

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 625  
3256599

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| BETWEEN | HARKAMAL SINGH<br>Applicant               |
| AND     | YASMINE HOLDINGS<br>LIMITED<br>Respondent |

|                                      |  |
|--------------------------------------|--|
| Member of Authority:                 | Robin Arthur   |
| Representatives:                     | John Wood, advocate for the Applicant<br>Arvind Nair, counsel for the Respondent         |
| Investigation Meeting:               | 5 July 2024  |
| Submissions and further information: | From the Applicant on 8 and 19 July 2024 and from the Respondent on 12 and 26 July 2024. |
| Determination:                       | 17 October 2024  |

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Harkamal Singh worked as a truck driver for Yasmine Holdings Limited (YHL) from 1 August 2022 to 26 September 2023. He resigned that day, after three weeks on unpaid suspension, and raised a personal grievance. Harkamal Singh said he has resigned because he felt “so helpless and disturbed” by the way YHL had treated him. He said this meant the end of his employment should be seen as a constructive dismissal, that is resulting from his employer’s actions, rather than solely his own choice.

[2] At the time YHL’s business operated eight trucks with a contract to do deliveries and pickups for clients of a large freight transport company with a depot in Penrose. There were four full-time drivers, one being Harkamal Singh, and four contract drivers working for the business.

[3] YHL's statement in reply to Harkamal Singh's application to the Authority said he resigned of his own volition while taking sick leave for mental health reasons unrelated to his employment. It said he was not suspended.

### **The Authority's investigation**

[4] Harkamal Singh and YHL's director Gurpreet Singh provided written witness statements for the Authority's investigation and answered questions at the investigation meeting from me and the parties' representatives.

[5] Bhethnee Kaur, who used the title of "CEO and COO" of YHL in her email sign off on documents provided in the evidence, also attended the investigation meeting and gave oral evidence in response to questions. Ms Kaur is the wife of Gurpreet Singh.

[6] The representatives provided written closing submissions after the investigation meeting, along with some additional documents and records that had been identified as necessary.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The issues**

[8] The issues requiring investigation and determination were:

- (a) Was Harkamal Singh unjustifiably disadvantaged by how a restructuring process was proposed and carried out, suspension from his duties on two occasions, and the hours of work offered to him?
- (b) Was the resignation of Harkamal Singh on 26 September 2023 caused by breaches of duties owed to him by Yasmine Holdings Limited (YHL), with his resignation in those circumstances being reasonably foreseeable, so that his resignation should be deemed a constructive dismissal?
- (c) If YHL's actions were not justified (in disadvantaging and/or constructively dismissing Harkamal Singh), what remedies should be awarded, considering:

- Reimbursement of wages lost during the period of suspension and/or after he resigned; and
  - Compensation under s123(1)(c)(i) of the Act?
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Harkamal Singh that contributed to the situation giving rise to his grievance?
- (e) Is Harkamal Singh entitled to an award of arrears of wages for periods he was on unpaid suspension?
- (f) Is YHL liable to penalties for breach of good faith, failing to provide a written employment agreement and failure to promptly provide wage and time records?
- (g) Should either party contribute to the costs of representation incurred by the other party?

### **No written employment agreement**

[9] Gurpreet Singh said Harkamal Singh was initially hired on the basis of being a casual driver. However, as Gurpreet Singh accepted in answer to a question at the Authority investigation meeting, the regular pattern of work provided to Harkamal Singh from August 2022 meant the nature of his employment permanent and ongoing.

[10] No written employment agreement was provided or agreed at the start of the employment. Whatever terms of employment were set were agreed orally only.

[11] Harkamal Singh described himself as being on a salary, getting “fixed pay” of \$2,400 a fortnight. From August 2022 he usually worked around 45 hours a week. No amount was taken away or added to his pay if he worked fewer or more hours in the week.

### **Informal arrangements**

[12] Harkamal Singh and Gurpreet Singh both described a friendly working relationship before August 2023. This included making what YHL’s closing submissions described as “various schemes” for payments to Harkamal Singh.

[13] Around April 2023 they agreed that only \$1,600 of Harkamal Singh’s fortnightly nett pay would be paid by direct credit to his bank account, with the remaining \$800 paid in cash. Harkamal Singh said Gurpreet Singh asked for that

arrangement to help reduce the amount of tax being paid by the company. Gurpreet Singh said Harkamal Singh asked for that arrangement so his income level did not interfere with a benefit being claimed by his partner.

[14] A few months later Harkamal Singh had an injury. He asked for the split in how he was paid to stop once he found the lower income level recorded in his bank account also reduced the amount he could then receive in ACC payments based on income. Gurpreet Singh agreed to his request. From mid-July 2023 Harkamal Singh's nett fortnightly pay paid by direct credit to his bank account returned to the level of \$2,400.

[15] Harkamal Singh said he also received other cash payments from Gurpreet Singh to pass on to another employee of YHL. He said the money was to pay a driver. Gurpreet Singh said the payments were for Harkamal Singh's partner who had worked as a receptionist for YHL and wanted payment in cash so the income would not affect a benefit payment she received.

[16] It was not necessary for the purposes of this determination to resolve the conflict in their respective accounts of both arrangements. Either way, the arrangements Harkamal Singh and Gurpreet Singh had willingly taken part in were part of the context for considering how the parties in this relationship dealt with their legal obligations.

### **How the grievances arose**

[17] Harkamal Singh's claims for personal grievance of unjustified disadvantage and unjustified dismissal arose from events from mid-August to early September 2023, as described below.

#### *Different views on promises of a pay rise*

[18] Harkamal Singh had a Class 2 driving licence when he started work for YHL. He said Gurpreet Singh had agreed to increase his pay if he obtained, at his own expense, a Class 4 and then a Class 5 licence. He said he was promised a pay rise to \$1,500 nett a week once he got his Class 5 licence.

[19] Gurpreet Singh said he and Harkamal Singh had "general conversations" about how classes of licence affected the prospects for better-paid work, but he denied making any firm promises about pay rises.

[20] After Harkamal Singh got his class 5 licence in mid-August he was assigned to work on overnight return runs from Auckland to Palmerston North. He said he asked about the pay rise and Gurpreet Singh promised his pay would increase to \$1,500 a week from the following month, once he had completed training runs with another driver and was “driving the truck by myself”.

*New written employment agreement offered in restructuring meeting*

[21] Harkamal Singh said he expected to get that pay rise by late August but, instead, was called to a meeting at Ms Kaur’s office on 26 August.

[22] In their evidence Gurpreet Singh and Ms Kaur said they were taking steps at that time to restructure YHL’s business due to changes in the economy and labour market and following discussions with the large freight company to which YHL provided its trucking services.

[23] They met with each driver to discuss changes to the business.

[24] In their meeting with Harkamal Singh on 26 August Ms Kaur and Gurpreet gave him a proposed written employment agreement. The hours clause provided a minimum of 30 hours each week.

[25] Harkamal Singh said the agreement he was given also stated an hourly pay rate of \$28.50 (gross). He said this amount, after tax, would be less than he was already getting at the fixed weekly rate. Ms Kaur, from calculations she did during the meeting, said the pay he was getting at the time worked out to be around \$31 an hour.

[26] Harkamal Singh said the agreement should include what he said was the promised pay rise for Class 5 driving work on the Palmerston North run. Ms Kaur proposed \$30 an hour if he worked 55 hours a week on that run.

[27] The conversation became heated. Harkamal Singh said he would not do the Palmerston North run and wanted to return to Class 2 driving for 45 to 50 hours a week in Auckland at his current rate.

[28] An email sent to Harkamal Singh after the meeting, written by Ms Kaur and sent in Gurpreet Singh’s name, said YHL was “firm” on its plans to restructure its business operations. It offered Harkamal Singh his current job as a class 5 truck driver

on the Palmerston North run “as permanent job with your current wages which comes to \$30 an hour max to 60 hours”. He was asked to provide his feedback by 2pm the next day “as you have threatened us that you will not show up”.

[29] Harkamal Singh replied by email soon after, repeating his claim that Gurpreet Singh had promised his pay would rise if he got his Class 5 licence. He wrote that he “refused to do Palmerston North run as nothing is compensated for me for my staying overnight”. He also wrote that he did not know what to do as he was not sure if he had any work to do from next week and was “so depressed right now”.

[30] The following morning Ms Kaur sent Harkamal Singh a copy of the proposed agreement, with a \$30 an hour pay rate, asking him to sign and return the agreement to her “before commencing your shift”.

*Harkamal Singh holds one-person “strike” protest*

[31] Harkamal Singh did not return the agreement as request or work the next day, Sunday 27 August. Instead, by text message, he told Gurpreet Singh and Ms Kaur he was “on strike” from 2pm. His message said he had told the Police and the freight company what he was doing and he would sitting outside the depot yard if Gurpreet Singh and Ms Kaur wanted to talk to him. Ms Kaur responded with a message saying “we don’t do our business meetings on the road”. She invited him to a meeting, with a support person, at 11 am the next day at her office (which was not at the freight company’s depot).

[32] Harkamal Singh did spend some time that afternoon outside the depot yard holding a cardboard sign. He said he did not recall what he wrote on it. There was no evidence about what the sign said.

[33] He said he ended this activity after about two hours. He had contacted an advocate, Sunny Sehgal. He said Mr Sehgal advised him to go home and let Mr Sehgal deal with the matter by raising a personal grievance with YHL.

[34] Mr Sehgal did raise a personal grievance for unjustified disadvantage by letter dated 29 August 2023.

### *Meeting on 29 August*

[35] Harkamal Singh, Mr Sehgal, Ms Kaur and Gurpreet Singh met on 29 August. Although the meeting was agreed to be on a 'without prejudice' basis, both parties later waived their privilege in the confidentiality of that discussion through evidence given for the Authority investigation. This included referring to some details of what was said and by providing copies of texts exchanged about it.

[36] What was said during the meeting also later became the subject of a disciplinary meeting Ms Kaur wanted Harkamal Singh to attend, so some reference to the discussion was necessary. Ms Kaur said Harkamal Singh called her a liar during the meeting and she told him that this was misconduct. Gurpreet Singh said Harkamal Singh was "particularly volatile" in the meeting, abusing Ms Kaur with sexist remarks about sticking to domestic roles rather than interfering in business matters.

[37] Harkamal Singh's evidence, by contrast, described the meeting as "productive" and ending with agreement that he would return to work that evening. He then drove the run to Palmerston North over the following few nights.

[38] After the meeting Ms Kaur advised Mr Sehgal, by text, that she would provide him with "updates" to the proposed employment agreement. Her text said the updates would include a minimum of 30 hours, add an unspecified "extra protection layer" for YHL and Harkamal Singh and provide for payment of a food allowance but all other terms and conditions would remain the same.

### *Stopping the truck on 5 September*

[39] By email in the late afternoon of 5 September Gurpreet Singh sent Mr Sehgal an email attaching the amended proposed employment agreement. Mr Sehgal forwarded this message to Harkamal Singh who was driving a truck back from Palmerston North that evening.

[40] During a break in his journey, near Waiouru, Harkamal Singh read the agreement. He said nothing had changed except for one line about a meal allowance. He said he "got really depressed and stressed" and felt too upset to drive. He contacted Mr Sehgal and also tried to contact Gurpreet Singh but was unsuccessful due to poor mobile phone coverage in that area. After driving to Turangi, Harkamal Singh stopped the truck and was able to get a telephone connection to Gurpreet Singh. He told

Gurpreet Singh he was too stressed by all his problems to focus on driving. He asked for a relief driver to be sent to drive the rest of the journey. According to Harkamal Singh, it would have taken a relief driver around three hours to get there.

[41] Gurpreet Singh was not impressed with Harkamal Singh's request or the reasons given for it. He did not consider it was motivated by health concerns, as Harkamal Singh said, about the risk of driving in a depressed and upset state but, rather, was a ruse to pressure the company to agree to his demands. In his view Harkamal Singh was holding the truck to ransom.

[42] Gurpreet Singh then spent around 40 minutes talking with Harkamal Singh about his concerns. Harkamal Singh said Gurpreet Singh agreed to pay for some sick leave he had taken and to pay the cost of getting his Class 5 licence. Gurpreet Singh, in his evidence, said he had agreed to pay the licence cost and to "sit down and talk" about providing more hours of work each week, but nothing more.

[43] The conversation ended with Harkamal Singh agreeing he was able to drive the truck back to Auckland. In his evidence Harkamal Singh said this was because he was "a bit relaxed" after their conversation.

[44] During the evening Mr Sehgal told Gurpreet Singh, by email, that he had received a text message from Harkamal Singh saying he was "extremely stressed with the way the negotiation is happening". Mr Sehgal proposed the parties meet in mediation to "resolve the matter and move on".

[45] The next day, Ms Kaur spoke by telephone to Mr Sehgal, confirming the company would attend mediation. By email to Mr Sehgal later that day Ms Kaur also complained Harkamal Singh was "showcasing unreliable behaviour" including by threatening "to abandon our loaded truck for his personal gain". Referring to their earlier telephone conversation she also wrote that Mr Sehgal had recommended Harkamal Singh should take time off because "he is not mentally well".

#### *Suspension on 6 September*

[46] In a telephone call to Gurpreet Singh on the afternoon of 6 September Harkamal Singh asked whether he was working that night or not. Harkamal Singh then sent Gurpreet Singh a text message noting that Gurpreet Singh had said he would check with Ms Kaur before answering Harkamal Singh's query about work that night.

[47] At 6.08pm Harkamal Singh and Ms Kaur had a heated conversation by telephone. He said she had called him. She, in her evidence, denied calling him.

[48] Harkamal Singh recorded their conversation. A transcript of the recording was provided as part of evidence lodged and served before the Authority investigation meeting.

[49] In her oral evidence at the investigation meeting Ms Kaur adamantly denied any such conversation took place. After part of the recording was then played Ms Kaur accepted she was incorrect and said she recalled the conversation.

[50] In the course of their heated telephone conversation on 6 September, Ms Kaur told Harkamal Singh several times that she was standing him down. As noted in the transcript of the call, this included Ms Kaur saying:

I'm standing you down simple as that at this point.

...

Bring me your medical certificate please that you are well, then I will discuss anything further.

...

I'm not going to waste my time. I'm standing you down.

...

So all I'm saying is standing you down until you prove to me that you are absolutely well, one. Second, I'm sending you disciplinary email. I need to see you and you can bring your support person, bring your lawyer again. We have already asked your lawyer to schedule a mediation ...

...

... No mate, I do not want you on my trucks, I do not trust the way you are, what if you do something? At this point I cannot trust you.

...

... I'm standing you down for misconduct. I'm standing you down for not being well. You come for disciplinary meeting, I've already told your lawyer. And we'll deal with you through our lawyers only.

[51] Around this time Gurpreet Singh also sent a text message to Harkamal Singh. The message, timed at 6.10pm, said: "You are not working until mediation happens as its better if we can resolve it before u resume yr work. Thanks."

#### *Disciplinary meeting called*

[52] Later that night, after midnight, Ms Kaur sent Harkamal Singh notice of the disciplinary meeting she had referred to in the telephone call.

[53] Ms Kaur sent three separate emails. Each referred to a separate incident, by date only with no details of what occurred in the alleged incident. They comprised an incident of serious misconduct on 27 August 2023, an incident of misconduct on 29 August 2023 and an incident of serious misconduct on 5 September 2023.

[54] In her oral evidence Ms Kaur described the three incidents referred to as being Harkamal Singh's "strike" on 27 August, "calling me names" in the meeting on 29 August and the threat to "dump the truck on the roadside if we did not come to the terms of his demands" on 5 September.

[55] The emails said the disciplinary meeting was scheduled for 5pm on 7 September. They said he could bring a representative.

*Medical certificate provided*

[56] On 8 September Harkamal Singh attended an in-person consultation with a doctor at a local GP clinic. He was issued with a medical certificate stating the doctor's opinion that he was "fit to work" and "fit to drive according to NZTA standards". His advocate provided a copy of the certificate to YHL later that day.

*Mediation delayed until November*

[57] In the following days Mr Sehgal raised a personal grievance of unjustified disadvantage over the suspension.

[58] Employment Mediation Services (EMS) also began liaising with the parties' representatives over dates for mediation. On 20 September EMS offered the parties the date of 20 October for a one-day mediation to be held by audio-visual link.

[59] By this time YHL had engaged Employsure, a human resources advisory and advocacy business for employers, to represent it in dealing with Harkamal Singh's personal grievance. Employsure responded on YHL's behalf to EMS with the following message from an anonymous member of its "claims team":

On behalf of [a named Employsure advocate] and our client, the proposed date is not suitable. Unfortunately we have no availability for the remainder of October due to pre-existing commitments.

We propose 15 November 2023 via Zoom as opposed to in person for efficiency.

*Offer to sign agreement and return to work*

[60] Following the message that YHL and its Employure advocate were not available for mediation for a further eight weeks, Harkamal Singh asked the company to consider lifting his suspension and letting him return to work. In a message to the company, sent through his advocate, Harkamal Singh said he could not meet a commitment to send \$1,200 a fortnight to his family in India. He wrote that he was “ready to sign the new contract without any changes” if YHL would revoke his suspension and pay him for the suspension period.

[61] YHL, through its advocate, did not respond to the request.

*Resignation on 26 September 2023*

[62] On 26 September Harkamal Singh resigned. By that time he had been suspended from work for three weeks. He had not received any pay for those three weeks. He did receive a payment of \$1,200 on 17 September. Subsequent inquiries established this was payment for the week worked before his suspension.

[63] His email said the circumstances “are not longer bearable for me”. He said he had been suspended without being given a reason and no information on whether or not he would be paid while suspended. He said he had provided a medical certificate and asked, through his advocate, for the suspension to be lifted but YHL “did not even bother to give a single reply back”. He said he was “willing to sign the new employment agreement and accept the bad terms of that contract” but thought Gurpreet Singh and Ms Kaur were “taking revenge from me” for fighting for his rights.

[64] On 4 October his advocate raised a personal grievance of unjustified dismissal, by constructive dismissal.

**Breaches of terms of employment and statutory rights**

[65] The evidence outlined above established YHL had breached duties owed to Harkamal Singh as its employee. Those duties existed even though his conduct was inconvenient or may have breached duties he owed to the company himself. The following shortcomings are established as breaches by YHL.

*Failure to provide written employment agreement*

[66] By the time of the August 2023 restructuring proposal, when a proposed written employment agreement was prepared to give to Harkamal Singh, he had been working for a year with no written employment agreement. This breached YHL's obligation under s 65A of the Act to provide a written employment agreement including terms, among others, which describe the work, the agreed hours or arrangements about working times and the wages or salary payable.

[67] A written employment agreement, in this situation, would have assisted with resolving some of the issues between the parties about pay and hours and, depending on other terms that could have been included, whether Harkamal Singh could have been suspended without pay and how issues between the parties should be raised and dealt with. Its absence made an appreciable difference to how the parties dealt with their differences over what had or had not been agreed over working arrangements.

*Suspension without proper consultation and without pay*

[68] Harkamal Singh said he was suspended on 27 August because he did not return a signed employment agreement and was then not allowed to work until it was agreed in the meeting on 29 August that he would do the Palmerston North run. He said this was a suspension because he had not complied with the directive in Ms Kaur's email on 27 August to "confirm your acceptance by signing the contract and returning it to me before commencing the shift".

[69] The situation at that time was not, however, quite as simple as the 'no signature, no work' scenario described in Harkamal Singh's account of events. If it were, such an edict would have been a suspension. It cannot be described definitively in that way because Harkamal Singh had made his own declaration about not working on the Palmerston North run until the company agreed to the pay rise which he said he was promised. He had suspended his own performance of duties in the protest activity that he described as a strike.

[70] The situation was, however, significantly different when Ms Kaur told Harkamal Singh by telephone on 6 September that YHL was 'standing him down'. It was a suspension, decided and announced without proper consultation.

[71] While Harkamal Singh said, in his resignation email, that no reason for the suspension was given, this was not correct. As the recording of the telephone conversation with Ms Kaur on 6 September showed, she did give two reasons. The first was her assertion that he had not proved that he was “absolutely well” enough to drive a truck. The second reason was the disciplinary issues YHL wanted him to answer about his protest activity on 26 August, his comments to Ms Kaur in their meeting on 29 August and stopping the truck during his 5 September run.

[72] Harkamal Singh did not have a proper opportunity to respond to those reasons before the decision to suspend him was made and communicated to him.

[73] In the absence of a written employment agreement, there was no express contractual provision authorising suspension. Not having provided Harkamal Singh a proper opportunity to respond to the proposal for suspension before deciding it, YHL could not say it had fairly established a good reason he could not remain in the workplace.

[74] There was also no express contractual provision for suspension without pay. What YHL did fell below the standard it set itself in the proposed employment agreement. Its proposed term on suspension said the employer reserved the right to suspend an employee “on full pay” in circumstances where the employee’s behaviour was under disciplinary investigation or posed a health and safety risk. While it was not a binding term, in the absence of agreement, this term in YHL’s own agreement indicated its own acceptance of what would comprise fair and reasonable action by an employer in such situations. YHL’s actions in suspending Harkamal Singh without pay was a breach of the duty of fair treatment owed to him at that time.

#### *Failure to act in good faith*

[75] The statutory duty of good faith required YHL to be active, constructive, responsive and communicative in addressing problems in the employment relationship.<sup>1</sup>

[76] Two substantial failures were established in the evidence.

[77] Firstly, YHL breached the obligation to be active and responsive by being unavailable to attend mediation for an eight-week period from 20 September to 15

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<sup>1</sup> Employment Relations Act 2000, s 4(1A)(b).

November. While on suspension, Harkamal Singh remained YHL's employee. YHL knew he had already been without income for the previous three weeks, because it was not paying him, and it had not responded to his request to be paid while the suspension continued.

[78] Ms Kaur said she and Gurpreet Singh were available for the October date offered by EMS but the problem was the availability of its Employsure advocate. It was not an adequate excuse. YHL was responsible for any representative it appointed meeting the company's good faith obligations. The company knew of the delay because the representatives' communication with EMS was copied to YHL's email address.

[79] Secondly, YHL also breached its good faith obligations by failing to be active and responsive to Harkamal Singh's offer, on 20 September, to sign the agreement on the terms required by the company if it would let him return to work. Again, the excuse YHL offered, that dealing with his request was in the hands of its advocate, was not adequate. Harkamal Singh's email making that offer was copied by his advocate to the company's email address. It knew about it and was not sufficiently communicative and responsive in that situation.

[80] YHL's failure to be active and communicative was, as described during questioning at the Authority investigation meeting, an approach by that company designed to use the financial pressure on Harkamal Singh to 'bleed him out'.

### **Unjustified disadvantage**

[81] Harkamal Singh was unjustifiably disadvantaged by his suspension without pay from 6 September and the continuation of that suspension in the following weeks until his resignation.

[82] The failures in the process YHL adopted were more than minor and resulted in him being treated in the following ways.

[83] By having the decision announced to him by telephone on 6 September, Harkamal Singh was denied an important opportunity that an employer acting fairly and reasonably could have provided. This was a chance, not given, for him to consider and propose some other arrangement that would have allowed for him to continue working until a disciplinary meeting or mediation took place as well as putting in place

some guidelines that could satisfy whatever concerns YHL had about what might happen in the meantime.

[84] Alternatively, a proper discussion could also have addressed the question of pay during the suspension.

[85] By email to Harkamal Singh's advocate on 7 September Ms Kaur wrote: "We need a full report from a medical practitioner and psychologist for him to be reinstated in the workplace".

[86] The suspension should have been reviewed in light of the medical certificate Harkamal Singh then provided on 8 September saying he was well and fit to drive. A reasonable employer, treating an employee in that situation fairly, could not have ignored the certificate. If YHL doubted the certificate's reliability, the company should have arranged some other assessment of its employee by a suitable registered health professional.

[87] YHL took no steps to facilitate such an assessment. Rather, it continued to treat Harkamal Singh unfairly by leaving him on unpaid suspension, envisaged as lasting until at least its proposed 15 November mediation.

### **Constructive dismissal**

[88] By 26 September Harkamal Singh's situation was one where his resignation was a reasonably foreseeable consequence of YHL breaching its duties of fair treatment to him as its employee.

[89] An ongoing suspension without pay, the delay in attending mediation and YHL's failure to respond to his offer to accept the company's terms were all sufficiently serious indications that YHL did not intend to be bound by its obligations in its employment relationship with Harkamal Singh.

[90] His email offer of 20 September, highlighting his financial difficulties, made it reasonably foreseeable he could not remain in the employment relationship under those conditions.<sup>2</sup> In the context of those circumstances, what caused him to resign were

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<sup>2</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 2 NZLR 415 (CA) at 419.

actions of his employer rather than his own freely chosen decision.<sup>3</sup> The employment, therefore, ended by constructive dismissal. And, for reasons already given, the actions which caused the dismissal were not what a fair and reasonable employer could have done in all the circumstances at the time. It was an unjustified dismissal.

### **Remedies**

[91] The personal grievances of unjustified disadvantage and unjustified dismissal arose in a chain of events for which remedies are appropriately considered together.

#### *Lost wages*

[92] Harkamal Singh gained new employment from 25 October 2023. He claimed lost wages for the period from the day after his resignation until then.

[93] From 27 September to 24 October he would have earned \$5,951.45 at the 'fixed pay' rate paid at the time he was suspended. The holiday pay loading of \$476.11 on that amount takes the lost wages to \$6,427.56.

[94] Gaining new employment within that relatively short period indicated Harkamal Singh had done what he reasonably could have done to mitigate his loss.

[95] Accordingly, \$6,427.56 is the sum YHL must pay Harkamal Singh under s 123(1)(b) of the Act in reimbursement of wages and holiday pay he lost as a result of the grievance.

#### *Compensation for humiliation, loss of dignity and injury to feelings*

[96] Harkamal Singh's evidence established he had placed a high degree of trust in Gurpreet Singh and was very distressed by what he saw as a failure to honour promises made to him. While the basis of his view is disputed, how YHL had then dealt with the difference of opinion over the following weeks clearly injured Harkamal Singh's feelings. It led to a period of intense anxiety over whether he could meet financial obligations to family in India who he said were relying on him. While deeply felt at the time, there was no evidence of substantial, long-lasting effects on him.

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<sup>3</sup> *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cases 95 at 104.

[97] Weighing the particular circumstances of this case and the range of awards in similar cases, \$12,000 was an appropriate sum to order YHL to pay Harkamal Singh as compensation for humiliation, loss of dignity and injury to his feelings.

*Reduction for blameworthy conduct contributing to the situation*

[98] Where remedies are awarded for a personal grievance, the Authority must consider whether any reduction in remedies is required. A reduction may be made where blameworthy conduct by the employee contributed to the situation giving rise to the grievance.<sup>4</sup>

[99] YHL submitted Harkamal Singh had breached his own good faith obligations by engaging in disruptive actions that undermined its business and the employment relationship. It referred to his protest activity outside the freight depot on 26 August and his threat to “abandon a truck mid-route” on 5 September. It described him as having “weaponised allegations of stress and distress against his employer”.

[100] There was no evidence of any actual damage to YHL’s business or client relationships as a result of his 27 August protest. On 30 August he sent an email to the freight company’s branch manager apologising for his “poor behaviour”, describing it as something he knew he should not have done. The manager responded by thanking him for the message, saying she understood the pressure he was under and hoping he could work through any issues with Gurpreet Singh.

[101] While Harkamal Singh could, arguably, have done more to pursue his concerns in a good faith manner, without seeking to publicly embarrass his employer at the site of its main client, his protest activity was not illegal and had no reported negative effects. It was not sufficiently blameworthy conduct to warrant a reduction of remedies.

[102] Two other aspects of his conduct were also the subject of intended disciplinary processes which never got underway.

[103] There was insufficient evidence about the abusive comments Harkamal Singh allegedly made to Ms Kaur in their meeting on 29 August to reach a conclusion that his conduct was so blameworthy as to require a reduction of remedies.

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<sup>4</sup> Employment Relations Act 2000, s 124.

[104] There was, however, more room to question Harkamal Singh's conduct in stopping the truck and seeking a relief driver on 5 September. He said he was too distressed after reading the proposed employment agreement to drive safely but, on his own account, he was sufficiently calm after a 50-minute telephone conversation with Gurpreet Singh to complete the journey.

[105] YHL's argument that its truck was 'held to ransom' in a cynical ploy that night would, however, have more weight if it had done more to obtain an appropriate medical assessment of Harkamal Singh in the days immediately following. Not having better information gained at the time to rely on, there was not sufficient evidence to conclude his conduct that night was so blameworthy that it required a reduction of remedies.

### **Arrears**

[106] YHL had not established a contractual right or other good reason to suspend Harkamal Singh without pay. He was ready to work and medically cleared for work from 8 September. YHL must pay his wages for the time he was suspended from 6 September to the date of his resignation on 26 September.

[107] Taking that period as three weeks, Harkamal was entitled to wages of \$4,693.98. Adding the holiday pay entitlement loading of \$375.52, the arrears due are \$5,069.50 (gross).

### **Penalties**

[108] In light of the findings made in this determination, YHL was liable to penalties for breaches of its statutory obligations to act in good faith, to provide a written employment agreement and to promptly provide wage and time records when requested.

[109] The following factors, identified in s 133A of the Act and case law, are considered when setting penalties:

- (i) The object stated in s 3 of the Act (of building productive employment relationships through promoting good faith behaviour);
- (ii) the nature and extent of the breach or involvement in the breach;
- (iii) whether the breach was intentional, inadvertent or negligent;

- (iv) the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach;
- (v) whether the person in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- (vi) the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee;
- (vii) previous conduct;
- (viii) deterrence, both particular and general;
- (ix) culpability;
- (x) consistency of penalty awards in similar cases;
- (xi) ability to pay; and
- (xii) proportionality of outcome to breach

[110] Before addressing the particular breaches, the following factors can be assessed as applying to all three of the penalties claimed.

[111] Penalties were appropriate to deter YHL, and employers generally, from failing to observe basic statutory obligations. There was no evidence of previous similar conduct by YHL or that it could not pay penalties. Harkamal Singh is a New Zealand resident and has lived in the country for almost ten years. There was no particular vulnerability associated with this employment relationship, as clear from the evidence of Harkamal Singh confidently asserting himself in interactions with his employers. The company had not paid any compensation for these breaches but, in its submissions, said it was committed to ensuring no further mistakes in its employment processes and practices.

*Breach of good faith: s 4 and s 4A of the Act*

[112] YHL's breaches of good faith, in delaying mediation and not responding to communications, were intentional and deliberate acts. They resulted from choices made by YHL, including through what its appointed advocate did or did not do.

[113] The failing, in both instances, made a real difference to the prospect that the parties might have more readily resolved the issues between them. Assessed

objectively, the failure was intended to undermine YHL's employment relationship with Harkamal Singh.

[114] Amounts set for breaches of good faith range widely according to the details of what has happened and its effects on the parties involved. In this case a penalty of \$3,000 was sufficient to mark the behaviour as below expected standards of employer conduct.

*Failure to provide written employment agreement – s 65(4) of the Act*

[115] The failure to provide a written employment agreement had a tangible effect in this case. Harkamal Singh could not point to the specific terms in a document recording his hours, pay rate, how pay rates might change and whether his suspension should be on pay. All were points in dispute. Having the written document would have assisted.

[116] In its submissions YHL acknowledged "it made mistakes in relation to providing documents to Harkamal Singh and accepted it would be censured for this".

[117] Taking account of that concession and its attempt to provide a written agreement at a later stage, albeit on disputed terms, a penalty of \$2,000 was sufficient to sanction YHL for its failure to observe the statutory obligation as the outset of the employment.

*Failure to provide wages and time records when requested – s 130(2)*

[118] The failure to promptly provide requested wage and time records was a topic addressed in an Authority case management conference on 4 December 2023. Wage and time records had been requested on 15 November 2023. They were not provided until the day of the conference call, some three weeks later. YHL's advocate had made abrupt responses to reasonable requests from Harkamal Singh's advocate about progress with the request.

[119] As recorded in the Directions of the Authority issued on 4 December, and having seen email correspondence between the advocates, I considered the response made by YHL, and the communication about it from its EmploySure advocate, did not meet the requirements of Employment Relations Act 2000 s 130(2): "Every employer must, upon request by ... a person authorised ... to represent an employee, provide that ... person immediately with access to ... part or all of the wages and time record ...".

[120] Section 130(4) provides that an employer who fails to comply with **any** requirement of s 130 is liable to a penalty. Section 130 is included in the Act's definition of employment standards and s 3 describes the objects of the Act as promoting effective enforcement of employment standards by conferring enforcement powers on (among others) the Authority.

[121] The request was not complex. It involved payments to a single worker for a relatively short period, 16 months of employment. No sound reason for the delay was given. When the wage and time information came, it was in the form of payslips printed from a payroll software system and dated 1 December. No satisfactory explanation was given for why completing what appeared to be a relatively simple and straight forward exercise took so long.

[122] The information was important to Harkamal Singh's case as he needed to quantify his claim for arrears.

[123] A penalty of \$2,000 is imposed for the breach of s 130(2) of the Act by not immediately providing access to wage and time records.

### **Summary and orders**

[124] Harkamal Singh was unjustifiably disadvantaged and unjustifiably dismissed by YHL.

[125] In settlement of his personal grievance YHL must pay Harkamal Singh the following sums:

- (i) \$6,427.56 reimbursement of lost wages and holiday pay;
- (ii) \$12,000 as compensation for humiliation, loss of dignity and injury to feelings

[126] YHL must also pay Harkamal Singh \$5,069.50 as arrears of wages and holiday pay for the period from 6 September to 26 September 2023.

[127] YHL must also pay to the Authority, for transfer on payment to a Crown account, penalties totalling \$7,000 comprising:

- (i) \$3,000, under s 4 of the Act for breach of good faith; and
- (ii) \$2,000, under s 65 of the Act, for failure to provide a written employment agreement; and

- (iii) \$2,000, under s 130 of the Act, for failure to immediately provide access to wage and time records.

[128] All sums ordered for payment to Harkamal Singh or to the Authority must be paid within 28 days of the date of issue of this determination.

### **Costs**

[129] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[130] If they are not able to do so and an Authority determination on costs is needed Harkamal Singh may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum YHL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[131] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>5</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).