

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 137  
5581373

BETWEEN                    KAPILABEN PATEL  
   Applicant

A N D                        CURRY POT ON LINCOLN  
   LIMITED  
   Respondent

Member of Authority:        Helen Doyle

Representatives:            Mohammed Shahadat, Advocate for Applicant  
   Natu Rama, Advocate for Respondent

Investigation Meeting:      14, 15 and 16 June 2016 at Christchurch

Submissions Received:      16 June 2016, from the Applicant  
   16 June and 24 June 2016, from the Respondent

Date of Determination:      23 August 2016

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**DETERMINATION OF THE AUTHORITY**

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**A        I order Curry Pot on Lincoln Limited to pay to Kapilaben Patel the sum of \$11,400.00 being reimbursement of money paid in contravention of s 12A (1) of the Wages Protection Act 1983.**

**B        Mr Rama said that Curry Pot on Lincoln Limited agrees to reimburse a further \$750 to Kapilaben Patel. I make no formal order but reserve leave for Mr Shahadat to return to the Authority if required.**

**C        I order Curry Pot on Lincoln Limited to pay to Kapilaben Patel the sum of \$31,413.19 gross being payment for unpaid wages, working on public holidays and holiday pay from 2011 to 2014.**

**D I have reserved the issue of costs and set a timetable for an exchange of submissions.**

### **Employment relationship problem**

[1] Kapilaben Patel was assisted by a Gujarati interpreter during the three day investigation of this employment relationship problem.

[2] Mrs Patel commenced employment at Curry Pot on Lincoln Limited (Curry Pot) on 5 August 2011 and her employment ended in or about July 2014.

[3] A signed copy of Mrs Patel's first employment agreement was only provided at the start of the investigation meeting on 14 June 2016 after Mr Rama had obtained a copy from Immigration New Zealand. The employment agreement was signed and dated 11 April 2011 which pre-dates the incorporation date of Curry Pot on 14 April 2011. The agreement referred to the employer as Currypot on Lincoln. Mrs Patel is described in that agreement as the assistant manager of Curry Pot.

[4] In the second individual employment agreement dated 20 January 2012, Mrs Patel is described as a chef. In that agreement the employer is again described as Currypot on Lincoln however there had never been any suggestion that Curry Pot on Lincoln Limited did not employ Mrs Patel when she commenced employment in August 2011.

[5] Both employment agreements provided Mrs Patel was to report to Rashmikant Thakrar who was described in the first agreement as business advisor and the second as general manager.

[6] Mrs Patel says that she wants the Authority to resolve employment relationship problems as follows:

- (a) Reimbursement of money paid in the nature of a premium for a job offer and support for a work visa and permanent residency application in the total sum of \$20,550 of which \$8000 has been repaid;
- (b) Reimbursement for unpaid wages, payment for statutory days and holiday pay over the whole duration of employment; and

(c) Costs.

[7] The total payment that Mrs Patel is claiming is owed from Curry Pot is \$57,326.00 net. The claim for penalties was withdrawn by Mr Shahadat during the Authority's investigation meeting.

[8] Curry Pot was incorporated on 14 April 2011. It has its registered office in Christchurch and carries on business as an Indian restaurant and takeaway in the township of Lincoln which is on the outskirts of Christchurch city.

[9] Natu Rama was appointed as the sole director of Curry Pot from 30 October 2012 and became a majority shareholder in or about December 2012. Mr Rama was the only witness the Authority heard from on behalf of Curry Pot.

[10] In its statement in reply lodged on 30 September 2015 Curry Pot accepts there may be some statutory holiday pay owing to Mrs Patel, but disputes all other amounts claimed. It does not accept that Mrs Patel worked the hours that she claimed she did or that premiums were paid. Mr Rama says advances may have been made from Mrs Patel to staff at Curry Pot but that these, aside from one payment of \$5000 into the Curry Pot account, were personal in nature and not premium payments and they have nothing to do with Curry Pot.

**The issues**

[11] The Authority needs to determine the following issues:

- (a) Was there an agreement on or about 18 March 2011 that Mr and Mrs Patel make payments to Rajesh Gamre and Mr Thakrar for a job offer and support with a work visa and permanent residency?
- (b) Was that agreement and the employment agreement subsequently ratified by Curry Pot in accordance with s 182 of the Companies Act 1993?
- (c) If payments were made in accordance with the agreement or otherwise then were they in the nature of a premium?

- (d) If payments were made in breach of s 12A(2) of the Wages Protection Act 1983, then should an order be made under s 12A(2) for reimbursement of the sums and if so in what amount?
- (e) Is there money owing to Mrs Patel for wages, holiday pay and for working on statutory days for the period that she was an employee?

**Was there an agreement on or about 18 March 2011 that Mr and Mrs Patel make payments for a job offer and support with a work visa and permanent residency?**

[12] Mrs Patel arrived in New Zealand in November 2006 with her husband, Avind Patel, from India.

[13] Mr Patel knew Mr Gamre, who was at the date of Curry Pot's incorporation a director of the company. The Authority heard from Mr Patel by telephone as he works on the West Coast and was unable to attend the hearing. He had provided a written statement of evidence.

[14] The Authority did not hear from Mr Gamre. There is a letter attached to Mr Rama's evidence signed by Mr Gamre. Mr Gamre wrote amongst other matters that it is not true that payments were made to him of \$6300 as Mr Shahadat had claimed in a letter. He writes about the alleged premium payments:

Anyone can make outrageous claims of giving money to any other party unless she gives me a proof until then her claims are unfounded.

Mr Gamre says that in fact it is Mrs Patel who owes him money for rent.

[15] Mrs Patel's evidence is that prior to a trip to India in February 2011, she and her husband had a discussion with Mr Gamre about the restaurant that was to be operated as Curry Pot. Mrs Patel said Mr Gamre told her and her husband that she would be able to get employment at the restaurant as a manager or a chef and support for a work visa and application for permanent residence.

[16] Mr and Mrs Patel then departed to India, returning in or about March 2011 when they met up again with Mr Gamre at his home. Mrs Patel puts the date of the meeting at 18 March 2011. The evidence from Mr and Mrs Patel was that an agreement was made at that meeting with Mr Gamre that they would make payments

of \$15,000 in exchange for a job for Mrs Patel with Curry Pot and support for a work visa and permanent residency. Mrs Patel said in her evidence that her husband reached what she called *the deal* with Mr Gamre about her situation because that is the way things are done.

[17] Mr and Mrs Patel say the agreement with Mr Gamre on 18 March 2011 was that payments would be made to him and Mr Thakrar, who was a shareholder when Currypot was incorporated and in 2012 a director of Curry Pot.

[18] Mr and Mrs Patel say that they paid cash of \$500 left over from their trip to India to Mr Gamre on 18 March 2011 where the meeting took place.

[19] Mr and Mrs Patel say other payments were then made over a period of time in accordance with the agreement and I will come to that shortly.

[20] Some momentum at or about that time in the business venture of Curry Pot was supported by the evidence of Mr Rama. Mr Rama said that he and his wife were approached in February 2011 by Mr Thakrar who asked if his wife would be interested in investing in a business venture. In mid-March 2011 after hearing nothing further Mr Rama and his wife enquired again and were advised that the venture was still on the table and that it was an Indian restaurant in Lincoln.

[21] In or about May 2011 Mr Rama went to see the restaurant, which he described as 4 walls, concrete floors, toilets and power only with no fit out and was advised that Mr Gamre had signed a 15 year lease and rent arrears were in excess of one month at that stage. Mr Rama said that a decision was made by him and his wife to put in \$15,000 and his wife specified that she would be a sleeping partner only. The other two partners, Mr Gamre and Mr Thakrar also put in \$15,000.

[22] The shareholders of Curry Pot at the time of its incorporation on 14 April 2011 were Mr Gamre, Mr Thakrar and Mrs Rama.

[23] At the start of the investigation meeting Mr Rama provided copies of the bank accounts of Curry Pot to October 2012. The bank account number remained unchanged but in April 2011 the name of the account was Rama, Gamre and Thakrar trading as Currypot on Lincoln. The name of the account was formally changed to reflect that of the three individuals trading as the company from in or about late June

2011 and then again to simply reflect the company name from in or about September 2011.

[24] The name of the account assumes some importance because there was a deposit accepted to have been made by Mr and Mrs Patel into the account of \$5000 on 1 April 2011 before Curry Pot was incorporated. That was the only amount paid by Mr and Mrs Patel into an account. Other payments they said were in cash although there was one payment by way of electronic transfer to Mr Gamre.

[25] Bank statements from Mr and Mrs Patel's joint Westpac account and Mrs Patel's BNZ account have been provided to the Authority. These accounts show the withdrawal of the amounts they say were paid to Mr Gamre and Mr Thakrar in accordance with the agreement they reached.

[26] Mrs Patel says that the amounts of \$500 and then \$5000 were paid for an offer of employment. There was some suggestion in a written document from Mr Thakrar that the payment of \$5000 was made towards rent. Significantly in my view some 11 days after that payment was made and well before employment commenced on 5 August 2011 an employment agreement was signed by the parties and provided to Immigration New Zealand. That evidence I find is more consistent with Mrs Patel's evidence that the payment was for a job offer rather than for rent.

[27] I have considered the bank statements and the withdrawals that were said to relate to each of the payments made. Having heard the evidence and considered the bank statements I am satisfied that Mr and/or Mrs Patel made the following payments to Mr Gamre, the first being before the incorporation of the company on 14 April 2011 and in cash:

18/03/2011	\$500
30/05/2011	\$700 by way of electronic transfer from Mrs Patel's BNZ account to Mr Gamre shown in the bundle at page 134
15/06/2011	\$4,000
16/09/2011	\$600
07/10/2011	\$600

[28] Mrs Patel says that the total paid to Mr Gamre was \$6,300 however; it will be clear when the above figures are added together that in fact the money paid was in the total sum of \$6,400.

[29] The payment of \$5,000 as set out above was paid into the bank account then in the name of Rama, Gamre and Thakrar trading as Currypot on Lincoln on 1 April 2011. That payment was seen by Mr and Mrs Patel as a payment to Mr Thakrar. This amount has subsequently been repaid to Mrs Patel by Curry Pot under Mr Rama's instruction.

[30] Mr and Mrs Patel say that further additional payments were made to Mr Thakrar of \$2,500 by instalments. These payments were made in cash. The first three sums can be seen as having been withdrawn from Mrs Patel's BNZ account and the final sum from Mr and Mrs Patel's Westpac bank account:

06/07/2011	\$250
01/08/2011	\$250
11/11/2011	\$500
08/10/2012	\$1,500

[31] If the above payments are all added together then the total figure comes to \$13,900 and not the full agreed amount of \$15,000. Looking at the matter in the round however it is not a matter I place significant weight on.

[32] Mr and Mrs Patel say that a further payment of \$6,000 was made to Mr Thakrar on 9 August 2013 on the understanding that it was to be paid to two shareholders at that time and she would then get permanent residence. Mr Rama confirmed that both the men referred to had taken a shareholding in Curry Pot. The sum of \$3000 was repaid by one of the shareholders; I find that this later payment sits outside any agreement reached with Mr Gamre on 18 March 2011.

[33] A subsequent sum of \$750 was paid to Mr Rama for, he says, matters relating to the advertising of her position and other expenses around continuation of her work visa. Mr Rama has agreed to repay this \$750 to Mrs Patel.

[34] I record that Mr Rama said he had no knowledge of payments at the time they were made to Mr Gamre and Mr Thakrar and that he has no tolerance for such payments. I accept that his involvement with Currypot was very minimal until late 2012.

[35] I have weighed all of the information and evidence including the timing of the discussions that are said to form the agreement with Mr Gamre in March 2011 and the payments made thereafter in determining whether an agreement was made. It is clear that the business venture was starting to move forward in March 2011. The bank account into which the Patel's money of \$5000 was deposited on 1 April 2011 shows a deposit by Mr Thakrar of \$7500 on 29 March and another deposit of \$15,000 on the same day although I could not ascertain who made that deposit.

[36] Unlike other investors into the business venture in or about April and May 2011 Mrs Patel did not receive a shareholding or even the promise of one for payments made. There is no evidence in front of me to support her being an investor as such.

[37] I am not satisfied therefore that the payments made were in the nature of an investment in the business and I find a suggestion that money was paid by the Patel's towards rent most unlikely particularly given the signing shortly thereafter of an employment agreement. I have also weighed that permanent residency was of the utmost importance for the Patels. Mrs Patel told me that Mr Gamre promised *100% permanent residency* at the meeting on 18 March.

[38] I find it more likely than not on the balance of probabilities that there was an agreement reached by Mr and Mrs Patel with Mr Gamre on or about 18 March 2011 that they would make payments of \$15,000 for a job offer with Curry Pot, assistance and support with a work visa and permanent residency application.

**Was any agreement reached pre-incorporation ratified by Curry Pot in accordance with s 182 of the Companies Act 1993?**

[39] Curry Pot was incorporated on 14 April 2011. An agreement that Mr and Mrs Patel make payments in the sum of \$15,000 for a job offer and for support with a work visa and permanent residency was reached before that date on or about 18 March 2011. Two payments were made pre-incorporation of \$500 on 18 March 2011 and \$5000 on 1 April 2011. \$5000 has subsequently been refunded.



[40] Further payments under the agreement were made to Mr Gamre and to Mr Thakrar in cash although there was an electronic transfer of money made to Mr Gamre. As I have stated earlier I have not treated the payment of \$6000 in 2013 as part of the agreement to pay \$15,000 reached in March 2011.

[41] Section 182 of the Companies Act 1993 provides as below:

**Pre-incorporation contracts may be ratified**

- (1) In this section and in sections [183](#) to [185](#) of this Act, the term pre-incorporation contract means—
- (a) A contract purporting to be made by a company before its incorporation; or
- (b) A contract made by a person on behalf of a company before and in contemplation of its incorporation.
- (2) Notwithstanding any enactment or rule of law, a pre-incorporation contract may be ratified within such period as may be specified in the contract, or if no period is specified, then within a reasonable time after the incorporation of the company in the name of which, or on behalf of which, it has been made.
- (3) A contract that is ratified is as valid and enforceable as if the company had been a party to the contract when it was made.
- (4) A pre-incorporation contract may be ratified by a company in the same manner as a contract may be entered into on behalf of a company under section [180](#) of this Act.
- (5) Notwithstanding the [Contracts \(Privity\) Act 1982](#), if a pre-incorporation contract has not been ratified by a company, or validated by the Court under section [184](#) of this Act, the company may not enforce it or take the benefit of it.

[42] In *Clark v Libra Developments Ltd*<sup>1</sup>, the Court of Appeal discussed how ratification under s 182 of the Companies Act could be expressed or implied by conduct.<sup>2</sup> Express or implied conduct requires a clear adoptive act on the part of the principal. There is a requirement for a conscious intention to ratify and adoption is to be accompanied by full knowledge of all essential facts and can be inferred from silence or inactivity. Ratification also has to take place within a reasonable time after incorporation.

[43] There is little difficulty finding that Curry Pot by its conduct ratified the employment agreement Mrs Patel signed on 11 April 2011 before incorporation. Mrs Patel started working at the Curry Pot on 5 August 2011 having obtained a work visa. After the first month of employment Mrs Patel's pay slips showed the hourly rate in

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<sup>1</sup> [2007] 2 NZLR 709 (CA)

<sup>2</sup> Ibid at paragraphs [163]-[165]

the employment agreement of \$16.50 and were in the name of the company Curry Pot.

[44] Curry Pot and Mrs Patel specifically turned their minds to a reduced possibility of obtaining residency with the position of assistant manager and a new employment agreement was signed changing Mrs Patel's position to a chef position and that was supplied to Immigration NZ on or about 15 February 2012. That agreement also did not reflect the employer as a limited liability company however there has never been any dispute that Mrs Patel was employed by the company. Curry Pot I find by its conduct adopted and performed the first employment agreement signed before its incorporation.

[45] I then turn to whether Curry Pot ratified the pre-incorporation agreement for payments of \$15,000. Curry Pot in terms of the agreement entered into with the Patels employed Mrs Patel. Whilst there had been a job offer before incorporation permanent residency remained at large and the further payments were made, Mr and Mrs Patel say, on the basis that support would be available for that purpose. For some months after incorporation Mr Gamre and Mr Thakrar continued to receive money I have found in terms of the agreement reached for immigration support.

[46] Payments did not go through the company accounts but I do not find that too much turns on that because they were made to a director of Curry Pot, Mr Gamre and a shareholder who subsequently became a director of Curry Pot, Mr Thakrar.

[47] The employment, that I shall go on to consider in more detail about the issue of payments, supports that there was a focus on permanent residency.

[48] I find that Curry Pot had knowledge of the agreement for payments and by its conduct, silence or inactivity allowed the pre-incorporation agreement with Mr Gamre for payments to continue to be made to its director and its shareholder. In that way it treated the agreement as authorised and adopted it.

[49] I find that there was ratification of the agreement for payments and the employment agreement by Curry Pot in accordance with s 182 of the Companies Act 1993.

**Were the payments made under the agreement and the latter sum of \$6000 in the nature of a premium?**

[50] Section 12A of the Wages Protection Act provides that no premium is to be charged for employment. Section 12A(1) provides that no employer shall seek or receive any premium in respect of the employment of any person, whether the premium is sought or received from the person employed or proposed to be employed or from any other person.

[51] Section 12A(2) provides that:

Where an employer receives any amount of money in contravention of subsection (1) of this section, whether by way of deduction from wages or otherwise, then, irrespective of any penalty to which the employer thereby becomes liable, the person by whom the money was paid or as the case may be, from whose wages it was deducted, may recover that amount from the employer as a debt due to the person; and civil proceedings for the recovery of the amount may be instituted in the [Employment Relations Authority] by the person or notwithstanding any disability to which the person is subject, by a Labour Inspector ...

[52] In *Sears v Attorney-General*<sup>3</sup>, the then Chief Judge Goddard stated that the normal understanding of the term “*a premium*” imports some consideration paid or demanded as the price of a contract. Although this decision was subsequently overturned on appeal, it was not overturned on the basis of the above definition: *Attorney-General v Sears*.<sup>4</sup>

[53] Mr Rama says that the payments I have found to have been made as set out above were personal.

[54] Mr Patel, when questioned by Mr Rama, agreed with him that the payments made were personal payments and nothing to do with the company. In that way his evidence did not accord with that of Mrs Patel. Mr Patel however was very clear what the payments were for and said that Mr Gamre was charging money for the job offer, residency and the work permit and that was why these payments were made. Mr Patel accepted that New Zealanders did not ask for money for jobs and that he knew “you did not need to pay for a job” but that he had given the payment so that Mrs Patel would get a work permit and residency.

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<sup>3</sup> [1994] 2 ERNZ 39

<sup>4</sup> [1995] 1 ERNZ 627 (CA)

[55] Both Mr and Mrs Patel referred to Mr Thakrar in particular as being “threatening” and to the payment of a “lot of money” without the expected outcome of permanent residence.

[56] Mr Rama is correct that payments, aside from one for the sum of \$5,000, were not made through a bank account. That is perhaps not surprising but does not satisfy me that the payments made were personal in nature. They were payments for the job offer and immigration support. The payment to Mr Rama of \$750 was not personal but related to continued employment and immigration. That was also not put through the company account.

[57] The evidence supports on the balance of probabilities that the payments made including those for the use of other shareholders in 2013 were initially for the job offer to Mrs Patel and then support in respect of a work visa and for permanent residency.

[58] These were payments made, I find, as the price of a contract and were in the nature of premium payments in terms of s 12A (1) of the Wages Protection Act.

[59] It is appropriate that an order be made for reimbursement of the money that I have found was paid as a premium.

[60] There has been reimbursement of \$5000 paid pre-incorporation to Mrs Patel. The total payments made after 14 April 2011 when Curry Pot was incorporated were \$14,400. This does not include the \$750 paid to Mr Rama. There has been a further reimbursement of \$3000.

[61] Mr Rama has agreed to reimburse the sum of \$750. I shall not formally order reimbursement of that sum but will record that agreement and reserve the right for Mr Shahadat to return to the Authority if required about that matter.

[62] One payment of \$500 was in cash left over from a holiday and there is no withdrawal from a bank account. The payment was made pre-incorporation of Curry Pot. I do not intend to order its reimbursement in the circumstances. The balance to be reimbursed to Mrs Patel for payments in the nature of a premium made to Curry Pot following incorporation on 14 April 2011 is \$14,400 less \$3000 which is the sum of \$11,400.00

[63] I order Curry Pot On Lincoln Limited to pay to Kapilaben Patel the sum of \$11,400 being reimbursement of money paid in contravention of s 12A (1) of the Wages Protections Act.

**Is there money owing to Mrs Patel for wages, holiday pay and for working on statutory days?**

*5 August 2011 – end December 2011*

*Wages*

[64] Curry Pot's records particularly for the period from 5 August 2011 until late 2012 are incomplete. Mrs Patel says they are inadequate and wrong. There were pay slips provided for that earlier period of employment but Mrs Patel says that she worked more hours than was paid for and for some months it is clear she was paid considerably less than was on the pay slips.

[65] Inland Revenue Department (IRD) records therefore based on payslips when payment was not made in accordance with them to Mrs Patel cannot be relied on for this period.

[66] Mr Rama was not actively present in the Curry Pot restaurant/takeaway until in or about December 2012. Mr Rama has over the period of time since Mrs Patel first raised an issue about her pay provided several spreadsheets as to what she may be owed and he placed emphasis on the time finished each day on the till tape close off. He has attempted to reconstruct the pay records and I am grateful for his efforts. He has had to because the poor records kept during this period make certain assumptions as to hours worked, whether there were days off and the reason for some reduced hours being paid.

[67] Mrs Patel has produced records that she says she kept over the full period of employment in two exercise books. Under questioning the reliability of these records became somewhat doubtful.

[68] I am not satisfied that Mrs Patel's english was at a level to enable her to make the entries at the head of each page of the exercise book for the month, date and hours. Mrs Patel having already stated clearly in her evidence that she completed the entries herself then accepted under questioning from the Authority that she had assistance

with them from Mr Patel. There are some inconsistencies within the records. The record says for example that Mrs Patel worked Christmas Day in 2011 for 12 hours but that does not accord with the statement of problem in which it is accepted that she had the day off.

[69] Mr Shahadat simply took Mrs Patel's figure and these remained without any adjustment notwithstanding some further information. For completeness I record that there has been no involvement by the Labour Inspector in this matter.

[70] As I explained to the parties I am going to have to make my own assessment of the claim for unpaid wages and statutory and holiday pay for the period of employment. I take matters raised by Mrs Patel and Mr Rama in evidence into account in doing so.

[71] Both parties agree that Curry Pot only operated as a take away until 5 October 2011 after which date it also operated as a restaurant.

[72] I'll start with considering the hours worked for 2011. Mrs Patel says that she worked seven days a week in 2011. Mr Rama says that she had one day off a week. In the absence of reliable evidence to the contrary I accept that Mrs Patel, except for some public holidays worked seven days a week in 2011. My calculations will reflect that for the part of 2011 worked.

[73] I have also had regard to close times. Mr Rama says the period between till close and finish is on average about 13 minutes at the current time. I have looked at this in the round. Mr Rama may have run a tighter ship when he took charge in December 2012 but I find 30 minutes from till close off to finish fair for 2011 and 2012 until December when Mr Rama was active in the restaurant. Mr Rama questioned Mrs Patel about why she needed to accompany Mr Thakrar on the shopping trips and spend so long at Curry Pot overall. I have balanced that concern as well in doing my best to conclude what actually happened in terms of hours for the period of employment before Mr Rama was in charge.

[74] Curry Pot was open, Mrs Patel said, from 11.30am to 2.30pm for lunch and then from 4.30pm to closing in the evening. She has claimed wages from 11.00am when she said that she started to undertake preparation. I accept that is reasonable given her evidence that she started even earlier at 10am some mornings. I accept

Mrs Patel was busier for the first two months of employment from 5 August until the end of September 2011.

[75] I am going to calculate the hours worked from 11.00am to 2.30pm with one hour for a break and then from 3.30pm to closing for the period until end September 2011. It is reasonable I find based on about 30 minutes from till close to finish to take the finish time for Mrs Patel for Friday and Saturday as 10pm. The other days of the week I will take the finish time as 9.30pm. That therefore is nine and a half hours for the days Sunday to Thursday and 10 hours for Friday and Saturday.

[76] From 1 October 2011 I shall assess on the basis of one and a half hours for breaks each day so that will be nine hours worked for the days Sunday to Thursday and nine and a half hours for Friday and Saturday. There will be swings and roundabouts but I consider it is a fair assessment overall in the circumstances.

[77] One significant issue for 2011 is that although Mrs Patel's payslips show she was paid on the basis of 40 hours per week for the period from 30 October until 1 January 2012 Mrs Patel was actually paid for hours of work between 16 and 19 each week during that period.

[78] The explanation put forward by Mr Rama was that there were issues with Mrs Patel's work visa from 21 October and new employees were hired so Mrs Patel only worked part-time for the period after that time.

[79] Mrs Patel strongly denied any reduction to her working hours and did not accept that there were issues with her work permit necessitating time off. The work permit I saw did not support any issue for that period.

[80] I could not be satisfied about Mr Rama's explanation why Mrs Patel was not paid between 21 October and 3 November 2011 when the pay slips says that she was. I could not be satisfied why thereafter she was only paid for limited hours a week when the pay slips show payment which was never made for 40 hours work. I shall calculate for that period on the same basis as earlier set out.

[81] There is no dispute that for 2011 Mrs Patel worked two statutory days being Labour Day and Canterbury Anniversary day. I can illustrate the significant difficulties I am faced with in this case by reference to the week ending 30 October within which Labour Day fell that year. The payslip for 30 October 2011 shows time

and a half for 8 hours and a net pay of \$603 but Mrs Patel was actually only paid \$227.40 net.

[82] Mrs Patel worked 21 full weeks and one week of three days at Curry Pot in 2011. Her hourly rate was \$16.50. For the first week of three days I find Mrs Patel worked 29.5 hours and should have been paid \$486.75 gross. I have assessed that on the basis of two 10 hour days for Friday and Saturday and one 9 and a half hour day on the Sunday.

[83] For the remaining eight weeks until the end of September Mrs Patel should have been paid \$1113.75 gross per week for 67.5 hours per week at \$16.50 per hour. This is calculated on the basis of 10 hours for Friday and Saturday and 9.5 for the remaining days Sunday to Thursday at \$16.50. That is \$8910 gross in total.

[84] For the remaining 13 weeks of 2011 calculated on the basis of 9.5 hours for Friday and Saturday and 9 hours for the remaining days Sunday to Thursday (64 hours) Mrs Patel should have been paid \$1056.00 gross per week which is \$13728.00 in total for that period.

[85] Adding all three sums together; \$486.75, \$8910 and \$13728 the total payments that should have been made by Curry Pot for the 2011 year to Mrs Patel are \$23,124.75 gross.

[86] I have taken gross earnings for the period commencing 5 August 2011 and ending 16 October 2011 from the pay slips. After 16 October 2011 after a period of no payment I have taken the figures from document 210 in the bundle supplied on behalf of Curry Pot for electronic transfer payments to Mrs Patel after that period. These figures are based on net sums actually paid with about 17% tax added on to reach a total figure for gross payments to Mrs Patel in the sum of \$8774.10 for 2011. There is a difference due and owing to Mrs Patel for unpaid wages being \$23,124.75 gross less \$8774.10 gross = \$14,350.65 gross.

[87] There is a sum due and owing of \$14,350.65 gross being unpaid wages for the period worked in 2011.



*Statutory days worked 2011*

[88] Two statutory days were worked for which there should have been payment at time and a half. There is no separate claim or calculation for alternative days before the Authority. I note that under s 60 (2) of the Holiday Act 2003 payment is made if an employee has not taken the alternative holiday before the date on which employment ended at the rate of the employee's relevant daily pay or average daily pay for the last day of employment. If the failure to claim these days is inadvertent Mr Shahadat could calculate any sum owing without difficulty with leave reserved to return if required.

[89] Mrs Patel was entitled to be paid time and a half for working on Labour Day on 24 October 2011. I have assessed hours worked on a Monday would be 9 hours at that time. Mrs Patel should have been paid \$24.75 per hour which is an additional \$8.25 per hour or \$74.25 gross together.

[90] Mrs Patel was entitled to be paid time and a half for working on Canterbury Anniversary day on 11 November 2011. That was a Friday and I have assessed hours worked on a Friday at that time at 9.5 hours. Mrs Patel should have received \$24.75 per hour which is an additional \$8.25 per hour or \$78.37 gross.

[91] There is a sum due and owing of \$152.62 gross being payment at time and a half for working on two public holidays.

*Holiday Pay*

[92] Mrs Patel did not take any paid holidays during her employment. She is therefore entitled to 8 % of gross earnings which I have calculated should have been \$23124.75 for 2011 together with \$152.62 gross being additional payment for working on a statutory day.  $8\% \times \$23,277.37 = \$1862.18$  gross.

[93] The sum of \$1862.18 gross for holiday pay for 2011 is due and owing.

**1 January 2012 – end December 2012***Wages*

[94] Mrs Patel says that she continued working in 2012 for Curry Pot but had one day off per week initially on a Wednesday. Mrs Patel says that she worked 11am to

2.30pm and then 4pm to 10pm Monday, Tuesday and Thursday. That is 9.5 hours per day. She says that she worked Friday and Saturday but to 11pm and Sunday until 10pm.

[95] Mr Rama does not accept the claims for this year. I want to comment on three significant matters before I assess as best I can if anything is owed for this period.

[96] The first is that pay slips for amounts not actually paid continued to be generated in Mrs Patel's name until the end of April 2012. Mrs Patel received every week until 10 April 2012 a net payment of only \$222.20 and after 10 April a net payment of \$223.30. The payslips for this period show net pay of \$536.70 and \$538.90.

[97] The second matter is that Mrs Patel did not work from 25 April 2012 until 14 October 2012 but was paid every week in accordance with pay slips the net sum of \$538.00 or \$538.90. That was more than she had received when she was working. Mrs Patel however says that she refunded these amounts and showed me the corresponding withdrawals from her bank account which she says were for the gross amount so that Curry Pot would not have to pay tax.

[98] As this is an unusual situation I have had careful regard to the bank statements from the joint account of Mr and Mrs Patel. There are withdrawals of reasonably significant amounts over this period that Mrs Patel or someone on her behalf has highlighted. The amounts withdrawn would be similar to if not exceed the gross amounts paid to Mrs Patel. That along with Mrs Patel's evidence that the only reason payments were made whilst she was absent from work for an extended period was for immigration purposes satisfies me Mrs Patel simply repaid the gross amounts of what was paid. I think it highly unlikely that Mrs Patel would have been paid for not working without an arrangement for reimbursement viewed against payments made to her overall during the relationship.

[99] The third matter is that a new employment agreement was entered into between Mrs Patel and Curry Pot which increased the hourly rate to \$17.00 per hour. Mrs Patel appears to have signed this agreement on 9 February 2012 with the agreement itself described as commencing on 6 February 2012. Mrs Patel was never paid at \$17 per hour but I find should have been after 9 February 2012.

[100] In assessing whether Mrs Patel was paid correctly for the first part of 2012 it did seem to me that her records of finishing times were out of step with the till close offs. I am minded to remain with the assessment of hours for the later part of 2011 of 9 hours Monday, Tuesday Thursday and Sunday and 9.5 hours for Friday and Saturday. That is a total of 55 hours per week for six days worked at \$16.50 per hour.

[101] Until 8 February 2012 (5 weeks 3 days) Mrs Patel should have received the sum of \$907.50 per week or part thereof for the final week.

[102] For the period after 9 February until 25 April 2012 (11 weeks) Mrs Patel should have received payment for 55 hours work but at the increased hourly rate of \$17 per hour in the sum of \$935 per week.

[103] When Mrs Patel commenced work again on 15 October 2012 until 2 December 2012 she had Mondays off instead of Wednesday. Mr Rama has provided records for hours worked for that period of 47.25 hours per week until 2 December 2012 to the Authority on the day of the investigation meeting. The spread sheet is headed *Kappilas wage records from 5/8/11 to 2/12/12 V2 based on closing time chits*. I am minded to accept that as an appropriate basis to assess wages for those 7 weeks. It is not significantly different to the hours Mrs Patel says she worked for that period. For those weeks Mrs Patel was paid based on 40 hours per week at \$16.50 per week. She should have been paid \$17 per hour for 47.25 hours work.

[104] From 2 December 2012 to 30 December 2012 Mr Rama says that Mrs Patel only worked 39 hours per week. I will accept that those were the hours worked. Payment should have been made on the basis of \$17 per hour however and not \$16.50.

[105] I shall set out then what that means in terms of payment that should have been received by Mrs Patel for 2012. Until 9 February 2012 (5 weeks 3 days) Mrs Patel should have received \$4983 gross based on \$907.50 per week.

[106] Between 9 February and 25 April 2012 (11 weeks) Mrs Patel should have received \$10,285.00 gross based on \$935 per week.

[107] From 15 October until 2 December 2012 (7 weeks) Mrs Patel should have received the sum \$5622.75 gross based on \$803.25 per week.

[108] From 2 December 2012 until 30 December 2012 (4 weeks) Mrs Patel should have received \$2652 gross per week based on \$663 per week.

[109] In assessing what Mrs Patel actually received by way of gross payments for 2012 I have disregarded the payments made to her during her period of absence because I accept that the money paid was reimbursed by Mrs Patel. As set out earlier this was in all likelihood an arrangement for immigration purposes. Mr Rama in his assessment included these payments and therefore his final assessment showed an over payment for 2012 to Mrs Patel.

[110] I have used the figures in document 210 again as a basis for gross payments from 1 January – 31 March 2012 to find payments over that period in the sum of \$2995.30 gross. From 1 April until 25 April 2012 Mrs Patel received four payments of \$223.30 net and I find looking at her bank statements one payment of \$538.90 net should be assessed as falling within that period she worked before her extended absence. Applying the same gross applied in document 210 I arrive at a total of \$1089.20 gross and for the final pay from the payslip in late April 2012 one gross payment of \$660.

[111] The gross earnings received for the first part of 2012 are \$2995.30 plus \$1089.20 plus \$660 which is \$4744.50 gross. From 15 October to 30 December 2012 I have relied on the pay slips in the bundle which seem to reflect from that time what was actually paid into Mrs Patel's bank account. There are only on my count 9 pay slips for that period in the bundle but 11 payments into Mrs Patel's bank account from Curry Pot. I have therefore multiplied \$660 by 11 to arrive at gross payments for the later part of 2012 in the sum of \$7260 gross. Gross earnings received by Mrs Patel for 2012 are the combined figures of \$4744.50 and \$7260 which is \$12004.50.

[112] I have found that Mrs Patel should have received \$23,542.75 gross for the period she worked by adding the amounts above of \$4983, \$10,285, \$5622.75 and \$2652. Taking from \$23,542.75 the gross payments I have found were made in the sum of \$12004.50 there is a balance due and owing of \$11,538.25.

[113] There is a sum due and owing for unpaid wages for 2012 in the sum of \$11,538.25.

*Statutory days worked*

[114] Mrs Patel worked on the following statutory days for 2012; 2 January 2012, Waitangi Day, Good Friday, Easter Monday and Canterbury Anniversary. I have not included statutory days that fell on a Monday or a Wednesday when those days were not worked by Mrs Patel.

[115] 2 January 2012 and 6 February 2012, Waitangi Day, are Mondays. I have assessed hours worked at that time as 9 hours on a Monday. The hourly rate was \$16.50. Hours worked should have been paid at time and a half or \$24.75. That is a difference in hourly rate of \$8.25. For two days that is an additional \$148.50 Mrs Patel should have received.

[116] Good Friday and Easter Monday fell at a time when the hourly rate had increased to \$17.00 per hour and assessed for 9.5 and 9 hours work respectively. Hours worked on those days should have been paid at time and a half which is \$25.50. That is a difference in the hourly rate of \$8.50. For two days that is an additional \$157.25 Mrs Patel should have received.

[117] Canterbury Anniversary fell on a Friday and the same calculation above for 9.5 hours applies. For one day that is an additional \$80.75 Mrs Patel should have received.

[118] There is a sum due and owing for working on statutory days in the sum of \$386.50 gross.

*Holiday Pay*

[119] I have calculated holiday pay for this year on the basis of the gross wages Mrs Patel should have received of \$23,542.75 and the amount for working on statutory days in the sum of \$386.50. That is the combined amount of \$23,929.25 gross.

[120] \$23,929.25 multiplied by 8% is \$1914.34.

[121] There is a sum due and owing for holiday pay for 2012 of \$1914.34 gross.

**January 2013 to end December 2013***Wages*

[122] In determining this matter I have decided that the time sheet records supplied for this period by Mr Rama to his then counsel, Angeline Boniface at pages 199 to 201 in the applicant's bundle are the most accurate reflection of the hours worked and gross pay received. Mr Rama was in charge at this time. I do record the absence of pay slips after 2012 and that I did not see the timesheets themselves, instead just the summary.

[123] There is one important matter that I need to make findings on and that is whether there was an agreed variation to the hourly rate from \$17 per hour to \$16 per hour.

[124] Mr Rama says that Mrs Patel agreed to vary her hourly rate from \$17 per hour to \$16 per hour on or about 18 January 2013 from 21 January 2013. He relied on two documents which were attached to his statement of evidence to support this.

[125] The first document is dated 10 November 2012 and I have taken it is background to the second document. Mrs Patel cannot read English but Mr Rama speaks Gujarati. The document advises Mrs Patel amongst other matters that Mr Rama does not accept she is employed as Chef and that he no longer wants her to be employed in that role. The document sets out that from 24 November Mrs Patel is to be a kitchen hand at \$16 per hour. The hours of duty are set out and it is specified that gross wages would be based on 35 hours and a pay rate of \$16 per hour and shall be \$560 gross and that she would not be paid additional payments unless Mr Rama's authorised that in writing. A serious blowout in costs was referred to and Mrs Patel was advised that if the proposal was not accepted she could resign immediately and go elsewhere.

[126] Mrs Patel did not sign the document. The employment agreement provides in clause 15.1 that the parties may vary the agreement, provided that no variation shall be effective or binding on either party unless it is in writing.

[127] I asked Mrs Patel about the November document. She said that she did not see it. She said that she did not know her hourly rate had reduced and was not aware that she had been demoted from Chef to kitchen hand. She did accept that Mr Rama had

spoken to her but only on one occasion about her not performing Chef duties. I prefer Mr Rama's evidence that there was more than one discussion. Mrs Patel said that she was unaware she would not get paid for additional hours worked over 35 unless authorised in writing.

[128] Mr Rama said that he did not consider Mrs Patel had the ability to undertake Chef duties. Mr Rama could have performance managed Mrs Patel but that did not appear to have occurred.

[129] I do not find that the November document amounts to a variation and changes to the hourly rate. In any event hours paid do not appear to have been implemented in accordance with the letter and Mrs Patel continued to be paid at the rate of \$16.50 until the pay period 14-20 January 2013 and for hours in excess at times of 35.

[130] The second document is dated 18 January 2013 and is signed by Mrs Patel. It provided a proposal for a wage review. It sets out that Mrs Patel's current wages including holiday pay are \$660 less tax.

[131] The new salary structure is set out as \$640 gross and holiday pay of \$49.25 with some performance based bonuses. Mr Rama in his written statement of evidence says that Mrs Patel by signing this document accepted a decrease to her hourly rate to \$16 per hour. I have read the document through carefully.

[132] The document seems to replace wages with a salary. Under conditions there is reference to a salary package which provides work hours may fluctuate "between 35 to 44 per week but there would be no additional pay out" unless turnover was over a particular amount. \$640 based on a 40 hour week is \$16 per hour.

[133] Payments fluctuate from the date the change was to be actioned after 18 January 2013 according to the hours worked below and above the \$640 figure but at \$16 per hour. For the pay week between 16-22 September 2013 Mrs Patel worked 36 hours but her gross pay was only \$578.43. Under the agreement she should have received \$640 gross. In the pay period from 20 to 26 May 2013 Mrs Patel is shown from the records as working 43.5 hours and her gross pay is shown as \$688.89. There was no evidence in front of me about turnover influencing this payment.

[134] I found Mrs Patel's evidence about whether she agreed to a change to the way and what she was paid somewhat unreliable. Initially she denied that she had signed the 18 January document and then she agreed that she had.

[135] I find it more likely than not that Mrs Patel agreed to the proposal in the 18 January 2013 letter when Mr Rama explained it. The proposal was signed and I find varied what had been agreed as the previous hourly rate of \$17. In those circumstances I shall use that as the basis of assessing whether there are unpaid wages for both this year and the following. There was no evidence of any agreement to vary again the way Mrs Patel was to be paid but I will come to that later.

[136] The arrangement in the letter dated 18 January was not to be implemented until 21 January but was in fact implemented the week commencing 14 January 2013 because the hourly rate was reduced to \$16.

[137] I have assessed payment at \$640 for a period of 50 weeks. Mrs Patel should have been paid for the first two weeks worked in January 2013 at \$17 per hour for 39 hours rather than the \$16.50 and therefore is entitled to an additional \$39 gross for those two weeks.

[138] For the balance of the year Mrs Patel should have received \$32,000 gross on the basis of \$640 multiplied by 50 weeks.

[139] For 2013 I was only supplied with the IRD records month by month breakdown from April 2013. Until then I have calculated from the time sheets records that gross earning for January are \$1264, February \$2528.07 and March \$3236.75. The total gross earnings for those three months are \$7028.82 gross.

[140] From the IRD records from April to December 2013 gross earnings are \$23,856.

[141] There is a shortfall therefore based on the 18 January 2013 variation to salary of \$1115.18 gross and before that date of \$39.00 gross.

[142] There is a sum due and owing for unpaid wages for 2013 of \$1154.18 gross.



*Statutory days 2013*

[143] Mrs Patel claims that she worked 2 January 2013, Waitangi Day, Good Friday, Anzac Day, Canterbury anniversary and Boxing Day.

[144] I have had regard to and relied on the time sheet record supplied to Mr Shahadat by Ms Boniface at page 199 – 201 of the bundle for 2012. It shows that Mrs Patel did not work 2 January 2013 or Waitangi Day. It shows that she did work four statutory days on Good Friday, Anzac Day, Queens Birthday and Canterbury anniversary day.

[145] I have taken the hours worked on the days from the time sheet and multiplied by time and a half. To calculate average daily pay under s 9(1) of the Holidays Act 2003 I have taken the \$640 weekly agreed payment and divided by six to arrive at a figure of \$106.66 per day. The portion of that daily pay is to be calculated on the time actually worked plus half that amount again.

[146] For ease of calculation and understanding of my findings I have calculated on the basis of \$16 per hour plus half again. There should have been payment on that basis of \$132 being \$24 multiplied by 5.5 hours. Payment was made at \$88. There is a sum due and owing for that day of \$44.

[147] For Anzac Day and Queens Birthday (2 June) the time sheet record show that Mrs Patel worked 4 hours and 6 hours respectively. Payment was made for Anzac Day of \$64 and should have been made at \$96 and for Queens Birthday at \$96 and should have been made at \$144. There is a sum due and owing for Anzac Day of \$32 and for Queens Birthday of \$48.

[148] For Canterbury Anniversary 2013 on 15 November Mrs Patel is shown as working 3 hours. Payment was made of \$48 and Mrs Patel should have received \$72 which means for Canterbury Anniversary Day there is a sum due and owing of \$24.

[149] The total sum due and owing for working for the four statutory days in 2013 is \$148.00.

*Holiday Pay*

[150] I have calculated holiday pay for this year on the basis of the gross sum of \$32,000 for fifty weeks and for the first two weeks in January on the revised basis of

\$17 per hour and \$663 per week which is for two weeks the sum of \$1326. There is also the sum due for working statutory days of \$148 gross. The total of \$32,000 plus \$1326 plus \$148 is \$33,474.

[151] \$33,474 multiplied by 8% is the sum of \$2677.92 gross

[152] The total sum due and owing for holiday pay for 2013 is \$2677.92.

### **January to 6 July 2014**

#### *Wages*

[153] Mrs Patel did not work for the whole year in 2014 and there was a period between 14 March 2014 and 7 April 2014 where she did not work at all because of work visa issues.

[154] I am going to use the payments made from the time sheet record in the bundle at pages 201 and 202. I am however going to apply the salary structure agreed on 18 January 2013 because there is no evidence this was further reviewed or varied. In doing so I will exclude the week worked before the period of leave in April where several days were not worked, and the weeks ending 29 June 2014 and 6 July 2014 again where there were several days without work.

[155] For the first ten weeks Mrs Patel received gross payments in the sum of \$5386.73. During this period she worked for nine of the weeks in excess of 30 hours. She should have received, on the basis of payment at \$640 per week, the sum of \$6400 gross because there was no evidence that the payment structure had been varied at that time.

[156] There is a sum due and owing for those first ten weeks in the sum of \$1013.27 gross being the difference between \$6400 and \$5386.73.

[157] For the remaining eleven weeks Mrs Patel received gross payments in the sum of \$5509.28. She worked fewer hours but I could not be satisfied that she agreed to be paid less than \$640 per week which was the change to an hourly rate of \$17 per hour and minimum hours. The variation agreed in January 2013 allowed for fluctuating hours without additional payment or reduction in payment.

[158] Mrs Patel should have received on the basis of \$640 per week for these eleven weeks the sum of \$7040 gross. There is a sum due and owing for the last eleven weeks in the sum of \$1530.72 gross being the difference between \$7040 and \$5509.28.

[159] There is a sum due and owing for 2014 of \$2543.99 gross for unpaid wages for the 21 weeks above adding together \$1013.27 and \$1530.72.

#### *Statutory Days*

[160] Mrs Patel says that she worked Waitangi Day, Easter Friday and Anzac Day and Mr Rama has also included Queens Birthday. I am not satisfied from the time sheet that Mrs Patel worked on Queens Birthday that year adding together \$1013.27 and \$1530.72.

[161] The hours worked for Waitangi Day and Anzac Day are shown as 3 hours and paid on the basis of \$16 per hour at \$48 per day. They should have been paid on the basis of \$24 per hour or \$72 per day. For both days there is a sum due and owing of \$48.

[162] The hours worked on Easter Friday are shown as 3.75 and were paid on the basis of \$16 per hour or \$60 per day. The hours should have been paid on the basis of \$24 per hour or \$90 per day. There is a sum due and owing of \$30.

[163] The total sum due and owing for working three statutory days in 2014 is the sum of \$78 gross.

#### *Holiday Pay*

[164] For gross earnings for 2014 from Curry Pot I have calculated for the 21 weeks Mrs Patel should have received \$13,440 gross and I have added gross payments for the three weeks I have excluded of \$668. That is a combined sum of \$14,108 gross. I have added to that the sum of \$78 for statutory days worked and arrived at total gross earnings that should have been paid of \$14,186.00.

[165] \$14,186.00 multiplied by 8% is the sum of \$1134.88 gross due and owing for holiday pay.

[166] There is a sum due and owing for holiday pay for 2014 of \$1134.88 gross.

**Total amounts owing for wages, statutory pay and holiday pay**

## Unpaid Wages

[167] I have found there is a sum due and owing for unpaid wages of \$14,350.65 gross for 2011. There is a sum due and owing for unpaid wages of \$11,538.25 gross for 2012. There is a sum due and owing for unpaid wages of \$1154.18 gross for 2013. There is a sum due and owing for unpaid wages of \$2543.99 for 2014. There is a total sum due and owing for unpaid wages of \$29,587.07 gross over the years 2011 - 2014.

## Statutory Holiday Pay

[168] I have found there is a sum due and owing for payment for working on public holidays of \$152.62 gross for 2011. There is a sum due and owing for working on public holidays of \$386.50 gross for 2012. There is a sum due and owing for working on public holidays of \$148 gross for 2013 and there is a sum due and owing for working on public holidays of \$78 gross for 2014. There is a total sum owing for working on public holidays of \$765.12 gross over the years 2011 - 2014.

## Holiday Pay

[169] I have found there is a sum due and owing for holiday pay for 2011 in the sum of \$1862.18 gross. I have found there is a sum due and owing for holiday pay for 2012 in the sum of \$1914.34 gross. I have found there is a sum due and owing for holiday pay for 2013 in the sum of \$2677.92 and for 2014 in the sum of \$1134.88. The total holiday pay due and owing is the sum of \$7589.32 gross.

*Payments made since 2014*

[170] Curry Pot has made payments of \$6528.32 to Mrs Patel since 2014 the evidence supports:

- (a) July 2014 at various dates \$2064;
- (b) August 2014 at various dates \$1974;
- (c) Payments close to the date of investigation meeting (exact date unclear) \$2490.32.

[171] The total gross payment I have found owing to Mrs Patel for wages, working on statutory days and holiday pay is \$37,941.51 less payments made of \$6528.32 which is the sum of \$31,413.19.

[172] I order Curry Pot On Lincoln Limited to pay to Kapilaben Patel the sum of \$31,413.19 for unpaid wages, working on statutory days and holiday pay.

**Costs**

[173] I reserve the issue of costs. Mr Shahadat has until 8 September 2016 to lodge and serve submissions as to costs and Mr Rama has until 22 September 2016 to lodge and serve submissions in reply.

Helen Doyle  
Member of the Employment Relations Authority