

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 306  
5611935

BETWEEN

SUKHPREET KAUR  
Applicant

AND

DIRECT AUTO IMPORTERS  
(NZ) LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Arunjeev Singh for Applicant  
William Harris for Respondent

Investigation Meeting: 19 July 2016

Submissions Received: 29 July 2016 from Applicant  
11 August 2016 from Respondent

Determination: 9 September 2016

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**DETERMINATION OF THE AUTHORITY**

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- A. Pursuant to section 131 of the Employment Relations Act 2000 Direct Auto Importers (NZ) Limited is ordered to pay to Ms Kaur arrears of monies owed within 28 days of the date of this determination as follows:**
- a) \$8,088.06 nett unpaid wages for the period 15 August 2014 to 8 July 2015;**
  - b) \$2,742.70 nett unpaid wages for the period 9 July to 9 October 2015;**
  - c) \$2,983.06 nett unpaid wages for the period 16 November 2015**

**to 28 January 2016.**

- d) \$3,547.17 gross unpaid holiday pay;**
- e) \$635.60 nett unpaid commission payments due.**

**B. Ms Kaur was not disadvantaged in her employment.**

**C. Costs are reserved.**

### **Employment relationship problem**

[1] Ms Sukhpreet Kaur claims outstanding wages including commission payments plus holiday pay for the period of her employment with Direct Auto Importers (NZ) Limited (DAIL) from 15 August 2014 to 28 January 2016. In addition Ms Kaur claims one or more conditions of her employment were affected to her disadvantage by the unjustified actions of DAIL.

[2] DAIL denies the claims.

[3] As permitted by section 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Ms Kaur and DAIL 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.

### **Inter-related companies**

[4] DAIL operates its business at 88 to 92 Avalon Drive, Hamilton. The property at 90-92 Avalon Drive is owned by Mrs Irene Sharma (Mr Prem Kumar's wife) and Mr Vishaal Kumar Sharma (Mr Kumar's son). DAIL leases the property at 88 Avalon Drive from its owner who is not associated with this matter.

[5] DAIL imports vehicles that are then sold through one of four companies:

- a) Super Cheap Vehicles Limited (this company was struck off the Companies Register on 15 July 2016);
- b) Best Auto Traders Limited;
- c) Cheap Deals on Wheels Limited; and

d) DAIL.

[6] Apart from those companies identified above a number of associated companies have been identified in the papers produced to the Authority which also operate from the Avalon Drive premises. I have undertaken a search of the Companies Register to ascertain any links between DAIL and all of these and other associated companies.

***Direct Auto Importers (NZ) Limited (Respondent)***

[7] Mr Sharma is the sole director and shareholder of DAIL. Mr Mohammed Hassan was removed as a director on 15 July 2016 two working days prior to my investigation meeting. The company was incorporated on 20 March 2009 under the name of Auto Enterprise (2009) Limited. At that time Mr Kumar was the sole director and shareholder. Mr Kumar ceased being a director on 9 July 2011.

[8] Between 2009 and 2014 the company changed its name several times including to Enterprise Traders Ltd in September 2011. The company adopted its current name on 3 July 2014.

***Super Cheap Vehicles Limited.***

[9] This company was owned and directed by Mr Daljinder Singh until it was removed from the Companies Register 2 working days before this investigation. Until 1 July 2013 both Mr Sharma and Mr Dilpreet Singh were directors and Mr Sharma was the sole shareholder until he was removed on 6 May 2014 and replaced by Mr Daljinder Singh.

***Cheap Deals on Wheels Limited***

[10] Mr Sharma is also the sole director and shareholder of Cheap Deals On Wheels Limited. This company was originally registered under the name of Super Cheap Batteries Limited. The company changed its name on 11 October 2013 to Motortech Auto Repairs Limited, and to its current name on 3 July 2014.

***Top Town Motors Limited***

[11] Mr Kumar was the sole director and shareholder of Top Town Motors Limited from 9 June 2010 until it was removed from the Companies Register on 4 March 2015.

***Best Auto Traders Limited***

[12] Mr Kumar was also the sole director and shareholder of Best Auto Traders Limited which went into liquidation on 24 February 2015. Until 2 July 2014 this company was known as Auto Enterprise Limited.

***Vikom Finance Limited***

[13] At the time of my investigation meeting the Companies Register recorded Mr Mohammed Hassan as the sole director and shareholder for Vikom Finance Limited. Vikom Finance Limited operates its business from the same premises as DAIL. A change in the named director and shareholder was registered in the Companies Register on 21 July 2016. The sole director and shareholder is now recorded as Mr Sharma.

***Venus Finance Limited***

[14] At the time of my investigation meeting Mr Mohammed Hasan was the sole director of Venus Finance Limited which also operates at DAIL's premises. On 5 August 2016 Mr Sharma was added as a second director. The sole shareholder of Venus Finance Limited is Mr Jatsinder Singh.

[15] Mr Hasan's address on the Companies Register is the same address as that recorded for Mr Mohammed Hassan. Despite the difference in the spelling of the last name I have concluded that the ex-director for Vikom Finance Limited and the director Venus Finance Limited and DAIL is the same person.

***Millenium Finance Brokers Limited***

[16] Mr Hassan Hussein is the sole director and shareholder of Millenium Finance Brokers Limited which operates its business on the same premises as DAIL. Mr Hussein's address is the same address as that of Mr Mohammed Hassan/Hasan.

***Nawton Panel & Mechanical Limited***

[17] The sole director and shareholder of this company is Mr Amandeed Singh. There have been a number of changes in the shareholding for this company. The most

significant changes were on 1 December 2014 when the shareholding moved from Mr Kumar to Mr Ravindra Chanda, and then on 7 September 2015 when the shareholding moved to Mr Dilbag Singh Sandhu. Mr Amandeep Singh became the sole shareholder on 12 April 2016.

### **Credibility**

[18] 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.

[19] The standard of proof is on 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 evidence than another. When I have reviewed the evidence from Ms Kaur and DAIL I have found areas of their evidence which simply do not seem credible.

[20] In drawing my conclusions in respect to Ms Kaur's arrears of wages claims I have relied on a combination of documents which Ms Kaur confirmed at the investigation meeting provide an accurate account of the time and hours she worked and the payments of wages she received.

### **Background**

[21] In her written evidence which she confirmed as being the truth Ms Kaur told me [verbatim]:

I came to know about Super Cheap Vehicles Limited, Auckland from Harjinder Singh in January 2014. Harjinder Singh was renting a house no. 55, Station Road, Papatoetoe and I was a boarder with him since 2013. He had told me that he knows Dilpreet Singh, a Manager with Auto Enterprise Limited, Hamilton.

During June 2013, I requested Harjinder Singh to help me get permanent residency in New Zealand. He said that he need money for buying a job offer. He quoted a total of \$18,000 for getting a job offer for me. I expressed my inability to arrange that huge amount. Then Harjinder offered me that if I can't pay the whole amount, he has his brother-in-law in Hastings, named Dilbag who can contribute half of that amount and me and after our marriage which would be only on papers and not a real one. He said that if we arrange \$18,000, he will get a job offer from some of his contacts and he will get my work visa and then permanent residency of both his guy and myself.

Harjinder Singh introduced me to Dilbag Singh in a restaurant in Auckland in June 2013. He told me that I have to marry this man and after marriage, Dilbag Singh will pay \$8,000 to him and Harjinder will get a job offer for me.

I agreed to the offer of Harjinder Singh as I was worried about my permanent residency.

After that meeting in June 2013, me and Dilbag met in Auckland on few occasions and we fixed the marriage date as 12 August 2013. It was solemnised in the Manukau branch of Department of Internal Affairs and Harjinder Singh was one of my marriage witnesses.

I gave Harjinder Singh \$10,000 in July 2013. I am not aware whether Dilbag gave \$8,000 to Harjinder Singh or not.

After marriage, me and Dilbag lived together for around 5 days with Harjinder Singh. Around 17<sup>th</sup> of August 2013, me and Dilbag started living apart.

On or about 28<sup>th</sup> August 2013, I received a call from Harjinder Singh that I should not contact Dilbag and I should not sponsor him for the spouse visa. I had emailed Dilbag in March 2015 and then in August 2015 when I requested him for signing the joint party application for dissolution of our marriage.

Harjinder Singh had offered me in January 2014 that he can get a job for me through Dilpreet to work in Super Cheap Vehicles Limited, Auckland. Harjinder also told me that Dilpreet manages many companies associated with his employer. He told me we can meet Dilpreet in Hamilton.

I and Harjinder went to Hamilton to meet Dilpreet in January 2014. We met Dilpreet in a parking near a takeaway for around 10 minutes. Dilpreet promised me that he can get a work visa for me in Super Cheap Vehicles Limited, but he said I will have to start work after 2-3 months from the grant of the work visa. At that time, I agreed to this proposal. At that time, Dilpreet had not disclosed his relationship with Super Cheap Vehicles Limited and I was not aware of his relationship with Super Cheap Vehicles Limited till August 2014 when I joined Direct Auto Importers Limited in Hamilton.

On or about 17 February 2014, Harjinder Singh forwarded me the employment contract for me in email. This contract was to work in Super Cheap Vehicles Limited. But the contract was incomplete as it did not contain the job description for the role of Assistant Manager. Harjinder Singh again forwarded another email from Dilpreet on 19<sup>th</sup> February 2014 which had job description of Assistant Manager.

[22] I have set Ms Kaur's evidence out in full because of concerns I have about Mr Harjinder Singh's conduct in these events and possible breaches of New Zealand employment law, in particular section 12A of the Wages Protection Act 1983 and the prohibition on requiring the payment of a premium to secure employment.

[23] I have been unable to take this matter further because there was no employment relationship between Ms Kaur and Mr Singh, however a copy of this determination will be provided to officials at the Ministry of Business, Innovation and Employment for their records.

### **Employment with Super Cheap Vehicles Limited**

[24] Ms Kaur signed a written employment agreement as an Assistant Manager for Super Cheap Vehicles Limited in Auckland on 21 January 2014.

[25] That employment agreement was signed by Mr Daljinder Singh who was recorded on the Companies Register as the sole director and shareholder. In its statement in reply DAIL denied Ms Kaur worked for it until August 2015 and referred the Authority to the fact that the work visa held by Ms Kaur limited her employment to Super Cheap Vehicles Limited.

[26] During my preparation for the investigation meeting I considered exercising my discretion under section 160 of the Act to interview Mr Daljinder Singh to investigate further the response from DAIL regarding Ms Kaur's employment with Super Cheap Vehicles Limited.

[27] The Authority made a number of attempts to locate Mr Singh. The Authority had four known addresses for Mr Daljinder Singh as recorded on the Companies Register. Unfortunately all attempts to locate him were unsuccessful. A further address for Mr Daljinder Singh was provided to the Authority after the investigation meeting had concluded but he was not at that address.

[28] This exercise became academic because at the investigation meeting Ms Kaur acknowledged that although she signed this agreement, she did so in the knowledge that there was no actual job but the signed agreement would be used to support her in obtaining a work permit which in turn entitled her to legally work in New Zealand.

[29] At the time Ms Kaur gave this evidence I raised with her the legitimacy of her applying for a work visa knowing the employment agreement provided to Immigration New Zealand with her application was a work of fiction. I advised Ms Kaur that my determination would be provided to officials at Immigration New Zealand for their records.

### **Employment with DAIL**

[30] After meeting him in January 2014 Ms Kaur was encouraged by Mr Dilpreet Singh who was working for Enterprise Traders Limited (the previous name for DAIL) in Hamilton, to apply for the role of Assistant Manager in Enterprise Traders Limited.

[31] Ms Kaur applied for the role and was interviewed by Mr Kumar. The evidence established that between 15 August 2014 and 9 July 2015 Ms Kaur worked

as a Customer Service Representative for DAIL. This was a breach of her work visa which limited her to working for Super Cheap Vehicles Limited.

[32] In early 2015 Ms Kaur was offered and accepted the role of Assistant Manager and started working in that role after a change to her work visa was approved on 9 July 2015 to allow her to legally work for DAIL.

[33] In October 2015 Ms Kaur visited India and returned to New Zealand in November 2015. Ms Kaur continued working for DAIL on her return from India until she left her employment on 28 January 2016.

### **Issues**

[34] The issues for determination are whether Ms Kaur:

- a) has been paid for all hours worked and if not, what is the arrears due to her;
- b) has been paid all commission payments due to her;
- c) has arrears of holiday pay due to her including payment for public holidays and alternate days owed to her and if so, what is the outstanding balance; and
- d) was unjustifiably disadvantaged during her employment and if so, what if any remedies should be awarded.

### **Arrears of wages**

[35] There are two periods of work for which Ms Kaur claims unpaid wages. The first relates to the period of work from 15 August 2014 to 8 July 2015 inclusive when Ms Kaur says she worked as a Customer Service Representative for DAIL. The second is after her appointment as the Assistant Manager from 9 July 2015 until the end of her employment in January 2016.

[36] I have been provided with a book (the time record book) in which employees of DAIL (including Ms Kaur) and Nawton Panel and Mechanical Limited have recorded their start and finish times for each day they worked. Ms Kaur confirmed

for me at the investigation meeting that this book contained an accurate account of the days and hours she worked each week. Ms Kaur has also provided me with copies of her bank statements for the periods which she is seeking payment for arrears of wages.

[37] DAIL disputes the entries made in the time record book and says they are not accurate. I have considered DAIL's claims in this regard but have not accepted its evidence. The time record book was a system put in place by DAIL. The book was kept in the office and was available for DAIL to check as and when it wished. At no time during Ms Kaur's employment did Mr Kumar or Mr Sharma raise with Ms Kaur any concerns about the entries she was making in the time record book.

[38] In the absence of any wages and time record from DAIL I have accepted the hours set out in the time record book as being the most accurate record of the days and times Ms Kaur worked for DAIL. I have used the information contained in the time record book, together with the bank statements produced by Ms Kaur to establish and determine Ms Kaur's arrears of wages claim.

[39] In coming to my conclusions regarding the arrears of wages claim I considered whether the calculation of wages should be based on gross or nett figures. The Inland Revenue Department statements provided by DAIL do not reflect accurately the wages paid to Ms Kaur and therefore the gross sums indicated on those returns is unreliable.

[40] I am satisfied it is more reliable to calculate Ms Kaur's arrears of wages on nett amounts. This allows me to take into account the nett payments received by Ms Kaur during her employment. To calculate the nett amounts payable I have used the PAYE calculator located on the Inland Revenue Department's website. DAIL will have to account to the Inland Revenue Department for the PAYE component of Ms Kaur's arrears of wages.

#### ***August 2014 – 8 July 2015***

[41] Ms Kaur says she worked for DAIL from 15 August 2015 until 8 July 2015 as a Customer Service Representative. Ms Kaur claims \$14,973.93 for hours she says she worked but was not paid during this period. DAIL says that Ms Kaur did not work for it until July 2015 but instead worked for Super Cheap Vehicles Limited.

[42] I find that on balance it is more likely than not that Ms Kaur worked for DAIL for the period 15 August 2014 to 8 July 2015 inclusive. This is because the bank statements show the first payment Ms Kaur received following her move to Hamilton was on 12 September 2014 from “Sharma IR Enterprise” in the amount of \$300. I have taken the reference to be associated with Mr Sharma, although a search of the Companies Register did not show any companies of that name.

[43] After this first payment Ms Kaur was paid three times by DAIL. On 10 October 2014 Ms Kaur was paid by Super Cheap Vehicles and then received a further payment from DAIL. This was followed by 16 payments recorded as being from Super Cheap Vehicles.

[44] Between 6 March and 8 June 2015 Ms Kaur received 12 payments recorded as being from Supercheap Batteries even though that company had since changed its name to Cheap Deals on Wheels Limited. She then received and one payment on 23 April 2015 recorded as being from Super Cheap Vehicles Limited.

[45] From 11 June 2015 Ms Kaur received seven payments from Cheap Deals on Wheels Limited which included payments made after 9 July 2015. My analysis shows that the majority of payments received by Ms Kaur between August 2014 and July 2015 were from Cheap Deals on Wheels Limited.

[46] With the exception of four payments of \$350 and two payments of \$300, Ms Kaur received payments of \$400 each week.

[47] At the investigation meeting Mr Sharma confirmed that the companies operating the various businesses at 88-92 Avalon Drive were intermingled to such an extent that payments were made from one entity on behalf of another. Given that, I have concluded the name of the payee recorded in Ms Kaur’s bank statements is not determinative of the name of Ms Kaur’s employer.

[48] In addition to her bank statements Ms Kaur has produced a copy of a Vehicle Offer and Sale Agreement dated 23 March 2015 for a vehicle sold by Ms Kaur on behalf of DAIL. Since the investigation meeting I have received additional Vehicle Offer and Sale Agreements signed by Ms Kaur on behalf of DAIL, some of which were dated prior to 9 July 2015.

[49] Ms Kaur says she worked six days a week from Sunday to Friday inclusive. The time record book does not support Ms Kaur's evidence that she worked every Sunday. I have concluded that for the period 15 August 2014 to 9 July 2015 Ms Kaur worked each week from Monday to Friday inclusive.

[50] Ms Kaur has not recorded the days and hours she worked between 31 March and 8 April 2015 inclusive and between 25 April and 8 July 2015 inclusive. Even though no times were recorded in the time record book Ms Kaur's bank statements show that she continued to receive regular weekly payments from DAIL during these two periods. I have therefore concluded that Ms Kaur worked continuously from 15 August 2014 to 8 July 2015.

[51] Based on the documents provided to me I am satisfied it is more likely than not that Ms Kaur worked 8.5 hours each day for the five days of the week Monday to Friday inclusive starting at 8.30am and finishing at 5.30pm. Ms Kaur has recorded that she generally took a 30 minute unpaid break for lunch each day.

[52] I am satisfied on the balance of probabilities that for the period 15 August 2014 to 8 July 2015 Ms Kaur worked on average 42.5 hours each week.

[53] Between 15 August 2014 and 31 March 2015 the minimum hourly rate of pay was \$14.25 per hour. On 1 April 2015 the minimum hourly rate of pay increased to \$14.75.

[54] 42.5 hours at \$14.25 per hour equates to a total of \$605.63 gross per week which results in a nett payment after PAYE of \$509.72. 42.5 hours at \$14.75 equates to a total of \$626.87 gross or \$526.93 nett.

[55] For the period 15 August 2014 to 8 July 2015 inclusive Ms Kaur received total nett payments of \$15,600.

[56] Between 15 August 2014 and 31 March 2015, a period of 32 weeks, Ms Kaur should have been paid the nett amount of 16,311.04. Between 1 April and 8 July 2015, a period of 14 weeks, Ms Kaur should have been paid the nett amount of 7,377.02. This is a total of \$23,688.06 nett.

[57] Taking into account the \$15,600 paid to her, I find Ms Kaur was underpaid her nett wages by \$8,088.06.

[58] Pursuant to section 131 of the Act Direct Auto Importers (NZ) Limited is ordered to pay to Ms Kaur the nett amount of \$8,088.06 within 28 days of the date of this determination.

***July 2015 – January 2016***

[59] Ms Kumar claims the sum of \$7,853.23 being unpaid wages for this period of her employment.

[60] It was common ground that on 9 July 2015 Ms Kaur began in her role as an Assistant Manager. From this time her employment was governed by the terms set out in the signed individual employment agreement. This included payment of wages for all hours worked at the rate of \$17.00 per hour with a minimum of 35 hours to be worked each week.

[61] Ms Kaur was absent from work from 9 October until 16 November 2015 when she returned to India for a holiday.

[62] DAIL says the terms of Ms Kaur's employment changed on her return from India in that she was no longer to be paid an hourly rate but agreed to be paid on a retainer plus commission basis.

[63] I have not accepted there was a change to the terms and conditions of Ms Kaur's employment in November 2015. Ms Kaur's bank statements show that Ms Kaur was paid \$450.00 every week from 9 July to 8 October 2015 inclusive and on her return the payments varied for a period of 5 weeks but then resumed at \$450 per week until her employment ended in January 2016.

[64] For the purpose of calculating the arrears of wages claim for this period I have broken the period employment into two further segments to take into account the period Ms Kaur was absent. I have established and determined Ms Kaur's arrears of wages for each period of 9 July to 9 October 2015 and 16 November 2015 to 28 January 2016.

9 July to 9 October 2015

[65] For the period 9 July to 9 October 2015 Ms Kaur has recorded in the time record book that she worked each week Monday to Friday inclusive from 8.30am to 5.30pm with a 30 minute lunch break giving a total of 42.5 hours a week. In addition Ms Kaur records that she worked a total of 11.15 hours over two Saturdays:

a) 1 August 2015 for 4 hours; and

b) 29 August 2015 for 7.15 hours.

[66] 42.5 hours at \$17 per hour equates to a total of \$722.50 gross which results in a nett payment after PAYE of \$604.44. Between 9 July and 9 October 2015, a period of 14 weeks, Ms Kaur should have been paid the nett amount of \$8,462.16.

[67] In addition Ms Kaur was entitled to receive payment for the two Saturdays totalling 11.15 hours at \$17.00 per hour which amounts to a total of \$189.55 gross which results in a nett payment after PAYE of \$130.54.

[68] Ms Kaur's total nett income for the period 9 July to 8 October inclusive should have been \$8,592.70. During this period Ms Kaur received total payments of \$5,850. I find Ms Kaur was underpaid her nett wages by \$2,742.70 nett.

[69] Pursuant to section 131 of the Act Direct Auto Importers (NZ) Limited is ordered to pay to Ms Kaur the nett amount of \$2,742.70 nett within 28 days of the date of this determination.

16 November 2015 to 28 January 2016

[70] Ms Kaur records that she returned to work on 16 November 2015. For the 11 week period from 16 November 2015 to 28 January 2016 inclusive Ms Kaur was paid \$4,213.61 in total.

[71] Ms Kaur records various starting and finishing times during this period. I am satisfied on balance that Ms Kaur generally started each day at 8.30am and finished at 6.00pm.

[72] During the period 16 November 2015 and 28 January 2016 Ms Kaur has recorded that she also worked the following weekend days:

- Sunday 13 December 2015 – 8 hours at \$17 per hour = \$136.00
- Saturday 26 December 2015 – 6 hours at \$17 per hour = \$102.00
- Sunday 27 December 2015 – 7 hours at \$17 per hour = \$119.00
- Saturday 2 January 2016 – 4 hours at \$17 per hour = \$68.00
- Sunday 3 January 2016 – 6 hours at \$17 per hour = \$102.00
- Sunday 17 January 2016 – 8 hours at \$17 per hour = \$136.00
- Sunday 24 January 2016 – 8.15 hours at \$17 per hour = \$138.55

[73] I have accepted Ms Kaur worked on average 9 hours each day Monday to Friday inclusive, being 45 hours each week and worked each of the weekend days set out in paragraph [60] above.

[74] 45 hours at \$17 per hour equates to a total of \$765.00 gross per week which results in a nett payment after PAYE of \$638.88. Extrapolated out over 11 weeks makes a total of \$7,027.68.

[75] In addition, Ms Kaur was entitled to be paid for each of the weekend days set out above which equates to a further payment of \$801.55 gross or \$668.99 nett.

[76] For the period 16 November 2015 to 28 January 2016 inclusive Ms Kaur was entitled to be paid a total of \$7,696.67 nett. For the same period Ms Kaur received total nett payments of \$4,213.61. Ms Kaur has been underpaid her nett wages for the period 16 November 2015 to 28 January 2016 by \$3,483.06 nett.

[77] During this same period Mr Kumar deducted \$50.00 each week by agreement with Ms Kaur as repayment of a loan of \$500 advanced to Ms Kaur. After calculating all of the deductions Mr Kumar had actually deducted \$700. At the investigation meeting Mr Kumar could not explain why he had deducted \$700.

[78] The amounts I have calculated as Ms Kaur's outstanding wages has not taken into account the loan advanced to her which she agreed to pay back through deductions from her wages. Accounting for the \$500 means Ms Kaur has been underpaid by \$2,983.06 nett for the period 16 November 2015 to 28 January 2016.

[79] Pursuant to section 131 of the Act Direct Auto Importers (NZ) Limited is ordered to pay to Ms Kaur the nett amount of \$2,983.06 nett within 28 days of the date of this determination.

### ***Holiday pay***

[80] Ms Kaur was not paid any holiday pay while she was employed at DAIL. Ms Kaur took time off to travel to India but was not paid during that time. Ms Kaur started work for DAIL on 15 August 2014. On 14 August 2015 Ms Kaur became entitled to four weeks holiday on pay.

[81] Ms Kaur terminated her employment on 28 January 2016. On termination she was entitled to receive a payment for all unpaid holidays plus an amount equivalent to 8% of her gross earnings for the period 15 August 2015 to 28 January 2016.

[82] Due to the difficulties with calculating holiday pay I have taken the total gross earnings Ms Kaur should have received for the whole of her employment and calculated 8% to arrive at the figure for holiday pay.

• Period 15 August 2014 to 9 July 2015	\$28,156.25
• Period 9 July to 9 October 2015	\$10,304.55
• Period 16 November 2015 to 28 January 2016	\$9,216.55
<b>Total gross earnings should have been</b>	<b>\$47,677.35</b>

[83] 8% of \$47,677.35 amounts to \$3,814.18 gross. Pursuant to section 131 of the Act Direct Auto Importers (NZ) Limited is ordered to pay to Ms Kaur outstanding holiday pay in the amount of \$3,814.18 gross within 28 days of the date of this determination.

### ***Unpaid public holidays***

[84] Ms Kaur says she has not been paid for days worked as public holidays. The Time record book records that Ms Kaur worked on 26 December 2015 and 2 January 2016. Both are public holidays as listed in section 44 of the Holidays Act 2003 (Holidays Act).

[85] Both holidays fell on a Saturday. Section 45 of the Holidays Act requires that where the public holidays for 26 December 2015 and 2 January 2016 fall on a Saturday and the day is not otherwise a working day for Ms Kaur the public holiday must be treated as falling on the following Monday.

[86] Saturday was not a day Ms Kaur normally worked. This means the public holidays are treated as falling on the following Monday. Ms Kaur did not work on Monday 28 December 2015 or Monday 4 January 2016. She was however entitled to be paid for those two days off. When calculating the arrears of wages claims above I have calculated the amounts owing on the basis that Ms Kaur would receive an ordinary days pay for each of those two days and they have been included in the weekly calculations for the arrears.

[87] No further amounts are due to Ms Kaur.

### ***Commission***

[88] It was common ground that Ms Kaur was to be paid commission on each vehicle she sold on behalf of DAIL. The commission payments were structured on the value of the vehicle sold as follows:

- \$10,000 and over – commission paid \$400
- \$6,000-\$9,000 – commission paid \$300
- \$3,000 - \$5,000 – commission paid \$200
- \$2,000 – commission paid \$100
- Less than \$1,000 – commission paid \$50

[89] I have been provided with copies of the sales documents relating to the sales of vehicles by Ms Kaur during her employment at DAIL. Ms Kaur sold the following vehicles:

<b>Date of sale</b>	<b>Make and Model</b>	<b>Value</b>	<b>Commission due</b>
24 December 2014	Isuzu Wizard	\$5,000	\$200
27 December 2014	Toyota Marino	\$1,400	\$100
23 March 2015	Nissan Bluebird	\$5,200	\$200
17 April 2015	Sabaru Legacy	\$9,000	\$300
27 May 2015	Nissan Skyline	\$10,000	\$400

2 August 2015	Toyota Passo	\$5,000	\$200
19 August 2015	Nissan Skyline	\$15,990	\$400
21 August 2015	Nissan Tiida	\$8,990	\$300
26 August 2015	Mazda MPV	\$9,990	\$300
<b>Total Commissions due</b>			<b>\$2,400</b>

[90] I am satisfied Ms Kaur received payment of \$1,385 nett before she left on her holiday to India for outstanding commission payments. Ms Kaur was entitled to \$2,400 gross which after PAYE is \$2,020.60 nett.

[91] Taking into account the nett commission payments made to Ms Kaur and pursuant to section 131 of the Act Direct Auto Importers (NZ) Limited is ordered to pay to Ms Kaur \$635.60 nett within 28 days of the date of this determination.

### **Unjustified disadvantage**

[92] Ms Kaur claims one or more conditions of her employment were affected to her disadvantage by the following actions of the employer which Ms Kaur says were unjustified:

- a) being subject to discrimination and harassment;
- b) being demoted;
- c) being required to work for other related companies for no pay;
- d) being blamed for others' mistakes; and
- e) the refusal of DAIL to support Ms Kaur's application for an extension to her work visa.

[93] Pursuant to section 103A of the Act I must be satisfied on the balance of probabilities that one or more conditions of Ms Kaur's employment were affected to her disadvantage due to DAIL's unjustified action. This requires a two-step process, firstly I must be satisfied of the disadvantageous actions and then I must determine whether those actions were justifiable.

[94] The statutory test of justification contained in section 103A of the Act provides for the question of whether an action was justifiable to be determined on an objective basis, having regard to whether the employer's action, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[95] In applying the test in section 103A of the Act, the Authority must consider the non-exhaustive list of factors outlined in section 103A(3) of the Act:

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[96] In addition to the factors described in section 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.<sup>1</sup>

[97] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[98] As a full Court observed in *Angus v Ports of Auckland Ltd*<sup>2</sup>

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

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<sup>1</sup> Employment Relations Act 2000 (the Act), section 103A(5).

<sup>2</sup> [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

### ***Discrimination and harassment***

[99] Ms Kaur claims she was discriminated against and subject to harassment during her employment at DAIL.

[100] The actions Ms Kaur says were discriminatory and harassing include Mr Kumar taking a fuel card off her and removing other responsibilities such as issuing window cards. Ms Kaur says that she was discriminated against on the basis of her gender.

[101] In *Air New Zealand Ltd v McAlister*<sup>3</sup> the Supreme Court held that the question to be answered in cases where discrimination is alleged is whether a relevant ground of discrimination was “a material factor” in the decisions made.

[102] I’m not satisfied that Ms Kaur has established that she was subject to discrimination and harassment during her employment at DAIL. Ms Kaur has not established that the actions of DAIL were actions taken against her on the basis that she was female. I can be of no further assistance to Ms Kaur in respect of this claim.

### ***Demotion***

[103] Ms Kaur says that when she returned to work following her holiday in India she was expecting to return to the role she had prior to commencing her leave but when she returned she was demoted to the role of sales consultant.

[104] Mr Kumar says Ms Kaur resigned three weeks before she left for India and he did not know when she would be returning to New Zealand. DAIL says that when Ms Kaur returned to New Zealand she was offered and accepted work as a Sales Consultant based on a \$300 retainer plus commission working five days each week. For the reasons set out earlier in this determination I have not accepted Mr Kumar’s evidence.

[105] Ms Kaur paid for her return tickets on or about 7 September 2015. On 10 October 2015 Ms Kaur emailed Mr Sharma in which she states (verbatim):

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<sup>3</sup> [2009] NZSC 78; [2010] 1 NZLR 153.

Hi Vishaal

I will say thanks to Direct auto Importers nz LTD management to understand and support me. I Sukhpreet Kaur, working as Assistant manager request to Direct Auto Imports NZ LTD to grant me leave, so I can go back to India and can see my family. I will report you once I will reach there and will try to come back as soon as possible, so I can restart my work to grow Direct Auto Importers NZ LTD in Better Vision. In India its very hard to connect with internet, so please allow me 2-3 days to reply and if u want me to contact plz contact via email, viber or whatsapp as my nz number will not work once i will leave nz.

Again, I appreciate to Direct Auto Importers NZ Ltd for all support and help.  
thanks

[106] No issues were raised by Mr Sharma or Mr Kumar about the content of Ms Kaur's email, in particular no issue was taken with Ms Kaur's assertion that she would return and would restart her work.

[107] At the investigation meeting Ms Kaur told me that nothing changed in relation to her duties but she was told she would have the title of Sales Consultant.

[108] I am satisfied that apart from the change in title no other terms and conditions of Ms Kaur's employment or duties were changed. Ms Kaur has not established she was subject to a disadvantageous action with the change in her title and I am unable to be of further assistance in respect of this claim.

***Work for other related companies for no pay***

[109] Ms Kaur says she was required to undertake work for other companies but was not paid for this work.

[110] I have already set out the number and identity of the companies operating from the Avalon Drive site. I accept that Ms Kaur did undertake work for other companies operating at Avalon Drive, but at all times she was an employee of DAIL. As set out earlier in this matter, the companies operated interchangeably.

[111] Ms Kaur has failed to establish to my satisfaction that she is owed any outstanding wages as a result of work undertaken for other companies while employed by DAIL.

***Being blamed for others' mistakes***

[112] There is no evidence on which to base a finding that one or more conditions of Ms Kaur's employment was affected to her disadvantage by being blamed for others' mistakes.

### ***Refusal to support visa application***

[113] Ms Kaur says Mr Kumar verbally promised her that DAIL would support her application for an extension to her work visa with Immigration New Zealand. Ms Kaur says she approached Mr Sharma in January 2016 but he referred her to Mr Kumar. When Ms Kaur approached Mr Kumar he refused to support her visa application. Ms Kaur says she was forced to take up a student visa instead and had to borrow \$4,000 for the course fees.

[114] Mr Kumar told me Ms Kaur advised him in early January 2016 that she had been offered a job opportunity in Auckland and that she was looking at furthering her studies.

[115] I have concluded that it is more likely than not that as Ms Kaur's work visa for DAIL was coming to an end she had looked at other opportunities. At the investigation meeting Ms Kaur confirmed that she is working for the employer discussed with Mr Kumar in January and is studying.

### ***Conclusion***

[116] Ms Kaur has not established that one or more conditions of her employment were affected to her disadvantage by any unjustifiable actions of DAIL.

### ***Costs***

[117] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Kaur shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. DAIL 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.

[118] 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