

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 221  
3023238

BETWEEN                      CHIRAG DODIA  
   Applicant  
  
AND                                MAVRA LIMITED  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            John Hickling for Applicant  
   Preeya Reddy for Respondent  
  
Investigation Meeting:     10 and 11 May 2018  
  
Submissions Received:    25 May and 7 June 2018 from Applicant  
   1 June 2018 from Respondent  
  
Determination:              17 July 2018

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**DETERMINATION OF THE AUTHORITY**

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- A.      Mr Dodia was an employee of Mavra Limited from 1 February 2015 until his dismissal on 5 December 2016.**
  
- B.      Mr Dodia's application for payment of a bonus is declined.**
  
- C.      Mavra Limited is ordered to pay Mr Dodia the sum of \$2,701.84 gross under s 131 of the Employment Relations Act for unpaid holiday pay within 28 days of the date of this determination.**
  
- D.      Mr Dodia's application for a determination that one or more conditions of his employment were affected to his disadvantage by the unjustifiable actions of Mavra Limited is declined.**

**E. Mr Dodia was unjustifiably dismissed. Mavra Limited is ordered to pay the following amounts within 28 days of the date of this determination:**

**a) \$10,600.08 gross under s 123(1)(b) of the Employment Relations Act; and**

**b) \$8,000 under s 123(1)(c)(i) of the Employment Relations Act.**

**F. Mr Dodia's claim for general damages is declined.**

**G. Costs are reserved.**

#### **Employment relationship problem**

[1] Mr Chirag Dodia and Mr Ashfaq Farooqi have known each other for a long time. Both men have been businessmen in their own right. Mr Farooqi was a director and shareholder of Nazra Trustee Limited, which in turn was the sole shareholder of Mavra Limited until July 2013. Mr Farooqi is no longer a business owner or company director.

[2] Mavra Limited operates a superette located in Flagstaff, Hamilton. The current shareholder and director of Mavra Limited is Ms Mavra Farooqi, the daughter of Mr Farooqi.

[3] Mr Dodia owns and operates two superettes in Hamilton and is the holder of an off license. He has also managed a third superette under a lease which was taken over by a family member in 2010.

[4] From 2012 under an arrangement with Ms Farooqi (who was the sole director of the company), Mr Dodia became heavily involved in the management of the Flagstaff superette on behalf of Mavra Limited.

[5] In 2015 Mr Dodia was successful in gaining a liquor licence for the store. The liquor licence was subject to Mavra Limited entering into a franchise agreement which would convert the store to a SuperValue Supermarket, a franchise brand

operated by Wholesale Distributors Limited (WDL). A franchise agreement was entered into and took effect from late October 2015.

[6] Mr Dodia became a 20% shareholder and a director of Mavra Limited on 14 April 2014. Ms Farooqi held the remaining 80% shareholding. The shareholding was removed from Mr Dodia in December 2016 and Ms Farooqi's shareholding increased to 100%. Mr Dodia has disputed his removal as a shareholder which he maintains was done in breach of the Companies Act 1993.

[7] Mr Dodia claims he was an employee of Mavra Limited from 2011 until 5 December 2016 when Mavra Limited failed to pay his wages. Mr Dodia says one or more conditions of his employment were affected to his disadvantage during the employment relationship and that he was unjustifiably dismissed. Mr Dodia claims he is owed arrears of wages including an unpaid bonus payment and holiday pay.

### **Issues**

[8] In order to resolve Mr Dodia's employment relationship problems I must determine the following questions:

- a) Was Mr Dodia an employee of Mavra Limited;
- b) Were one or more conditions of Mr Dodia's employment affected to his disadvantage by the unjustified actions of Mavra Limited and if so what if any remedies should be awarded;
- c) Was Mr Dodia unjustifiably dismissed and if so what if any remedies should be awarded;
- d) Is Mr Dodia owed arrears of wages for an unpaid bonus payment and holiday pay?

[9] 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 Dodia and Mavra Limited but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

## Credibility

[10] Mr Dodia's evidence in some aspects was unreliable. There were a number of inconsistencies between the evidence he gave to the Authority and earlier sworn statements made by him in other jurisdictions as well as assurances he made to WDL in 2014.

[11] By way of example:

- a) In support of his claim that he was an employee Mr Dodia told me he was never in control of the business or its finances and that Mr Farooqi was always in control. This is inconsistent with a sworn statement he made to the Hamilton City District Licencing Committee in July 2014. That statement was made on behalf of Mavra Limited in support of an application for a liquor licence for the Flagstaff superette in anticipation of entering into a franchise agreement with WDL to change the superette into a SuperValue supermarket.
- b) In his evidence to the Committee Mr Dodia persuaded the Committee that he was in control of the business and not Mr Farooqi. That was an important point in those proceedings because Mr Farooqi had a criminal conviction for a dishonesty offence which would have been a barrier to Mavra Limited obtaining a liquor licence. The importance is highlighted in the decision by the Alcohol Regulatory and Licensing Authority which stated:

There was a suspicion that Ms Farooqi and Mr Dodia were acting as a front for [Mr Farooqi] (who would not have been suitable). The DLC, in its decision, did not accept this was the case. Had the DLC found that Ms Farooqi and Mr Dodia were acting as a front for [Mr Farooqi], then in terms of *C A McCullough LLA* decision PH 915/07, the applicant would have been found to have been unsuitable on that ground and the application could not have succeeded.

...

The Authority recognises that if an applicant and/or its directors are dishonest then it is unlikely that the applicant would be found to be suitable. As the DLC recognised, if an applicant has dishonest directors then the DLC cannot be satisfied that the applicant will be honest with the reporting agencies.

- c) In an email sent by Mr Dodia to WDL with a view to securing the SuperValue franchise Mr Dodia assured WDL that:

Regarding the control of the finance I can assure you that I have the full control and authority of it.

- d) That this was an important factor in WDL's decision to enter into a franchise agreement with Mavra Limited is demonstrated by the initial approach for a franchise being unsuccessful because of WDL's view that Ms Farooqi was a front for the family business.

[12] There are other aspects of Mr Dodia's evidence that I do not accept as correct but I have addressed them throughout my determination. Because of my concerns as to credibility I have relied as far as possible on the documents produced by the parties to reach my conclusions.

### **Was Mr Dodia an employee?**

[13] Mr Dodia says he was an employee of Mavra Limited from May 2011 until the relationship ended in December 2016. The onus of establishing whether Mr Dodia was an employee rests with him on the balance of probabilities. The starting point for the Authority is Section 6(1) of the Employment Relations Act ("the Act") which states:

In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.

[14] Section 6(3) states:

For the purposes of subsection (2), the court or the Authority-

- (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
- (b) is not to treat as a determining matter any statement by the persons that describes the nature of the relationship.

[15] The leading case in New Zealand which sets out the tests for determining whether an individual is an employee or an independent contractor is the Supreme Court decision in *Bryson v Three Foot Six Ltd.*<sup>1</sup>

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<sup>1</sup> [2005] ERNZ 372.

[16] The Employment Court in *Poulter v Antipodean Growers Limited* summarised the following applicable principles derived from the judgment of the Supreme Court in *Bryson* and from earlier judicial decisions:<sup>2</sup>

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- The real nature of the relationship can be ascertained by analyzing the tests that have been historically applied such as control, integration, and the “fundamental” test.
- The fundamental test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

[17] As held in *Bryson*, the starting point in determining the question is to examine the terms and conditions of the contract and the way it operated in practice, then to apply the three tests known as the control, integration and fundamental or economic reality test.

[18] In *Poulter* the Court concluded that ultimately it is necessary to also gain an overall impression of the underlying and true nature of the relationship between the parties.<sup>3</sup>

[19] The Court in *Atkinson v Phoenix Commercial Cleaners Ltd* noted:<sup>4</sup>

Section 6 of the Act is broader and requires more than simply determining the common law contractual question of the parties’ common intention. It focuses on the nature of the relationship in law for the purposes of determining whether the rights and obligations of employer and employee arose from that relationship. In circumstances such as these, a s 6 analysis can and must be made of the relationship between the parties to determine whether Mrs Atkinson was Phoenix’s employee.

### ***Terms and conditions of the agreement***

[20] Evidence of written terms of the arrangement between Mr Dodia and Mavra Limited include a Special Power of Attorney dated 27 August 2012 and a copy of an employment agreement dated 2 November 2015.

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<sup>2</sup> [2010] NZEmpC 77 at [20].

<sup>3</sup> Ibid at [21].

<sup>4</sup> [2015] NZEmpC 19 at [58].

### ***Special Power of Attorney***

[21] The Special Power of Attorney gave Mr Dodia full rights, powers and authority of the business at the Flagstaff store owned by Mavra Limited. Under the power of attorney Mr Dodia was able to attend to all legal obligations and responsibilities on behalf of Mavra Limited.

[22] Mr Dodia used this authority to enter into a Deed of Renewal of Lease dated 19 December 2012 which he signed on behalf of Mavra Limited. Under the delegation of the power of attorney Mr Dodia also secured a lotto outlet for the store.

### ***Employment agreement***

[23] During January 2014 Mr Dodia had a number of discussions WDL about the possibility of the Flagstaff store being converted into a SuperValue supermarket. During these discussions Mr David Kendall, Financial Development Manager for WDL advised Mr Dodia of his concerns regarding the financial structure of the business and the expectation of WDL that the owners of franchises were expected to be working full time in the business.

[24] At that time the only shareholder and director of the company was Ms Farooqi and she had delegated full responsibility for the operation of the store to Mr Dodia who was not a shareholder.

[25] Mr Kendall suggested WDL might review the decision about a franchise if Mr Dodia became a bone fide shareholder/director of the company.

[26] Mr Dodia discussed this with Mr Farooqi and it was agreed Mr Dodia would become a shareholder/director of Mavra Limited. Mr Dodia advised WDL of the decision and confirmed that with this change the requirement for an owner/operator would be met. However, WDL declined to enter into a franchise agreement because it still held concerns about the financial and ownership structure of the company. It was concerned that Mr Dodia would only be acting as a front for Mr Farooqi and this was not acceptable to WDL given Mr Farooqi's criminal conviction.

[27] An response to an enquiry from Mr Dodia about what a suitable structure might look like, Mr Kendall wrote to him setting out his thoughts which included:

- a) That Mavra Limited transfer 20% of its shares to Mr Dodia at something like \$100,000;
- b) That Mavra Limited formally recognise that Mr Dodia was not required to invest in his shares;
- c) That Mr Dodia would owe Mavra Limited \$100,00 interest free for the shares;
- d) Mavra Limited would pay an agreed salary to Mr Dodia to manage the store;
- e) Mr Dodia be credited each year a bonus equivalent to 20% of the net profit before tax;
- f) When Mr Dodia's current account reached \$100,000 it should be transferred to Mavra Limited in payment of the shareholding;
- g) There needed to be a shareholders agreement;
- h) There should be an employment agreement between Mavra Limited and Mr Dodia;
- i) Mr Dodia would be a director and guarantor.

[28] Mr Kendall pointed out that this was not the usual structure for franchises and that he had provided his thoughts as a starting point.

[29] Mr Dodia became a director and 20% shareholder on 14 April 2014. He did not pay any money for the shares and the parties did not enter into a written shareholder agreement.

[30] Mr Dodia has produced a copy of an employment agreement signed by himself as a director for and on behalf of Mavra Limited and also as the employee dated 2 November 2015. The date on the employment agreement coincided with the signing of the franchise agreement to convert the store into a SuperValue supermarket.

[31] As a director, when Mr Dodia signed the employment agreement he was “interested” in the transaction. That is, he was a party to the transaction and was to derive a material financial benefit from it. In that case he was required to declare his interest by entering the transaction in an interests register and disclose the monetary value of the interest to the board of the company.<sup>5</sup>

[32] Mr Dodia took no steps to meet these obligations. I have accepted the evidence from Ms Farooqi who was the second director and the only other member of the Board, that she was not aware of the employment agreement and Mr Dodia did not bring the existence of the agreement or the monetary value of the terms of the agreement to her attention or ask her to sign it on behalf of Mavra Limited.

***Intention of the parties***

[33] Mr Dodia says it was intended that he be an employee from May 2011. His claim that his employment relationship started in 2011 is inconsistent with other documentary evidence.

[34] By way of example in his sworn statement made in support of the application for the off licence Mr Dodia stated he had been working for Mavra Limited for a period of 2 years since mid-2012.

[35] Then, in an application for a Managers Licence dated 6 March 2018 Mr Dodia states he ran the SuperValue Flagstaff for a year and a half. Mr Dodia signed the application and in doing so confirmed its contents were true and correct. That period of time is consistent with Mr Dodia running the SuperValue from mid-2015 to December 2016.

[36] Mr Dodia signed off Employer Monthly Schedules on behalf of Mavra Limited during his relationship with Mavra Limited which were submitted to the Inland Revenue. During the period between August 2012 and February 2015 he never recorded his name in the schedule. Mr Dodia’s name does not appear as an employee of Mavra Limited until February 2015.

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<sup>5</sup> Companies Act 1993 s 140.

[37] Mr Dodia's personal tax statements record that his total income was received from his own company Vaishali Holdings Limited until February 2015 at which time the record reflects a change in employer to Mavra Limited.

[38] At the outset of the relationship I find the intention between Mr Dodia and Mavra Limited was that Mr Dodia would act in the capacity of business associate of Mr Farooqi, as a mentor to Ms Farooqi who had no previous business experience and that this was from August 2012 when he signed the Special Power of Attorney and not 2011.

[39] The intention between the parties changed during 2014 during the discussions Mr Dodia had regarding the SuperValue franchise. The conditions from WDL attaching to a franchise agreement included a requirement that Mr Dodia become a shareholder and director and be employed. Without the assurances that this was the case it is highly unlikely Mavra would have been offered a SuperValue franchise.

[40] I find the discussions culminated in the establishment of an employment relationship arising from 1 February 2015. I have based the date on the date Mr Dodia first appeared as an employee in the official records submitted to the Inland Revenue and in the wages records maintained by Mr Dodia and Mr Farooqi. I find it is more likely than not that the relationship started in February in anticipation of Mavra Limited entering into the franchise agreement with WDL which occurred in late October 2015.

### ***The control test***

[41] This test examines the extent to which the activities of Mr Dodia were controlled by Mavra Limited. Mr Dodia told me that even though Mr Farooqi wasn't a director or shareholder of the company he exerted considerable control over the business. He refers to Mr Farooqi as a "shadow director".

[42] Section 126 of the Companies Act 1993 sets out the meaning of director which includes those who do not openly adopt the role of director but who "from the wings" control the persons who do purport to act as directors.<sup>6</sup> In this case Mr Dodia and Ms Farooqi were the appointed directors named on the Companies Register. They constituted the Board of the company.

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<sup>6</sup> Companies Act 1993, s 236(1)(b) and as referred in Peter Watts *Directors' Powers and Duties* (2nds edition LexisNexis, Wellington 2015) at 7.

[43] To support his assertion that Mr Farooqi acted as a shadow director Mr Dodia told me Mr Farooqi interfered with the management of the business all the time and upset staff. He told me Mr Farooqi put cash floats in the cash tills each morning, emptied the cash tills each evening and did all the banking. He told me Mr Farooqi instructed Ms Farooqi not to sign the employment agreement or the shareholding agreement in 2015.

[44] Mr Dodia's evidence before the Authority is inconsistent with documentary evidence provided to the Authority during its investigation. For example:

- a) In an email to Mr Dodia on 21 January 2014, Mr Kendall advised Mr Dodia:

... The issue we have is that our franchise system is largely based on committed owner/operators and total transparency as to the ownership structure.

We all know that Mavra Limited is a front for the family in terms of the ownership and it certainly seems that she is an intelligent young lady that will want to pursue a career not necessarily in the grocery industry.

If circumstances change we will be happy to review our position but unfortunately we are unable to proceed based on the current structure. ...

- b) In response Mr Dodia assured Mr Kendall that he "...had full control and authority of the finances...".
- c) When Mr Dodia applied for an off licence on behalf of Mavra Limited concerns were raised by the Hamilton District Licencing Committee about Mr Farooqi's involvement in the day to day management of the Super Value supermarket. In his written evidence to the Committee Mr Dodia stated that he managed the store and was responsible for its day to day operations. This was important to the Committee because Mr Farooqi has been convicted of dishonesty offences. If Mr Farooqi was acting as a shadow director, it would have made Mavra Limited an unsuitable candidate for an off licence.
- d) The Committee accepted Mr Dodia's evidence that he had the full responsibility for the company and how it would operate as a potential licensee. The Committee found there to be no evidence that Mr Farooqi

was involved in the company but declined to grant the off licence on other grounds.

- e) Mavra Limited, through Mr Dodia, successfully appealed the Committee's decision. I have set out the findings of the Authority earlier in this determination.

[45] Mr Dodia is either wrong now, or he was wrong in his previous statements. If he was wrong in his assertions to WDL and his evidence to the Commission in 2014 it is possible a franchise agreement was entered into based on false information provided by Mr Dodia and an off licence was granted to Mavra Limited in circumstances where an off licence would not usually be granted.

[46] I prefer to take the view that Mr Dodia is mistaken in his evidence to the Authority. To do otherwise leaves open a question of whether Mr Dodia perjured himself. This of course is a criminal offence.

[47] I find it is more likely than not neither Mr Farooqi nor Ms Farooqi played any significant role in managing the business and that Mr Dodia was at all times the person who controlled the business. Factors that support my conclusion include:

- a) Mr Dodia made significant business decisions without the need to consult including decisions about bank loans;
- b) I saw no evidence that Mr Farooqi or Ms Farooqi had any direct supervision over Mr Dodia. He was largely left to his own devices. He could come and go as he pleased, and made all the key decisions in the business including obtaining the liquor licence, and securing a lotto outlet.
- c) Mr Kendall gave evidence that he was under the impression that it was Mr Dodia and not Mr Farooqi or Ms Farooqi who was controlling the business.

[48] The control test is not indicative of Mr Dodia being employed by Mavra Limited, particularly in the years from 2012 to 2015. I find on balance that between 2012 to 2015 it is more likely than not that he was engaged by Mr Farooqi as a business mentor and/or consultant and acted under the Special Power of Attorney.

***Integration test***

[49] This test examines the extent to which Mr Dodia was integrated into Mavra Limited's business. That is whether the work undertaken by Mr Dodia was integral to the business and whether Mr Dodia had become part and parcel of the business.

[50] When Mr Dodia started undertaking work for Mavra Limited in 2012 Ms Farooqi had only recently been appointed as the sole director. Ms Farooqi was inexperienced and as the director (possibly with encouragement from Mr Farooqi) delegated full control of the superette to Mr Dodia. Acting on that delegation Mr Dodia introduced improvements to the business including entering into a Lotto franchise which was installed in the store and entered into discussions with WDL about a franchise agreement. Those discussions ultimately led to a franchise agreement being entered into between Mavra Limited and WDL. During this period Mr Dodia received payment of wages from his own company Vaishali Holdings Limited.

[51] In his written evidence Mr Dodia told me he did not have financial control nor did he pay the wages. His evidence is contrary to the documents produced to the Authority which show that Mr Dodia had responsibility for the calculation and payment of wages.

[52] Until February 2015 his name does not appear in the wages records provided to the Authority. If Mr Dodia believed he was an employee prior to February 2015, given his control over the wages books, I am surprised he did not insist on paying himself wages and properly accounting for the PAYE.

[53] The work undertaken by Mr Dodia for the period of his involvement with Mavra Limited was integral to the business but could have been undertaken equally as an employee or in some other capacity.

### ***Fundamental test***

[54] This test examines the extent to which Mr Dodia took on financial risk himself in providing his services to Mavra Limited including whether he was in business for himself.

[55] In order to secure the SuperValue franchise Mr Dodia entered into personal guarantees with Mavra Limited's bank and WDL. Mr Dodia entered into these guarantees as a director of Mavra Limited.

[56] I find Mr Dodia took on a financial risk in his involvement in Mavra Limited and stood to gain significant benefits. The evidence shows Mr Dodia took advantage of the buying power achieved through the franchise agreement to purchase goods for his own stores at reduced prices. Mr Dodia told me that when there were sales on products through WDL he would place an order for the sale products to sell in his own stores. In this way he benefitted by utilising the buying power of WDL which would not have been available to him if he was not a director of Mavra Limited.

### ***Industry practice***

[57] There was no evidence as to the industry practice. I am satisfied that without the assurance that Mr Dodia was an owner/operator and subject to an employment agreement WDL would not have agreed to enter into a franchise. These are WDL's standard requirements.

### ***Overall impression***

[58] On balance I am satisfied Mr Dodia was not an employee for the period 2012 to February 2015. During that time Mr Dodia was paid by his own company and acted fully under the delegated powers of the Special Power of Attorney. That changed when it became apparent that in order to secure a franchise agreement Mr Dodia had to be an employee. I am satisfied Mr Dodia became an employee of Mavra Limited from 1 February 2015 and was entitled to payment of wages and other minimum standards from that date.

### **Arrears of wages**

[59] Mr Dodia claims he entered into a written employment agreement with Mavra Limited on 2 November 2015 which included the payment of a bonus. He also claims unpaid holiday pay.

### ***Bonus***

[60] The employment agreement is signed by Mr Dodia both on his own behalf and on behalf of Mavra Limited. I have discussed the appropriateness of Mr Dodia's conduct in taking that course of action earlier in my determination.

[61] The employment agreement at clause 2 provides for Mr Dodia to be paid an annual bonus of \$20,000 which was to be used as part payment for his 20% shareholding in Mavra Limited. Under the terms of the agreement Mr Dodia would not have received a cash payment of \$20,000, instead that amount would have been attributed to the value of his shareholding.

[62] There is no evidence that Mavra Limited intended to be bound by the bonus clause set out in the employment agreement. The only other Board Member (being Ms Farooqi) was not even aware of the terms set out in the employment agreement.

[63] I am not satisfied the bonus clause is enforceable and Mr Dodia's application for the payment of the bonus is declined.

### ***Holiday pay***

[64] Mr Dodia claims payment of outstanding holiday pay including accrued annual holidays for the period 2011 to October 2015. I have found Mr Dodia was not an employee of Mavra Limited until 1 February 2015. In his written evidence Mr Dodia told me he never took any paid holidays. This evidence was inconsistent with his oral evidence given at the investigation meeting when he told me he had taken paid holidays in 2015 and in November and December 2016.

[65] Mr Dodia relies on the written employment agreement which states that he is entitled to five weeks leave after the first anniversary of employment after 28 October 2015. For the reasons already stated, I am not satisfied the provision of five weeks annual leave is enforceable.

[66] As an employee Mr Dodia was entitled to the statutory minimum of four weeks leave at the end of each year of employment. I have found his employment started on 1 February 2015. On 31 January 2016 he became entitled to four weeks leave on pay. When his employment terminated on 5 December 2016 Mr Dodia was entitled to be paid for any unused annual holiday entitlement plus 8% of his gross earnings from 1 February to 5 December 2016.

[67] Mr Dodia took three and a half weeks paid leave in 2015 and five days paid leave during November and December 2016. For the period of his employment Mr Dodia took a total of 22 days paid annual leave.

[68] Mr Dodia's entitlement to four weeks (20 days) paid leave which became due on 31 January 2016 was exhausted by the time his employment ended on 5 December 2016.

[69] Mr Dodia was paid two days over and above his four week entitlement which I have concluded was taken in advance of his next entitlement falling due at the end of January 2017. The leave taken in advance must be reconciled when calculating 8% of his gross earnings for the period 1 February to 5 December 2016.

[70] I have calculated Mr Dodia's outstanding holiday pay on the basis of the gross earnings set out in the wages books provided to me. At the time of his dismissal Mr Dodia was paid 883.34 gross per week.

[71] Mr Dodia gave evidence that he received an additional \$400 in cash each week from Mr Farooqi which was taken out of the tills. During the period of Mr Dodia's employment Mr Farooqi was overseas for approximately 6 months. If cash was being taken out of the tills to top up Mr Dodia's wages, it is more likely than not that he himself took the cash during the times Mr Farooqi was absent. Mr Dodia was responsible for the calculation and payment of wages. He has not accounted for any cash payments either through the wages book or by payment of PAYE to the Inland Revenue.

[72] If Mr Dodia has received additional payments of wages which have not been disclosed, that is a matter between him and Inland Revenue. In the absence of any evidence of the payment of the cash amounts I have preferred to base my calculations on Mr Dodia's documented earnings.

[73] Based on the information contained in the wages book Mr Dodia received \$38,189.76 gross earnings for the period 1 February to 5 December 2016. 8% of this amount is \$3,055.18 gross. Reducing that amount by the two days paid annual leave taken in advance on 4 and 5 December (2 days at \$176.67) Mr Dodia is entitled to outstanding holiday pay in the amount of \$2,701.84 gross.

[74] Mavra Limited is ordered to pay to Mr Dodia the sum of \$2,701.84 gross under s 131 of the Act within 28 days of the date of this determination.

### **Unjustified disadvantage**

[75] Mr Dodia claims one or more conditions of his employment were affected to his disadvantage by the following actions of Mavra Limited which he claims were unjustified:

- a) allegations of theft;
- b) claimed reimbursement of \$146,726.76;
- c) attempted blackmail;
- d) his removal as a director;
- e) loss of shareholding;
- f) reputational damage;
- g) demand for repayment of an alleged loan;
- h) non-payment of a bonus.

[76] As indicated to the parties during the case management call on 22 February 2018 and again at the start of the investigation meeting, with the exception of the non-payment of the bonus the allegations set out above all occurred after 5 December 2016. The employment relationship ended on 5 December and so the above actions could not have caused one or more conditions of Mr Dodia's employment to have been affected to his disadvantage.

[77] The allegations of demand for repayment of an alleged loan have not formed part of the claims investigated and determined in the Authority. I understand proceedings in the Disputes Tribunal have been delayed awaiting the outcome of my investigation and determination. While I have not been required to determine the

matter of the loan I have formed a view that if there was a loan it was a matter between Mr Farooqi and Mr Dodia and not between Mavra Limited and Mr Dodia. It is highly likely it would therefore arise outside the employment relationship.

[78] I have dealt with the payment of the bonus earlier in my determination. Even if the bonus was an enforceable term of the employment agreement, it would not have been payable to Mr Dodia, but would have been attributed as a contribution to satisfying payment for his shareholding.

[79] Mr Dodia's application for a determination that one or more conditions of his employment were affected to his disadvantage by the unjustifiable actions of Mavra Limited is declined.

### **Dismissal**

[80] Mr Dodia says he was dismissed on 5 December 2016 when Mavra Limited stopped paying his salary. He says the dismissal was unjustified. Mr Dodia and his wife went on holiday on 28 November, travelling to India. Mr Dodia intended to return to work on 28 January 2017.

[81] While he was overseas, Mr Dodia's automatic payment of his wages was stopped without warning. He told me it was not until mid-February 2017 that he discovered why his wages were not paid. Mr Farooqi told me he no longer trusted Mr Dodia and the business was not performing well under his management.

[82] I am satisfied the stopping of Mr Dodia's wages on 5 December amounted to the termination of the employment relationship. Mr Dodia was dismissed.

[83] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine whether Mavra Limited's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[84] In applying this test, I must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, Mavra Limited sufficiently investigated any allegations, raised its concerns with Mr Dodia,

gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[85] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Dodia being treated unfairly.<sup>7</sup> A failure to meet any of the s 103A (3) tests is likely to result in a dismissal being found to be unjustified.

[86] The process leading up to Mr Dodia's dismissal was defective. There is no evidence Mavra Limited met any of the mandatory considerations set out in s 103A(3). Mavra Limited did not raise its concerns with Mr Dodia prior to making the decision to dismiss him. Mr Farooqi told me he made the decision on 2 December to end the relationship. That was not a decision Mr Farooqi could make. He was neither a shareholder nor a director of the company and had no control or management over the affairs of the company.

[87] There was no opportunity for Mr Dodia to respond to any concerns before the decision was made to terminate his employment and there was no genuine consideration of any explanation. The dismissal was immediate and abrupt. These defects were not minor and resulted in Mr Dodia being treated unfairly.

[88] Mr Dodia's dismissal was unjustified and he is entitled to a consideration of remedies.

### **Remedies**

[89] Mr Dodia seeks remedies of lost remuneration including bonuses, payment of a profit entitlement, damages and compensation.

### ***Lost remuneration***

[90] Mr Dodia seeks reimbursement of his salary at \$80,000 per annum, the \$20,000 bonus and payment of a profit share for the period of two years from the date of his dismissal. These claims are based on his assertion that the employment agreement was a fixed term agreement for four years.

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<sup>7</sup> Employment Relations Act 2000 (the Act), s 103A(5).

[91] I am not satisfied the terms expressed in the employment agreement are enforceable. That includes the fixed term, salary and bonus. There is no provision in the employment agreement for payment of a profit share or any evidence that such an agreement had been reached between Mr Dodia and Mavra Limited.

#### Lost wages

[92] I have taken Mr Dodia's application for payment of lost wages for two years to be an application under s 128 of the Act for reimbursement of lost wages beyond the three month statutory minimum. Mr Dodia told me he started working for another company in September 2017. Mr Dodia has provided no evidence of the steps he took in mitigation of his loss. I am satisfied his evidence is sufficient to support an order for lost wages of three months' ordinary time remuneration under s 128(2) of the Act but does not warrant an award for a longer period as permitted under s 128(3) of the Act.

[93] Mavra Limited is ordered to pay to Mr Dodia the sum of \$10,600.08 gross (12 weeks at \$883.34) under s 123(1)(b) of the Act within 28 days of the date of this determination.

#### Bonus and profit share

[94] I have already addressed the question of the bonus. There is no evidence to establish an agreement that Mavra Limited would pay Mr Dodia a profit share equal to his shareholding. Mr Dodia's applications for payment of the bonus and profit share are declined.

#### ***Compensation***

[95] Mr Dodia seeks the payment of \$8,000 in compensation under s 123(1)(c)(i) of the Act. He gave little evidence to support his claim but I am satisfied the dismissal would have come as a shock to Mr Dodia and would have caused him embarrassment coming as it did, while he was on holiday overseas.

[96] Mr Dodia was the face of the SuperValue supermarket. He had developed strong relationships with the key supplier, WDL, and customers of the store. For all intents and purposes he was the owner/operator of the store.

[97] In the particular circumstances of this case and considering the range of awards generally, \$8,000 is an appropriate modest award of compensation.

[98] Mavra Limited is ordered to pay to Mr Dodia the sum of \$8,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

#### Contribution

[99] Under s 124 of the Act I must, when determining remedies, consider whether any actions of Mr Dodia contributed to the situation that gave rise to his grievance. If they did those actions may require a reduction of remedies that would otherwise be awarded to Mr Dodia.

[100] Mavra Limited claims Mr Dodia was responsible for misappropriating stock from its SuperValue supermarket. Mr Farooqi told me he became concerned about misappropriation in August 2016 and discussed it with Mr Dodia at that time.

[101] Mr Dodia raised a personal grievance for unjustified dismissal in a letter dated 29 February 2017. In response to that letter Mavra Limited raised concerns that Mr Dodia had taken large quantities of stock to sell at his other stores. Mavra Limited acknowledges that when it asked Mr Dodia about the payment of the stock Mr Dodia confirmed he had paid for it. In July 2017 Mr Dodia was provided with significant documentary evidence setting out the full extent of Mr Farooqi's concerns.

[102] During the course of this investigation Mr Dodia has provided significant evidence to rebut the allegations that he had not paid for the stock he took from the SuperValue. I am satisfied that if the full disclosure of information had been available to Mr Dodia before the decision to terminate the relationship was made, Mavra would have been in a strong position to consider his explanations and dismissal may not have been considered.

[103] Mr Dodia had no opportunity to provide evidence to contradict or deny the allegations prior to the decision being made to dismiss him. I am not satisfied Mr Dodia's conduct could be said to be blameworthy to such an extent that he contributed to the situation that gave rise to the personal grievance. In these circumstances no reduction to remedies is warranted.

### ***Damages***

[104] In his statement of problem Mr Dodia seeks an award for damages of \$15,000. During the investigation meeting I asked questions about the basis for this claim and in response was told that the claim may be withdrawn. It has not been withdrawn.

[105] After reviewing all of the evidence and documents I am not satisfied Mr Dodia has established on the balance of probabilities a claim for damages. His application is declined.

### **Costs**

[106] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Dodia will have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mavra Limited will 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.

[107] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority