

## **TASMANIAN INDUSTRIAL COMMISSION**

### **Industrial Relations Act 1984**

s29 application for hearing of an industrial dispute

**Rajiv Kumar**

(T13638 of 2010)

and

**Anil and Manju Sharma trading as Magic Curries Indian Restaurant**

PRESIDENT TIM ABEY

HOBART, 2 November 2012

**Industrial dispute – unfair termination of employment – breach of award – classification – days worked – rosters – hours of work – salary arrangements – penalty rates – annual leave – public holidays – superannuation – parties ordered to confer**

### **DECISION**

**[1]** On 19 January 2010, Rajiv Kumar applied to the President, pursuant to s.29(1A) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with Anil and Manju Sharma trading as Magic Curries Indian Restaurant (the employer) arising out of alleged unfair termination of employment and alleged breach of an award.

**[2]** A hearing commenced in Hobart before Commissioner J McAlpine on 12 February and continued on 6 July 2010 and 13 January 2011. The matter was adjourned sine die but resumed before President Tim Abey on 24, 25 and 26 September 2012.

**[3]** The applicant, Mr Kumar, was employed in the restaurant known as Magic Curries Indian Restaurant from 25 August 2003 until 24 June 2007. The proprietors of Magic Curries Indian Restaurant are Mr Anil Sharma and Mrs Manju Sharma.

**[4]** Mr Kumar alleges that throughout his period of employment the employer was in breach of the Restaurant Keepers Award. The alleged breaches relate to the appropriate classification, hours of work, days worked each week, penalty rates, annual leave and superannuation. The claim, as amended, amounts to a total of \$173,607.

**[5]** The application was lodged some thirty months after the date of termination, and was not pursued to full hearing for a further 32 months. Hence the matters in dispute occurred between nine and five years ago. This substantial delay has made the task of determining the issues significantly more difficult than it would otherwise have been. The application regarding alleged unfair termination of employment was not pursued.

## Evidence.

[6] Sworn evidence was taken from the following witnesses.

*Rajiv Kumar*, the applicant.

*Amit Sharma*, employed as a Kitchen Hand from May 2007 until October 2008.

*Rajnesh Kumar*, employed on cooking duties from December 2004 until 2008.

*Vijay Sharma*, wife of the applicant and employed in a front of house role from 2004 until 2006.

*Ujjwal Datta*, taxi cab owner.

*Anil Sharma*, proprietor of Magic Curries restaurant in partnership with his wife.

*Manju Sharma*, proprietor of Magic Curries Restaurant in partnership with her husband.

[7] An unsworn statement from Mr Adam Burnett, who was employed as a Kitchen Hand trainee during 2005 and 2006, was tendered.<sup>1</sup>

[8] Mr Green submitted that the evidence of Mr Rajnesh Kumar should be dismissed. This witness understandably was upset as to the content of a letter written by Mr Anil Sharma to an educational institution in India.<sup>2</sup> His evidence was emotionally charged and on one fundamental point, clearly in error. Whilst I am not prepared to make an adverse finding as to witness credit, to the extent of any inconsistency, I have generally preferred the evidence of others.

[9] There was a considerable amount of evidence going to matters not directly related to the matters in dispute. The focus in this decision is on evidence relevant to the matters which are to be determined.

[10] As English was not the first language of a number of witnesses, this has caused difficulties with the transcription service. As such there is less reliance in this decision on direct quotes from the transcript than would otherwise have been the case. I am however quite satisfied that the substance of the witness evidence has not been compromised by this difficulty.

## The Appropriate Classification.

[11] An issue in dispute is the appropriate classification for Mr Kumar. The applicant claims this should be *Food and Beverage Service Grade 5* whereas the respondent maintains that *Food and Beverage Service Grade 3* is the appropriate level.

[12] The classification descriptors in this consideration are as follows:

*" 'Food And Beverage Service Grade 3' shall mean an employee who has the appropriate level of training undertaking functions at a level of complexity greater than Grade 2;*

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<sup>1</sup> Exhibit A13

<sup>2</sup> Exhibit A2M

*shall competently undertake any or all of the below duties with little or no supervision.*

*Duties include any of the following:*

- undertaking general waiting duties of both food and liquor service including supplying, dispensing or mixing of liquor;*
- non-cooking kitchen duties of a specialised nature;*
- cooking duties including baking, pastry cooking or butchery;*
- as Food and Beverage Attendant Grade 2 who is involved in the operation of mechanical lifting device or attending TAB terminal;*
- taking reservations, greeting and seating guests;*
- full control of a cellar or liquor store (including the receipt, delivery and recording of goods within such an area);*
- mixing a range of sophisticated drinks;*
- may provide guidance, supervision and training to employees at this or lower grades.*

***'Food And Beverage Service Grade 4'*** shall mean an employee who has completed an apprenticeship or who has passed the appropriate trade test.

*Duties include any of the following:*

- cooking (known as a Commis Chef), baking, pastry cooking or butchering;*
- specialised skilled duties in a fine dining room or restaurant.*

***'Food And Beverage Service Grade 5'*** shall mean an employee who has completed an apprenticeship or who has passed the appropriate trade test and appropriate additional training; or appropriate level of management training.

*Shall be engaged in the supervision and training of other employees including the development of on-the-job training for other employees.*

*Duties include any of the following:*

- general or specialised cooking (known as Demi Chef), butchering, baking or pastry cooking and/or supervises and trains other cooks and kitchen employees;*
- supervisor of a food and beverage area who has overall responsibility for a bar, series of bars or food outlet area/s*
- supervision, training and co-ordination of food and beverage staff or stock control for a bar or series of bars or food outlets."*

**[13]** Mr Kumar commenced employment in 2003. However it would seem that it was not until Mr Kumar gained his permanent resident visa that he was formally offered employment in writing. This came in the form of correspondence from Anil Sharma dated 10 February 2005. The correspondence relevantly reads: <sup>3</sup>

*"Re: Offer of Employment*

*This letter is to advise you that upon the grant of a permanent residence visa by the Department of Immigration, I intend to appoint you as a cook at Magic Curries Indian Restaurant at 41, Hampden Rd, Battery Point, Hobart for a minimum period of two years. The contract will be able to be extended with the consent of both the parties.*

*Your salary will be \$37,720.00 per annum & the provisions of the Restaurant Keepers Award will govern all other conditions of your employment including annual and sick leave.*

*Your job description requires you to ensure food quality, control cooking equipment, prepare and cook food, season food, portion out food on plates & platters, add gravies, sauces and garnishes. You will also ensure that food is hygienically kept, plan menus, review food costs and arrange appropriate menus in consultation with management, purchase food, and ensure that all supplies of food are at the appropriate quality for the restaurant."*

**[14]** On the evidence I am satisfied that Mr Kumar's duties did not materially alter before and after the letter of appointment.

**[15]** I am also satisfied on the evidence that Mr Kumar carried out many of the duties detailed in the letter of appointment. There are however some issues in contention.

**[16]** It would seem that Mr and Mrs Sharma brought the menu used in Magic Curries with them when they moved from Sydney in 2001. Whilst there have been subsequent modifications at the margin, I am satisfied that Mr Kumar's input into menu planning has been minimal.

**[17]** In terms of stock control, I am satisfied that Mr Kumar had a level of responsibility for food quality, and advised Mr Sharma of stock requirements; he in turn made the orders. There is no evidence that Mr Kumar had any responsibility for food costs.

**[18]** Supervision and training is not mentioned in the letter of appointment but are important considerations in terms of the classification descriptors. From the evidence it would seem that Mr Kumar had the responsibility for overseeing, in conjunction with the Group Training Company, the training program for the Kitchen Hand trainee, Mr Burnett. It must be noted however that this training program did not involve cooking duties. In relation to other employees on cooking duties, I accept that Mr Kumar probably provided advice and guidance, but not at the level of a formalised and structured training program.

**[19]** Whilst there is an issue as to Mr Kumar's formal qualifications, it is important to note that Mr Sharma did not have any issue as to Mr Kumar's competency as a cook.

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<sup>3</sup> Exhibit A4

[20] I now turn to the matter of formal qualifications.

[21] Mr Kumar tendered a document which he contends is his certificate of qualification.<sup>4</sup> The attached translation states that the qualification obtained is a one year trade diploma in cookery at the State Agricultural Science Training Centre, Kotdwar, India. The Commission-appointed interpreter stated that the certificate also made reference to the completion of a six month apprenticeship at the same institution. This was consistent with the evidence of Mr Kumar.

[22] On 9 June 2010 Mr Sharma wrote to the Institute seeking verification of Mr Kumar's certificate.<sup>5</sup> A letter dated 2 July 2010 purporting to be from the Principal of the Institute claimed that *"no such student passed from our Institute. Mr Rajid Kumar's Certificate is Fake."*<sup>6</sup> Mr Kumar in turn claimed that this letter was fake, pointing to a number of unusual aspects of the correspondence.

[23] Under cross-examination Mr Kumar's knowledge of the Institute was vague. This might be explained by the effluxion of time (22 years) since Mr Kumar's purported enrolment.

[24] Under normal circumstances the Commission would accept a tendered certificate of achievement as being valid. Whilst some doubt has been raised as to the validity of Mr Kumar's certificate, there is insufficient evidence to make a positive finding to this effect. On balance I am prepared to accept that Mr Kumar's qualifications, as expressed in the certificate, are legitimate.

[25] Mr Kumar stated that he undertook a trade test in a Sydney restaurant in which he was previously employed. However the outcome of this test is not clear on the evidence.<sup>7</sup>

[26] Mr Kumar's qualifications and experience have been subject to formal assessment by the Department of Employment and Workplace Relations (DEWR). On 21 February 2003 DEWR wrote to Mr Kumar advising:<sup>8</sup>

*"A careful assessment of the information submitted with your application, has revealed that you do not possess suitable skills for any of the occupations under the Skilled Occupations List (SOL) assessed by Trades Recognition Australia (TRA) for migration purposes."*

[27] In the attached *Reason for Decision Sheet*<sup>9</sup> the Skills Assessor noted that Mr Kumar had not presented verifiable evidence of a formal apprenticeship or relevant formal training, but did present evidence of 'other' training directly related to the occupation.

[28] The assessor offered the following comments:

*"Mr Kumar first applied for recognition as a Chef in October 2001 and, based on the available evidence at the time, he was classified as a Cook for the purpose of migration to Australia."*

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<sup>4</sup> Exhibit A3

<sup>5</sup> Exhibit A2J

<sup>6</sup> Exhibit A2K

<sup>7</sup> Transcript p42

<sup>8</sup> Exhibit R1

<sup>9</sup> Exhibit R2

*In addition to his classification as a Cook he again applied for recognition as a Chef in September 2002. That application was also based on the claims of training and employment identified in his first application and supported by the same documentary evidence.*

*In support of his current application he provided a copy of a One Year Trade Diploma in cookery, but did not provide evidence of the nature and content of the training undertaken which would allow evaluation of the skills attained.*

*He also provided statements of service from Hotel Amrit, Hotel Yanak Bar and Restaurant, Bombay Regency in India, and from Bawarchi Indian Restaurant and Indian Empire in Australia. However, verification of his claims of employment in India proved to consist of unverifiable evidence.*

*In response to that he was given an opportunity to provide additional documentary evidence which was to reinforce information about his claimed employment in India. Unfortunately he was unable to do so.*

*Therefore, whilst I am prepared to accept his previous classification as a Cook I am satisfied that he is unable to substantiate sufficient periods of employment to satisfy the requirements of the 9 year provisions for recognition as a Chef."<sup>10</sup>*

**[29]** It is important to note that the Commonwealth assessment was largely for Department of Immigration (DOI) purposes in assessing applicants under the Skilled Occupation List. The criteria applied in that assessment is not necessarily the same as are applicable under the award. Thus the DEWR assessment, whilst of interest, is not necessarily determinative of the issue.

**[30]** The applicant tendered a series of documents purporting to show that Mr Kumar was presented in the public eye as a chef or head chef. These documents included:

- Correspondence from Anil Sharma dated 22 May 2007 describing Mr Kumar as an 'Indian chef.'<sup>11</sup>
- Correspondence from the Indian cricket team referring to 'your head chef Mr Rajiv Kumar.'<sup>12</sup>
- Mercury Newspaper article in which Mr Kumar is referred to as 'chef'.<sup>13</sup>
- A reference from Anil Sharma dated 7 July 2001 in which Mr Kumar is referred to as an 'Indian Chef.'<sup>14</sup>
- Reference from the Indian Empire Restaurant in Sydney dated 23 November 21 1999 in which Mr Kumar is referred to as a 'Head Chef'.<sup>15</sup>
- Two Newspaper articles concerning the Bawarchi Indian Restaurant in Newport NSW in which Mr Kumar is referred to as 'chef' or 'head chef'.<sup>16</sup>

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<sup>10</sup> Exhibit R2

<sup>11</sup> Exhibit A2B

<sup>12</sup> Exhibit A2C

<sup>13</sup> Exhibit A2D

<sup>14</sup> Exhibit A2E

<sup>15</sup> Exhibit A2E1

<sup>16</sup> Exhibit A2F and F1

- Internet references in which Mr Kumar is referred to as 'chef'.<sup>17</sup>

**[31]** The evidence of Anil Sharma was that a number of these documents could be categorised as promotional and that it made business sense to present the business in a positive light. It would not be sensible to present to the public that a kitchen hand was cooking the food. Further, it is accepted terminology in Indian restaurants that *"everybody calls a cook a chef."*<sup>18</sup>

**[32]** The letter from the Indian Cricket team had actually been drafted by Anil Sharma at the invitation of the cricket team who did not have computer facilities readily available. The reference to Mr Kumar as 'head chef' was designed to assist Mr Kumar in gaining a permanent visa.

#### *Conclusion*

**[33]** There can be no doubt that that Mr Kumar, in his employment at Magic Curries, undertook cooking duties in a competent manner. He was variously referred to by Anil Sharma and others as cook, chef or head chef. The actual title is not wholly determinative of the question. For example, the term 'chef' appears in *Food and Beverage Service Grades 4, 5 and 6*. The critical issues are the level qualification and the work actually performed.

**[34]** Whilst the DEWR assessment concluded that Mr Kumar had failed to present evidence of a formal apprenticeship, the evidence before the Commission was that Mr Kumar did complete an apprenticeship (albeit 6 months) at the same Institute in which he completed his diploma. The outcome of the trade test Mr Kumar undertook in Sydney is not clear from the evidence. However I am satisfied that Mr Kumar has performed relatively high level cooking duties in Indian restaurants over an extended period.

**[35]** I conclude that the combination of duties performed and qualifications held does not sit comfortably with a grade 3 classification as urged by the respondent.

**[36]** In relation to Grade 4, I am satisfied that, on balance, Mr Kumar satisfies the requirement of an *"employee who has completed an apprenticeship or who has passed the appropriate trade test."*

**[37]** I am further satisfied that in relation to grade 4, Mr Kumar was engaged on *"cooking"* duties and exercised *"specialized skilled duties in a fine dining room or restaurant."*

**[38]** The Grade 5 classification requires, in addition to an apprenticeship or trade test, *"appropriate additional training; or an appropriate level of management training."* This is expressed as a mandatory requirement and one which Mr Kumar has not satisfied.

**[39]** Further, noting that *"guidance supervision and training"* first appears in the Grade 3 descriptor, I am not satisfied that Mr Kumar undertook the higher level *"supervision, training and co-ordination"* requirements contemplated at grade 5.

**[40]** I conclude that the appropriate classification for Mr Kumar was *Food and Beverage Service Grade 4*.

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<sup>17</sup> Exhibit A2G and Gi.

<sup>18</sup> Transcript p 206/207

## Time and Wages Record

[41] The time and wage record maintained by the respondent consisted of a proprietary document supplied by a stationary company.<sup>19</sup> The record contained the following information:

- Name of employee
- Per annum or per week salary.
- Hours worked on a daily basis.
- Gross wage
- Taxation deducted.
- Employer superannuation contribution.
- Rostered days off. Annual leave and public holidays taken
- Signature of employee.

[42] Between August 2003 and June 2006 the record showed hours worked on a daily basis but not start and finish times. Thereafter the start and finish time was shown on a daily basis.

[43] Without exception the record has been signed by Mr Kumar.

[44] It is clear from the evidence that the record was presented to the employees for signature on an irregular basis, usually several weeks apart.

[45] The evidence of Anil Sharma was:<sup>20</sup>

*"Now did he sign these documents every week?...No, because we use to give them a few weeks because we thought they are on a fixed roster, they are on a fixed salary and we use to give them few weeks' time to sign those things, and we always give them after work, that means we are trusting them even if they refuse to sign later on, that means we are in trouble. And then sometime if we give them to sign it they might say, 'I'm busy I will sign it later' and they will forget it. So it was just sort of a trust relation at that time and we trusted them because we don't get them signed at the time, I think we are – we are in trouble."*

[46] The requirement to maintain a Time and Wages Record is found in both the Act (s75) and the Award (cl 36 Time and Wages Record/Award). The Award adds the additional requirement to record start and finish times on a daily basis together with the signature of the employee verifying that the record is correct.

[47] Generally speaking, I am satisfied that the respondent has complied with both the Act and the Award in respect of the Time and Wages Record.

[48] However the respondent has clearly not complied with the statutory requirement to provide written advice of pay details for each pay period (s75[1B]). Wages were paid weekly in cash without any supporting documentary detail.

[49] There is some evidence which suggests that Mr Kumar felt pressured by his lack of permanent visa status to work at Magic Curries in what he felt was less than acceptable circumstances, including being discouraged by Anil Sharma from taking a

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<sup>19</sup> Exhibit R5

<sup>20</sup> Transcript p 198

part-time taxi driving job.<sup>21</sup> Equally there is also evidence that Mr and Mrs Sharma demonstrated some generosity in assisting Mr Kumar with visa application advice and expenses together with accommodation.

[50] Whilst I am satisfied that Mr Kumar found himself in difficult financial circumstances and felt pressured to work hard at Magic Curries, there is no evidence that the Time and Wages Record which he signed on a regular basis was done so under duress. There is also no evidence that Mr Kumar at any time during his period of employment complained that the record was in any way false or incorrect.

[51] In the circumstances I conclude that, unless compelling evidence to the contrary is demonstrated, *prima facie* the Time and Wages Record should be accepted as correct.

### **Number of Days Worked Each Week**

[52] In the statement of claim it is submitted that Mr Kumar *"worked an unbroken cycle averaging 47.5 hours per week over 7 days, 52 weeks per year (excluding a period of unpaid leave 13 October 2003 through 3 November 2003)."*

[53] Curiously, given the importance of this aspect in the totality of the claim, this does not appear to have been canvassed in Mr Kumar's evidence in chief, and only fleetingly in cross-examination.<sup>22</sup>

[54] Nonetheless, at no stage has the applicant resiled from this claim.

[55] The evidence of Amit Sharma, Rajnesh Kumar and Vijay Sharma is of no assistance as the issue is simply not addressed.

[56] Anil Sharma maintained that Mr Kumar worked six days per week. His evidence was:

*"Mr Kumar gave evidence that he would arrive at about 2.30 in the afternoon. Do you agree with that?.....No, I don't agree with that because we had given (indistinct words) 38 hours which generally starts on the week days from 4 o'clock until 9.30 in the evening and the weekend I think 3.30 to 10.30 which is for six days. It was a fixed roster and I never asked him to come at 2.30 and I'm not aware because he is coming at 2.30 as well.*

*So your expectation was that he would commence work at about 4 o'clock ?.....That's right, on the weekdays and on the weekends 3.30, yes."<sup>23</sup>*

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*"How many days a week were - ?.....They were working six days a week.*

*When you say, "They," can you just talk about Mr Kumar?.....Sorry, Mr Kumar was working six days a week.*

*Six days a week?.....Yeah, and he was working less than 38 hours and that's what was the roster."<sup>24</sup>*

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<sup>21</sup> Transcript p 50-53.

<sup>22</sup> Transcript P92

<sup>23</sup> Transcript P191

<sup>24</sup> Transcript P195

...

*"You also stated that it was an immigration requirement that he work a 38-hour week or compensated accordingly?.....Full-time, yes, that's right.*

*So if we worked, for argument's sake, 20 hours - ?.....My understanding is still I have to pay him for 38. That's my –*

*So irrespective of what hours he worked immigration viewed it as a full-time engagement - ?.....Otherwise they will not get a visa, yes.*

*So that – for the purposes of your understanding at that time you sponsored him for 38 hours and you worked him over a six-day week?.....That's correct, yeah.*

*You realised and words to this effect – that you realised you should not have done it, it should have been over five days?.....That's correct, yes."<sup>25</sup>*

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*"Before we get to the eftpos records, I would just suggest that Mr Kumar has certainly throughout the course of this trial and the submissions prior to that, maintained that he worked seven days a week, 365 days a year. Do you agree or disagree with that?.....Disagree with that."<sup>26</sup>*

**[57]** The evidence of Manju Sharma was:<sup>27</sup>

*"Okay. Now, do you have – you understand Mr Kumar's claim to be that he worked seven days a week?.....Mm hm.*

*Do you agree that he worked that number of days?.....No, he – no.*

*So how many days do you say that he worked?.....Six days."<sup>28</sup>*

**[58]** The Time and Wage Record<sup>29</sup> clearly shows that one 'RDO' was allowed each and every week.

**[59]** I accept Anil Sharma's evidence that rostering over six days was an error on his part which was a consequence of a lack of industrial knowledge. I further note Mr Sharma's evidence that there was no particular advantage to him as employer to roster over six days, and indeed a five day roster was in some respects more advantageous.<sup>30</sup>

**[60]** Evidence was tendered in relation to time sheets for the trainee, Adam Burnett.<sup>31</sup> These are NGT timesheets and clearly show a roster over six days. This of course is not evidence of Mr Kumar's work pattern. However, given that it is consistent with other evidence available to the Commission, it may well be an indication of a roster pattern applicable to Magic Curries staff generally.

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<sup>25</sup> Transcript P237

<sup>26</sup> Transcript P265

<sup>27</sup> Transcript p272

<sup>28</sup> Transcript P272

<sup>29</sup> Exhibit R5

<sup>30</sup> Transcript p237/20

<sup>31</sup> Exhibit A13

[61] There is no supporting evidence for Mr Kumar's contention that he worked seven days per week. Mr and Mrs Sharma were adamant that Mr Kumar worked a roster over six days. This is consistent with the Time and Wage Record which Mr Kumar consistently signed, presumably as verification for what actually occurred in the work place.

[62] I conclude that Mr Kumar worked a roster over six days each week.

### Hours of Work

[63] A considerable amount of evidence went to the hours Mr Kumar worked each day. It was common ground that the restaurant opened for business at 5pm each day and closed 'late', i.e when the last customers had finished their meal. However Mr Kumar was clearly required to commence work prior to 5pm to undertake the necessary preparations.

[64] It was also common ground that Mr Kumar was allowed a meal break of 30 minutes each shift.

### *Starting times.*

[65] Whilst a considerable amount of evidence related to the time Mr Kumar claimed he commenced work, Mr Concannon in his closing submission said the claim was based on a "balanced view" which involved some concession and did not differ greatly from the Time and Wage Record. Thus the claimed starting times were 3.30 on two weekdays, (being 'delivery days') and 4pm on each other working day.

[66] The evidence of Anil Sharma was:<sup>32</sup>

*"Can I take you to – can you tell the Commission about how the restaurant operates, just give some details in relation to the opening hours of the restaurant?.....Our opening hours are probably dinner which is from 5 o'clock. Generally the set up starts around 4 o'clock we open the kitchen basically and it runs weekdays until 9.30 or 10 o'clock because it's not really busy from Sunday, Monday, Tuesday, Wednesdays, but as far as weekends are concerned we just start preparing the kitchen from 3.30 onwards and I think it runs for 10.30 but we don't have a specific closing time and when restaurant opens 5 o'clock generally the orders start coming around 6 o'clock, 6.00 to 6.30, the takeaways and people start arriving around 7 o'clock generally is the time."*

[67] And later:<sup>33</sup>

*"Did you ever tell Mr Kumar that he should be at work at a certain time to receive deliveries?.....I never told him to receive those deliveries at that time as well. Our suppliers generally, chicken and lamb, these people they generally arrive after 4 o'clock but for example the vegetables or the milk (indistinct words) they have the keys so the milk (indistinct words) to come in the early morning hours and they have already put that thing in the cool room. The vegetables I already instructed them to deliver this. My prior instructions was to deliver the food after 3.30. But they said because their*

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<sup>32</sup> Transcript p189

<sup>33</sup> Transcript p191

*drivers are not sure what time they are coming, when the car coming, so I then I had to put it after 3.00 so that when they arrive at 4 o'clock they can pick up the deliveries and then put it inside. The chicken deliveries used to come in the evening. "*

**[68]** Anil Sharma's explanation as to delivery arrangements is not entirely convincing. I accept that Mr Kumar was at the restaurant at the time the deliveries were made and I suspect Anil Sharma had a tacit expectation that Mr Kumar, or at least one of the 'cooks/chefs' would be present to receive the deliveries, even if they were not specifically instructed as to a specific time. It seems unlikely that the proprietor, would for security and/or quality control reasons, allow for the delivery of perishable goods when no staff member was present to receive them.

**[69]** In relation to the roster, Anil Sharma said:<sup>34</sup>

*"You made some comment that the chefs and Mr Kumar were working a fixed roster and that it was up to them to work out themselves?.....That means I have given them a fixed roster that you should work from this time to this time. Okay, and if they are claiming that they are coming 2 o'clock or 1 o'clock or they are finishing at midnight then that's up to them. It's not me, you know, I never ask them to come there at half past 2.*

*Did you ever instruct any of the employees not to be there at half past 2?.....I have always – every time I tell them not to be there. No.*

*As a general rule how would the management of that roster work out?.....Management means?*

*As a general rule, so you have allowed them to manage that roster largely themselves. Is that correct?.....Yes (indistinct words) the roster too and I know they can cook during that time and, yes."*

**[70]** Allowing for the difficulties of reconstructing events many years after they occurred, I conclude that realistic and balanced starting times for Mr Kumar were:

- Monday to Thursday: two days at 3.30pm and two days at 4pm
- Friday and Saturday: 3.30 pm.

*Finishing time.*

**[71]** The claim is based on an 11pm finish time each night of the week.

**[72]** It is accepted that there was no official closure time for the restaurant. Rather, the actual time of closure was driven by customer demand.

**[73]** The evidence of Mr Kumar was:<sup>35</sup>

*"Yes, and you worked through until approximately what time?.....Sorry?*

*You'd work through until approximately what time?.....Until half past 10, 11 o'clock on the weekend sometime we knock off at 11 o'clock."*

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<sup>34</sup> Transcript p236

<sup>35</sup> Transcript p62

[74] And later:<sup>36</sup>

*"No, okay, then the restaurant opens. Mr and Mrs Sharma's position is what they've put in their outline is that the typical busy period would be from that initial start then it would quieten down during the night. You say, well you gave in your evidence this morning there were some nights that you were working until 11 o'clock and some nights were quiet, is it your evidence that you were required to work 7 days a week to 10.30 or 11 o'clock at night every night. So, there wouldn't be quiet times at all?.....Quiet time means just like we're doing 8 o'clock, 9 o'clock, not have any customers but we are still waiting until 10 o'clock. 10 o'clock we have to just starting for the wind up.*

*So, why would you hang around until 10 o'clock.....Because Mr Sharma instructed to me if any take-aways coming, come in during that time, any working people, they have to come in their time and phone call people they still want a table to book at 9 o'clock, half past nine.*

*So, it's your evidence, is it, that you had to stay?.....Yes.*

*In the kitchen until at least 10 o'clock.....Yes, because I have to be responsible person in the kitchen."*

[75] Mr Kumar gave evidence concerning his position as a part-time taxi driver. It would seem that the taxi shifts commenced around 11 pm. Allowing time to change clothes and travel to where the taxi was located, it is a reasonable assumption that his Magic Curries shift finished some time prior to 11 pm.

[76] Mr Rajnesh Kumar said that Mr Kumar left the restaurant around 10.30pm on a week day.<sup>37</sup>

[77] Vijay Sharma said she travelled home with her husband (Rajiv Kumar) at the conclusion of the shift. On weekdays this was usually between 10 and 10.30pm and weekends, 11 to 11.45pm.

[78] The evidence of Manju Sharma was:<sup>38</sup>

*"And what was the hours of operation of the restaurant at this time? What time did it open?.....Oh, we are open 5 o'clock. When we start the same time, 5 o'clock, and onwards. Like, if someone is there 9.30 we are there. If someone is not, quarter to 9 we finish at restaurant 9 or 9.15 and everybody is finished, then we close the restaurant.*

*So what was - ?.....It depends. Oh, 10, 10.30 or 9 or 9.30."*

[79] And later:<sup>39</sup>

*"Now, did you have an opportunity to observe when Mr Kumar would finish up from the restaurant, when he would finish his shift?.....When he's finished his shift?*

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<sup>36</sup> Transcript p85

<sup>37</sup> Transcript p143

<sup>38</sup> Transcript p272

<sup>39</sup> Transcript p273

*Yes?.....Because we said to him and other staff as well, in – the inside people, because outside if the customer is there so outside people stay there. If inside people we said if your work is finished, if you want to stay with us you can stay and leave with us, if you want to go before you can go, so sometime they go, sometime they – they stay with us and wait for outside people. If they finish they go, or sometime they go their own.”*

**[80]** Manju Sharma disputed Mr Kumar’s claim that he spent about one hour each night cleaning the restaurant, stating this would be necessary only once in 15 or 20 days.<sup>40</sup>

**[81]** Anil Sharma’s evidence was that the kitchen staff did not necessarily have to stay until all customers had left. He said:<sup>41</sup>

*“So your – what is your evidence about the times -.....The timings, as I mentioned before, generally we don’t have any closing time, for example, after nine o’clock if all the people they leave, you know, we generally close the restaurant and go home, and at nine thirty, sometimes it can be ten thirty, eleven as well, if the customer is still sitting, it does not necessarily mean that kitchen staff is always there or they will have to wait for customer to leave, because me and my wife, both know how to cook – if once in a while – in a six months time somebody comes at ten o’clock for order and I am still there and my wife is still there, we will happily cook for them, even the cooks or chefs are not there. But –*

*So you wouldn’t require the -.....No.*

*- kitchen staff to stay there?.....No, no.*

*And would you close up the restaurant -.....Yes.*

*- at the end of the night?.....That’s right.”*

**[82]** The claim for a finish time of 11pm each night of the week is not sustainable, even on Mr Kumar’s evidence, who acknowledged that on week nights, he invariably finished before 11 pm.

**[83]** A further complication is the nature of the roster and the ‘all in’ salary arrangement (which is considered later in this decision). Suffice to say that I accept that Mr Kumar had some flexibility in terms of the actual hours he worked. I observe in passing that there is a distinction between hours an employee is required to work and hours an employee chooses to work.

**[84]** There was a considerable amount of evidence from both parties going to the issue of time taken in preparation and cooking of meals for customers. Anil Sharma tendered a document which he maintained was based on data previously recorded by the cooks/chefs. The document purports to demonstrate that the total weekly task for a curry cook should be capable of being accomplished within a time span of 35 hours, and less for a tandoori cook.<sup>42</sup>

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<sup>40</sup> Transcript p 276

<sup>41</sup> Transcript p213

<sup>42</sup> Exhibit R4

[85] It is extraordinarily difficult, if not impossible, for the Commission to stand in the shoes of the restaurant proprietor and determine the optimum staffing arrangements for the establishment. Suffice to say that on the evidence available, I am satisfied that there is no obvious impediment which would have prevented Mr Kumar from completing his tasks within a span of 38 hours spread over six days.

[86] A review of the time sheets records time worked for Mr Kumar as typically between 36 and 37.5 hours, albeit he was paid on a 38 week basis (apparently a DOI requirement). Moreover, the timesheets from July 2006 onwards do not appear to have taken the 30 minute unpaid meal break into account. This in itself would reduce the total recorded hours by up to three hours each week, i.e from approx. 37 to 34 hours per week. It is not clear whether the meal period was accounted for prior to July 2006.

[87] It is not possible to make a precise finding as to the actual finishing time for Mr Kumar over the relevant period although I am satisfied that the Time and Wage Record probably understates to a modest extent the actual hours he was expected/required to work.

[88] Again using the approach of a realistic and balanced assessment of the evidence I conclude that a typical working week would be represented by the following finishing times:

- Two week nights at 9.30 pm
- Two week nights at 10.30 pm
- Friday and Saturday 11pm

*The Typical Week.*

[89] Based on the above analysis, I conclude that a typical working week for Mr Kumar is represented by the following:

- Monday 3.30 to 9.30pm
- Tuesday 4.00 to 9.30pm
- Wednesday 4.00 to 10.30pm
- Thursday 3.30 to 10.30pm
- Friday 3.30 to 11.00pm
- Saturday 3.30 to 11.00pm

[90] Allowing for a 30 minute unpaid meal break each shift, this equates to 37 hours per week.

### **The appropriate Weekly Wage Rate**

[91] Mr Kumar was paid on an annual salary basis which Anil Sharma states was drawn up under legal advice. This is a perfectly legitimate arrangement. The relevant clause in the Award reads:

**"10. ANNUAL SALARY**

- (a) *As an alternative to being paid by the week according to Clause 8 - Wage Rates, by agreement between the employer and the employee, an employee can be paid at a rate equivalent to an annual salary of at least 25 percent or more above the rate prescribed in Clause 8 - Wage Rates, times 52 for the work being performed. In such cases, there is no requirement under Clause 24 - Overtime and Other Penalty Rates, to pay overtime and penalty rates in addition to the weekly award wage.*

**PROVIDED** *that the salary paid over a year was sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with.*

**PROVIDED FURTHER** *that in the event of termination of employment prior to completion of a year the salary paid during such period of employment shall be sufficient to cover what the employee would have been entitled to if all award overtime and penalty rate payment obligations had been complied with.*

- (b) *An employee being paid according to subclause (a) of this clause, shall be entitled to a minimum of eight days off per four week cycle. Further, if an employee covered by this clause is required to work on a public holiday, such employee shall be entitled to a day off in lieu or a day added to his or her annual leave entitlement.*
- (c) *Where payment in accordance with subclause (a) of this clause is adopted, the employer shall keep a daily record of the hours worked by an employee which shall show the date and start and finish times of the employee for the day. The record shall be countersigned weekly by the employee and shall be kept at the place of employment for a period of at least six years."*

**[92]** In essence this means that the salary must be at least 25% above the prescribed weekly rate. Such additional payment is in lieu of overtime and penalty rates, provided that the salary paid over a year is sufficient to cover what the employee would have been entitled to had the penalty rate provisions applied on the award rate.

**[93]** I have already determined that the appropriate classification is *Food and Beverage Service Grade 4*.

**[94]** The following table compares what Mr Kumar should have been paid with a 25% loading compared with what he was actually paid.

Period	Award rate per week \$	With 25% loading applied	Actual amount paid \$	Difference \$
1/8/03 to 31/7/04	542.20	677.75	689.00	11.25
1/8/04 to 31/7/05	561.20	701.50	689.00	(12.50)
1/8/05 to 11/9/05	578.20	722.80	689.00	(33.80)
12/9/05 to 31/7/06	578.20	722.80	725.40	2.60
1/8/06 to 31/7/07	598.20	747.80	725.40	(22.40)

[95] The 25% loading is a minimum below which the rate cannot fall at any time. It follows that, based on the above table, an adjustment will be necessary wherever the amount actually paid falls below the prescribed 25% loading. (2004/05, part of 2005/06 and 2006/07.) Under the terms of the clause it is not permissible to offset overpayments in other relevant periods.

[96] There is an additional test. The 25% loading must be sufficient to cover, on an annual basis, overtime and other applicable penalty rates which would have otherwise applied.

[97] The applicant's claim is based on a seven day/week roster pattern. As I understand the applicant's contention, because Mr Kumar was not allowed the prescribed eight rostered days off in a four week period, penalty rates applied until such time off was allowed. Presumably the same contention would apply where a six day week applies, (as I have found in this case).

[98] In my view, this construction of the award is misplaced. Clause 25(e) of the 2003 Award (and equivalent clauses in subsequent awards) reads:

*"(e) **Rostered Day Off** - An employee required to work on his or her rostered day off shall be paid at the rate of double time with a minimum payment of two hours. Such minimum shall not apply where the overtime is continuous from the previous day's duty.*

*Rostered Day Off for the purposes of this subclause shall be the two full days off each week to which the employee is entitled."*

[99] In the case of Mr Kumar, the sixth day in each weekly roster should have been an RDO. According to the Time and Wage Record, this day was often (but not always) a Saturday. As he was required to work on this day, the penalty rate of double time would apply in accordance with clause 25(e).

[100] Thereafter the roster would revert to ordinary time and repeat the cycle. There is nothing that I can see in the Award which prescribes that penalty rates continue

indefinitely until the employee is allowed the requisite time off. I have reached this conclusion without the benefit of argument and it should not be construed as a conclusive decision. It is offered at this stage to assist the parties in negotiating a resolution to this matter.

**[101]** Applying the above construction, I have undertaken a number of spot checks based on the 'typical week' as determined in the previous section. It would seem that the 25% loading comfortably embraces the penalties which would otherwise apply. However this is a matter for the parties to review.

### **Annual Leave.**

**[102]** Mr Kumar maintains that he not provided with any paid annual leave notwithstanding that his letter of employment stated that annual leave would be in accordance with the Restaurant Keepers Award.

**[103]** The Record of Employment shows that paid leave was allowed, generally in periods of one, two or three days. Whilst this is unusual, the arrangement does not on its face contravene the Award.

**[104]** Mr Kumar has signed the Record on each occasion leave has been recorded. As stated earlier, the Commission has no reason not to accept the Record as a statement as to what had occurred.

**[105]** According to my perusal of the Record, Mr Kumar has been allowed the following paid leave:

- 2003            2 days
- 2004            17 days
- 2005            18 days
- 2006            17 days
- 2007            14 days.
- Total            68 days

**[106]** The total period of employment is three years and ten months. During this period a total of 76.6 days annual leave would have accrued.

**[107]** I suspect there are also implications for the annual leave loading which does not appear to have been paid.

### **Public Holidays**

**[108]** Mr Kumar maintains that he was not paid penalty rates for Public Holidays worked. The Time and Wages Record suggests otherwise. Anil Sharma's evidence is that Public Holidays are generally allowed when they fall on a week day. When they occur on a weekend, a day in lieu is allowed.

**[109]** Substitution of public holidays is permissible under the award. The parties are to confer as to whether obligations for the payment of Public holidays have been met.

### **Taste of Tasmania**

[110] On at least one, possibly two occasions, Magic Curries participated in the Taste of Tasmania Festival (TOT). Mr Kumar said he and his colleagues were required to prepare food for the TOT as well as continuing to run the restaurant. This he said necessitated working from 7am until midnight for the duration of the Festival.

[111] The evidence of Anil Sharma is that the cooks set their own hours and Mr Kumar was paid \$2000 in addition to his normal salary for the TOT effort.

[112] It is not clear what remedy if any Mr Kumar seeks for the TOT event. However there is insufficient evidence to make a meaningful finding one way or the other.

### **Superannuation**

[113] From the Time and Wage Record it is clear that superannuation has been paid by the respondent on a regular basis. It is possible that an additional amount for superannuation may arise as a consequence of this matter being resolved.

### **Conclusion**

[114] The above 'in principle' decisions together with the findings and conclusions are provided to assist the parties in negotiating a settlement to this dispute.

[115] Pursuant to Section 30 of the *Industrial Relations Act*, I hereby order that the parties confer with a view to negotiating a settlement of this dispute.

[116] Either party may apply to have this matter re-listed should that be necessary.

[117] The file shall remain open pending further advice from the applicant.

Tim Abey  
**PRESIDENT**

### **Appearances:**

Mr J O'Neill representing Mr R Kumar (2010)

Mr T Concannon representing Mr R Kumar (2012)

Mr C Green representing Anil and Manju Sharma trading as Magic Curries Indian Restaurant (2010 and 2012)

### **Date and place of hearing:**

2010

July 6

2012

24, 25, 26 September

Hobart