**IN THE EMPLOYMENT COURT OF NEW ZEALAND**
**AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA**
**TĀMAKI MAKAURAU**

**[2023] NZEmpC 181**
**EMPC 379/2021**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | HENDERSON TRAVELS LIMITED<br>Plaintiff |
| AND | RAJWINDER KAUR<br>Defendant |

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| Hearing: | 10–12 and 31 May 2023<br>(Heard at Auckland) |
| Appearances: | Arunjeev Singh, counsel for plaintiff<br>J M Douglas, counsel for defendant |
| Judgment: | 26 October 2023 |

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**JUDGMENT OF JUDGE K G SMITH**

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[1] In November 2018, Rajwinder Kaur was employed by Henderson Travels Ltd as an agency manager. The company considered her employment ended by notice dated 11 December 2019 when it advised her that the position was redundant with effect from that date.

[2] Ms Kaur disagreed. She considered her dismissal occurred on 26 November 2019 during a meeting with the company director, Vyom Sikri, when she refused his demands for payment of money.

[3] In the Employment Relations Authority Ms Kaur established that she was unjustifiably dismissed. Henderson Travels was ordered to pay her:[1]

(a) $7,268.10 in unpaid wages, $267.75 for working on a public holiday, plus holiday pay on these amounts;

(b) $860, to refund the premium she paid that company in contravention of the Wages Protection Act 1983;

(c) $21,000 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act); and

(d) $25,480 gross for reimbursement pursuant to ss 123(1)(b) and 128 of the Act.

[4] In addition, Henderson Travels was ordered to pay a penalty of $12,000 of which $9,000 was payable to Ms Kaur and the balance to the Crown.

[5] Subsequently, Ms Kaur was awarded costs.[2]

[6] In determining that the dismissal was unjustified the Authority held that the redundancy was not genuine and amounted to an attempt to cover up what happened.[3]

[7] The Authority held that, even if the dismissal occurred because the company was restructuring, the process followed was so deficient that it would have been unjustified in any event.

## The challenge and stay

[8] Henderson Travels challenged the determinations and sought a full rehearing. It successfully applied for a stay pending the challenge being heard. The stay was

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1 *Kaur v Henderson Travel Ltd* [2021] NZERA 418 at [3], [85]–[89] (Member van Keulen).
2 *Kaur v Henderson Travels Ltd* [2021] NZERA 584 (Member van Keulen).
3 *Kaur*, above n 1, at [69]–[71].

granted subject to a condition requiring the amount ordered by the Authority being paid to the Registrar of this Court.[4]

## The issues

[9] This proceeding gives rise to the following issues:

(a) Was redundancy the reason for Ms Kaur's dismissal?

(b) If the answer to (a) is yes, was the process followed adequate?

(c) If the answer to (a) is no, was she unjustifiably dismissed and entitled to any remedies?

[10] Before discussing the circumstances that led to Ms Kaur's employment ending it is necessary, unfortunately, to make a decision about credibility.

[11] Significant and entrenched disagreements permeated this hearing. The parties disagreed about almost everything including when Ms Kaur started work, when she was trained and who provided that training, why she began working in a restaurant owned by the company's directors before working in the travel agency, whether she borrowed money and/or took money from the company and why she was dismissed.

[12] The protagonists in these disagreements were primarily Ms Kaur and the former and current directors of Henderson Travels, Mr Vyom Sikri and Mrs Preeti Sikri.[5] The evidence Mr and Mrs Sikri gave was, to a limited extent, intended to be supported by evidence from Rajat Grover and Reema Patel, both of whom were employed by the company.

[13] It is not possible to describe these disagreements as merely different recollections about what happened.

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4 *Henderson Travels Ltd v Kaur* [2022] NZEmpC 34.

5 Mr Sikri had retired as a director at the time of the hearing.

[14] I prefer Ms Kaur's evidence where it conflicts with what was said by Mr and Mrs Sikri. The reasons for that conclusion lie in the following:

(a) Ms Kaur's description of what happened was consistent and plausible.

(b) Ms Kaur's evidence was supported by transcripts of recordings of conversations with Mr and/or Mrs Sikri that make the most sense when measured against her evidence that Henderson Travels demanded money from her.

(c) Mr and Mrs Sikri's evidence contained inconsistencies.

(d) When Mr and Mrs Sikri replied to Ms Kaur's evidence and were confronted with aspects of the transcripts of the recorded conversations, emails and WhatsApp communication that were inconvenient to their narrative of events, they often responded with unsupported assertions that the transcript or documents concerned had been tampered with.

(e) No cogent evidence was provided by Henderson Travels (or Mr and Mrs Sikri) to support the contention that any evidence was tampered with despite this claim forming a significant part of the company's case.

[15] Mr Grover and Ms Patel's evidence did not sway this assessment. At relevant times Ms Patel was based in Christchurch. While she participated in meetings ostensibly about redundancy she was not involved in the pivotal conversations between Ms Kaur, Mr Sikri and Mrs Sikri that preceded them. Most of Mr Grover's evidence relied on information supplied to him by others and, like Ms Patel, he was not a party to the conversations between Ms Kaur, Mrs Sikri and Mr Sikri.

[16] For completeness, I do not accept Mr Singh's submission that Ms Kaur's evidence was materially untruthful or unreliable because she briefly worked in breach of her visa, or because there were some deviations between her AT HOP bus card records and notes she said showed the hours she actually worked.

*Was redundancy the reason for Ms Kaur's dismissal?*

[17] Ms Kaur was employed by Henderson Travels in November 2018. After signing the employment agreement she began a period of training initially (at least) as a volunteer. In January 2019, she reluctantly began working for a restaurant Mr and Mrs Sikri owned through another company rather than in the travel agency. The explanation provided to her for this change of job was that the position she was to fill in the travel agency was not available at that time.

[18] Despite there being nothing in common between the work to be undertaken for the travel agency and the restaurant business, there was no change to the employment agreement. Ms Kaur continued to be employed by Henderson Travels and was paid by the company, as if the agreement they had previously signed remained relevant. Ms Kaur worked in the restaurant until she took unpaid leave beginning in April 2019. When she returned, in early May 2019, she began working in the travel agency where she remained until her meeting with Mr Sikri on 26 November 2019.

[19] On the morning of 26 November 2019, Ms Kaur sent Mr Sikri an email enquiring about her unpaid wages. Mr Sikri's response was a visit to the office about an hour later.

[20] Mr Sikri's explanation for this visit, and the resulting impromptu meeting, was that he intended to discuss with Ms Kaur electrical work to be undertaken in the office that afternoon and to tell her the company was considering restructuring that might adversely affect her position. To support this stated second purpose he said that before attending the office that day he obtained professional advice about potentially restructuring the business.

[21] The real purpose for the meeting was neither of those things; it was to demand Ms Kaur pay money to the company. Ms Kaur said, and I accept, that reasonably early in the employment relationship the company told her that she had to pay back some of her wages. Ms Kaur said that, on several occasions during 2019, demands were made for her to pay more than $4,000 in cash.

[22] The company's demands took the form of an expectation that, despite the employment agreement stating Ms Kaur was to be paid $21 per hour for 35 hours work per week, her actual income should be $10 per hour. The difference was to be paid back in cash.

[23] To understand how the demands culminated in the 26 November 2019 meeting it is necessary to refer to two phone conversations between Ms Kaur and Mrs Sikri on 7 November 2019 and 14 November 2019.

[24] In May 2019, Ms Kaur paid $860 in cash to Mr Sikri to partially satisfy the company's demands but from then on she did not pay any more, primarily because she did not have enough money to do so. The demands for payment were repeated in the two phone conversations between Ms Kaur and Mrs Sikri. In the first conversation, on 7 November 2019, Mrs Sikri acknowledged the amount previously paid by Ms Kaur and calculated what was needed to clear the balance of the "debt". She calculated the amount as $4,110.

[25] The purpose of the subsequent conversation, on 14 November 2019, was to confirm the demand for payment and to arrange for the money to be collected by Mr Sikri.

[26] Ms Kaur took the self-help precaution of secretly recording the phone conversations and the meeting with Mr Sikri.

*Are the transcripts of the recordings admissible?*

[27] The recorded conversations were not in English and Ms Kaur relied on several transcripts including one from an accredited translation service.

[28] Not surprisingly, given the subject matter of the conversations, the transcripts showed a degree of circumspection in the discussions. What the conversations were about and what could be reliably taken from them was strongly disputed.

[29] Mr and Mrs Sikri objected to the transcripts being admitted into evidence, claiming that the recordings they were made from were manipulated. There was no

dispute about who participated in the conversations, or that the recorded voices were of Ms Kaur and Mr and Mrs Sikri.

[30] In addition, Mr Sikri said the audio file supplied to him of the conversation on 26 November 2019 was dated 28 November 2019, which supported his claim that it was manipulated.[6] He considered that the recording (and therefore the transcript) blended together parts of more than one innocuous conversation to create the version being relied on. The audio file was not in evidence and, if the date was different, no explanation for that one way or the other was provided.

[31] Despite the serious allegations about alleged manipulation of the recordings, no evidence was produced by Henderson Travels to substantiate its claims. Conversely, when Ms Kaur was repeatedly asked questions designed to obtain an admission from her that the recordings (and other evidence) were interfered with, her consistent and constant answer was that she had not tampered with them in any way.

[32] At this juncture it is necessary to add that the same criticism, of manipulation of evidence, was also made about other communications produced by Ms Kaur in the form of texts and WhatsApp correspondence. Strikingly, all of that evidence was produced by her. Henderson Travels (or Mr and/or Mrs Sikri) must have had its own copies of texts and WhatsApp correspondence from which it could have shown, by comparison, what had been changed or interfered with. It did not produce them or otherwise explain why the criticisms it made were justified. It is noteworthy that the complaints were only about texts and correspondence showing the company in a poor light.

[33] Mr Singh's first submission about the recordings was that the evidence gleaned from them was inadmissible. The grounds he relied on were:

(a) to question the genuineness of the transcripts by claiming the recordings from which they were made were "tampered, manipulated and doctored";

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6 Supplied as part of the defendant's disclosure obligations.

(b) the recording of Ms Kaur and Mr Sikri on 26 November 2019 was of poor quality and "inaudible";

(c) the recordings were obtained in breach of the duty of good faith in s 4 of the Act and were therefore illegal;

(d) that making recordings was a breach to the right to privacy guaranteed under the Privacy Act 2020 and its use was illegal; and

(e) that the act of recording the conversations was premeditated, well-planned with a deliberate intention to create "false evidence".

[34] It was incumbent on the company, in making these allegations, to demonstrate that there was a proper basis for them.[7] There was no basis on which it could be concluded that the recordings, transcripts, text messages or WhatsApp communications were tampered with. I find that they have not been altered by Ms Kaur and are what they purport to be.

[35] Despite Mr Singh's first submission, he accepted that the Court of Appeal's decision in *Talbot v Air New Zealand Ltd* applies; that is that the recording and consequent transcript are prima facie admissible.[8] He submitted, however, that the prejudicial effect of admitting that evidence outweighed its probative value. The prejudicial effect relied on was the possible "chilling effect" that would follow on "workplace cooperation, collaboration, open settlement discussion and frank exchange of problem solving".

[36] Supplementing that submission, Mr Singh argued that admitting this evidence would not:

(a) encourage trust in workplace relationships;

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7 *Medtronic New Zealand Ltd v Finch* [2014] NZHC 266 at [25]; *Kaur v Police* [2019] NZHC 3124 at [32] and [35].

8 *Talbot v Air New Zealand Ltd* [1996] 1 NZLR 414, [1995] 2 ERNZ 356 (CA). See also Crimes Act 1961, ss 216B(1) and 216B(2)(a).

(b) foster objectives of cooperative participation to facilitate resolution of workplace issues; or

(c) promote conditions favourable for the orderly, constructive settlement of disputes.

[37] Two Authority determinations were relied on to advance this submission supported by two Canadian judgments and one from Australia. The determinations were *Nicol v Canterbury Concrete Cutting NZ Ltd* and *Simpson v IBM New Zealand Ltd*.[9] The Canadian cases were *Shalagin v Mercer Celgar Limited Partnership*, a decision of the Supreme Court of British Colombia, and *Schaer v Yukon (Government of)* from the Supreme Court of Yukon.[10]

[38] In both Canadian cases the Court excluded secret recordings of conversations made leading up to the termination of employment. The Australian case was *Haslam v Fazche Pty Ltd trading as Integrity New Homes*, a decision of the Fair Work Commission.[11] In *Haslam*, the Commission refused to admit in evidence recordings by a worker of two meetings she claimed proved her dismissal was not a resignation.

[39] *Talbot* favours admitting the evidence. That case was an appeal from an interlocutory judgment rendering inadmissible a transcript of a tape-recorded phone conversation. In that case the parties to the conversation knew others were listening but not that one party was recording it. The recording was inadvertently erased or lost and the transcript was to be relied on at the substantive hearing.[12]

[40] In the Court of Appeal, Cooke P acknowledged that there are reciprocal obligations of fidelity, confidence and fair dealing between employers and employees commenting that there are "no doubt reciprocal obligations to deal in good faith".[13] He accepted that no objection could be taken on the basis of unfairness if those who

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9 *Nicol v Canterbury Concrete Cutting NZ Ltd* [2018] NZERA Christchurch 180; and *Simpson v IBM New Zealand Ltd* [2014] NZERA Auckland 321.

10 *Shalagin v Mercer Celgar Limited Partnership* [2022] BCSC 112; and *Schaer v Yukon (Government of)* [2018] YKSC 46.

11 *Haslam v Fazche Pty Ltd T/A Integrity New Homes* [2013] FWC 5593.

12 *Talbot*, above n 8, at 366–367.

13 At 367.

listened had taken notes that were then relied on.[14] He noted that there may be cases where tape-recording is a breach of the duty of "fair dealing" but said that the subject did not lend itself to generalisations.[15]

[41] In *Talbot*, three factors were taken into account in allowing the use of the transcript:

(a) There was no suggestion the conversation was intended to be confidential or "off the record".

(b) The participants knew others were listening.

(c) There was no evidence that the employer's participant in the conversation had complained of the recording, or had not expected it, or regarded it as unfair or inaccurate.

[42] Ms Kaur's recordings were surreptitiously made. However, there was no indication before or during the conversations that the participants expected the discussion to be confidential, or "off the record" in the sense that they were engaged in genuine efforts to resolve a bona fide dispute. Nor can there be any suggestion that the act of recording what was said was unfair to Mr and/or Mrs Sikri. The conversations were not engineered by Ms Kaur in some way attempting to snare them into making remarks that were unintended but compromising.

[43] There is, of course, fairness to Ms Kaur to consider. She was being pressured to repay wages, something which Mr and Mrs Sikri were probably keen to avoid having any record about. Excluding the transcripts would remove a reliable source of evidence from the hearing and deprive Ms Kaur of the ability to support her case that Henderson Travels breached duties it owed to her.

[44] Mr Singh could not point to any feature of the evidence, or its collection, which could support his submissions. I am not persuaded that general observations such as

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14 At 368.

15 *Re Greater Niagara General Hospital v Ontario Public Service Employees Union* (1989) 5 LAC (4th) 103.

encouraging trust in the workplace, or fostering cooperation, or promoting constructive resolution of disputes have a determinative bearing on this analysis.

[45] The Canadian decisions Mr Singh relied on assumed, without explaining why, that a surreptitious recording is unacceptable. They appear to turn on concerns that the mere act of recording breaches the trust and confidence required in the relationship. I am not persuaded that those decisions assist. It is hard to see why an employee who does nothing more than record a potentially difficult conversation with an employer should be prevented from using that recording and/or a transcript of it to support that person's case. A recording may resolve, as it does here, a dispute about what was said.

[46] No weight can be placed on the assertion by Mr and Mrs Sikri that the recordings were of such poor quality that they and the resulting transcripts are unreliable. Transcripts were able to be prepared and while, in places, the transcriber noted that the conversation was inaudible and at least on one occasion that there were loud noises to be heard, that does not detract from the overall thrust of what was translated.

[47] Mr Singh did not develop detailed submissions about how, or why, recordings and a subsequent transcript might breach the Privacy Act. The Court of Appeal noted in *Harder v Proceedings Commissioner* that it was not unlawful for a participant in a conversation to record it without the other party's knowledge.[16] The issue is whether it is unfair to do so and the answer to that depends on the particular circumstances. The circumstances of this case, I conclude, do not establish that there has been a breach of the Privacy Act.

[48] It follows that the evidence is relevant in establishing what happened. It tends to establish Ms Kaur's case and to undermine Henderson Travel's response to it.

*The recorded demands*

[49] The critical conversation for the purposes of understanding the meeting on 26 November 2019 occurred between Ms Kaur and Mrs Sikri on 7 November 2019.

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16 *Harder v Proceedings Commissioner* [2000] 3 NZLR 80 (CA) at [32]–[34].

In it Mrs Sikri first acknowledged how much was paid in May 2019 towards satisfying Henderson Travels' previous demands for payment. From that starting point Mrs Sikri calculated the amount to be paid to the company, as at 27 October 2019, was $4,110 "in total". The calculation was not a mistake because the amount was mentioned twice.

[50] Not surprisingly, Mrs Sikri attempted to distance herself from any suggestion that this conversation was about money or a demand that Ms Kaur pay back some of her wages. In answer to questions about the numbers referred to in the transcript of this discussion she dismissed them as meaningless. Her answers were unconvincing.

[51] In contrast, when Ms Kaur gave evidence she was able to demonstrate how the numbers mentioned by Mrs Sikri worked together. For example, Ms Kaur explained how the number "135" mentioned by Mrs Sikri was part of a calculation of the amount to be paid. The calculation worked the following way; Mrs Sikri acknowledged that Ms Kaur worked 43 hours in a week. The company expected to pay her $10 per hour amounting to $430 for the week. Adding an agreed $50 per week for additional work Ms Kaur undertook outside usual business hours increased the running total of these calculations to $480. Ms Kaur's net weekly pay was $615. Deducting $480 from $615 produces the "135" mentioned by Mrs Sikri in the conversation.

[52] The subsequent conversation on 14 November 2019 continued the same theme. The thrust of this conversation was that the payment problem needed to be sorted out promptly and that Mr Sikri would collect the money. I do not accept Mrs Sikri's explanation that this conversation was an innocuous one about a payment due to Ms Kaur.

*Ms Kaur's departure*

[53] The transcript of those recordings supports Ms Kaur's evidence about what was discussed in those phone calls. They explain the real purpose for Mr Sikri attending the office on 26 November 2019 and what happened during the meeting that day. From the beginning of the meeting Mr Sikri concentrated on persuading Ms Kaur to pay what Mrs Sikri had calculated as owing. He did that by making comments such

as telling her she had to "clear the old account". All attempts to obtain payment were rebuffed because Ms Kaur had no money with which to pay.

[54] At some point during this conversation, and probably towards its end, Mr Sikri mentioned restructuring the company. That was not, however, an attempt at beginning consultation in the face of a genuine reason for the company to reconsider its staffing needs. It was a subject only mentioned to apply pressure. When Mr Sikri's efforts to obtain payment were unsuccessful the meeting came to an end but not before Mr Sikri instructed Ms Kaur to leave the premises and told her to leave behind the office keys, company's laptop and mobile phone.

[55] Ms Kaur left work and did not return the following day or subsequently except to attend meetings with Mr Sikri about the company's apparent redundancy proposal. When contacted by Ms Patel, who was inquiring about her absence from work, she explained that Mr Sikri had taken back the phone, laptop and office keys the previous day.

[56] Mr Sikri's unconvincing explanation for instructing Ms Kaur to leave was that he had decided to give her paid time off while electrical work was undertaken in the office later that day and she could not be in the premises for health and safety-related reasons. Ms Kaur had not previously heard anything about the need to undertake electrical work, let alone something so significant that it required her to vacate the office. In response to questions from the Court about the nature of this work, Mr Sikri said it was an installation of a "few sockets" and "something to do with the circuit breaker", which fell well short of justifying instructing Ms Kaur to leave the premises.

[57] It follows from this analysis that I do not accept that the electrical work to which Mr Sikri referred was anything more than a convenient excuse.

[58] Even if Mr Sikri's explanation passed scrutiny, to the extent that the keys were needed to allow the electrician access to the office, there was no connection between that work and requiring the laptop and mobile phone to be left behind. Mr Sikri could not adequately explain why he denied Ms Kaur's request to take the laptop home and to work from there. He attempted to say it was for security reasons, referring to an

unfortunate incident when someone attempted to take Mr Grover's work laptop from him while he was away from his office. I do not accept that Mr Sikri's motivation was as altruistic as his explanation suggests. It is far more likely, as Ms Douglas submitted, that the reason for the meeting, and the abrupt decision, was that Mr Sikri was dissatisfied with Ms Kaur's failure or refusal to pay.

[59] Henderson Travels subsequently took steps to go through the motions of consultation but what it did was too little and too late. On 27 November 2019, an email was sent to Ms Kaur purportedly following up her query about unpaid wages earlier in the month. Subsequently, there was an exchange of emails to arrange meetings to discuss a restructuring proposal. The company attempted to explain in these emails that it had not made a decision about restructuring and noting her continued absence from work.

[60] Ms Kaur participated in meetings conducted with Mr Sikri, although he was in India and they were by phone. She even obtained medical certificates exempting her from work to explain why she could not attend the proposed meetings at certain times. All of that was window dressing that did not alter the quality of what happened on 26 November 2019.

[61] Mr Singh described Ms Kaur's case as an unjustified assumption that she was dismissed on 26 November 2019 when in fact the company was continuing to engage with her about its proposal, something he submitted she accepted because of her continued participation in the meetings as has just been described. I disagree.

[62] What amounts to a dismissal was compellingly described in *Wellington, Taranaki and Marlborough Clerical etc IUOW v Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* as a concept having a wide meaning; it was any form of "sending away" of the employee by the employer.[17] Whether a dismissal occurred is a fact-dependent analysis.

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[17] *Wellington, Taranaki and Marlborough Clerical Etc IUOW v Greenwich (T/A Greenwich and Associates Employment Agency and Complete Fitness Centre)* (1983) ERNZ Sel Cas 95 (AC) at 102; and see for example *Nath v Advance International Cleaning Systems (NZ) Ltd* [2017] NZEmpC 101 at [31]-[32].

[63] I conclude that on 26 November 2019 Mr Sikri's intention was to bring to a conclusion the demands for money by the company. The groundwork for the meeting on 26 November 2019 was laid well before, by at least May 2019, when the first part-payment of $860 was made. The demands continued thereafter even though Ms Kaur did not have the means to satisfy them.

[64] The immediate forerunner to the meeting on 26 November 2019 was the crystallisation of the demands in the phone calls on 7 November and 14 November. Viewed in this way, when Mr Sikri attended the office on 26 November 2019, what he intended to do was extract payment. When that failed he promptly took steps to end the employment; the failure or refusal to pay led to an instruction to return all of the company property and to leave the premises. That was conduct that had one unequivocal meaning; Ms Kaur was sent away from work and denied all means of carrying it out. In the *Greenwich* sense she was dismissed.

[65] Of course, that leaves for consideration the fact that Ms Kaur attended meetings with Mr Sikri after 26 November and provided medical certificates that excused her attendance from work. Mr Singh's point was that, contrary to Ms Kaur's assertion that she was dismissed in November, her attendance at the meetings and those certificates meant she was still acting as if she was employed right through until being given notice on 11 December 2019.

[66] I do not accept that proposition. Mr Sikri's actions went far further than a repudiation of the employment agreement giving rise to an election on Ms Kaur's behalf to either affirm the agreement or cancel it.[18] The decision to dismiss was clearly taken on 26 November 2019 and Ms Kaur's attempt to resurrect something from the ashes of that disaster does not absolve the company from the quality of its actions.

[67] Even if my assessment is wrong, and the dismissal did not take place until December 2019, Henderson Travels still faces difficulties in attempting to justify its decision as a redundancy.

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[18] See Contract and Commercial Law Act 2017, s 36.

[68] On 27 November 2019, Mr Sikri wrote to Ms Kaur about her potential redundancy. The letter referred to the meeting of the previous day which it described as an informal meeting. The subject matter of the letter was, however, stated as considering restructuring the "area in which you work" due to the financial challenges the company was facing. In an accompanying, brief, restructuring proposal the reason given for this review was that over the previous 12 months Henderson Travels had identified a decline in profitability and a financial loss. The proposal stated that the loss had significantly impacted on the financial viability of the business and that the company was looking at ways to ensure its viability. The proposal stated that the company closed its Auckland CBD and Henderson offices because it did not see them as financially viable.

[69] The letter and proposal are inconsistent with Mr Sikri's evidence about Henderson Travels' finances. He denied demanding money from Ms Kaur to support the company and, seemingly as a way to explain why he would not have made such a demand of her, described the business as profitable. That statement was not consistent with the limited information supplied to Ms Kaur.

[70] Mr Sikri attempted to explain that inconsistency by describing the references to the viability of the business in the proposal as being about comparisons to previous years, and by saying that the only branch he was concerned with was the one where Ms Kaur worked. The explanation made the picture more confusing. None of the financial information he purported to rely on was provided to Ms Kaur or the Court.

[71] Henderson Travels bore the onus of establishing that its decision to dismiss Ms Kaur for redundancy was justified and, on this ground alone, it would have fallen short of that mark.[19]

[72] This analysis means it is not necessary to consider the second issue, about the procedure used by Henderson Travels to discuss its belated redundancy proposal.[20]

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19 Employment Relations Act 2000, s 103A. And see *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494.

20 At [9](b) above.

*Borrowed or taken money?*

[73] These conclusions mean the company's challenge fails, but for completeness it is necessary to address a residual issue that formed a significant part of Henderson Travels' case. That is, whether Ms Kaur borrowed or took money from it. Mr and Mrs Sikri relied on these claims to explain why Ms Kaur paid $860 in May 2019 and, it seems, the subsequent conversations between them.

[74] Henderson Travels claimed that Ms Kaur borrowed two sums of money. The first loan was said to be of $1,700, advanced through Mr Sikri to provide financial assistance to enable Ms Kaur to apply to vary her work visa to start work for Henderson Travels.

[75] The second loan was said to have been made because Ms Kaur kept some cash she received from a customer, paid to purchase an airfare. Henderson Travels said the cost of this travel was $3,641. It claimed that the whole fare was paid to Ms Kaur, but she only deposited $500 of it into the company's bank account. The company's case was that, when questioned about the shortfall, she acknowledged keeping the balance and an agreement was reached for the amount she took to be treated as a loan.

[76] The company pointed to an email from its Indian call centre as proof that the customer paid in full in cash and that some of that money was kept by Ms Kaur.

[77] Ms Kaur denied borrowing money to assist with her visa or taking any money from the company or anyone else. As to the shortfall on the airfare, she explained that the customer only made a part payment, leaving a balance owing. It was, she said, normal for Mr Sikri to give permission for a ticket to be issued to a friend who would pay him later.

[78] I do not accept that Henderson Travels (or for that matter Mr and/or Mrs Sikri) made loans to Ms Kaur either for her to apply to vary the visa or, as the company attempted to say, by electing to treat alleged financial misappropriation as a loan.

[79] There was no evidence supporting Mr Sikri's assertion that he lent Ms Kaur $1,700. There was no record of such a transaction when, in the circumstances, one

might be expected. For example, the employment agreement made no mention of it and there was no correspondence which might tend to support what was claimed. It is in my view highly unlikely that an employer would advance money to a new employee without recording the nature of the loan in some way, if only to make sure that there was clear agreement about what the funds represent and how they would be repaid.

[80] I also do not accept the contention by Henderson Travels that Ms Kaur took money and when her wrongdoing was discovered it elected to treat the misappropriation as a loan.

[81] The circumstances as they were described by Henderson Travels are implausible. It is difficult to accept that an employer would continue to employ a person in a responsible position, such as an agency manager, who had been caught in such flagrant dishonesty. It is notable that in the email exchanges the company relied on the customer was assigned a unique identifier that would have allowed that person to be identified. Henderson Travels made no effort to call that customer as a witness. It is far more likely, and I find, that the company's customer short paid the airfare as part of a private arrangement with Mr Sikri.

[82] Further, all the call centre email does is illustrate that there was a shortfall, not who was responsible for it. It is also illustrative that in the conversation of 7 November 2019 Mrs Sikri stated the amount owed was $4,110 and her calculations made no mention of repaying loans or, for that matter, that the amount in some way covered the shortfall on the airfare. Interestingly, the Court was provided with Mr Sikri's witness statements in the Authority where he described the amount in issue as $3,000 and the money having been paid by two customers not one.

## What remedies?

[83] Ms Kaur was unjustifiably dismissed and is entitled to remedies. The Authority awarded compensation to Ms Kaur under ss 123(1)(c)(i), 123(1)(b) and 128(3) of the Act, for humiliation, loss of dignity and injury to feelings and for lost

remuneration resulting from her personal grievance. In addition, Henderson Travels was ordered to reimburse for Ms Kaur the premium she paid of $860.[21]

[84] Reimbursement for earnings lost under ss 123(1)(b) and 128(3) of the Act was fixed at eight months, relying on *Sam's Fukuyama Food Services Ltd v Zhang*.[22]

*Compensation for distress*

[85] Because Henderson Travels' challenge was to the whole determination, which necessarily included the compensatory awards the Authority made, Ms Douglas sought an uplift of compensation under s 123(1)(c)(i) of the Act from $21,000 to $40,000. To support that uplift reliance was placed in *Richora Group Ltd v Cheng*, *Rayner v Director General of Health*, *Henry v South Waikato Achievement Trust* and *New Zealand Steel Ltd v Haddad.*[23] The compensatory awards in those cases were $20,000, $42,500, $35,000 and $25,000 respectively.

[86] The submission was that there was a significant impact on Ms Kaur. She visited her general practitioner and counsellors because of what happened. Immediate physical impacts included vertigo and nausea. She suffered from anxiety and depression, and she had feelings of being exploited, hopeless and frightened.

[87] Ms Douglas likened the description of the emotional impact on Ms Kaur to the emotional rollercoaster described in *Rayner* and *Henry.* Ms Kaur's experiences were identified and commented on helpfully by her friend, Dashanpreet Kaur. Mr Singh did not make submissions on this subject.

[88] I agree with the Authority that the impacts of Henderson Travels' conduct on Ms Kaur resulted in harm that placed her in Band 2 from *Richora*. Ms Douglas did not seek to alter that assessment but concentrated instead on lifting the compensation from the middle of that band.

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21 Wages Protection Act 1983, s 12A.

22 *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

23 *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337; *Rayner v Director-General of Health* [2019] NZEmpC 65, [2019] ERNZ 142; *Henry v South Waikato Achievement Trust* [2023] NZEmpC 20; *New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57.

[89] While fixing this compensation is more of an art than a science, it is important to avoid unnecessarily tinkering with the Authority's conclusions based on essentially the same evidence. Having made that point, I accept that an uplift is required to reflect the impact on Ms Kaur. This case sits somewhere between the circumstances in *Haddad* and *Henry*; I consider that $30,000 is an appropriate sum to award.

*Reimbursement*

[90] Ms Douglas submitted that under ss 123(1)(b) and 128 of the Act the process of fixing remedies should result in restoring the aggrieved party to the financial position he or she would have been if a dismissal had not occurred.[24] Her argument was that Ms Kaur was out of work for 19 months and could not easily obtain a job because of the necessity to obtain variations to her visa and, because employers needed to satisfy an appropriate test to be able to employ a person in New Zealand, her opportunities were reduced.

[91] Ms Kaur made several unsuccessful job applications before finding work on 23 June 2021. Additionally, she was not paid by Henderson Travels for the week starting 25 November 2019, even though she worked part of it.

[92] Mr Singh submitted that Ms Kaur failed to mitigate her losses, because she had not provided evidence of attempts to find a job in a same or similar field, meaning with a travel agency. His point was that most of her unsuccessful applications were for positions in the hospitality industry. Attention was also drawn to the impacts of the COVID lockdown, which began in about March 2020, which would have had an impact on Ms Kaur's situation.

[93] I consider it is appropriate to award compensation for lost remuneration and to exercise the discretion to extend it beyond the three-month limit in s 123(1)(b).

[94] Taking into account the observations in *Sam's Fukuyama*, the complications arising from COVID and the impact that is likely to have had in searching for employment, I allow 12 months' remuneration of $38,220 gross.

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[24] Relying on *Haddad*, above n 23.

*Premium*

[95] Ms Kaur paid a premium of $860. I have already held that she was doing so as part of an unlawful demand by Henderson Travels. The payment made is a breach of s 12A of the Wages Protection Act. That amount is to be reimbursed.[25]

*Unpaid wages*

[96] Ms Kaur made a claim for unpaid wages and overtime which encompassed two areas of work; the time when she undertook what had previously been regarded as unpaid training from 18 November 2018 until early December 2018 and additional hours of work over and above the contracted hours completed between January 2019 and November that year. The former was calculated in Ms Kaur's case as amounting to $1,701 and the latter to $8,001.

[97] I have already accepted Ms Kaur's evidence where it conflicts with what was said by Mr and/or Mrs Sikri. I find that Ms Kaur began work in mid-November 2018, ostensibly undertaking a lengthy period of training, which she did under Mrs Sikri's tutorage. She was entitled to be paid for that time and an allowance ought to be made as claimed. Similarly, there is no doubt that Ms Kaur worked additional hours over and above those that were contracted. Often that took the form of being available after business hours to deal with the Indian call centre or otherwise as required by the company. An allowance should be made for that sum as well.

[98] The total sum allowed for this claim is $9,702.

*Contribution*

[99] Under s 124 of the Act the Court must consider whether Ms Kaur contributed to the circumstances which gave rise to her dismissal. If she did then a deduction is required from the remedies to be imposed.

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[25] See *Labour Inspector v Tech Five Recruitment Ltd* [2016] NZEmpC 167, [2016] ERNZ 552; *Kazemi v RightWay Ltd* [2019] NZEmpC 73, [2019] ERNZ 113.

[100] The reason for Ms Kaur's dismissal was the demand for money made by Henderson Travels to which Ms Kaur did not contribute in any way. There is no basis to consider a reduction in some or all of the remedies.

*Penalty*

[101] The last matter to address is the penalty imposed by the Authority. A total penalty of $12,000 was imposed on Henderson Travels for breaching the Holidays Act 2003 and Wages Protection Act 1983. The Authority's analysis was undertaken by taking into account the steps required in *Borsboom v Preet PVT Ltd* and a *Labour Inspector v Daleson Investments Ltd.*[26] It also took into account the factors in s 133A of the Act.

[102] The Authority concluded that breaches occurred over a long period of time and the demands were significant.[27]

[103] Mr Singh's submissions were directed towards establishing that the company's actions were not in breach and, as a consequence, that there was no basis for a penalty. As will be apparent from the balance of this judgment, I do not accept that submission. The Authority's assessment was a robust one and I agree with its conclusions. There is no basis to interfere with the penalty that was imposed or the amount of it directed to be paid to Ms Kaur.

## Outcome

[104] Henderson Travels' challenge is unsuccessful and the following amounts are payable to Ms Kaur:

(a) under s 123(1)(c)(i) of the Act, $30,000;

(b) under ss 123(1)(b) and 128(3) of the Act, $38,220;

(c) under s 12A of the Wages Protection Act, reimbursement of $860; and

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[26] *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514; *Labour Inspector v Daleson Investments Ltd* [2019] NZEmpC 12, [2019] ERNZ 1.

[27] *Kaur*, above n 1, at [47].

(d) unpaid wages and holiday pay of $9,702.

[105] In addition to the amounts payable to Ms Kaur, the penalty imposed on Henderson Travels is unchanged. That is, the penalty remains at $12,000 of which $9,000 is payable to Ms Kaur and balance to the Crown.

[106] The Registrar is holding funds in accordance with the stay judgment. Those funds and accumulated interest are to be paid to Ms Kaur.

[107] Ms Kaur is entitled to an award of costs. If the parties cannot agree on them memoranda may be filed.

K G Smith
Judge

Judgment signed at 12.30 pm on 26 October 2023