;
- (b) Timesheets produced are not reliable because:
  - (i) The applicants' timesheets have never been seen by the respondent before the investigation meeting. Also the timesheets were prepared by someone else; and
  - (ii) The timesheets relied upon by SRP were constructed with the purpose of providing a record of some wages being paid for a certain period before they ceased. The records were not accurate. Mr Gaddam did not know if they were accurate. Mr Sonthi did not care. Mr Sonthi admitted the timesheets were not accurate and were a record of wages. Other witnesses contradicted the information about time and hours worked. The applicants were required by Mr Sonthi to fill the timesheets out, which would explain why they signed them. And Mr Sonthi signed them off without any other adequate explanation for their existence given they later ceased. I do not accept that it is plausible that he stopped the timesheets because the wages and hours were standard, and especially where the law requires the employer to keep proper wage time and holiday records.
- (c) Evidence from the parties' witnesses involved those witnesses providing their opinions on various matters and estimates on time they say they saw the three applicants working. The character references have not assisted me either because of the challenges made between all the parties on the evidence. Whilst the same witnesses say they observed the applicants' at work at various times they could not say with any certainty what the terms and conditions of the applicants' employment were. However, some of the witnesses' evidence has assisted to establish that the respondent's timesheets could not have

possibly been correct. Those witnesses confirm that the timesheets were only filled in on a pro forma basis. I am however satisfied that any work would have been associated with the 40 hour provided under the terms of the applicants' employment agreements.

- (d) It was likely that the factory was shut down during the festive seasons 2008 – 2009 and 2009 – 2010 because of Mr Gaddam's and Mr Sonthi's absences.
- (e) Diary notes produced cannot be relied on because they were produced after the event for this matter and involved someone else writing them up.
- (f) The decision made by the applicants not to return to work is probably explained as being more likely because they were not being properly paid. They have in their statements of problem referred to not being treated properly during their employment and that the workplace was dangerous. These were not matters that had been previously raised by the applicants during their employment. When they gave evidence before me I found their evidence to be vague and lacking in any specifics. Also there were no proper records and any prior complaints associated with a dangerous place of work.

## **Determination**

[35] The employment agreements between SRP and Srikanth Damacharla and Satyanarayana Raju Uppalapati made provision for hours of work in the following terms:

### **6. Hours of work**

*6.1 Full time hours with an obligation to perform overtime as necessary with an entitlement to extra pay.*

*The employee's normal hours of work shall be 40 hours per week, between the hours of 6am to 4.30pm on week days. The employee may also be required to perform such overtime as may be reasonably be required by the Employer in order for the Employee to properly perform their duties. Where extra hours are performed the Employee shall be entitled to an overtime payment as set out in the wages clause below.*

[36] The next relevant provision is a variation on hours of work. The provision is as follows:

**6.4 Variation to Hours of Work**

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

- (i) *By mutual agreement between the Employee and the Employer; or*
- (ii) *If agreement cannot be reached, by the Employer, following consultation with the Employee, provided that the Employee's minimum hours of work are not reduced below 30 hours and that any increase in hours of work is reasonable.*

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

[37] These terms can be implied for Subba Rao Kothapalli given that there was an agreement for him, but that it has not been produced and was likely to have contained the same provisions.

[38] There is no evidence:

- (i) That there was ever any mutual agreement to work 30 hours per week; and
- (ii) That the employer consulted any of the applicants to work 30 hours per week.

[39] I hold that each of the applicants had a reasonable expectation and understanding that they would be working 40 hours a week because of the terms of the employment agreements. A fair and reasonable employer would be expected to put any mutually agreed variation, and/or any decision to reduce hours, in writing considering clause 14.1 of the two agreements that had been produced, and the terms implied for Subba Rao Kothapalli, that provide for a variation of the agreements in the following terms:

*The parties may vary this agreement, provided that no variation shall be effective or binding on either party unless it is in writing and signed by both parties.*

[40] A prudent and cautious employer would have followed this process to have some record of any change, even although it was not obliged to under the hours of work clause, and clause 14.1 arguably stands on its own. I accept that it would be open to the employer to provide fewer hours under the terms of the employment agreements, and the employer was not required to make a variation under clause 14.1, but the change did require consultation because such a change had to be reasonable and the employees' personal circumstances and commitments had to be taken into account. There is no evidence, in the absence of any document of any other arrangements being entered into before the applicants started work. Furthermore there was no consultation in any event to reduce hours, I hold.

[41] I hold that it was more than likely the applicants worked more than 30 hours per week. I further hold that in regard to the work being undertaken that it was more than likely that the applicants were accounting for at least up to 40 hours per week. In any event under the terms of the employment agreements the applicants had a reasonable expectation and understanding that they were required to work 40 hours per week under the terms of those agreements.

[42] Also, to support my findings, I have found that the time sheets submitted in the employment relationship problem by Srikanth Damacharla and Subba Rao Kothapalli are simply not reliable enough because there is a lack of any certainty about when the time sheets were filled in, and who filled them in, and what details the information was based. The time sheets appear to have been completed to cover the past and filled in from memory for their claims. As such I have found the reliability of the timesheets to be doubtful to give them any weight.

[43] Satyanarayana Raju Uppalapati did not keep his own time sheets during the employment and this adds further uncertainty about his hours of work and days and overtime he claimed he worked.

[44] In addition, the respondent has produced the time sheets for 16 January 2009 to 26 June 2009. These time sheets provide information that the hours worked equate to 30 hours for four days per week. Mr Gaddam during the course of his evidence before me accepted that he did not know if the time sheets were indeed an accurate record. Mr Sonthi during his evidence before me accepted that he did not care much for the detail in the time sheets and he acknowledged the time sheets produced were

not an accurate record of the time the applicants actually worked, but they were produced only for salary purposes and each of the applicants filled them out and signed them off and it did so because they believed they were needed for reasons unrelated to the requirements of keeping a proper records under the Employment Relations Act and Holidays Act. The time sheets I find have also proved to be inconsistent with the applicants' carrying out work that has been witnessed by other people who confirmed that the applicants were working during different times not recorded.

[45] I conclude, therefore, it is more than likely Srikanth Damacharla commenced work on 15 September 2008, and that Satyanarayana Raju Uppalapati and Subba Rao Kothapalli commenced work on or about 1 October 2008. The evidence also supports my conclusion that each of the applicants worked 40 hours, five days a week.

[46] I also hold that it is more than likely that the factory shut down for two periods from 23 December 2008 until 12 January 2009 and 23 December 2009 until 11 January 2010 and that the applicants would have been entitled to the payment of holidays in advance for those two festive seasons.

### **Overtime and extra hours**

[47] I find that the applicants' claim for overtime and extra hours has not been persuasive. This is because:

- (a) There was no evidence of any authority for them to work overtime;
- (b) The applicants were not consistent in their evidence about the days and hours they claimed;
- (c) The applicant's witnesses could only provide estimates of the time they say they saw the applicant's working. In the circumstances this is not sufficient, I hold. However, I do accept that their evidence of the applicant's working would be within the 40 hours per week (including work on Fridays) under the applicants' terms and conditions of employment.
- (d) The applicants' understanding of their claims was poor, notwithstanding English is their second language;

- (e) I have doubts about Srikanth Damacharla's alleged contemporaneous diary notes that he produced for the first time at the Authority's investigation meeting. I have my doubts about who wrote the notes and when the notes were written;
- (f) There was some conflict about the number of days claimed where the factory was closed for shut downs and whether or not the applicants' attendance either at the factory or at Mr Gaddam's home was with any authority. The balance of probabilities must lie with the employer where Mr Gaddam and Sonthi referred to the shut downs and their personal arrangements to be absent from work during these periods and that overtime had not been authorised;
- (g) The applicants had no real idea of what statutory holidays were involved, if any, and how these days were calculated within their claim. However, I have treated them as paid days taken as holidays in the overall calculation. I have not included them as overtime (and days in lieu) because I have not been satisfied what days the applicants have claimed they worked;
- (h) The applicants did not make any claim for any outstanding wages, overtime and holiday pay before leaving their employment. Indeed they did not make any complaints to any body and it is reasonable to have expected them to do so, such as complaining to a labour inspector, immigration officials or anyone else; which they were able to do after they left their employment;
- (i) I find it is unlikely the overtime claimed occurred because there were two Christmas shut downs that should have been taken and calculated as annual leave (in advance for the first festive season) and claims made that relate attendance at the premises without Mr Gaddam's and Mr Sonthi's knowledge and/or authority for overtime to be worked. Indeed Mr Gaddam has claimed that he engaged someone else to mow his lawns and look after his house (not challenged);

- (j) The applicants have not clearly made any allowance in their claims and any overlapping time with their work for a number of social events and skiing trips that Mr Gaddam arranged for them;
- (k) The lack of particular detail makes it unsafe for me to agree with the applicants' calculations, I hold. The timesheets relied upon by parties are uncertain and open to challenge of not being reliable, valid or having integrity;
- (l) Because of the manner and way that the timesheets and diary notes have been produced for the investigation meeting and how they have been written up, I have decided not to rely on them;
- (m) SRP used other firms to transport product: (eg Respondent's documents 46, 47 and 48).
- (n) I conclude that the claim for overtime is likely to be inflated.

[48] Although in the absence of wage and time records s 132 of the Act would apply in this instance, I hold that the applicants have not done enough for me to accept their claims as uncontested when the evidence does point to the claim for over time and extra days being inflated and unreliable and clouded in some doubt.

[49] In addition the respondent has tried to refute the applicants' claims about the extent of their hours of work by producing a spreadsheet of manufacturing of bench tops during the time to support only 30 hours being available. I have not given this much weight because it fails to be an adequate quantitative indicator of what was involved because of the conflicting evidence about the extent of work that the applicants were required to undertake, I hold.

[50] I now wish to turn to the unanswered and unexplained issue about the applicants working with monuments and whether or not this was work for another business during some of this time, and using a truck not owned by SRP and owned by someone else.

[51] Mr Gaddam has denied any claim that SRP had some contract with another company operating with the work associated with monuments and the vehicle being used that involved Srikanth Damacharla, Satyanarayana Raju Uppalapati and Subba

Rao Kothapalli and for them to claim any further wages from SRP. The evidence is that someone else owns the truck, and another company was registered for monument work. This evidence supports my conclusion to give the applicant's claims over and above their 40 hours for 5 days per week little weight. The continuation of the use of SRP's signage on the truck remains unexplained, and there is no evidence that Mr Gaddam had any continuing responsibility over the use of the truck. My findings in regard to the contractual obligations that make it more than likely the applicants worked 40 hours per week 5 days a week means that any work in this time would have been associated with SRP, and that SRP had the responsibility for the applicants and their work during that time.

[52] Also, there is no satisfactory evidence to establish that any driving involving Subba Roa Kothapalli and Satyanarayana Raju Uppalapati was not associated with their duties at SRP. It was likely to have related to their employment with SRP, while their driver's licences were valid, when they and other SRP employees were involved with work off site and worked together involving some travel for installing bench tops, deliveries and getting quotes, I hold.

[53] Subba Rao Kothapalli's claim for wages due because of injury is affected by the conflicting evidence from both sides, and ACC requirements. If there was a reported ACC accident Subba Rao Kothapalli could only expect the employer to pay his first week's wages. He would not have been entitled to sick leave at the time because he had only been working for three months. There is no top up provision in his employment agreement. In the absence of any agreement on payment and the conflicting evidence of what happened during that time, I find that Subba Rao Kothapalli has not established his claim.

### **Hours of work and wages owing**

[54] I now turn to each of the applicants' claims in regard to their hours of work and the actual amounts of wages due.

[55] First, SRP has calculated Srikanth Damacharla's hours from 16 January 2009 on the basis of a 32 hour week and has changed this to 37.35 hours per week (excluding paid tea breaks). The fact is that Srikanth Damacharla is entitled to be paid from 15 September 2008 at \$15 per hour for five days per week for 40 hours per week under the terms of the employment agreement. The total gross pay should have

been \$39,600 for 66 weeks as claimed, and by my calculation. A deduction has to be made for the payments Srikanth Damacharla received from SRP during his employment. That deduction amounts to the average of both parties' claims on the amounts paid in the sum of \$15,862.48: paid by cash, cheque and to his family in India (SOP and employer's document).

[56] I have determined an average because the details produced by both parties of the amounts they believed had been paid cannot be reconciled to determine the correct sum. The amount owing to Srikanth Damacharla is \$23,737.52, including holiday pay for 15 days of shut down (2008/2009 and 2009/2010). He is owed a remaining 5 days annual leave (I will explain this in more detail shortly).

[57] Second, on the same basis I have calculated that Satyanarayana Raju Uppalapati should have been paid \$33,600 for 56 weeks from 1 October 2008, including a deduction for 10 weeks for the time he went to India (31 July 2009 to 2 October 2009), and for which he was not entitled to holidays and no holidays in advance were arranged. Also, he says he took 2 weeks off work during the 2008/2009 festive season and presumably not paid. The total also includes the break taken during the festive season in 2009/2010. The average amount of deduction for the amounts that he received during his employment is \$18,339.65: paid by cash, cheque and to family in India.

[58] I hold that SRP owes Satyanarayana Raju Uppalapati the sum of \$15,260.35 for wages. Offsetting the shut downs and incorporating leave entitlements he is owed two days for holidays (I will explain this in more detail shortly).

[59] Third, I have calculated Subba Rao Kothapalli's total gross pay should have been for 66 weeks from 1 October 2008 as claimed, less approximately 3 weeks he says he did not work due to injury. This amounts to \$37,800. The average amount of deduction for monies paid was \$14,225: paid by cash and cheque. The medical details show that he would have been off work for at least 2 weeks and 3 days. The amount owing to Subba Rao Kothapalli is \$23,575 for 63 weeks, including holiday pay for 15 days of shut down (2008/2009 and 2009/2010). He is due 5 remaining days for holidays (I will explain this in more detail shortly).

[60] SRP has not assisted its defence in this matter by changing its position on the amount of hours, excluding tea breaks when they should obviously be included, and failed to keep proper records.

[61] In conclusion, Srikanth Damacharla is owed \$23,737.52, Satyanarayana Raju Uppalapati is owed \$15,260.35 and Subba Rao Kothapalli is owed \$23,575 wages.

### **Holiday pay**

[62] Srikanth Damacharla's holiday entitlement was four weeks after his first year. He had used 7 days in advance during the first shut down. Thus, he was due 13 days on his 12 month anniversary (15 September 2009). He used 8 days in the second shut down (2009/2010). He would be due 5 days annual leave based on average weekly earnings, and 8% of his gross earnings for the unexpired portion of his employment between 15 September 2009 and 10 January 2010. His estimated gross earnings amount to \$10,200.00 for this period, I hold. He is entitled to \$600 for the 5 days outstanding holiday pay and \$816.00 for the period of his new entitlement not completed (at 8% of gross earnings).

[63] Satyanarayana Raju Uppalapati's holiday entitlement was four weeks after his first year. He had used 10 days in advance during the first shut down (the two weeks he took off). Thus he was due 10 days on his 12 month anniversary (1 October 2009 which after 10 weeks leave without pay would have been 10 December 2009). He used 8 days in the second shut down (2009/2010). He would be due only 2 days, and 8% of his gross earnings for the unexpired portion of his employment between 1 October 2009 and 11 January 2010. His estimated gross earnings amount to \$8,400 for this period. He is entitled to \$240 for the 2 days outstanding holiday pay and \$672.00 for the period of his new entitlement not completed (8% of gross earnings).

[64] Subba Rao Kothapalli is entitled to four weeks holiday after his first year. He had used 7 days in advance during the first shut down. Thus, he was due 13 days on his 12 month anniversary (15 September 2009). He used 8 days in the second shut down 2009/2010. He would be due only 5 days, and 8% of his gross earnings for the unexpired portion of his employment between 1 October 2009 and 11 January 2010. His estimated gross earnings amount of \$8,400 for his period. He is entitled to \$600 for the 5 days outstanding holiday pay and \$672 for the period of his new entitlement not completed (8% of gross earnings).

**Other claims for money paid to Mr Gaddam in India**

[65] Subba Rao Kothapalli and Satyanarayana Raju Uppalapati say that they are owed money they paid to Mr Gaddam in India. It just does not make any sense the claim made by the applicants relates to a payment for tax in advance before their employment started.

[66] There are no contractual terms about what these payments were for, or even if it related to Subba Rao Kothapalli's and Satyanarayana Raju Uppalapati's employment in New Zealand. In the absence of any contractual terms and documents for repayment I have decided not to make any orders in respect to this matter. However, the matter does highlight a significant issue as to whether or not there was some premium being taken for employment, but there is not enough evidence to take this any further. However, the decision I have made to average all the payments both parties have submitted, and the fact that the applicants' representative felt that the intermittent payments would be treated by SRP as wages, I consider in equity and good conscience the averaging is a fair and appropriate way to conclude this matter, at least for these proceedings. I make no order on the payments made in India.

**Personal grievances**

[67] I hold that the applicants did not return to work after 10 January 2010. It is common ground that their employment ended on or about this date. Also, this is supported by:

- (a) The applicants were not properly paid;
- (b) SRP has conceded that sums of money are owed to each of the applicants;
- (c) SRP did not pay wages on time as required under the terms of the employment agreement during the applicants' employment;
- (d) SRP has breached the terms of the employment agreement when the applicants were not properly paid as required.

[68] My conclusion can only be that the applicants were not paid regularly and on time and that it would be more than likely that the primary reason for their leaving their employment related to this failure by SRP, especially given the times the

applicants were actually paid and the time lapse between their last payment and deciding enough was enough. I would comment that any employer who does not pay their employees correctly has to accept that it will become foreseeable that an employee at some point is not expected to continue to put up with it, and would be likely to resign and or leave and not return to work. In this regard the employer has repudiated the employment by not properly paying wages and holiday pay on a continuing basis and cannot rely on the defence that the employees have abandoned their employment.

[69] I hold that the evidence from Srikanth Damacharla that he was not properly treated during his employment has not been established given his vague evidence and lack of any specifics and Messrs Sonthi's and Gaddam's denials of the claim.

[70] I hold that the evidence from Mr Sonthi and Satyanarayana Raju Uppalapati of a disputed issue of whether or not Mr Sonthi told Satyanarayana Raju Uppalapati that he needed to get a New Zealand drivers licence remains unclear and uncertain given Mr Sonthi denied the claim.

[71] I hold that the evidence from Mr Sonthi and Subba Rao Kothapalli on the same disputed issue about getting a New Zealand drivers licence remains unclear and uncertain given that Mr Sonthi denied the claim. This evidence around the claim has not been helpful.

[72] However, the evidence about unpaid wages has been enough to support the claim of constructive dismissal. Srikanth Damacharla, Satyanarayana Raju Uppalapati and Subba Rao Kothapalli have not produced sufficient evidence to corroborate the claims and have not produced any other documents to assist the claim for any other reasons applying to their decisions not to return to work. The underpaid wages even by the employer's own calculation upon getting legal advice, after the employment ended, was significant, I hold.

[73] I also conclude that it is most unlikely that Subba Rao Kothapalli was suspended by Mr Sonthi due to not having a New Zealand driver's licence because Subba Rao Kothapalli says he left his employment because he was not paid and took out a trespass notice against Messrs Gaddam and Sonthi. It is not likely in such circumstances there was any suspension and this is further supported by a lack of any evidence on the details about this.

[74] Finally, I do not accept that Satyanarayana Raju Uppalapati has a claim in regard to leaving his employment because of a dangerous workplace. There were no other reasons provided for his decision not to return to work and this was a belated claim in the statement of problem and raised for the first time as an issue in that document. SRP has denied the claim in the statement in reply. There was no evidence of any complaints being made during the course of the employment about a dangerous workplace. Given Satyanarayana Raju Uppalapati's different and changing reasons for leaving I do not find this evidence compelling enough to support his claim that his leaving was due to any dangerous workplace.

[75] However each of the applicants has a personal grievance related to leaving their work when they were not paid, I hold.

### **Remedies for personal grievance**

[76] The applicants are each entitled to compensation for the reimbursement of lost wages caused by the dismissals. Each of the applicants I am satisfied has lost wages due to their decision not to return to work where the employer has breached its obligations to pay wages on time and correctly. My assessment is that 8 weeks lost wages for Srikanth Damacharla amounts to \$4,800, Satyanarayana Raju Uppalapati amounts to \$4,800 and Subba Rao Kothapalli amounts to \$4,800 given that they each were able to get alternative work in that time. They have not contributed to the situation giving rise to their personal grievances, I hold.

[77] I also accept that as they were able to obtain new employment, albeit at a lesser pay rate they have mitigated their losses. Therefore I make no deduction to the 8 week's lost wages. I am not satisfied that any differential in pay between SRP and their new employment has been properly established from the evidence to give them any more lost wages. Thus, I conclude that any losses have only been established for 8 weeks each.

[78] Each of the applicants is entitled to compensation for humiliation, loss of dignity and injury to feelings under s. 123(1) (c) (i) of the Act. However I hold that this was more of a matter to do with the recovery of wages and holiday pay and enforcement of rights and therefore the claim for compensation for a constructive dismissal must be at the lower end of the scale. There were other remedies available to enforce the applicants' rights other than resigning. I hold that much of the defence

has been focused on a paternalistic relationship between the employer and the applicants and that this would have been an influencing factor on them in regard to their rights and any procedures to follow during the course of their employment. I accept that the applicants' feelings were affected by the employer's actions and their decisions not to return to work.

[79] My assessment is that compensation for each of the applicants would be \$2,000. There is no deduction on this sum because the applicants did not contribute to the situation giving rise to their personal grievance.

### **Breach for not paying wages on time**

[80] SRP is in breach of the applicants' employment agreements for not correctly paying wages on time. I am not satisfied there is any evidence that there has been a breach of the Wages Protection Act as such. However the breach of employment agreement attracts a penalty under s 134 of the Act, because there has been a deliberate action by the employer not to pay wages on time.

[81] The failure to pay wages on time means that SRP must pay a penalty of \$500 to each applicant because SRP's action was deliberate and wilful in denying them the proper use of their wages.

### **Interest on arrears**

[82] SRP opposed the applicants being allowed this claim late. I hold the claim was properly made and should have been foreseeable to the respondent given it was represented. It is a permissible claim under the Act and Schedule 2 of the Act like parties deal with costs. SRP's failure to pay wages and holiday pay on time and pay each of the applicants properly means that the applicants are each entitled to interest on the sum owed because they have been denied the opportunity to use their wages. The sums are significant. The delays in payment are also significant. I have factored in that the respondent has paid sums in trust until the outcome of the proceedings, and thus determined the period of the interest as set out below.

[83] Interest has been calculated on the 90 day bill rate (3%) plus 2% per annum from the last date when the payment was due (10 January 2010) to be made to the date of this determination (8 November 2010). This calculation is based on 303 days out of 365 for the year.

**Penalties for failure to keep a wage, time and holiday records**

[84] SRP has failed to keep wages time and holiday records as required under s.130 of the Act for the applicants during the entire period of their employment. Questionable timesheets have been produced, but given competing claims I have found that those timesheets have not been helpful. The employer's failure to keep proper records has impacted on the ability of each of the applicants to bring an accurate and reliable claim. Each of the applicants has claimed a penalty under s.130 (4) of the Act.

[85] The employer deliberately failed to keep wage and time and holiday records, I hold. This was deliberate, sustained and continuing without any defence.

[86] SRP has taken advantage of these three applicants, who I hold are vulnerable workers, because they were working under the terms of immigration permits and were dependant on the employer. The failure of the employer to keep contemporaneous wage, time and holiday records is inexcusable. This is especially so, when there is evidence of comprehensive employment agreements being produced, so there is no excuse for the failure to keep and maintain proper wage, time and holiday records.

[87] The mix of payments by cash and cheque and payments made to Srikanth Damacharla and Satyanarayana Raju Uppalapati and their families in India mean that the responsibility on the employer to keep and maintain proper wages, time and holiday records was absolute and necessary as the law requires. The deliberate failure by SRP to meet the requirements must attract a penalty I hold.

[88] The applicants' claims were brought in 12 months of their last pay being due (on or about 10 January 2010) and the statements of problem being filed in the Authority. The wage, time and holiday pay records had been requested by the applicants' lawyer on 28 January 2010. The employer's failure to keep these records in a proper form means that this is a matter for a penalty.

**Penalty claim under s.4A of the Employment Relations Act**

[89] There has been a claim for penalty under s.4A of the Act for a breach of good faith. I decline to impose a penalty for this because the applicants' claims have been met for arrears and a personal grievance which was based on them not being paid and leaving their employment with a constructive dismissal. Any failure of the employer

to properly consult and engage in good faith is a side issue to the primary causes of action to resolve this employment relationship problem I hold.

### **Orders of the Authority**

[90] It is my order that Southern Rocks Pacific Ltd pay Srikanth Damacharla the following sums:

- (a) \$23,737.52 wages including annual holiday pay and statutory holidays;
- (b) \$500 penalty for breach of employment agreement for failing to pay wages on time;
- (c) \$600 for five days outstanding annual leave;
- (d) \$816 for 8% of gross earnings for holiday pay;
- (e) \$985.27 interest (5% per annum of \$23,737.52) less any interest on the sum in trust;
- (f) \$4,800 lost wages compensation for the constructive dismissal;
- (g) \$2,000 compensation for humiliation, loss of dignity and injury to feelings.

[91] It is my order that Southern Rocks Pacific Ltd pay Satyanarayana Raju Uppalapati:

- (a) \$15,260.35 wages including annual holiday pay and statutory holidays;
- (b) \$500 penalty for breach of employment agreement for failing to pay wages on time;
- (c) \$240 for two days outstanding annual leave;
- (d) \$672 for 8% of gross earnings for holiday pay;
- (e) \$633.41 interest (5% per annum of \$15,260.35) less any interest on the sum in trust;
- (f) \$4,800 lost wages compensation for the constructive dismissal;

- (g) \$2,000 compensation for humiliation, loss of dignity and injury to feelings.

[92] It is my order that Southern Rocks Pacific Ltd pay Subba Rao Kothapalli the following sums:

- (a) \$23,575 wages including annual holiday pay and statutory holidays;
- (b) \$500 penalty for breach of employment agreement for failing to pay wages on time;
- (c) \$600 for five days outstanding annual leave;
- (d) \$672 for 8% of gross earnings for holiday pay;
- (e) \$978.52 interest (5% per annum of \$23,575) less any interest on the sum in trust;
- (f) \$4,800 lost wages compensation for the constructive dismissal;
- (g) \$2,000 compensation for humiliation, loss of dignity and injury to feelings.

[93] In addition, Southern Rocks Pacific Limited is to pay \$3,000 penalties under s 130 (4) of the Act, for failing to keep wage and time records in regard to the 3 applicants, but \$500 is to be paid to each applicant (total \$1,500) and \$1,500 is to be paid to the Crown.

**Costs**

[94] Costs are reserved.