

**IN THE ALCOHOL REGULATORY AND LICENSING AUTHORITY  
TE MANA WAETURE TAKE WAIPIRO**

**[2021] NZARLA 139-145**

UNDER the Sale and Supply of Alcohol Act 2012

AND

IN THE MATTER of applications pursuant to s 280 of the Act for the cancellation (or suspension) of five off-licences

AND

IN THE MATTER of applications pursuant to s 285 of the Act for cancellation (or suspension) of two managers' certificates

BETWEEN the CHRISTCHURCH CITY COUNCIL ALCOHOL LICENSING INSPECTOR and the NEW ZEALAND POLICE Applicants

AND NEKITA ENTERPRISES LIMITED First Respondent

AND HARJIT SINGH Second Respondent

AND SHEREEN SINGH Third Respondent

Hearing: 16 - 17 August 2021 at Christchurch  
& 2 September 2021 (by AVL)

Authority: Judge K D Kelly  
Ms J D Moorhead  
Mr R S Miller

Counsel: Ms K South and Mr W Taffs for the Applicants  
Mr J H M Eaton QC for the First Respondent  
Mr P J Egden for the Second Respondent  
Mr K H Cook for the Third Respondent

Judgment: 17 September 2021

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**DECISION OF THE AUTHORITY**

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## **Introduction**

[1] Ms Anneke Lavery, the Licensing Inspector for the Christchurch City Council, and Sergeant David Robertson of the New Zealand Police (together the ‘Applicants’), have applied to the Authority for orders cancelling or suspending five licences held by Nekita Enterprises Limited (‘Nekita’), as well as the managers’ certificates issued to Mr Harjit Singh and Mrs Shereen Singh.

[2] At the time of the applications being filed, Mr and Mrs Singh were joint directors and shareholders of Nekita. Mr Singh has since resigned as a director, and has reduced his shareholding in the company to a minority interest. Mr John Yoon has also joined Nekita as an independent director.

[3] Mr Singh has also surrendered his manager’s certificate precluding its cancellation or suspension by the Authority. The grounds of the application against Mr Singh, however, have not been withdrawn.

## **Summary of result**

[4] Pursuant to s 280(5)(d) of the Act, off-licence numbers:

- i. 60/OFF/28/2017;
- ii. 60/OFF/113/2018;
- iii. 60/OFF/38/2019;
- iv. 60/OFF/100/2017; and
- v. 60/OFF/45/2019:

— issued to Nekita Enterprises Limited are cancelled from the date of this decision.

[5] Pursuant to s 285(5)(b) of the Act, manager’s certificate number 60/CERT/612/2016 issued to Shereen Vandana Singh is cancelled from the date of this decision.

## **General enforcement provisions of the Act**

[6] The relevant parts of s 280 of the Act read:

**280 Variation, suspension, or cancellation of licences other than special licences**

(3) The grounds on which an application for an order may be made are as follows:

(a) that the licensed premises have been conducted in breach of any of the provisions of this Act or of any conditions of the licence or otherwise in an improper manner:

(b) that the conduct of the licensee is such as to show that he or she is not a suitable person to hold the licence:

...

(5) If the licensing authority is satisfied that any of the grounds specified in subsection (3) is established and that it is desirable to make an order under this section, it may, by order,—

(a) vary or revoke any condition of the licence imposed by the licensing authority or a licensing committee: or

(b) impose any new condition (relating to any matter specified in section 110(1), 116(1), or 117(1)); or

(c) suspend the licence for such period not exceeding 6 months as the licensing authority thinks fit; or

(d) cancel the licence.

(6) Instead of making an order under subsection (5), the licensing authority may adjourn the application for any period it thinks fit to give the licensee an opportunity to remedy any matters that the licensing authority may require to be remedied within that period.

[7] The relevant parts of s 285 of the Act, in turn, read:

**285 Suspension or cancellation of manager's certificates**

(3) The grounds on which an application for an order under this section may be made are as follows:

(a) that the manager has failed to conduct any licensed premises in a proper manner:

(b) that the conduct of the manager is such as to show that he or she is not a suitable person to hold the certificate: ...

...

(5) If the licensing authority is satisfied that any of the grounds specified in subsection (3) is established and that it is desirable to make an order under this section, it may, by order,—

(a) suspend the certificate for such period not exceeding 6 months as the licensing authority thinks fit; or

(b) cancel the certificate.

- (6) Instead of making an order under subsection (5), the licensing authority may adjourn the application for any period it thinks fit to give the manager an opportunity to remedy any matters that the licensing authority may require to be remedied within that period.

## Grounds of the applications

### *First application – Nekita*

[8] The first application is made pursuant to s 280(3)(a) of the Act, and says that the following five premises, for which Nekita holds licences, have been conducted in an improper manner:

- (a) Canterbury Liquor Lyttleton;<sup>1</sup>
- (b) Ferrymead Wine and Spirits;<sup>2</sup>
- (c) Canterbury Liquor Pages Road;<sup>3</sup>
- (d) Wainoni Liquor Store;<sup>4</sup> and
- (e) Woodham Road Liquor Store.<sup>5</sup>

[9] The Applicants say that Nekita has conducted these premises in an improper manner as follows:

### *Grounds arising from disclosures to Super Liquor Holdings Limited*

- (i) by dishonestly misstating the hourly rate of pay in employment agreements for the purposes of satisfying visa requirements;
- (ii) by paying workers otherwise than in accordance with their employment agreements;
- (iii) by engaging in migrant worker exploitation;
- (iv) by breaching the Minimum Wage Act 1983; and
- (v) by committing PAYE tax evasion;

### *Grounds arising from Employment Relations Authority (ERA) determination*

- (vi) intentionally operating a dual payment system between 2012 and 2016, the effect of which was that employees were not paid their minimum wage

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<sup>1</sup> located at 42 Norwich Quay, Lyttleton: licence number 60/OFF/28/2017 – this licence expired on 1 April 2020 and is the subject of an opposed renewal application (refer Lavery BOE dated 12 February 2021 at [6] and following)

<sup>2</sup> located at 9 Humphreys Drive, Christchurch: licence number 60/OFF/113/2018

<sup>3</sup> located at 51 Pages Road, Christchurch: licence number 60/OFF/38/2019

<sup>4</sup> located at 169 Pages Road, Christchurch: licence number 60/OFF/100/2017

<sup>5</sup> located at 191 Woodham Road, Christchurch: licence number 60/OFF/45/2019

- entitlement for the additional hours they worked, in breach of the Minimum Wage Act 1983;
- (vii) engaging in PAYE tax evasion through the use of a dual payment system whereby Nekita intentionally failed to account for PAYE on the cash payments to employees for the additional hours worked, in breach of s 143B(1)(d) of the Tax Administration Act 1994;
  - (viii) having been proved to have underpaid four employees in breach of the Minimum Wage Act 1983 amounting to \$19,805.89;
  - (ix) intentionally failing to keep complete and correct wage and time records, in breach of s 130 of the Employment Relations Act 2000 for 59 employees;
  - (x) intentionally failing to keep complete and correct holiday and leave records for 59 employees as required under s 81 of the Holidays Act 2003 meaning that it is unlikely that all employees were, in some way, underpaid their holiday pay entitlements;
  - (xi) intentionally operating the dual payment system in relation to vulnerable migrant employees (who required work visas) who had limited knowledge of their employment rights and who were reliant on the licensee for their employment, income and ability to reside in New Zealand because of their dependence on a visa;
  - (xii) by failing to take steps to determine how widely the dual payment system was applied and to look at what arrears would be owed to employees or (if establishing loss to other employees was too difficult to calculate), failing to make compensatory payments to employees who had been underpaid;
  - (xiii) by failing to maintain appropriate record keeping in relation to the operation of its licences and failing to have adequate processes in place to ensure statutory compliance in order to meet the object of the Act; and
  - (xiv) by giving and calling false evidence at the ERA hearing held on 24 and 25 September 2020.

[10] In addition, the Applicants say that Nekita is not suitable to hold a licence (s 280(3)(b) of the Act):<sup>6</sup>

- (i) [the above grounds in relation to s 280(3)(a) are repeated];
- (ii) Nekita is operated by Harjit Singh and Shereen Singh, who are husband and wife and who are the subject of allied applications for cancellation of their managers' certificates; and
- (iii) Nekita demonstrated a lack of candour in relation to the Labour Inspectorate investigation (and subsequent ERA proceedings) regarding breaches of minimum employment standards.

*Second application – Mrs Shereen Singh*<sup>7</sup>

[11] The second application is made pursuant to s 285(3)(a) and (b) of the Act and alleges that Mrs Singh has failed to conduct the five licensed premises in a proper manner, and that her conduct is such as to show that she is not a suitable person to hold a manager's certificate.

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<sup>6</sup> in addition to repeating the above grounds

<sup>7</sup> Manager's certificate 60/CERT/612/2016

[12] It is alleged that Mrs Shereen Singh failed to conduct the licensed premises in a proper manner, in particular, by failing to provide directorship and oversight of Nekita enabling it to engage in the matters set out in the grounds pursuant to s 280(3)(a) of the Act in respect of Nekita.

[13] It is also alleged that the conduct of Mrs Singh is such as to show that she is not a suitable person to hold a manager's certificate. In particular, Mrs Singh is unsuitable:<sup>8</sup>

- (i) [the above grounds in relation to s 285(3)(a) are repeated];
- (ii) because she demonstrated a lack of candour in relation to the Labour Inspectorate investigation (and subsequent ERA proceedings) regarding breaches of minimum employment standards;
- (iii) by association to her husband and given her conduct in relation to Nekita;
- (iv) on her own account, as she only became actively involved in Nekita in 2017 and was, at the least, an inactive director who failed to monitor the business activities of her co-director husband;
- (v) because since being specifically on notice about Nekita's unlawful conduct in November 2019, she has:
  - made no apparent efforts to investigate the breadth and scope of the unlawful behaviour;
  - made no efforts to investigate the conduct blamed by Mr Singh as being the fault of a manager;
  - made no effort to identify underpayments to any other staff who were not included in the ERA proceedings, despite having gained a significant financial benefit through Harjit Singh's offending; and
- (vi) because she lacks either the willingness or capacity to ensure legal compliance and is therefore unsuitable: she is not a person in a position to meaningfully cure Nekita's and Mr Harjit Singh's overt lack of suitability given the history of illegal dealings and non-compliance.

*Third application – Mr Harjit Singh*<sup>9</sup>

[14] The third application against Mr Singh is also made pursuant to s 285(3)(a) and (b) of the Act on similar grounds to the application against Mrs Singh.

[15] As noted, a week prior to the hearing before the Authority,<sup>10</sup> Mr Singh surrendered his manager's certificate. As a consequence, there is no longer any manager's certificate to cancel or suspend.

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<sup>8</sup> in addition to matters relating to s 285(3)(a)

<sup>9</sup> Manager's certificate 60/CERT/349/2017

## Production Order

[16] The Applicants sought an order pursuant to s 4C(1)(b) and (c) of the Commissions of Inquiry Act 1908, requiring Super Liquor Holdings Limited (Super Liquor) to produce for examination copies of any papers, documents, records, or things in Super Liquor's possession or under its control relating to the alleged or suspected unlawful or unsatisfactory behaviour by Nekita, Mr Harjit Singh, and Ms Shereen Singh, relating to their conduct as franchisees, employers, off-licence holders and managers of off-licence premises.

[17] The Authority made this order on 24 February 2021.

## Evidence for Applicants

[18] The Authority heard evidence in support of the applications from:

- (a) Ms Anneke Lavery, Licensing Inspector for the Christchurch City Council (and one of the Applicants);
- (b) Mr Richard Lewis, Labour Inspector with the Ministry of Business, Innovation and Employment (MBIE);
- (c) Ms Hannah Crampton, also a Labour Inspector employed by MBIE;
- (d) Mr Mark Willson, Senior Technical Advisor for the Business and Specialist unit of the Border and Visa Operations branch of Immigration New Zealand (INZ) (a division of MBIE); and
- (e) Mr Steven Westwood, Immigration Officer and Risk and Verification Manager of INZ.

### *ERA determination*

[19] Ms Lavery says that in September 2020, MBIE brought a claim against Nekita in the ERA for breaches of the Employment and Minimum Wage Acts.<sup>11</sup> In respect of these, Mr Lewis gave evidence that before the ERA Nekita admitted that it:<sup>12</sup>

- (a) failed to pay four of its employees the minimum hourly rate totalling \$19,805.89;

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<sup>10</sup> 9 August 2021

<sup>11</sup> Lavery further BoE dated 11 August 2021 at [27]

<sup>12</sup> Lewis BoE dated 11 February 2021 at [15]; ERA determination [2020] NZERA 509 dated 8 December 2020 at [26]

(b) failed to pay holiday pay on the minimum wage arrears for these four employees totalling \$1,584.48; and

(c) failed to keep wage and time records, and holiday and leave records for 59 employees.

[20] In light of these admissions, amongst other things, the ERA found that:

(a) the four breaches of minimum wage requirements reflected ongoing, persistent and deliberate breaches of the minimum wage requirements for four employees;<sup>13</sup>

(b) the failures to keep wage and time records and holiday and leave records for 59 employees were systemic, probably arising out of the widespread operation of a dual payment system and Nekita's practice of recording insufficient employment information, and were therefore repeated for each employee over the time they were employed;<sup>14</sup>

(c) the payments in cash were not recorded for calculating holiday pay so it is likely that the four employees also lost a significant amount of holiday entitlement;<sup>15</sup>

(d) the loss for the 59 employees is significant<sup>16</sup> as the failure to accurately record hours means it is likely that all employees were, in some way underpaid their holiday pay entitlements;<sup>17</sup>

(e) all breaches were intentional and were designed to minimise the gross amounts paid to employees and to limit the amount of holiday pay paid;<sup>18</sup> and

(f) many of Nekita's employees were migrant employees requiring work visas and as such they were vulnerable employees with little knowledge of their employment rights, and who were reliant on Nekita for their jobs and income and their right to reside in New Zealand.<sup>19</sup>

### *MBIE Investigation*

[21] The investigation leading to the ERA's determination is canvassed in the evidence of Mr Lewis and Ms Crampton.

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<sup>13</sup> ERA determination [2020] NZERA 509 dated 8 December 2020 at [34]

<sup>14</sup> above n 13, at [35]

<sup>15</sup> above n 13, at [39]

<sup>16</sup> this loss is not quantified

<sup>17</sup> above n 13, at [40]

<sup>18</sup> above n 13, at [41]

<sup>19</sup> above n 13, at [43]

[22] Mr Lewis says that Mr and Mrs Singh have been directors of Nekita since the company was first registered in October 2002,<sup>20</sup> and that as a Labour Inspector for MBIE he has investigated various employment breaches in relation to Nekita between 2012 and 2018.

[23] In January 2019, Mr Lewis says a complaint was received by MBIE from a former employee of Nekita which was supported by three other former employees. These employees, alleged that:<sup>21</sup>

- (a) they were paid below minimum wage during their employment;
- (b) some paid a premium in the form of paying money back for their wages to their employer;
- (c) they were not paid their annual leave entitlements correctly;
- (d) they were not paid correctly for worked public holidays; and
- (e) they did not receive alternative holidays when they worked on a public holiday that was an otherwise working day.

[24] Mr Lewis says that Mr Singh was in charge of all aspects of Nekita's recruitment process, including the hiring and dismissal of employees, as well as completing all payroll tasks for the company, including recordkeeping and the calculation and payment of wages.<sup>22</sup>

[25] The employees were subsequently interviewed, during which Mr Lewis says that he was shown 'paid out' reports produced from the till system used in Nekita. Mr Lewis says these reports showed varying amounts of cash having been taken from the tills, and paid to numerous employees, along with the hours worked in relation to some of these payments. This system of recording hours and wages, Mr Lewis says, was separate to, and different from, the record produced later by Nekita to the Labour Inspectorate.<sup>23</sup> Before the Authority, Mr Lewis said: "There was one official set of records, which was the wages and time records, where people were paid appropriately and tax was paid and all that kind of thing, and then a completely separate set of records, which are the 'paid out' reports, which show the hours that people worked and the wages that they were paid, those wages usually being well below the minimum wage and paid in cash from the till."

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<sup>20</sup> above n 12, at [4] this being the situation as at the date of his affidavit rather than at the date of the hearing before the Authority

<sup>21</sup> above n 12, at [7](g)

<sup>22</sup> above n 12, at [7](d)

[26] Mr Lewis says that following this interview, on 29 August 2019 he and Labour Inspector Hannah Crampton visited the main office of Nekita at Pages Road and requested from Mr Singh a list of current and past employees. Subsequently, on 13 September 2019 Ms Crampton also requested from Mr Singh employment agreements, wage and time records, and holiday and leave records for five employees on the list provided by Mr Singh.

[27] Ms Crampton said that she analysed these documents and determined that the wages and time records, and holiday and leave records, were non-compliant with statutory requirements. Ms Crampton says that she used the records provided by Mr Singh from his payroll and compared this to the information in the paid out reports she received from the former staff. As the records provided by Mr Singh presented weekly not daily hours worked, Ms Crampton says that this caused issues with determining entitlements to bereavement leave, alternative holidays, and unworked holiday and sick leave, that is, whether employees received their correct entitlements.<sup>24</sup>

[28] Attached to Ms Crampton's brief of evidence is a spreadsheet which shows the payment employees received for the hours worked which indicates that employees were being paid below minimum wage from moneys paid out of the till.<sup>25</sup>

[29] Mr Lewis says that at a subsequent interview with Mr Singh on 4 October 2019, conducted by himself and Ms Crampton, Mr Singh admitted that he had operated a dual system whereby official hours of work and payments were recorded in one system, while an unofficial system (the paid-out reports) recorded extra hours worked, and that these extra wages were at significantly lower rates of pay.

[30] Ms Crampton said that she took contemporaneous notes at this meeting, a copy of which were produced by Mr Lewis. These notes record, that discrepancies were put to Mr Singh.

[31] Ms Crampton says Mr Singh initially denied his involvement regarding paid out reports and paying employees in cash below minimum wage but then admitted that he was running a dual system.<sup>26</sup> Ms Crampton says Mr Singh also admitted that this occurred on a widespread and systemic basis over a number of years. Mr Singh, however, denied that

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<sup>23</sup> above n 12, at [7](h)-(k)

<sup>24</sup> Crampton BoE dated 11 February 2021 at [11]

<sup>25</sup> above n 24, at [15] - [20]

employees were forced to pay money back to him in cash after the scheme with the paid out reports stopped in 2016.<sup>27</sup>

[32] The notes taken by Ms Crampton record, amongst other things:<sup>28</sup>

[Labour Inspectorate] told [Harjit Singh] about allegations that [employees] would sometimes be paid cash if extra hours were worked. [Harjit Singh] says that this could have happened when he was on holiday when he was using an automatic payment and an [employee] worked longer than their typical hours.

[Harjit Singh] says that it is not true that there was a system where cash was paid. [Labour Inspectorate] showed [Harjit Singh] a sample of the paid out report. [Harjit Singh] says that someone has made it up and that it is malicious. He says he knows who provided the report to [Labour Inspectorate] and that was why he blacked out the names because he knew they would do something like this. [Harjit Singh] thinks that someone could have gone into the system and created it. [Harjit Singh] says he has never seen the document before. [Harjit Singh] is surprised that [Labour Inspectorate] has many more of the paid out reports.

[Harjit Singh] appeared to have changed his story and says that he did know about it and that employees would need his permission to do this. Body language changed after the paid out report came out – arms crossed.

[Harjit Singh] admitted that he has operated a dual system in the past where employees were paid cash out of the till. Harjit Singh became evasive and kept trying to change the subject – asking who has given [Labour Inspectorate] the information and that he would like to have a look at what [Labour Inspectorate] has.

[Harjit Singh] says that employees made him operate the system since he did it maybe once or twice and it became a bit of a habit which was hard to stop.

[Labour Inspectorate] asked if it was to avoid tax and pay [employees] less than minimum wage to increase profit. [Harjit Singh] acknowledges that this has happened on a widespread and systemic basis that happened over a number of years.

...

[Labour Inspectorate] advised that the system appeared to stop in 2016 and that people started working and earning a lot more hours. [Harjit Singh] says that he stopped the system in 2016 and started paying [employees] properly through the books. [Labour Inspectorate] told [Harjit Singh] about allegations about

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<sup>26</sup> above n 24, at [22]

<sup>27</sup> above n 24, at [23] – [24]

<sup>28</sup> Exhibit 'I' to Lewis BOE, above n 12

[employees] forced to pay part of their wages back to [Harjit Singh] in cash. [Harjit Singh] denies that this happened and says he would like to see the evidence.

[Labour Inspectorate] gave another opportunity to [Harjit Singh] to tell [Labour Inspectorate] about the cash back system. [Harjit Singh] continued to deny that that happens.

[33] Mr Lewis accepted under cross-examination, however, that the notes of the meeting of 4 October 2019 were not shown to either Mr or Mrs Singh, and do not show that Mr Singh has been involved in any cash payments to employees.

[34] Following this interview, all paid out reports were sought for all stores between October 2013 and the end of 2016. On receipt of paid-out reports from Mr Singh and Nekita's lawyers, Mr Lewis said that the Labour Inspectorate was able to identify the names of 59 individual employees who are recorded as have received payments directly from the till outside the payroll system, and who did not have full and accurate wage and time records and holiday and leave records. Mr Lewis says that many of the names appear multiple times in the paid-out reports, a copy of which he produced before the Authority. The failure to keep complete records, Mr Lewis says, means Nekita is unable to demonstrate minimum employments standards have been met at all times.<sup>29</sup>

[35] Following their investigation, Ms Crampton said that she and Mr Lewis concluded that Nekita had breached its obligations in respect of minimum wage and holiday requirements because of the dual payment system running until the end of 2016. As a result the Labour Inspectorate filed proceedings in the ERA.<sup>30</sup>

[36] The deficiencies uncovered, Ms Crampton says, have significant implications because accurate records of the number of hours actually worked were not kept. Ms Crampton says that this likely means that leave entitlements during the time were paid inaccurately because cash payments were not taken into account when calculating what is owed for holiday entitlements. Ms Crampton said that she formed the view that there had been breaches of s 6 of the Minimum Wage Act 1893, s 12A of the Wages Protection Act 1983, ss 4B and 130 of the Employment Relations Act 2000, and s 81 of the Holidays Act 2003.<sup>31</sup>

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<sup>29</sup> above n 12, at [7](s)-(z)

<sup>30</sup> above n 24, at [26]

<sup>31</sup> above n 24, at [28]

[37] Ms Crampton also says there was also no evidence of PAYE or holiday pay having been paid in relation to the cash payments recorded in the paid out reports,<sup>32</sup> although Ms Crampton acknowledged under cross examination that she did not know whether anyone had made inquiries with IRD about this.

[38] Mr Lewis said that Mrs Singh controlled the company in the absence of Mr Singh.<sup>33</sup> Under cross-examination by Mr Cook for Mrs Singh, however, Mr Lewis accepted that Mr Singh's advice at the 4 October 2019 meeting that Mrs Singh would be looking after the business while he was away for nine days, did not equate with Mrs Singh having looked after the business whenever Mr Singh was away between 2012 and 2016. In response to a question asked by Mr Eaton QC for Nekita, Mr Lewis said that he thought Mrs Singh was in charge of Nekita in Mr Singh's absence because she is a director of the company which he says implies some measure of control, and that he inferred that this was the case from what Mr Singh said at the meeting on 4 October 2019.

[39] Under cross-examination by Mr Cook, both Mr Lewis and Ms Crampton confirmed that they did not request to speak to Mrs Singh at any time during their investigation. Mr Lewis explained that Labour Inspectorate investigations are time limited and that they have 12 months to apply for penalties, which time limit is fairly strictly enforced. Mr Lewis said that as they were running out of time to interview Mrs Singh and it: "seemed evident on the information that we had to that point as a co-director and 50% shareholder that she was involved and that Harjit Singh was presumably speaking on behalf of both of them."

[40] Mr Lewis confirmed that he did not use his powers under s 229 of the Employment Relations Act to require Mrs Singh to answer questions. In response to a question from Mr Cook, Mr Lewis said he did not consider it productive to speak to Mrs Singh because all of their interactions to date had been with Mr Singh, and Mr Singh was the 'spokesperson' for Nekita. For her part, Ms Crampton says that there was no discussion between her and Mr Lewis, that she could recall, about interviewing Mrs Singh and that a contributing factor for this may have been that Mrs Singh was not the focus of the witnesses who had come forward.

[41] In relation to whether Mrs Singh had been obstructive in providing the paid out reports sought by the Labour Inspectorate (which Mr Singh promised to provide before he

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<sup>32</sup> above n 24, at [28]

went overseas), Mr Lewis accepted that when he asked Mrs Singh for the documents it was possible that she may not have been able to operate the till. Mr Lewis also accepted that the till system had been changed and that, as a result, Nekita had to engage IT experts to recover the data requested in order to be able to provide it.

#### *2016 enforceable undertaking*

[42] Mr Lewis also gave evidence that in April 2016, following a previous audit, the Labour Inspectorate entered into an enforceable undertaking with Mr Singh in relation to paying employees out more than one week of annual leave in a 12 month period. Mr Lewis says that the Labour Inspectorate's recent investigation revealed that Mr Singh did not adhere to this undertaking as there were two weeks of annual leave paid out within 12 months, during periods when an employee also worked. Mr Lewis said that he himself performed the 2016 audit and at no time did Mr Singh alert him to the dual payment system, despite it being in effect at the time.<sup>34</sup>

[43] In response to a question from Mr Cook, Mr Lewis confirmed again that he had not spoken to Mrs Singh as part of this audit; that the enforceable undertaking was signed by Mr Singh; and that references in it are to 'Mr Singh'.

#### *ERA hearing*

[44] The breaches identified by MBIE resulted in an Investigation Meeting of the ERA on 24 and 25 September 2020, at which various allegations against Nekita and Mr Singh were upheld and found to be proved.

[45] Mr Lewis gave evidence that prior to the hearing Mr and Mrs Singh filed a statement in reply on behalf of Nekita, which he produced in evidence. In this statement Nekita:

(a) accepts that it paid four named employees less than the minimum rate of wages for each hour worked and said that it was making arrangements to pay the arrears;<sup>35</sup>

(b) denies seeking premiums or cash back from employees;<sup>36</sup>

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<sup>33</sup> above n 12, at [7](d)-(f)

<sup>34</sup> above n 12, at [8] – [11]

<sup>35</sup> above n 24, annexure Q2: Statement in Reply dated 21 February 2020 at 1.1(a) and (b)

<sup>36</sup> Statement in Reply dated 21 February 2020 at 1.1(d)

(c) accepts it failed to keep full and accurate time and wage records for 59 employees, pursuant to s 130 of the Employment Relations Act 2000;<sup>37</sup> and

(d) accepts it failed to keep full and accurate holiday and leave records for 59 employees pursuant to s 81 of the Holidays Act 2003;<sup>38</sup>

[46] In the same statement in reply, Mr Lewis gave evidence that:

(a) Mr Singh accepted that he was a person involved in the breach of employment standards in relation to some of the claims;<sup>39</sup> and

(b) Mrs Singh accepted that she was a person involved in the breach of employment standards in relation to some of the claims.<sup>40</sup>

[47] Collectively, Mr Lewis says, Nekita and Mr and Mrs Singh made the following statements in relation to the dual payment system:<sup>41</sup>

4.5 Any employee who had an immigration visa specifying the number of hours per week the visa holder could work, was only ever paid for these hours through the payroll system. [Mr Harjit Singh] followed this practice diligently.

4.6 The four employees who have brought claims against [Nekita, Mr Singh and Mrs Singh] made an arrangement with the Store Manager, Kunal Gulati (“the Store Manager”) shortly after they commenced employment.

4.7 The arrangement provided that they would be paid cash out of the till for any extra hours they sometimes worked (beyond the hours stipulated in their visas, which were paid through [Nekita’s] payroll system).

4.8 Their reasons for wanting cash from the till were that they did not want to wait for their next weekly pay cycle, and they needed money to send back to India.

4.9 The Store Manager agreed to this arrangement without [Nekita’s, Mr Singh’s and Mrs Singh’s] permission. He is no longer employed by [Nekita].

[48] Mr Lewis says that Mr Kunal Gulati, a relative of Mr Singh’s, was called to give evidence before the ERA to the effect that he started paying employees under the dual payment system of his own accord and that Mr Singh was not aware of the system.

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<sup>37</sup> above n 36, at 1.1(f)

<sup>38</sup> above n 36, at 1.1(h)

<sup>39</sup> above n 36, at 2.1(b)

<sup>40</sup> above n 36, at 3.1(b)

<sup>41</sup> above n 36, at 4.5 – 4.9

[49] Mr Lewis produced a copy of Mr Kunal Gulati's witness statement before the ERA. To check the veracity of Mr Gulati's claims (who Mrs Singh confirmed before the Authority to be her husband's second cousin), Mr Lewis says that the ERA Investigator obtained further paid out reports relating to Nekita from a time before Mr Gulati was working as the manager at Nekita's New Brighton Store. Mr Lewis says that these paid out reports, which Mr Lewis produced before the Authority, show that the dual payment system was in place at a time before Mr Gulati was involved thereby undermining Mr Gulati's claim that he commenced the system and that he did so without any reference to Mr Singh and without Mr Singh's knowledge.<sup>42</sup>

[50] In response to a question from Ms South, Mr Lewis expanded on this saying that the Labour Inspector is limited in terms of the period for which it can request records (and can only request records for six years which is what they did). The ERA, however, Mr Lewis thought, is able to ask for anything it wants and said that it asked for records from before Mr Gulati worked at the store. In doing so they found paid out reports showing the dual payment system in operation at a time prior to when Mr Gulati claimed it had started.

[51] The ERA said in relation to Mr Gulati's evidence that:<sup>43</sup>

... Kunal's oral evidence was not very credible in terms of explaining how he came to operate the scheme and how he operated it once he started paying cash to employees. Also the contemporaneous documents, including additional documents that I called for and reviewed after the investigation meeting, are not consistent with much of what Kunal said when he explained the operation of the dual payment system. I was not persuaded by Kunal that he was responsible for implementing the dual payment system, at least for one of Super Liquor stores and that Mr Singh did not know about it.

[52] Mr Lewis says that: "...the ERA accepted the Labour Inspectorate's evidence that when first asked about the dual payment system Mr Singh acknowledged that it operated in Nekita (at [70]). The ERA concluded at [71] that Mr Singh knew of the dual payment system and at least condoned it."<sup>44</sup> In relation to Mr Singh's claim that he lacked knowledge of the dual payment system, Mr Lewis says the ERA Investigator then stated:<sup>45</sup>

...his explanation of the documents and that he knew about revenue, salary payments and cash flow through the accounts and various reports he received

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<sup>42</sup> Lewis Second BoE dated 26 March 2021 at [7] – [11]

<sup>43</sup> above n 12, at [14]: ERA determination above n 13 at [67]

<sup>44</sup> above n 12, at [14]: ERA determination above n 13 at [70]

<sup>45</sup> above n 12, at [14]: ERA determination above n 13 at [69]

was not credible or realistic. I simply fail to see how in his position he was unaware of the dual payment system given what he knew about the revenue, costs and profit of Nekita's stores;<sup>46</sup> and

... it does not make sense that as director and shareholder of Nekita, Mr Singh did nothing about the dual payment system other than shut it down when it was supposedly brought to his attention for the first time by the Labour Inspector, which was Mr Singh's evidence. This type of behaviour by managers was non-compliant with statutory requirements, potentially fraudulent in term of Nekita's taxation obligations, had had a significant impact on employees' incomes, and on many levels left Nekita vulnerable to potentially high amounts of liability as well as bad publicity; yet despite all of this there was no evidence of an investigation by Nekita, no evidence of any disciplinary action being taken against the managers involved nor any evidence of attempts to compensate employees. This lack of action by Mr Singh indicates that he was aware of and complicit in the dual payment system.

[53] Mr Lewis says that given that the breaches were deliberate and systemic, and the extent of vulnerable employees impacted and their loss, along with Nekita's culpability and the need for deterrence, 90% of the maximum award was considered an appropriate starting point.<sup>47</sup> Further, the ERA said that there was no evidence that Nekita took further steps to consider how wide the dual payment was applied and to look at what other arrears could be owed to employees, or if establishing loss to other employees was too difficult to calculate, it could simply have made compensatory payments to all employees to reflect the fact that all employees were subject to the dual payment system have lost some remuneration.<sup>48</sup>

[54] The allegations about demanding premiums or cash back from employees was not proved.

[55] Mr Lewis also produced before the Authority the witness statements of Mr and Mrs Singh before the ERA.<sup>49</sup> Annexed to Mr Singh's statement is a series of payslips produced by Mr Singh to show that lump sum payments had been made to some employees. In response to a question from Ms South, Mr Lewis confirmed that the payslips have "Nekita Enterprises Ltd" at the top and some payslips dated 23 February 2020 have "Thanks for working Harjit and Shereen Singh" printed on the bottom of them as well.

[56] In response to a question asked by Mr Cook, however, Mr Lewis accepted that the ERA found, after hearing the evidence, that Mrs Singh was not involved in the running of the

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<sup>46</sup> above n 12, at [14]: ERA determination above n 13 at [68]

<sup>47</sup> above n 12 at [15]: ERA determination above n 13 at [58]

<sup>48</sup> above n 12 at [15]: ERA determination above n 13 at [59]

bottle stores at the time of the hearing and that Mrs Singh had no knowledge of all of the breaches.<sup>50</sup>

[57] In response to a specific question from Mr Cook about the first ground of the application against Mrs Singh,<sup>51</sup> Ms Lavery also accepted that it is stated in the ERA determination that Mrs Singh was not involved in the oversight of the company and had no knowledge of the breaches.

[58] In relation to the employment contracts which Mr Lewis produced before the Authority, in response to a question from Mr Cook, Mr Lewis accepted that none of them appeared to have been signed by Mrs Singh.

[59] Mr Lewis also said in response to a question from Mr Cook that he was not aware of anyone checking with the IRD to see whether any monies were outstanding to them and that he did not do so himself.

#### *Franchise agreements*

[60] Aside from the ERA determination itself, Ms Lavery gave evidence that Super Liquor Holdings Limited (Super Liquor) would not renew its contracts with Nekita and that as a result Nekita became a Thirsty Liquor franchisee where it is able to purchase alcohol at reduced rates.<sup>52</sup>

[61] Ms Lavery says that the ERA decision attracted a lot of public attention and annexed to her affidavit *Stuff* articles in which she says Super Liquor made direct comments to the public about Nekita and the Singhs.

[62] Under cross-examination by Mr Cook, Ms Lavery said that prior to the ERA hearing she had only spoken to Mrs Singh on one occasion at the Pages Road, when she spoke to both her and Mr Singh for about 10-15 minutes. Otherwise Ms Lavery said that most of her interaction with Nekita was through Mr Singh and that he was Ms Lavery's point of contact.

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<sup>49</sup> above n 42 at [4] – [6]

<sup>50</sup> Above n 12 at [15]: ERA determination above n 13 at [79]

<sup>51</sup> Namely that Mrs Singh failed to conduct the licensed premises in a proper manner by failing to provide directorship and oversight of Nekita...

<sup>52</sup> Above n 11 at [29]

[63] Ms Lavery also said in response to questioning from Mr Cook about allegations of giving false evidence in relation to the period between 2012 and 2016, that the ‘high point’ of her application that Mrs Singh had called false evidence before the ERA was that she was a director and shareholder of Nekita who portrayed herself as such on Nekita’s business cards, and her name was on payslips for the company.

*Scheme of Immigration Act*

[64] Mr Mark Willson’s evidence was taken as read. Mr Willson’s evidence is of the scheme of Immigration Act 2009 and how migrants may move between different categories of visa depending on their qualifications and occupations, with a particular focus on the liquor store industry. Mr Willson’s evidence describes, amongst other things, the ‘student to residence’ pathway;<sup>53</sup> the ‘skilled migrant category’ for residence visa’s;<sup>54</sup> the ‘skilled employment’ classifications against the Australian and New Zealand Standard Classification of Occupations (and the applicable pay rates as considered in assessments for employment at each skill level);<sup>55</sup> student visas;<sup>56</sup> and post study work visas.<sup>57</sup> Mr Willson describes how prior to November 2018 INZ’s instructions relating to the grant of the employer-assisted category of post-study work visas were able to be exploited by employers because visa holders would be tied to the assisting employer.<sup>58</sup>

*Risks and issues surrounding visas in the liquor store industry*

[65] Mr Steven Westwood’s evidence is of the risks and issues surrounding visas in the liquor store industry. Mr Westwood describes ‘job inflation’ as the practice says where an employer misrepresents the nature of a job to INZ in order for the role to be assessed as more highly skilled than it really is, allowing the applicant to meet the tests for an Essential Skills Work Visa or to apply for a Skilled Migrant resident visa.<sup>59</sup>

[66] Wage Manipulation, Mr Westwood says, involves the misrepresentation of wages or salaries in order for an employer to appear to be paying higher hourly rate than they actually pay. This, Mr Westwood says, can be done: “through an employee working additional hours

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<sup>53</sup> Willson BoE at [6] – [7]

<sup>54</sup> above n 53 at [8] – [11]

<sup>55</sup> above n 53 at [12] – [16]

<sup>56</sup> above n 53 at [18]

<sup>57</sup> above n 53 at [19] – [21]

<sup>58</sup> above n 53 at [22] – [25]

without additional pay, an employee repaying a portion of their wage or salary to the employer, or the use of salary deductions to artificially reduce the employee's take home pay."<sup>60</sup>

[67] Mr Westwood says that both job and wage inflation have been identified in the liquor store industry as a means for visa applicants to obtain a non-genuine pathway to a resident visa. Mr Westwood also says that migrant exploitation is a serious crime and is made possible in the liquor store industry by the willingness of the visa applicant to accept lesser employment conditions to obtain a resident visa in New Zealand, as well as the visa applicant's reliance on the employer for their income and work visa.<sup>61</sup>

[68] In relation to Nekita, Mr Westwood says that from January 2002 Nekita has supported 310 applications for visas, many of whom have made multiple visa applications with support from Nekita. Mr Westwood says these numbers may not fully reflect the number of migrant workers that have been employed by Nekita as INZ does not keep records of employers for all visa categories (e.g. open work visas, or student visas).<sup>62</sup>

[69] Mr Westwood says that employers who have been subject to a penalty from the ERA are viewed as being non-compliant with employment law and face a stand-down period in respect of their ability to support visa applications. Mr Westwood says Nekita is on the current stand-down list for a period of 24 months from 8 December 2020 as a result of the penalty imposed by the ERA.<sup>63</sup>

[70] In response to a question from Mr Eaton QC, Mr Westwood said that going on the stand-down list was automatic upon the ERA Finding and that the finding did not trigger an investigation by INZ. Mr Westwood said further that to the best of his knowledge Nekita has not been prosecuted by INZ.

[71] Mr Westwood said in response to a question from Mr Eaton QC about whether, taking a forward looking view, there are safeguards in place to reduce the risk of issues arising with migrant workers until December 2022, Mr Westwood said that Nekita will still be able to employ people on open work visas, partnership work visas, student visas and post-study work

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<sup>59</sup> Westwood BoE dated 30 March 2021 at [7]

<sup>60</sup> above n 59, at [8]

<sup>61</sup> above n 59, at [9] – [11]

<sup>62</sup> above n 59, at [19] – [20]

<sup>63</sup> above n 59, at [23]

visas which are not caught by the stand-down regime. Mr Westwood said that after the two year stand down, additional steps can be put in place to try to minimise future risks but that these are relatively minimal in nature.

[72] In response to a question from the Authority, Mr Westwood confirmed that while a business is on the stand-down list, they are only prevented from supporting new employees and this does not affect current employees.

#### *Management appointments and other matters*

[73] Ms Lavery also gave evidence that on 23 July 2020, at a time when Mrs Singh says she was involved in Nekita, she undertook an inspection of the Canterbury Liquor Lyttleton premises. Ms Lavery said that she found only one staff member working who did not hold a manager's certificate and who was not appointed as the nominated manager, or as an acting or temporary manager. The nominated manager, Ms Lavery says, was not on the premises.

[74] Ms Lavery says further that this was not a one-off incident and said that joint-agency visits on the same day found issues at all of Nekita's premises.<sup>64</sup> Ms Lavery produced in evidence warning letters addressed to Nekita in respect of identified breaches which she says concern the need to update the Council of duty manager appointments, and which are serious breaches.<sup>65</sup>

[75] Ms Lavery also produced copies of the staff rosters for Nekita's Woodham Road premises (which she said Licensing Inspector Hamish Little uplifted on 23 July 2020), and for the Canterbury Liquor Woolston premises which she visited on 14 December 2020.<sup>66</sup> These were put to Mrs Singh before the Authority, which we discuss later.

[76] Ms Lavery also says further that in April 2020 during the COVID-19 lockdown, Nekita reportedly sold alcohol from the rear of the Pages Road bottle store direct to the public in contravention of MBIE's rules for sales from bottle stores, which Nekita's operational manager said arose from a "lack of understanding" of the rules. Ms Lavery also produced follow-up emails to Mr Harjit Singh about the rules for contactless sales following

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<sup>64</sup> above n 11 at [33] - [40]

<sup>65</sup> above n 11 at [34]- [36]

<sup>66</sup> Lavery further BoE dated 11 August 2021

advertising on *Facebook* which advertising Ms Lavery said the Christchurch City Council's Alcohol Licensing Team found to be in breach of those rules.<sup>67</sup>

[77] In response to questions from Mr Cook, however, Ms Lavery confirmed that when she refers to sales from the rear of the Pages Road bottle store, she is referring to Mr Harjit Singh. Ms Lavery also accepted that there was some confusion at the time about the rules around whether there needed to be contactless payments.

[78] Ms Lavery says that the findings of the ERA and the admissions by Mr Harjit Singh and Nekita before the ERA, as well as these other matters highlight concerns about Nekita's suitability and raises issues about Nekita's administration, staff, systems and training.<sup>68</sup>

#### *Mr Singh's involvement in Nekita*

[79] In response to questions from Mr Eaton QC for Nekita, Ms Lavery accepted that Mr Singh has surrendered his manager's certificate, resigned as a director and reduced his shareholding significantly. When asked by Mr Cook whether Mrs Singh's offer to provide undertaking that Mr Singh would not be involved in the management of Nekita assisted in her assessment of Mrs Singh's suitability, Ms Lavery said that it did not because Mr Singh still has a 16% shareholding; Mr Singh and Mrs Singh are married; and Mr Singh will benefit financially from Nekita.

[80] Ms Lavery did not believe that removing Mr Singh as director will not prevent him remaining in the background overseeing all of the continued operation of the business. Ms Lavery considers that Mr Singh has been at the forefront of the business since it started and that in a 2017 District Licensing Committee hearing in Methven, Mr Singh said that he and Mrs Singh had been operating bottle stores continuously since 2001.

[81] Ms Lavery says that even though Mr Singh is no longer a director, she does not consider that he will step away completely. In response to questioning from Mr Cook, Ms Lavery said that it is not a matter of Mrs Singh not honouring an undertaking that he will not be involved but that she would find it difficult to operate Nekita without the assistance of her husband. Ms Lavery said that she did not believe that there was anything Mrs Singh could do to change her mind about Mr Singh continuing to be involved in Nekita.

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<sup>67</sup> above n 11 at [44] -[45]

<sup>68</sup> above n 11, at [46]

[82] Under cross examination about Nekita's systems, staff and training, Ms Lavery accepted that new employees are required to undergo a staff training manual test that outlines similar things to the Licensed Controller Qualification (LCQ). In response to whether having managers completed the LCQ is an improvement since July 2020, Ms Lavery admitted it was. Ms Lavery also acknowledged that Mrs Singh has engaged the Alcohol Consulting Group (ACG) to assist Nekita, but before the Authority said that she had assumed that the ACG recommendations were yet to be put into place.

[83] When asked by Mr Cook if she had attempted to speak to Mrs Singh about the operations of Nekita since Mr Singh resigned as director, Ms Lavery said that she had not and confirmed that since she started in her role in 2015 she has only had one conversation with Mrs Singh towards the end of 2019 or in early 2020. Ms Lavery said that as she has not monitored the premises she has not seen any evidence that the systems improvement are in place. When challenged about whether she had a closed mind to systems changes and training being provided, Ms Lavery expressed concern that it's not about whether training or policies have been put in place but it is about how the premises are operating.

[84] In relation to other changes such as having an incident book or putting the licence by the principal entrance, Ms Lavery said under cross-examination by Mr Cook that these types of things should have already been in place as part of the way Nekita operated its premises from the start. That staff will be trained, Ms Lavery says, demonstrates that staff should have been trained already and were not.

[85] In response to questions from Mr Eaton QC about Mr Robert Thompson being asked to provide employment law advice, and about Mr John Yoon coming on as an independent director, Ms Lavery said she has made no enquiries about them. Ms Lavery confirmed that in terms of Nekita's suitability, she was relying on the fact that Mrs Singh is a director and shareholder of Nekita. Despite Mr Yoon saying that Mr Singh will not be involved in the affairs of the company, Ms Lavery reiterated that she did not think Mr Singh would step aside completely.

### **Evidence for Shereen Singh**

[86] Mrs Singh gave evidence of her work history and that she was employed in administration of a supermarket between 1995 and 1998 which taught her about

recordkeeping, the importance of policies and taking advice on matters.<sup>69</sup> Upon having children Mrs Singh said that she and Mr Singh bought a dairy and in 2000 they opened their first liquor store in Christchurch. During this time Mrs Singh said she obtained her manager's certificate.<sup>70</sup>

[87] As turnover grew, Mrs Singh says that she and Mr Singh incorporated Nekita in 2002. Mrs Singh said that Mr Singh was the main operator of the liquor store and that she would work part time and do administration tasks in the evening.<sup>71</sup> They also purchased takeaway businesses for which she was also involved in their administration.

[88] In 2006 Mr Singh says that she and her husband purchased their second liquor store and that it was shortly after purchasing this store that Nekita joined Super Liquor and that she stopped work to raise her twins.<sup>72</sup>

[89] In 2008 Mrs Singh says that she and Mr Singh incorporated Samsas Enterprises Limited (Samsas) to purchase a supermarket. Mrs Singh said that she was solely responsible for running the supermarket while Mr Singh continued to focus on the liquor stores.<sup>73</sup> Mrs Singh said she ran the supermarket for seven years and employed 80 staff. Mrs Singh described the duties she undertook and her compliance with alcohol licensing laws. Mrs Singh also described the training she provided employees in relation to alcohol and that as part of the *SuperValue* franchise, controlled purchase operations were conducted which she and her staff never failed. Mrs Singh described the requirement to check minors for identification and to refuse sale if they could not produce identification. Other obligations, Mrs Singh says, included obligations relating to health and safety, building warrants of fitness, food hygiene and lottery sales.

[90] Mrs Singh says that until 2017 she had limited involvement in the running of Nekita.<sup>74</sup> When Nekita's in-house accountant left the business in August 2017, Mrs Singh said that she became more involved with Nekita in a part-time capacity. Mrs Singh said her husband dealt with the majority of things in relation to liquor licensing and the running of the business. Mrs Singh says that her primary duties were reconciling supply transactions, banking, paying

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<sup>69</sup> Singh BoE at [1] – [9]

<sup>70</sup> above n 69, at [10] – [11]

<sup>71</sup> above n 69, at [13]

<sup>72</sup> above n 69, at [16] – [17]

<sup>73</sup> above n 69, at [21]

<sup>74</sup> above n 69, at [30]

suppliers, and invoicing. Mrs Singh says she was never responsible for hiring staff, training staff, making rosters, or operating the payroll. Mrs Singh also says she had no involvement with Super Liquor directly.<sup>75</sup>

[91] When asked by Ms South for the Applicants whether the number of migrant staff would have created a huge administration workload for Nekita, Mrs Singh agreed it probably would have but that Mr Singh always did the payroll from day one and that they never discussed the administrative pressures that he was under.

[92] In response to questions from Ms South, Mrs Singh said that she was not aware of the paid out reports until she saw reference to them in the Labour Inspector's report, and that she had no idea of the financial success or otherwise of Nekita as she trusted her husband to look after Nekita and to run it on a profitable basis in compliance with the law, while she looked after the supermarket.

[93] Mrs Singh says that due to the downsizing of Nekita, Nekita has only 15 staff left, all of whom have been with Nekita for many years and who are highly trained and experienced in the liquor industry with no negative findings against them.<sup>76</sup> Mrs Singh describes in her evidence the training required to be undertaken by staff at the commencement of, and during, their employment.

[94] From her time in managing *SuperValue* and returning to Nekita in 2017, Mrs Singh said she has gained experience in hospitality and in the sale and supply of alcohol.<sup>77</sup>

[95] Mrs Singh says that she had very little knowledge of the 2016 enforceable undertaking and was largely unaware of the Labour Inspectorate's interest in the business. At the time of the enforceable undertaking, Mrs Singh said staff would frequently pressure her husband to pay out their holiday pay so they could send it back to their families in India to pay for holidays in advance. Mrs Singh said Mr Singh would occasionally mention this to her and said he was a generous man and that she understood that he was not aware that the Holidays Act provided that only one week of holidays may be cashed up.<sup>78</sup>

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<sup>75</sup> above n 69, at [32]

<sup>76</sup> above n 69, at [33] – [34]

<sup>77</sup> above n 69, at [35] – [36]

<sup>78</sup> above n 69, at [40]

[96] Under cross-examination Mrs Singh said that she only found out about the enforceable undertaking in the ERA hearing and that Mr Singh did not tell her anything about it.

[97] Mrs Singh says further that she was not involved in the first visit from the Labour Inspectors in August 2019, and that they spoke to Mr Singh. On 4 October 2019, Mrs Singh said that Mr Singh attended an interview with Mr Lewis and Ms Crampton and that she did not know this interview was taking place until after it concluded. Mrs Singh said that she was not invited to this interview or told about it by Mr Singh or by Mr Lewis. When Mr Singh returned from the meeting he was to go overseas. In relation to Mr Singh's promise to provide documents to Mr Lewis, Mrs Singh said she did not know of her husband's offer to Mr Lewis that if he had any queries she could assist. When Mr Lewis telephoned on 8 October 2019, Mrs Singh said that this was the first time that she had interacted with Mr Lewis.<sup>79</sup>

[98] By way of an update to her brief of evidence Mrs Singh says that to the best of her knowledge there was only one trip overseas by Mr Singh alone during the period 2012 to 2016 and that Nekita was run by store managers and not her. Mrs Singh says further that when she and Mr Singh were both overseas the store managers managed individual stores and the operational manager oversaw Nekita.<sup>80</sup>

[99] Mrs Singh said that in November 2019 Mr Singh received a copy of the Labour Inspector's investigation report but no one had ever sought her input into that report. Mrs Singh said this made sense as she was not involved in the business during the time period covered by the claims and she would not have been able to comment on allegations she knew nothing about.<sup>81</sup>

[100] Mrs Singh said she also did not see the statement in reply to the investigation when it was filed with the ERA on 21 February 2020. The ERA also accepted that she was not involved in any aspects of Nekita's bottle stores and had no knowledge at all of the breaches.<sup>82</sup> Under cross-examination, however, Mrs Singh said that she accepted that she was

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<sup>79</sup> above n 69, at [41]

<sup>80</sup> Singh updated BoE at [8] – [11]

<sup>81</sup> above n 69, at [42]

<sup>82</sup> above n 69, at [43] – [44]

involved in the breaches on the advice of an employment lawyer, due to her being a director of Nekita.

[101] Mrs Singh said that Nekita intended to repay the outstanding wages and holiday pay that the Labour Inspector calculated to be owing and this was done in late February 2020 once bank account details were provided. In addition, Mrs Singh said Nekita paid a \$500 gross payment to each employee as a gesture of goodwill.<sup>83</sup>

[102] Mrs Singh reiterated that she had little to no involvement in the operation of Nekita between 2012 and 2016 and had absolutely no involvement in the breaches for which penalties were being sought.<sup>84</sup> Mrs Singh said she was never aware of cash being paid out of the till, nor did she ever witness Mr Singh paying cash to, or taking cash from, staff. Mrs Singh said she never paid, or taken a premium from an employee in relation to their employment.<sup>85</sup>

[103] Under cross-examination Mrs Singh said that she has not gone through the paid out reports herself and that she was advised by her lawyers that they did not have to do any investigations following the ERA hearing. Voluntary disclosures of PAYE and penalties were made to IRD for the period 2012 to 2016 which was confirmed by Mr Eaton QC for Nekita.

[104] Mrs Singh said further that she was never given responsibility for operating the payroll during the relevant period and is therefore unaware of any failure in maintaining wage, holiday and leave records. Mrs Singh said she was never the first point of contact for new employees and did not hire, arrange placements, or terminate anyone's employment. Mrs Singh said she did not set wages of holiday pay and was not involved in deciding to pay holiday pay out. Mrs Singh said she was also not responsible for setting the roster or controlling the hours of work but that these matters were all the responsibility of Mr Singh.<sup>86</sup>

[105] Mrs Singh said that the Labour Investigators never spoke to her as part of the investigation because she had little input into this part of her and her husband's businesses. Mrs Singh said she understood Mr Singh gave the Inspectors a business card with her name on it which was printed when Nekita was incorporated in 2002. Her name was on the card as

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<sup>83</sup> above n 69, at [43]

<sup>84</sup> above n 69, at [44]

<sup>85</sup> above n 69, at [45]

<sup>86</sup> above n 69, at [46] – [47]

she was a director. The card filed in evidence before the ERA, Mrs Singh says, makes it clear that Mr Singh was the manager of Nekita.<sup>87</sup>

[106] Under cross-examination by Ms South for the Applicants, Mrs Singh said that she may have erred about when the business cards were produced as they were Super Liquor branded business cards and that they did not join Super Liquor until 2006. Regardless, Mrs Singh said that while the business cards have her name, that is because she is co-owner and co-director of Nekita.

[107] Mrs Singh also acknowledged under cross examination that when she was served as part of the ERA proceedings, she was in possession of the Labour Inspector's reports which mentioned the paid out reports. Mrs Singh said, however, that as she was not involved in the company she did not know about these and did not know what to look for in them.

[108] Ms South took Mrs Singh through the paid out reports. In response to why Mrs Singh did not go through them and determine to what they related, Mrs Singh said that all she knows about them is that the amounts owing were settled and that her lawyers said she did not have to do anything about them. Mrs Singh otherwise repeatedly said, in response to questions put to her, that she cannot take responsibility for something for which she was not aware. When Mrs Singh said that she become aware of the paid out reports, Mrs Singh said her legal advice was that she did not need to do anything and that her accountant had paid the shortfall and PAYE.

[109] Under cross examination, Mrs Singh said that having read the Labour Inspector's report she had a conversation with Mr Singh and conveyed her disappointment in him but took no other action as Mr Singh was running the company.

[110] In relation to Super Liquor, Mrs Singh said that she was not involved in the meeting between Super Liquor and Mr Singh and was not present at the meeting. Mrs Singh said she became aware on 12 February 2020 that Super Liquor terminated the franchise agreements with Nekita and while she understood Mr Singh had been open and honest with Super Liquor, she had not seen the notes of that meeting until they were disclosed as part of these proceedings.<sup>88</sup>

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<sup>87</sup> above n 69, at [48]

<sup>88</sup> above n 69, at [49] - [50]

[111] When asked why Mrs Singh signed the contract with Super Liquor in November 2016, which lists her as a nominated person, when she was not involved in the company at that time, Mrs Singh said that she did so as a director of Nekita . When asked whether as a nominated person she has not complied with the Super Liquor franchise agreement, Mrs Singh accepted that as a director she had obligations and that she signed as a director accordingly.

[112] Under cross-examination Mrs Singh said that despite the Super Liquor documents having been produced months prior to the hearing before the Authority, the first time she had seen them was during the hearing before the Authority. Mrs Singh also said that she only had a brief look at the termination letter from Super Liquor in February 2020 but was in shock when she read it. Mrs Singh says she has subsequently read the letter but not in detail.

[113] When asked by Ms South about whether Mrs Singh had read Mr Lewis' statement prior to the ERA hearing about what Mr Singh had admitted to the Labour Inspectors at the meeting on 4 October 2019, and whether she knew going into the ERA hearing that the evidence Mr Singh was giving to the ERA was contradictory to that, Mrs Singh said she accepts that Mr Singh breached the law but that it was historical but says she did not know of the breaches herself, and that moving forward she has taken over the company.

[114] Mrs Singh gave evidence that the structure of Nekita is now different from when Mr Singh was in charge. Mrs Singh says that there is now an independent director, Mr John Yoon, who is a commercial and employment lawyer who she asked to become a director. Mrs Singh says she is now taking a significant hands-on role in Nekita and was the sole director for a period before Mr Yoon came on following her husband's resignation.<sup>89</sup>

[115] Mrs Singh says it was her decision to ask Mr Singh to resign from Nekita, a decision she made after taking independent advice. Mrs Singh said that she is happy to give an undertaking to the Authority that Mr Singh will have no responsibility in the day to day running of Nekita.<sup>90</sup> In response to a question from the Authority, Mrs Singh clarified that Mr Singh resigned as director on 24 May 2021, reduced his shareholding 19 July 2021, and surrendered his manager's certificate on 9 August 2021.

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<sup>89</sup> above n 69, at [50]

<sup>90</sup> above n 69, at [51] – [56]

[116] Mrs Singh says that Nekita has also engaged I R Thompson for specialist employment law advice and to ensure compliance with all employment obligations.<sup>91</sup>

[117] Mrs Singh says she has completed refresher training about her responsibilities as a director.<sup>92</sup> Mrs Singh also said she has engaged the ACG to review Nekita's current systems, staff and training in all of Nekita's premises. Mrs Singh produced a report by Ms Jenn Ramsay of the ACG outlining her recommendations for Nekita. Mrs Singh says she has also contracted the ACG to undertake an annual compliance review of systems, staff and training for each premises, and to undertake mystery shopper visits and regular checks.<sup>93</sup>

[118] In relation to Mr Yoon, Mrs Singh said under cross-examination that he will not be on the premises but will be monitoring the business as required.

[119] Mrs Singh also says that neither she nor Mr Singh have even been accused by the IRD of tax evasion nor investigated for such. Mrs Singh says that she understands that all of the PAYE shortfall has been fully accounted for and there is no ongoing investigation by IRD. Mr Eaton QC has provided confirmation from Nekita's accountants that PAYE and penalties have been paid to the IRD. Mrs Singh says that the purpose of the dual payment system as she understood it, was not to avoid tax.<sup>94</sup>

[120] Mrs Singh also denied ever exploiting migrant workers.<sup>95</sup>

[121] Mrs Singh rejects the suggestion that she is operating at Mr Singh's will or that she is a puppet for him.<sup>96</sup>

[122] Mrs Singh also said that she has discussed matters regarding the ERA hearing with Mr Kunal Gulati and that he has tendered his resignation for personal reasons and will finish with Nekita in September 2021.<sup>97</sup>

[123] Under cross-examination by Ms South, Mrs Singh confirmed that Mr Gulati is Mr Singh's second cousin, and that he was not working for Nekita in 2017 when she became

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<sup>91</sup> above n 69, at [57]

<sup>92</sup> above n 69, at [61]

<sup>93</sup> above n 69, at [62] – [119] and updated BOE at [14]

<sup>94</sup> above n 69, at [52]

<sup>95</sup> above n 69, at [54]

<sup>96</sup> above n 69, at [56]

<sup>97</sup> above n 69, at [60] and updated BOE at [12]

active in Nekita. Mr Gulati, however, was rehired in 2020. Mrs Singh says that when Mr Gulati was reemployed in April 2020 (prior to the ERA hearings in September 2020), she was unaware of the breaches at the time. When asked why Mr Gulati is still employed by the company despite his evidence that he was running an illegal hidden economy with staff under Mrs Singh's nose, Mrs Singh replied that she has sought to terminate Mr Gulati's employment which he has accepted, giving notice until September 2020.

[124] Ms South took Mrs Singh through the rosters produced in evidence by Ms Lavery. In response to questions from Ms South as to why Nekita was still producing rosters in 2020 that showed that Nekita did not provide minimum break requirements to staff, Mrs Singh said that was not part of her role when she came into the company in 2017. Notwithstanding the media attention and the adverse rulings of the ERA, when asked if she was still content to let this important part of the business be run by Mr Singh, Mrs Singh replied that this was when she started thinking of taking the business on herself and getting an independent director in, and that she had a conversation with Mr Singh about doing so.

[125] Mrs Singh also discussed that the Code of Conduct and employee induction checklist have been updated and that staff must now acknowledge their responsibilities on a monthly basis. New policy documents have also been created in consultation with the ACG. Staff are also tested on a twice-yearly basis and Mrs Singh has ensured that the Licensed Premises Toolkit is stored at each premises.<sup>98</sup>

[126] Under cross examination by Ms South, however, Mrs Singh accepted that the issues facing Nekita have never been about policy documents, and that Nekita had high quality documents provided by Super Liquor previously. Rather, Mrs Singh agreed the issues have always been about the implementation of those policies.

[127] Mrs Singh described the changes made to each premises following the compliance visits by the ACG.<sup>99</sup> In relation to these, Ms South asked Mrs Singh about the ACG report for Pages Road. In this report, Ms Ramsay says, in part:<sup>100</sup>

I note that there was fridge of single sale beers located at so (sic) it must be passed to enter the main part of the premises. The fridge was labelled singles

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<sup>98</sup> above n 69, at [64] – [72]

<sup>99</sup> above n 69, at [62] – [119]

<sup>100</sup> Alcohol Consulting Group report dated May 2021 at page 4 (re Pages Road)

with about 20 products available from mainstream Heineken and Stella to obscure Russian beer.

Dump stacks were used to display specials.

[Duty Manager] stated that most people use the fridge to choose cold product and don't buy from the dump stacks.

There was a trolley of single sale ciders and beer displayed with a sign "7 for \$10". The [Duty Manager] advised this is from broken packaging and they don't have it often. That equates to \$1.43 per unit – extremely cheap alcohol"

Shot type products were displayed at the point of sale but were obscured by way of shelving displaying food products.

The [Duty Manager] stated that the most popular product is Woodstock pre-mixed cola and bourbon.

Advertising on the front of the premises was minimal.

There were three products promoted on large sign boards on the wall, but wording and prices only.

[128] Mrs Singh accepted that the Pages Road premises in Aranui is one of the most deprived suburbs in Christchurch. Despite this, when questioned about the report, Mrs Singh replied that they only have a handful of customers who buy single sales and that they are not promoted. Mrs Singh said that Ms Ramsay agreed that so long as there was not a high turnover and they were not promoted, they should not be an issue. Mrs Singh said because of the layout of the store the fridge couldn't be moved and when they tried to do so they would have more aggravated customers stealing when they tried to stop them. Mrs Singh could not say what the alcohol content was of the Russian beer off the top of her head and would need to look this up.

[129] When asked how this aligned with the object of the Act, Mrs Singh repeated that the company does not encourage single sales or sell them for a reduced or special price, and that they are only sold when packages are broken. Mrs Singh did not appear to recognise that a sign advertising '7 for \$10', and a fridge at the front door, is promoting single sales of alcohol. Mrs Singh also said that they had never come across alcohol-related harm from selling single beers.

[130] In response to whether Mrs Singh saw a problem with her manager in Wainoni Road (in deprived Aranui), saying that Woodstock and single cans were the most popular purchase at Wainoni Road,<sup>101</sup> Mrs Singh replied that it is just a core product and that they have not caused any harm by selling single beers.

#### *Sales of stores*

[131] Mrs Singh said that a number of the stores are undergoing potential sales, however, intense media scrutiny has meant that they are taking significantly lower prices on sale. Mrs Singh described details of the sales for those premises being sold.<sup>102</sup> By way of an update to her initial brief of evidence, Mrs Singh says that the Woodham store is under contract signed by Mr Singh while he was still a director. The contracts for the sales of the Lyttleton and Ferrymead stores were signed by Mrs Singh. The contract for Woodend was signed by both Mr and Mrs Singh on 9 July 2021 because Mr Singh had been negotiating with a potential purchaser for months before he resigned as director. Mrs Singh says that if the four stores sell that will only leave the Pages Road and Wainoni Stores and would reduce staff to six.

[132] In terms of allegations that she has not provided directorship and oversight, Mrs Singh says that when she was working at Nekita initially she did provide significant oversight but when she was raising her children Nekita became “Harjit’s” baby”. When Mrs Singh re-entered the workforce she said she was working at the supermarket and Mr Singh was essentially the CEO of Nekita, while she was the CEO of Samsas.<sup>103</sup>

[133] In relation to allegations that she enabled Nekita to call false evidence before the ERA, Mrs Singh says that she did not see the statement in reply before it was filed and, in any event, the ERA said that she was not involved in any aspect of Nekita’s stores and had no knowledge of the breaches.<sup>104</sup>

[134] In terms of her suitability, Mrs Singh says that she does not know what conduct she is supposed to have done as she was not involved with Nekita at the time of ERA matter. Mrs Singh agrees that she was not monitoring Nekita, however, this is because she trusted

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<sup>101</sup> Alcohol Consulting Group report dated May 2021 at page 6 (re Wainoni Road)

<sup>102</sup> above n 69, [120] – [123] and updated BoE at [2] – [7]

<sup>103</sup> above n 69, at [125] – [127]

<sup>104</sup> above n 69, at [128]

Mr Singh to do so while she was running the supermarket. Now that Mr Singh is removed, Mrs Singh says that the same issues of the past will not arise.<sup>105</sup>

[135] Under cross examination Mrs Singh said she did not accept that she was tainted by Mr Singh's actions because she trusted him to comply with the law, and while she is very disappointed in Mr Singh for not complying with the law, she played no part in Nekita and was not involved in the day to day running of the company. Mrs Singh accepts that Mr Singh has breached the law and that was accepted by the ERA.

[136] Mrs Singh says that she does not understand what she is supposed to have investigated as regards the payments and scope of unlawful behaviour and that her job, is to ensure the safe sale and supply of alcohol to minimise alcohol-related harm.<sup>106</sup>

[137] Mrs Singh says that she has meaningfully cured any issues by the removal of Mr Singh; the appointment of Mr Yoon as independent director; the involvement of the ACG; and the involvement of an employment law specialist. Mrs Singh says the premises are well run and have excellent staff and policies and training is improved.<sup>107</sup>

[138] Under cross examination by Ms South, Mrs Singh said that Mr Singh was no longer involved in the liquor industry but later said that he won't be involved in Nekita but she could not speak of what he will do in the future in the industry.

[139] Ms South asked Mrs Singh about evidence Mr Singh had recently given before a District Licensing Committee in 2017 in which he said that he and Mrs Singh had been involved on a continuous basis running off licences since 2001 in the Canterbury region, Mrs Singh said that that was because she was one of the directors of the company but said that she was not actively running the company.

[140] In response to cross examination about other companies in which Mr and Mrs Singh were joint directors, and whether Mrs Singh was willing to work with Mr Singh in those other companies but not in Nekita, Mrs Singh said the other companies were inactive.

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<sup>105</sup> above n 69, at [129] – [131]

<sup>106</sup> above n 69, at [132 – [134]

<sup>107</sup> above n 69, at [134]

[141] In response to a further question from the Authority, Mrs Singh said that the last time she acted as a manager using her manager's certificate was when she ran the supermarket and has never done so in any of the bottle stores owned by Nekita.

[142] By way of re-examination by Mr Cook, Mrs Singh confirmed that she had not seen Mr Singh's brief of evidence before the ERA dated 20 March 2017 until now. Mrs Singh also confirmed that she is not aware of any obligation as a director or as an individual to investigate the paid out reports. Finally, Mrs Singh confirmed that Mr Singh dealt with Super Liquor on behalf of Nekita.

### **Evidence for Nekita Enterprises Limited**

#### *Mr Yoon*

[143] Mr John Yoon gave evidence for Nekita. Mr Yoon is a lawyer in Christchurch practicing in commercial and company law, conveyancing and immigration. Mr Yoon says he is also competent in employment law and has a good understanding of the Employment Relations Act and Holidays Act.<sup>108</sup>

[144] Mr Yoon says that he has also assisted a number of clients apply for liquor licences and is familiar with the "Sale and Supply of Liquor Act 2012" and with licensing issues generally.<sup>109</sup>

[145] Mr Yoon says that he has been acting for Nekita in relation to a number of matters since 2019 and has come to know Mr and Mrs Singh. Mr Yoon is aware of the ERA decision and findings against Nekita; its breaches of employment law; and what Nekita must do to improve compliance.

[146] Mr Yoon said that he became aware of the applications before the Authority and Nekita's proposal to engage an independent director. Mr Yoon said that when he was advised that Mr Singh was to resign his directorship with Nekita and that Mrs Singh would effectively take over as CEO of Nekita, he offered his services to act as an independent director.<sup>110</sup>

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<sup>108</sup> Yoon BoE at [5] - [6]

<sup>109</sup> above n 108, at [7]

<sup>110</sup> above n 108, at [11] - [12]

[147] Mr Yoon says that his role will be to provide guidance to Nekita with a view to improving corporate responsibility and governance. Mr Yoon says the role will also involve proactive risk management to ensure full compliance with applicable employment, immigration and sale of alcohol requirements.<sup>111</sup>

[148] Mr Yoon said that he gives the Authority his absolute assurance that any appointment will be arm's length and that he will act independently and in the best interests of Nekita uninfluenced by Mr Singh.<sup>112</sup> Mr Yoon said that he has considered the negative reputation consequences for himself and his firm if the Authority is misled about Mr Singh's involvement in Nekita, and said that if the Authority required, he would undertake to report to the Authority or other appropriate agency if he has concerns that Mr Singh is becoming involved in the affairs of Nekita.

[149] In response to a question put to him by Mr Eaton QC, Mr Yoon said that Mr Singh could not choose in the future to become involved in the company while he was independent director and said that practically he did not see how that he could do so now that he has surrendered his manager's certificate. Mr Yoon said that Mr Singh would have to take steps to get his certificate and he cannot see how that could happen without the Authority becoming aware of that.

[150] Under cross-examination by Mr Taffs, Mr Yoon said that by way of due diligence he read the ERA decision. Mr Yoon confirmed that he did not ask to see the current proceedings before the Authority and that he did not see any reason to read affidavits or paperwork that would be adjudicated on by people more knowledgeable and expert than he is. In response to questions by Mr Taffs, Mr Yoon said that he is aware that Mr Singh is said to have acknowledged that he was paying staff for a certain number of hours and then paying cash above that; and that holiday pay was paid out in a lump sum at the end of the year. In respect of these matters, however, Mr Yoon said that in his view these matters were dealt with by the ERA and that his focus would be on whether all safety measures are in place by the engagement of the ACG and Mr Robert Thompson of IR Thompson and that his only inquiry is whether there is a tangible potential for the company to better comply with the law. In Mr Yoon's view, there is.

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<sup>111</sup> above n 108, at [113]

<sup>112</sup> above n 108, at [17]

[151] Mr Yoon confirmed that he will not be in the stores, but will be focused on governance and compliance. Mr Yoon did not consider that he would look at rosters, for example, but would rely on documents produced by the ACG and Mr Thompson, and on reports provided by Mrs Singh and Nekita's accountant.

[152] When asked if he could categorically rule out Mr Singh continuing to exert influence over Nekita, Mr Yoon accepted he could not categorically rule out anything in the world.

## **Submissions for Applicants**

### *Improper Conduct*

[153] The Applicants rely on minutes of a Super Liquor Board Meeting held on 3 - 4 December 2019 which Mr Singh attended on 4 December 2019.

[154] Also relevant to the applications is a letter dated 12 February 2020 from Super Liquor to Nekita, and to Mr and Mrs Singh titled: "Notification of Termination of Franchise Agreements". In this letter, Super Liquor says, amongst other things:

6. The Labour Inspectorate received a complaint from several of Nekita's ex-employees alleging that Nekita failed to comply with employment law obligations that were owed to them.
7. The Labour Inspectorate undertook an investigation of the complaint that was received.
8. The Labour Inspectorate concluded that Nekita breached employment laws by undertaking the following activities:
  - 8.1 Nekita failed to pay at least the minimum wage to its staff in breach of the Minimum Wage Act 1983. This included a practice of paying employees through the payroll for fewer hours than they actually worked and making cash payments to such employees for the "non-payroll" hours that were worked.
  - 8.2 Nekita operated a "cash back" arrangement. This involved employees being paid in full for their wages but then being required to return cash to Harjit. The Labour Inspectorate concluded that this had the effect of breaching the Minimum Wage Act 1983 as well as being an unlawful premium for employment in breach of the Wages Protection Act 1983. We note that this is the only finding of the Investigation Report that Nekita

had denied, and as such we have not taken this allegation into account in our decision to terminate the Franchise Agreements.

8.3 Nekita breached the Holidays Act 2003 by:

- 8.3.1 failing to pay the correct holiday pay for annual leave;
- 8.3.2 paying annual leave to employees on a public holiday;
- 8.3.3 failing to pay the correct holiday pay on termination of employees' employment;
- 8.3.4 failing to record all mandatory information required in relation to holiday and leave records;
- 8.3.5 paying out more than one week's leave in a relevant period;
- 8.3.6 paying the incorrect holiday pay for public holidays;
- 8.3.7 failing to record employees' entitlements to alternative holidays (a right to an alternative paid day off arises where an employee has worked on a public holiday that occurred on a day that the employee would normally have worked on); and
- 8.3.8 failing to pay the correct amount of sick leave.

8.4 Nekita failed to maintain a wages and time record as required by the Employment Relations Act 2000.

8.5 Nekita provided an individual employment agreement to an employee that did not contain several mandatory clauses.

9. Further details of the breaches are specified at pages 3-9 of the Investigation Report and the Statement of the Problem.

10. On 4 December 2019 Harjit met with the Board of [Super Liquor]. At the meeting, Harjit admitted the breaches identified in the Investigation Report (again except for the cash-back allegation). In addition to that admissions, Harjit also admitted to the Board that Nekita still had a practice of paying six of its employees at a lower rate than the rate specified in their individual employment agreements. This practice had been carried out in relation to other employees historically but Harjit explained that it was an ongoing practice for six employees for immigration purposes. This is a further breach of the Wages Protection Act 1983, immigration law and a breach of the relevant employees' individual employment agreements. As you will recall, [Super Liquor] instructed Harjit to cease this practice and inform Lane Neave of it (since Lane Neave was not aware of it).

[155] Ms Karyn South, counsel for the Applicants, submits that because of admissions of unlawful conduct which constituted material breaches of its franchise agreements with Super Liquor, Super Liquor cancelled its franchise agreements with Nekita.

[156] In particular, it is submitted that Mr Singh admitted to Super Liquor matters that he:

- (a) paid employees less than the minimum rate of wages;
- (b) failed to keep full and accurate time and wage records for 59 employees; and
- (c) failed to keep full and accurate holiday and leave records for 59 employees.

[157] In addition, it is submitted that Mr Singh admitted to Super Liquor that he:

- (a) inflated the hourly rate of pay for employees who were seeking visas for the purposes of ensuring INZ visa requirements were met (and that he intended to continue this practice for six employees who were in the process of securing residency);
- (b) paid staff less than the amount stated in their employment agreements;
- (c) required workers to work additional hours to make up the difference between what was represented to INZ as being their true hourly rate, and the rate Mr Singh actually paid them;
- (d) paid workers on student visa as little as \$10 per hour until 2016, that is, below minimum wage; and
- (e) required staff work additional hours for cash over and above the hours claimed through the PAYE system thereby evading the payment of PAYE on those wages and that he was “dodging tax” tax;
- (f) did not keep all wage and time records supplied to him and not meeting minimum record keeping requirements as required by law.

[158] The Applicants submit that dishonestly misstating the hourly rate of pay in an employment agreement constitutes wage manipulation and job inflation which is an offence under the Immigration Act 2009.

[159] Paying otherwise than in accordance with an employment agreement, it is submitted, is a breach of the Wages Protection Act 1983.

[160] It is also submitted that it is unlawful to require any employee to work additional unpaid hours as a form of ‘claw back’ for an inflated hourly rate for the purpose of assisting an employee to obtain a visa.

[161] This conduct, the Applicants submit, amounts to migrant exploitation in that workers who are vulnerable because of their visa dependency are required to accept illegal working conditions.

[162] It is submitted that failing to pay the applicable minimum wage is a breach of the Minimum Wage Act 1983 and that tax evasion is an offence under the Tax Administration Act 1994.

[163] These admissions to Super Liquor, it is submitted are grounds to cancel Nekita's licences in their own right. It is submitted that it is desirable for the Authority to do so to maintain the integrity of the alcohol licensing regime.

[164] The Applicants submit further that much of the conduct acknowledged by Mr Singh to Super Liquor was also formally admitted before the ERA which resulted in it penalising both Nekita and Mr Singh. Notably, it is submitted that Mr Singh admitted to the Labour Inspectors, as he did to Super Liquor, that he had been operating a dual payment system for years.

[165] As part of these proceedings, it is submitted that Nekita accepted that it paid four employees less than the minimum wage, and failed to keep full and accurate time and wage records and holiday and leave records for 59 employees in breach of the Employment Relations Act 2000 and the Holidays Act 2003. It is also submitted that Mr and Mrs Singh accepted in response to the allegations made against them, that they were both involved in the breaches of employment standards. The ERA found accordingly, that Nekita engaged in serious and repeated breaches of employment law including the Employment Relations Act 2000, the Holidays Act 2003, and the Minimum Wage Act 1983.

[166] While the ERA said that Mrs Singh was not involved with, and did not know of the dual payment system at the time, the Applicant submitted that the ERA did not have the pool of evidence before it that the Authority does, namely information in relation to Super Liquor.

[167] It is also submitted before the ERA both Mr and Mrs Singh gave sworn evidence claiming ignorance of the dual payment system and said this was run by Mr Kunal Gulati, a member of Mr Singh's extended family, who worked at one of Nekita's stores. This claim, it is submitted, was knowingly false because Mr Singh admitted the existence of the dual payment system to Super Liquor, and to the Licensing Inspectors, that he operated the system.

[168] For her part, it is submitted that Mrs Singh knew the claim by Mr Gulati was false prior to the ERA hearing because she was served with the witness statement of the Labour

Inspector, Mr Lewis, which included notes of a meeting with the Labour Inspectorate on 4 October 2019 taken by Ms Crampton. It is submitted that Mrs Singh must have appreciated the conflict what had been admitted to the Labour Inspectors and their account of the dual payment system before the ERA, and that it was obvious that Mr Gulati could not have run the system.

[169] The Applicants submit that the ERA found that the dual payment system was in operation at a time when Mr Gulati was not working with Nekita and that its operation was attributable to Mr Singh.

[170] While the ERA case was framed in relation to four complainants, it is submitted that the paid out reports show that the system was in widespread use by Nekita, for a large number of employees, and that in many cases the hourly rate paid is below the applicable minimum wage rate.

[171] It is submitted that the ERA concluded that the breaches of minimum wage requirements in relation to the four employees that were the subject of ERA hearing was ongoing, persistent, and deliberate. The failure to keep wage and time records and holiday and leave records for 59 employees was in turn found to be systemic and repeated for each employee. The ERA concluded that the breaches were intentional and designed to minimise the gross amounts paid to employees and to limit the amount of holiday pay paid.

[172] This was aggravated, it is submitted, by the ERA finding that many of Nekita's employees were vulnerable employees with little knowledge of their employment rights and who were reliant on Nekita not just for their jobs and income but also for their right to reside in the country.

[173] The Applicants submit that the breaches identified in the ERA decision are extremely serious and make the case for cancellation obvious. The operation of the dual payment system and the giving of false evidence in the ERA, it is submitted, are also decisive in showing Nekita's lack of suitability.

[174] It is submitted that a clear pattern emerges from an overall assessment of the evidence namely that all of the breaches evidence an operating structure within Nekita that sees the payment of basic entitlements to employees being diminished with inadequate records being maintained to make any back calculation of entitlements difficult, if not impossible.

[175] It is also that Mrs Singh has made no effort to understand the paid out reports used as part of the dual payment system. While Nekita has re-paid the four staff who took complaints to the ERA, it is submitted that is the extent of Nekita's reconciliation in relation to its unlawful practices. It is submitted that Mrs Singh has not analysed, and has shown no interest in analysing, what the other staff beyond the four who were the subject of complaints in the ERA, might be owed.

*Ongoing non-compliance*

[176] It is also submitted that during licensing inspections of Nekita's bottle stores in 2019 and 2020, issues were uncovered in each premises relating to the non-appointment of managers amongst other things, at a time when Mrs Singh says she was actively involved with the management of Nekita.

[177] It is submitted that rosters provided by Nekita to the Licensing Inspector in July and December 2020 show that there were systemic breaches of minimum employment requirements in that employees were not being provided with breaks in accordance with the Employment Relations Act 2000. Moreover, it is submitted that before the Authority Mrs Singh showed no sign of concern about these rosters evidencing a total disregard by Mrs Singh for legal compliance and her own poor attitude towards the welfare of her staff. It is submitted that it is inadequate for Mrs Singh to now say that an employment specialist has been engaged because Mrs Singh would have known full well of her obligation to provide breaks from her time operating her supermarket.

[178] The Applicants submit that not only is this an ongoing breach of minimum employment standards, but it is conduct directly relevant to the increased risk of alcohol-related harm. It is submitted that it is a foreseeable outcome that workers who do not have breaks and who work long shifts are more likely to be fatigued, which links back to the object of the Act.

[179] It is also submitted that Mrs Singh demonstrates an inadequate understanding of the risks associated with selling low cost, single serve alcoholic drinks in deprived areas of Aranui where Nekita operates its Pages Road and Wainoni stores. While Nekita has engaged the ACG to provide it advice and support, ACG's report highlights a fridge being used for single sale beers that must be passed to get to the main part of the premises; the use of dump stacks to display specials; and the promotion of single sales of beer.

*Suitability*

[180] Ms South submits that suitability is not to be considered in a vacuum. Rather, Nekita's operation as a whole is to be considered including in relation to licences that are no longer currently held.

[181] Nor is consideration of Nekita's suitability restricted, it is submitted, to the current situation where Mr Singh no longer continues to be involved in Nekita. In this regard, it is submitted that Mr Singh is not distanced from the control of Nekita despite Nekita's best efforts because he remains a shareholder (16%); he has a matrimonial property interest in Nekita and receives income from the company; and is married to and lives with Mrs Singh (such that he has influence in such a close relationship). Further, it submitted that the independent director appointed to Nekita (Mr Yoon) will play no part in the day to day management of Nekita, and that Mr Singh has remained involved in the sell down of Nekita's assets.

[182] It is submitted that there is no legal basis for dividing suitable and unsuitable shareholders to allow Mr Singh to be considered to be unconnected to Nekita. It is also submitted that the various undertakings given that he will not be involved in Nekita are meaningless and unenforceable. Equally it is submitted that there is no basis for the Authority to condition the licence to the effect that Mr Singh will not participate in the operation or management of Nekita. It is submitted that Mr Singh is plainly unsuitable to be a director of the licensee company and his removal is artificial.

[183] In any event, it is submitted that Mrs Singh is unsuitable in her own right, which also renders Nekita to be unsuitable. It is submitted that, by her own account, Mrs Singh says that she was involved in Nekita from 2017 and was an inactive director who failed to monitor the business activities of her co-director husband. This claim to have been an entirely inactive director, it is submitted, is contradicted by:

- (a) Mr Singh saying before a District Licensing Committee in March 2017 that he 'and his wife' have been involved in running off-licences in the Canterbury region on a continuous basis since 2001;
- (b) Mrs Singh's name being on a business card provided to the Labour Inspector;
- (c) Mrs Singh's name being on payslips provided by employees; and

- (d) Mrs Singh being a co-signatory to the November 2016 Super Liquor Franchise Agreement in which she is also a nominated person for the purposes of that agreement.

[184] It is also submitted that since November 2019 when Mrs Singh was on notice about Nekita's unlawful conduct, she has made no efforts to:

- (a) investigate the breadth and scope of Nekita's unlawful behaviour;
- (b) investigate the conduct blamed by Mr Singh as being the fault of Mr Kunal Gulati; or
- (c) identify under payments to any other staff who were not included in the ERA proceedings (despite having gained a significant financial benefit through Mr Singh's offending).

[185] It is submitted that Mrs Singh lacks either the willingness or the capacity to ensure legal compliance by Nekita and is therefore unsuitable. The Applicants say that Mrs Singh is not a person who is can meaningfully cure Nekita's, and Mr Singh's, overt lack of suitability given the history of illegal dealings and non-compliance.

[186] The Applicants submit further that even if the restructuring of Nekita could allow it to be considered as suitable to hold a licence, Mrs Singh is unsuitable both by virtue of her association with Mr Singh and in her own right. It is also submitted that Nekita has been found to be non-compliant in 2020 after Mrs Singh reengaged with the company in 2017.

[187] By way of conclusion, the Applicants submit that Nekita, Mr Singh, and Mrs Singh have conducted their licensed premises in an improper fashion and are unsuitable. As a result, the licences – which are privileges – ought to be cancelled.

[188] Moreover, it is submitted that Mrs Singh as director and shareholder of Nekita, is not suitable to hold a manager's certificate and that cancellation of Mrs Singh's manager's certificate will ensure she no longer participates in the industry.

### **Submissions for Harjit Singh**

[189] Mr Peter Egden, counsel for Mr Harjit Singh confirms that Mr Singh accepts the findings of the ERA, namely that he:

- (a) failed to pay four of Nekita's employees the minimum hourly wage totalling \$19,805.89;
- (b) failed to pay holiday pay on the minimum wage arrears for the four employees totalling \$1,584.48; and
- (c) failed to keep correct wage and time records and holiday and leave records for 59 employees.

[190] Mr Singh submits that the amounts claimed of \$19,805.89 and \$1,584.48 were paid prior to the ERA Hearing.

[191] Mr Egden confirmed that Mr Singh decided to cease his involvement with the company other than as a minority shareholder (for tax purposes). Accordingly, Mr Singh resigned as a director of Nekita on 24 May 2021 (following the applications being filed before the Authority), and transferred the majority of his shares to Mrs Singh on 19 July 2021. Mr Singh also surrendered his manager's certificate on 9 August 2021.

[192] On behalf of Mr Singh, Mr Egden gave an undertaking to the Authority that Mr Singh will have no further involvement in the governance and management of Nekita and its licensed premises.

### **Submissions for Nekita**

[193] Mr Jonathon Eaton QC for Nekita submits that at the time of disclosures made by Mr Singh to Super Liquor, and of the determination of the ERA, Mr Singh was fully engaged in the affairs of Nekita and was its 'directing mind and will'.

[194] It is submitted that the disclosures to Super Liquor are attributable solely to Mr Singh, and that the adverse findings of the ERA are particular to him. It is submitted that the ERA found that Mrs Singh was not involved in any aspect of Nekita's bottle stores, and had no knowledge of the breaches.

[195] It is also submitted that the time for the determination of the applications is the date of the hearing before the Authority, and that the applications engage a prospective assessment of suitability. It is submitted that applications such as these do not serve as an opportunity to punish for historic wrongdoing.

[196] Mr Eaton QC submits that the conduct being relied on by the Applicants to support the grounds of appeal is historical, attributable to one person (i.e. Mr Singh), lacks a strong nexus with the object of the Act, and is conduct for which Nekita has been punished.

[197] It is further submitted that much has changed since the conduct which forms the bases of the applications, namely that:

- (a) Mr Singh has resigned as director and has surrendered his manager's certificate and will have no further involvement in Nekita;
- (b) Mrs Singh has committed to managing Nekita and has engaged appropriate professional support;
- (c) a new director has been appointed to provide support to Mrs Singh, who is conscious that Mr Singh will not have any role in the affairs of Nekita in the future; and
- (d) Nekita has significantly downscaled and is presently only operating six bottle stores (down from 21), four of which are under contracts for sale: as a consequence the number of employees has diminished from 60 to 15 and will reduce to six (after the sale of four premises).

[198] Nekita submits that the ERA determination and Super Liquor disclosures must be considered in their agreed, and essential context namely that Mr Singh was the directing mind and will of Nekita. The restructuring and departure of Mr Singh from any role in Nekita; the appointment of Mr Yoon; the engagement of Mr Thompson; and the engagement of the ACG, it is submitted, when considered against the substantial downsizing of Nekita's operations, ought reasonably lead to a finding that the concerns raised in the applications have been adequately addressed. It is submitted that the individual culpability of Mr Singh must be at the forefront of the Authority's consideration of the applications.

[199] In relation to allegations of tax evasion, it is submitted that there are no outstanding revenue issues and that there is no evidence of tax evasion.

[200] In terms of giving and suborning false evidence, Nekita says that there has been no allegation, complaint, investigation or prosecution, and the Authority has not heard the evidence that was before the ERA first hand. It is submitted that the ERA after hearing the evidence tested, accepted Mrs Singh denials. The applications, it is submitted, ignore the findings that Mrs Singh was not involved in, and had knowledge of the issues that are the subject matter of the ERA hearing.

[201] In relation to immigration fraud, it is acknowledged that Mr Singh made disclosures at a meeting with Super Liquor and that he admitted that workers were being paid a different hourly rate to that in their employment agreements. The inference that the Applicants make, it is submitted, is that the employees then used these contracts to secure working visa. It is submitted that there is no evidence of this and that the Authority has not heard evidence from any of those employees. Nor is there evidence of any kind of investigation, or prosecution in relation to workers misleading INZ.

[202] The allegation of exploitation of migrant workers, it is submitted, is also not supported by any direct evidence. It is submitted that the Super Liquor notes and the findings of the ERA do not allow the Authority to make a positive finding that Mr Singh engaged in a sustained practice of exploiting migrant workers relevant to considerations of suitability.

[203] In terms of the Super Liquor disclosures, it is submitted that the purpose of the meeting with Super Liquor is far removed from these proceedings and that breaches of franchise agreements are contractual matters that carry limited weight in the current inquiry. Without a proper investigation, it is submitted that the minutes of the meeting are not evidence of offending.

[204] It is also submitted that the evidence by the Licensing Inspector regarding alleged COVID sales; single-serve sales; issues with duty managers in 2020; and issues with rosters, are not relevant to the grounds in the applications. These matters, it is submitted, are not particularised in the applications and in relation to the 2020 rosters, these do not establish that the premises were not shut for 10 minutes to allow employees to take breaks. In response to a question from the Authority, however, it was acknowledged that these may go to the question of desirability of making an order.

[205] In relation to Mr Singh's ongoing involvement in Nekita, it is submitted that as a minority shareholder he has no capacity to control Nekita and he cannot acquire further shares without the knowledge of Mr Yoon. It is also submitted that Mr Singh's shareholding does not allow him to appoint or dismiss a director.

[206] It is submitted that the grounds advanced do not taint Nekita as an entity and nor do they taint Mrs Singh. Rather, it is submitted that they focus on the shortcomings of Mr Singh as the directing mind and will of Nekita in the period to 2016. That conduct, and Mr Singh's involvement in Nekita, it is submitted, are historical.

[207] It is submitted that the changes made ought to provide assurances to the Authority such that it is not inevitable that the licences be cancelled. Alternatively, it is submitted that the application against Nekita could be adjourned to allow Nekita to remedy any matters that the Authority may require to be remedied, allowing the assurances given as to the operation of Nekita to be put to the test.

### **Submissions for Shereen Singh**

[208] Mr Kerry Cook, counsel for Mrs Singh submits that notwithstanding that Nekita was incorporated in 2002, Mrs Singh has had very limited involvement in the running of the company until 2017, including the period from 2012 to 2016 which gave rise to the investigation leading to the ERA findings. The failings of Nekita during this period, it is submitted, were the sole responsibility of Mr Singh.

[209] Since the applications have been filed, it is submitted that there have been a number of important changes and that Mrs Singh is willing to provide an undertaking that Mr Singh will have nothing to do with the running of Nekita. That is, Nekita has been ‘cleansed’ of the individual responsible for the breaches.

[210] Further it is submitted that Robert Thompson of I R Thompson has been engaged to provide Nekita specialist employment law advice in order to ensure compliance with all employment obligations.

[211] Nekita has also engaged the ACG which has resulted in changes to Nekita’s policies, operating systems, and to staff training in all of Nekita’s premises. Among these changes, it is submitted, is a folder for records pertaining to each employee, and updated code of conduct, and regular checks of staff understanding of the Licensed Premises Toolkit.

[212] It is submitted that Mrs Singh and through her, Nekita, has shown her commitment to ensuring the bottle stores are operated in a manner which achieves the object of the Act. This has been done at great expense, it is submitted, in terms of both time and money. It is submitted further that Mrs Singh and Nekita have taken on board the investigation and findings of the ERA with the utmost seriousness, as is evident by the removal of Mr Singh from Nekita.

[213] Mrs Singh submits that she is now the directing mind and will of Nekita, that the breaches in relation to employees are historical, and that she was not involved in them. The managerial 'slips' of Mr Singh, it is submitted, were his mistakes and it is submitted that Mrs Singh has not failed to conduct any licensed premises in a proper manner.

[214] It is submitted that the applications to cancel Mrs Singh's manager's certificate and Nekita's licences do not meet the high threshold required by the Act. It is submitted that the breaches are being visited upon Mrs Singh, without evidence to support the assertions made.

[215] Moreover, it is submitted that it cannot be said, based on the ERA findings, that Mrs Singh is not a suitable person to hold a manager's certificate.

[216] As a result, it is submitted that the grounds of the application against Mrs Singh have not been made out.

[217] Mrs Singh submits that the Authority is not faced with the same respondents (in terms of Nekita and herself), as it was when the applications were filed. It is also submitted that Nekita is not operating at the level it was at the time of the ERA findings. It is submitted further that Mrs Singh's personal suitability, having had no issues in relation to the supermarket she operated, reflects favourably on Nekita.

[218] In terms of Mrs Singh failing to provide directorship and oversight of Nekita, it is accepted that she should not have allowed her husband to do the things that she has done but says that she delegated the directorship of Nekita to Mr Singh and that she was entitled to rely on him to undertake that role.

[219] The division in this case, it is submitted, is clear. Mr Singh was to operate Nekita while Mrs Singh operated another company (Samsas), which owned the supermarket at the time of the breaches, where she was in charge of everything employee related. This, it is submitted, does not mean that she is unsuitable, or unable to uphold the object of the Act. Mrs Singh submits that she used her manager's certificate in the supermarket with no issue and that during the time that she has been involved in the management of Nekita, the company has been fully compliant.

[220] Nor, it is submitted, do the applications allege that Mrs Singh (or Nekita) are currently breaking any employment regulations, particularly in relation to rosters and break

entitlements. These matters are also not alleged in the applications and as such no evidence was called by Nekita or Mrs Singh in relation to them.

[221] The steps taken by Mrs Singh, it is submitted, highlight that Mrs Singh is someone who is compliance focused. On this basis, it is submitted that the Authority can have confidence that she, and Nekita, will manage the licensed premises in a manner that is consistent with the object of the Act.

[222] It is submitted that cancellation is more appropriate when there is a significant and reasonably held concern that the future operations of a licensee or manager will be unlawful. The steps taken by Mrs Singh, it is submitted, ought to provide assurance to the Authority as should the previous conduct of Nekita having been sheeted home to a different officer who is no longer an officer of Nekita.

[223] In relation to Mrs Singh not investigating the unlawful behaviors and the conduct of her husband, or the underpayments to staff, it is submitted that there is no duty on Mrs Singh to investigate and none has been evidenced. It is submitted that it is also difficult to discern any nexus between a failure to investigate conduct in the past and the ability to comply with the object of the Act.

[224] In terms of Mrs Singh failing to conduct licensed premises in a proper manner, it is submitted that there is no evidence that Mrs Singh knew of what was said to Super Liquor, and if what is recorded is true, that she participated in or had any knowledge of the acts when they occurred. The ERA determined, it is submitted, that Mrs Singh was not involved in any aspects of Nekita's bottle stores and had no knowledge of the breaches. It is submitted that the Super Liquor notes do not change the ERA's finding as there is nothing within the Super Liquor material that shows that Mrs Singh was involved.

[225] It is submitted that the Applicants are asking the Authority effectively to look behind the ERA determination without evidence from those actually involved in the breaches.

[226] Further, it is submitted that there is no evidence to suggest that Mrs Singh was engaged in conduct that amounts to worker exploitation. Nor, it is submitted, is there evidence of tax evasion. The evidence is instead that all of the PAYE shortfall has been fully accounted for and that there is no ongoing investigation by IRD.

[227] In terms of giving false evidence, it is submitted that the evidence of Mr Lewis is that it was Mr Singh who called Mr Gulati in the ERA proceedings. Further, it follows that Mrs Singh could not have known whether the evidence was false given that the ERA found that she had no knowledge of the breaches.

[228] It is submitted that the only ground that relates to the Act is that Mrs Singh failed to maintain appropriate record keeping in relation to the operation of its licensed premises and of failing to have adequate processes in place to ensure statutory compliance in order to meet the object of the Act. This conduct, however, is focused on the past conduct of Mr Singh who was the directing mind and will of Nekita at the time. The steps taken by Nekita, through Mr Singh, it is submitted, go to Mrs Singh's credit and demonstrate her suitability in adhering to the Act.

[229] Furthermore, it is submitted that Mrs Singh has relevant experience both in her time working for Nekita but also from her running of the supermarket.

## **Decision and Reasons**

### *Applicable tests*

[230] The tests for cancellation or suspension under both ss 280 and 285 involve two stages. The first stage requires the Authority to be satisfied of the grounds specified in s 280(3) and s 285(3) respectively. As Ms South correctly submits, the Applicants need only prove one of the grounds under s 280(3)(a) or (b).

[231] The second limb then requires the Authority to be satisfied that it is desirable to make an order (per s 280 (5) and s 285(5)).

[232] The Authority agrees with the Applicants that notwithstanding that the application is to be assessed as at the date of the hearing, the focus of s 280(3)(a) (improper conduct), is on the past operation of licensed premises. That is clear from the plain language of s 280(3)(a).

[233] Whether it is desirable to make an order, however, is wider in scope and includes the considerations of past behaviour as well as consideration of changes made since the conduct giving rise to the applications. In this regard, desirability reflects both the penal nature of the

grounds but also the prospective risk of alcohol-related harm should the licensee or managers continue to hold the licences and managers' certificates.

[234] Independently, the Authority may also adjourn the applications, for any period that the Authority thinks fit, to give the licensee and managers time to remedy any matters that the Authority may require to be remedied (per s 280(6) and s 285(6)). This too involves consideration of risk. Adjourning an application, however, is not to be equated with giving a licensee or manager a 'second chance' or the opportunity to prove itself akin to a probationary period. In the absence of some matter capable of being remedied, adjournment is not an available option and, in any event, is unlikely to be countenanced except in circumstances where the risk of alcohol-related harm is low, or the nature of the circumstances are not otherwise egregious in nature.

#### *Burden and standard of proof*

[235] As the Authority has previously said in *Rapira-Davies v Gogo Bar Ltd*,<sup>113</sup> and in subsequent enforcement applications, the applicant has the burden of proving the grounds of the applications. The standard of proof is that described in *Triveni Puri*,<sup>114</sup> namely 'on the balance of probabilities' but in accordance with decisions of *Spring v King*,<sup>115</sup> and *Z v Dental Complaints Assessment Committee*,<sup>116</sup> the standard of proof is at the higher end of that standard. This was recently reinforced by the High Court in *TS & RK Bhullar Ltd v Commissioner of Police* where Lang J said:<sup>117</sup>

As in any civil proceeding, the standard of proof is on the balance of probabilities. The consequences of a finding against the appellants in the present case are significant, however, because the appellants stand to lose financially if the orders are permitted to remain in force.

An application for the suspension of a liquor licence or manager's licence is undoubtedly penal in nature. Stronger evidence is therefore required before proof to the required standard is achieved. This led Woolford J to observe in *General Distributors Ltd v De'Ath* that the standard of proof in such cases must be very close to that of a criminal prosecution.

[236] The Authority agrees with the Applicants that notwithstanding the need for stronger evidence these proceedings remain civil proceedings, and proof of criminal offending is not a

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<sup>113</sup> *Rapira-Davies v Gogo Bar Ltd* [2016] NZARLA PH 283

<sup>114</sup> *Triveni Puri* [2012] NZHC 2913

<sup>115</sup> *Spring v King* NZLLA 1414/93

<sup>116</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

prerequisite to establishing the grounds of the applications.<sup>118</sup> Conversely, a finding by the Authority does not amount to proof of criminal offending.

***Ground 1: Improper Conduct***

*Applications against Mr and Mrs Singh pursuant to s 285(3)(a)*

[237] The Applicants face an immediate hurdle in respect of the applications against Mr and Mrs Singh made pursuant to s 285(3)(a) of the Act.

[238] Section 285(3)(a) relates to the conduct of the premises by “the manager”. It is clear from s 214(3) of the Act that the manager to which s 285(3)(a) refers, is the manager whose name is displayed in the licensed premises at the time of the alleged conduct. Section 214 of the Act reads:

**Manager to be on duty at all times and responsible for compliance**

(1) Except as provided in section 215, a manager must be on duty at all times when alcohol is being sold or supplied to the public on any licensed premises.

(2) A manager on duty on any licensed premises is responsible for—

(a) the compliance with and enforcement of—

(i) the provisions of this Act; and

(ii) the conditions of the licence in force for the premises; and

(b) the conduct of the premises with the aim of contributing to the reduction of alcohol-related harm.

(3) At all times while a manager is on duty on any licensed premises, the full name of the manager must be prominently displayed inside the premises so as to be easily read by people using the premises; and the person named as manager at any time is to be treated for the purposes of this Act as the manager at that time.

(4) At all times when alcohol is being sold or supplied on licensed premises the licensee must take all reasonable steps to enable the manager to comply with this section.

[239] There is no evidence before the Authority that either Mr or Mrs Singh were nominated managers at the time of any conduct which is the subject matter of the applications. Moreover, in the case of Mrs Singh, Mrs Singh has said that she has never acted as a duty

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<sup>117</sup> *TS & RK Bhullar Ltd v Commissioner of Police* [2019] NZHC 3397 at [27] – [28] (citations omitted)

<sup>118</sup> *Christchurch District Licensing Inspector v Karara Holdings Limited* (CA 178/02) at [40]

manager in any of Nekita's premises but that she only used her manager's certificate in the supermarket she ran prior to 2017.

[240] As a consequence, the applications pursuant to s 285(3)(a) against Mr and Mrs Singh, must fail.

[241] This, however, does not impede the application against Nekita pursuant to s 280(3)(a) of the Act, or the applications against all three respondents pursuant to s 285(3)(b) (based on suitability).

#### *Improper conduct - Nekita*

[242] The Authority is not satisfied that the minutes of the Super Liquor meeting of 4 October 2019 are reliable. It is not apparent who took these minutes, and the respondents were not asked to confirm them as an accurate record of what was said at that meeting. No person who was at that meeting has been called to give evidence of what transpired at it. For this reason we disregard the minutes of the meeting with Super Liquor in their entirety.

[243] That said, Mr Eaton QC for Nekita acknowledges that Mr Singh made disclosures at the Super Liquor meeting and admitted that Nekita workers were being paid a different hourly rate to that set out in their employment contracts.

[244] The termination letter from Super Liquor dated 12 February 2020 also outlines the reasons for Super Liquor terminating the franchise agreements with Nekita. In this letter Super Liquor cites the Investigation Report by the Labour Inspectorate.

[245] Regardless, the matters set out in the termination letter were repeated before the ERA. The evidence establishes that before the ERA Nekita accepted that it failed to pay four employees minimum wage entitlements for which it paid arrears of \$19,805.95. Nekita also accepted that it failed to pay holiday pay on those minimum wage arrears and it paid arrears of \$1,584.48 for this. Further, Nekita admitted its failure to keep time and wage records and holiday and leave records for 59 employees.<sup>119</sup>

[246] The nature and extent of the breaches against the four employees, the ERA found, arose from the operation of a dual payment system over a period of up to four years. Nekita

accepted that the dual payment system operated between 2012 and 2016.<sup>120</sup> As a result, the ERA found the breaches were: “ongoing, persistent and deliberate breaches of the minimum wage requirements for those four employees”.<sup>121</sup>

[247] The failure to keep wage and time records and holiday and leave records for the 59 employees, the ERA found, occurred over a number of years and were “systemic” and because they probably arose from the dual payment system, they were “repeated for each employee over the time each employee was employed.”<sup>122</sup>

[248] The ERA found that all of the breaches were intentional and were designed to minimise the gross amounts paid to employees and to limit the amount of holiday pay paid.<sup>123</sup> Moreover, many of the employees were migrant employees, requiring work visas. As a consequence, as the ERA said, they were vulnerable employees, with little knowledge of their employment rights and reliant on Nekita not just for their jobs and income but also for their right to reside in the country.<sup>124</sup>

[249] The breaches were significant, as was Nekita’s business expansion through the period of time that it operated the dual payment system,<sup>125</sup> which was reflected in the penalties imposed on both Nekita and Mr Singh.<sup>126</sup>

[250] The question for the Authority is whether this is evidence of improper conduct on the part of Nekita?

[251] In *Cooke v CZ Lucky Limited*,<sup>127</sup> the Authority had cause to consider the expression ‘improper conduct’ for the purposes of s 280(3)(a) of the Act. There, the allegations were of patrons trying to gain entry into licensed premises by jumping from the roof; of people congregating in the carpark, on the road, and in the vicinity of the premises; of patrons consuming alcohol in the carpark; and of empty vessels on the ground. The Authority said:

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<sup>119</sup> above 13, at [6]

<sup>120</sup> above n 36, at [4.4] and following

<sup>121</sup> above n 13, at [34]

<sup>122</sup> above n 13 at [35]

<sup>123</sup> above n 13, at [41]

<sup>124</sup> above n 13, at [43]

<sup>125</sup> above n 13, at [61]

<sup>126</sup> above n 13, at [58]

<sup>127</sup> *Cooke v CZ Lucky Limited and anor* [2020] NZARLA 163-164 at [167] – [173]

The ordinary dictionary definition of the word ‘improper’ is ‘unseemly, indecent; not in accordance with the rules of conduct’.

Alternatively, the term ‘improper’ can be interpreted to mean ‘wrongly’ or ‘not correctly’, but to this extent the correctness of the operation of licensed premises can only be determined by reference to some rules of conduct. These rules are in fact the provisions of the Act or the conditions of the licence. Used in this sense, the other bases for the grounds in s 280(3)(a) would likely be relevant but in the present case there is no allegation that either the Act or the conditions of the licence have been breached.

In *Re The Cantabrian Tavern (1989) Limited*,<sup>128</sup> the Authority had cause to consider whether premises were conducted in an improper manner for the purposes of an application for suspension or cancellation of a licence pursuant to s 132(3)(a) of the 1989 Act, which section corresponds to s 280(3)(a) of the current Act. In that case, the Authority said:<sup>129</sup>

The Authority does not accept that the words in s 132(3)(a) referring to licensed premises being conducted in breach of the provisions of the Act or of any conditions of the licence **or otherwise in an improper manner** must be limited by s 4 of the Act to conduct involving the abuse of liquor. The words “or otherwise in an improper manner” conjure up the ordinary dictionary meaning i.e. conduct that is unseemly or indecent. We have previously said in response to complaints about wet T-shirt competitions that we are not charged by the Act with being the moral arbiter of what is acceptable conduct on licensed premises. However, it is clearly incumbent on the Authority to respond to a complaint that a licensee or manager has overstepped the mark and allowed conduct on licensed premises that no responsible licensee or manager would accept. (original emphasis)

In that case the Authority held that the premises in question had been conducted in an improper manner. The conduct in question, however, is markedly different to that which features in this application. There the conduct involved a promotion called ‘How Far Will You Go’ which involved contestants, amongst other things, drinking vomit and urine. A male patron also stapled his genitals onto a wooden cross from which he swung a heavy iron weight and set it alight. In the process, lighter fluid spilled onto the man’s penis and set it alight, which fire needed to be doused by a patron’s drink.

[252] While the allegations before the Authority in this matter are not of the kinds considered in in *CZ Lucky Limited*, let alone *The Cantabrian*, the Authority has been clear in these cases that improper conduct includes conduct that is wrong by reference to some rules of conduct, which rules need not directly relate to the object of the Act. That is, this conduct is not limited to alcohol-related harm or abuse.

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<sup>128</sup> *Re The Cantabrian Tavern (1989) Limited* LLA PH 2557/99 – PH 2559/99

[253] The rules of conduct in the present case are the employment standards set down in employment legislation namely the Minimum Wage Act, The Wages Protection Act, the Holidays Act and the Employment Relations Act which apply to Nekita's licensed premises as they do to any business.

[254] Paying employees at a different hourly rate to that in their employment contracts, failing to pay employees minimum wage entitlements, failing to pay holiday pay, and the failure to keep time and wage records and holiday and leave records for employees as required by law is improper conduct. It is conduct that no responsible licensee or manager, or other reasonable employer for that matter, would accept.

[255] Given the findings of the ERA, the Authority is satisfied that Nekita has engaged in improper conduct. Accordingly, the grounds of the applications pursuant to s 280(3)(a) have been made out against Nekita.

### ***Ground 2: Suitability***

*Suitability is a broad concept*

[256] Turning to the second ground of the applications, the test for suitability is broad.

[257] In *Re: Sheard* (albeit in the context of an appeal), Holland J said:<sup>130</sup>

The Authority in its decision refers to the fact that there is no special statutory meaning of "suitability". That does not surprise me. Suitability is a word commonly used in the English language and is well understood. In an earlier decision the Authority has adopted the definition in the Concise Oxford dictionary as "well fitted for the purpose, appropriate".

I do not find it helpful to refer to other decisions on different facts as to the meaning of that word. Where a statute uses an unambiguous and well understood word or expression and chooses not to enlarge on the ordinary definition of the word or expression by a special interpretation in the statute it is usually unwise for a Court to add to the ordinary meaning of the word as a general guide for all cases, as distinct from applying the word to the particular facts before it.

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<sup>129</sup> at pages 10-11

<sup>130</sup> *Re: Sheard* [1996] 1 NZLR 751 at 758

In this case the applicant has been declared unsuitable, primarily because of his previous convictions and record in managing licensed premises.

Obviously the applicant's past conduct will be very relevant to the consideration of suitability. The real issue is whether the evidence of that past conduct will indicate a lack of confidence that the applicant will properly carry out the obligations of a licensee. ...

[258] Subsequently, in *New Zealand Police v Casino Bar No 3 Ltd*<sup>131</sup> Dobson J considered an appeal against a decision of the Authority (in relation to a licensing application), in which the Authority said that when determining an applicant's suitability, the principal issue is whether the applicant is suitable given the statutory object of reducing liquor abuse. The Authority considered that the setting up of a business (an adult entertainment venue in central Wellington), and their marketing would seem to have little to do with this object. Rather, the Authority said, it is how the business operates or will operate once it is open for business that is the issue.

[259] In relation to this, Dobson J said:<sup>132</sup>

I respectfully agree with Holland J's practical observations to the effect that "suitability" is commonly used and is well understood so that it is unhelpful to draw on the way it may have been applied in different factual circumstances. Suitability is a relatively broad concept and, in the context of an assessment of an application under s 13 of the Act, it relates to the suitability of the applicant to be granted the privilege of an on-licence to dispense liquor. The decision-maker would run the risk of excluding matters that are relevant to the suitability of an applicant if the analysis of that criterion focused solely on the applicant's proposals as to how the business is to operate. Although the weight to be given to individual components of the assessment of suitability will vary in each case, the decision-maker errs if it excludes indicators of an applicant's suitability or unsuitability that are not reflected in the applicant's proposal as to how the business will operate.

In this case, a significant aspect of any assessment of suitability of the applicant involved the applicant distancing itself from an unsuitable person (Mr Samson) whose involvement in running the licensed operation was implicitly treated as adversely affecting the applicant's ability to make out its suitability to be granted a licence. In that context, it would be unrealistic to ignore the extent to which such a presumptively unsuitable individual had been involved in setting up and marketing the business, when assessing the credibility of a claim on behalf of the applicant that he would be excluded from the operation of its licensed business.

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<sup>131</sup> *New Zealand Police v Casino Bar No 3 Ltd* [2013] NZHC 44

<sup>132</sup> above n 131, at [30] – [36]

In its decision, the LLA rejected the Police concern at the involvement of Mr Samson, by relying on what it took to be the undertaking provided by Ms Le Prou that he would be entirely excluded from the applicant's business operations. Having done so, the LLA considered it could be satisfied as to the applicant's suitability, essentially because Ms Le Prou was associated with other licences that had been granted for some time, and that nothing adverse had been raised in respect of her, in her own personal capacity.

The LLA supported its reliance on the undertaking with its expectation that if the undertaking was not complied with the Police would immediately bring an application for cancellation of the licence under s 132 of the Act.

In criticising this approach as unduly narrow, submissions for the Police cited a checklist of matters likely to be relevant to an assessment of suitability from the text *Dormer & Sheriff Sale of Liquor*. The list is as follows:

- (a) previous convictions, especially those involving liquor or those raising questions as to honesty or propensity for violence;
- (b) character, reputation;
- (c) matters raised in reports filed under s 11;
- (d) previous unlawful operation of premises;
- (e) any of the above in relation to a person other than the applicant who is involved in the application (as a director, manager, etc) or is intended to be employed by the applicant;
- (f) breach of an undertaking; and
- (g) misleading information in an application and/or misleading public notice.

Not all of the criteria from *Dormer & Sheriff* will be relevant in every application where objection is raised to the suitability of an applicant. However, it is an appropriate starting point for the range of matters that the LLA would need to traverse in assessing whether the onus on an applicant to establish suitability, where it is challenged, has been discharged. These matters are significantly wider than the applicant's proposal as to how the business will operate.

[260] In the same year, in *Nishchays' Enterprises Limited*, the Authority said:<sup>133</sup>

The applicant sought to establish its suitability by adopting a narrow assessment of the meaning of that term. This approach was criticised in *New Zealand Police v Casino Bar No 3 Ltd* .... The High Court rejected the proposition that it was the manner in which the business would be operated as the determinate factor. Rather, suitability is a broad concept and the assessment of it includes the character and reputation of the applicant, its previous operation of premises, its proposals as to how the premises will operate, its honesty, its previous convictions and other matters. It also includes matters raised in reports filed under s 33 of the Act and those reports may raise issues pertaining to the object of the Act as set out in s 4. Thus, whether or not the grant of the licence will result in the reduction or an increase in liquor abuse is a relevant issue.

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<sup>133</sup> *Nishchays' Enterprises Limited* [2013] NZARLA PH 387 at [53] – [54]

*Casino Bar No 3 Ltd* did not specifically refer to the test for suitability contained in *Sheard* ... where Holland J said at 758: “The real test is whether the character of the applicant has been shown to be such that he is not likely to carry out properly the responsibilities that go with the holding of a licence.” However, the judgment inferred that the test applied when the learned Judge referred with approval to Holland J's statement in *Sheard* : “Suitability is a relatively broad concept and, in the context of an assessment of an application under s 13 of the Act, it relates to the suitability of the applicant to be granted the privilege of an on-licence to dispense liquor”. Traditionally, that test has been interpreted as meaning whether or not an applicant will comply with the penal provisions of the Act. In fact, the test is much wider. To carry out the responsibilities that go with the holding of a licence includes whether or not liquor abuse issues are likely to arise. Thus, it includes the object of the Act as set out in s 4. The *Sheard* test is not simply about how a business is likely to operate in the future. It is dependent on an assessment of the more generalised factors referred to in the previous paragraph. It includes how a licensee will deal with liquor abuse issues that may arise from the establishment of the business. The usefulness of the *Sheard* test is that it gives a focus to the wider exercise contemplated in the *Casino Bar No 3 Ltd* decision by reminding one of the reason for the exercise.

[261] More recently, in *Two Brothers Wholesale Limited v Medical Officer of Health (Waikato District Health Board)*,<sup>134</sup> this Authority recognised that the failure to provide minimum employment entitlements to staff; to maintain proper record keeping practices; and to attempt to diffuse responsibility for these practices, amongst other things, go to the matter of suitability. This is especially the case, as was the case in *Two Brothers*, where there are systemic faults in a licensee's employment practises in circumstances where it gained an advantage as a result of those practices.

#### *Suitability of Nekita and Mr Singh*

[262] The findings of the ERA put beyond doubt that Nekita is unsuitable to hold a licence. The ERA makes it clear that the breaches against the four employees arose from the operation of a dual payment system over a period of up to four years. As already noted, these breaches were: “ongoing, persistent and deliberate breaches of the minimum wage requirements for those four employees”. This goes directly to the character and reputation of Nekita.

[263] It is no answer to say that Nekita has now changed. As the Court of Appeal said in *Christchurch District Licensing Agency Inspector v Karara Holdings Limited*,<sup>135</sup> in respect of

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<sup>134</sup> *Two Brothers Wholesale Limited v Medical Officer of Health (Waikato District Health Board) and others* [2021] NZARLA 32 at [133]

<sup>135</sup> above n 118, at [30]

the corresponding provision to s 280 in the 1989 Act: “The place of [s 280] in the Act is to achieve the purpose of maintaining the integrity and effectiveness of the licensing system. The powers of the Licensing Authority to make orders under [s280] in respect of licences, following particular proved breaches of standards of conduct of licensed premises, reflects a legislative perception of the appropriate scope of the powers required by the statutory body with principal responsibility for administration of the Act to achieve the statutory object.

[264] The evidence as it stands today is such as to demonstrate that the grounds have been established. This is not a licensing application where Nekita is being evaluated against the criteria for holding a licence. As an enforcement application, once the grounds have been established, the historical nature of the breaches and any changes made, go to the question of desirability in making an order rather than the establishment of the grounds. We discuss desirability shortly.

[265] As we have noted Mr Singh has surrendered his manager’s certificate. Had he not done so, the findings of the ERA against Mr Singh would have also rendered him unsuitable to hold a manager’s certificate as he was the accepted directing mind and will of Nekita at the time of these breaches. So long as Mr Singh is associated with Nekita as a director, Nekita is indelibly tainted by Mr Singh’s unsuitability.

[266] Given our finding of improper conduct in the case of Nekita, and our findings against Nekita and Mr Singh in terms of unsuitability, the grounds of the application under ss 280(3)(a) and (b), and under s 285(3)(b), have also been established in respect of Nekita and Mr Singh.

#### *Mrs Singh’s suitability*

[267] In terms of Mrs Singh’s suitability to hold a manager’s certificate, Mrs Singh has never acted as a manager of any of Nekita’s bottle stores. Mrs Singh said that the last time she utilised her manager’s certificate was as the manager of the supermarket prior to 2017. There is also no evidence before the Authority to indicate any issues in relation to her past operation as a manager of the supermarket that would indicate that she is not suitable to hold a manager’s certificate.

[268] The ERA determination said that Mrs Singh did not operate the dual payment system in Nekita; was not involved in the running of the bottle stores at the time of the hearing; and

that Mrs Singh had no knowledge of the breaches.<sup>136</sup> The Authority accepts that finding as the ERA had the benefit of the evidence having been tested.

[269] As Ms South has said, however, the ERA, did not have the benefit of the Super Liquor disclosures which the Authority has. Notwithstanding that we do not consider the minutes of the Super Liquor Board meeting to be reliable in themselves, and there is no evidence Mrs Singh participated in either the meeting with the Labour Inspectors on 4 October 2019 and with Super Liquor on 4 December 2019, under cross-examination about the Super Liquor minutes before the Authority Mrs Singh said that she understood that Mr Singh had been open and honest with Super Liquor.

[270] Mrs Singh also accepted that she received the Labour Inspectorate's report in November 2019, and Super Liquor's letter of termination in February 2020. To say that she was not aware, or did not appreciate the importance, of the allegations made when Mrs Singh also says that she did not operate at her husband's will or as a puppet for him, defies credibility. Mrs Singh's evidence that she did not fully digest the seriousness of Super liquor termination letter because she was in shock likely reflects that she understood full well the seriousness of the matter before her.

[271] Under cross-examination, Mrs Singh said that she expressed her disappointment in Mr Singh in light of the Labour Inspectorate's report. She could only have done so if she had read the report.

[272] Mrs Singh also said that she only had a brief look at the termination letter at the time it was sent and that she was in shock. Mrs Singh accepted under cross-examination, however, that she later read the letter but said that she did not read it in detail. This defies credibility particularly given she was already aware of the Labour Inspectorate's report.

[273] While Mrs Singh may not have had knowledge of the breaches in 2012-2016, the Authority is satisfied that Mrs Singh knew of the allegations prior to the ERA determination. The Authority finds Mrs Singh's evidence that she did not know what conduct she was supposed to have done and that she "was not involved in Nekita's bottle stores during the times that the ERA were dealing with it" such that she did not demonstrate a lack of candour and that she has been "honest and upfront", to be in direct contradiction to her

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<sup>136</sup> above n 13, at [79]

acknowledgement of the Labour Inspectorate's report and the termination letter she received months before the ERA hearing.

[274] The Authority is also satisfied that Mrs Singh would have known of the inconsistency in the evidence given before the ERA and what she knew to have been alleged in the Labour Inspectorate's report and the Super Liquor termination letter.

[275] Despite being on notice of the allegations made against Nekita, Mrs Singh took no steps to do anything about these prior to the hearing before the ERA.

[276] Otherwise the allegations are that Mrs Singh is unsuitable to hold a manager's certificate because she failed to provide directorship and oversight of Nekita enabling it to engage in the matters set out in the grounds in respect of Nekita; she conducted the five premises improperly; she maintains an association with her husband; and she has failed to monitor the business activities of her co-director husband.

[277] Mrs Singh has accepted that as a director of the licensee company she 'should have done better' in terms of providing directorship and oversight of Nekita, and that she should not have allowed her husband to do the things that he has done.

[278] Mrs Singh says, however, that she delegated the directorship of Nekita to Mr Singh and that she was entitled to rely on him to undertake that role. Mrs Singh's counsel has referred the Authority to *R v Moses*<sup>137</sup> where the High Court said:

Any director, when exercising powers or performing duties as a director, is required to exercise the care, diligence and skill that a —reasonable director would exercise in the same circumstances. At face value, the notion of a —reasonable director does not draw any distinction between those who act in executive or non-executive capacities. However, in determining whether the appropriate degree of care has been applied, —the nature of the responsibilities undertaken by the particular director can be taken into account. The division of responsibilities accords with the general reliance provisions in s 138 of the Companies Act, in that, in particular circumstances, a director is entitled to rely on any other director in performing his or her duties.

[279] There is no doubt that particular directors may have different responsibilities and that a director is entitled to rely on another director to undertake the duties within that other director's designated authority. That, however, is not the situation here.

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<sup>137</sup> *R v Moses HC Auckland CRI-2009-004-001388*, 8 July 2011 at [78]

[280] Mrs Singh has said in evidence that until 2017 she had limited involvement in the running of Nekita as she was running the supermarket and raising children. When Nekita's in-house accountant left the business in August 2017, Mrs Singh said that she became more involved with Nekita in a part-time capacity but that Mr Singh dealt with the majority of things in relation to liquor licensing and the running of the business. Mrs Singh says that her primary duties were reconciling supply transactions, banking, paying suppliers, and invoicing. Mrs Singh says she was never responsible for hiring staff, training staff, making rosters, or operating the payroll. Mrs Singh says she had no involvement with Super Liquor directly.

[281] While in the period since 2017 Mrs Singh may have been able to rely on Mr Singh to undertake his duties in relation to their separate areas of responsibility, the same cannot be said for the period between 2008 and 2017.

[282] The evidence is not that Mrs Singh had certain designated areas of authority during this period and that Mr Singh had others but that Mrs Singh had no apparent areas of responsibility and did not involve herself with Nekita. Moreover, the evidence establishes that Mrs Singh took no interest in understanding what was occurring in a company for which she was a director and 50% shareholder. Repeatedly before the Authority, Mrs Singh denied responsibility for Nekita and sought to divorce herself from the actions of Nekita in the past. In effect she seeks to rely on her having been a director in name only with little or no responsibilities that go with being a director.

[283] As was also stated in *Moses*:<sup>138</sup>

Directors direct; managers manage. That is the essential difference between governance and management. Directors establish the policy or rules that are to be implemented by management and put systems in place to ensure their instructions are carried out. In *Dairy Containers Ltd v NZI Bank Ltd*, Thomas J expressed this idea as follows:

It should not be necessary to restate that it is the fundamental task of the directors to manage the business of the company. Theirs is the power and the responsibility of that management. To manage the company effectively, of course, they must necessarily delegate much of their power to executives of the company, especially in respect of its day to day operations. Although constantly referred to as — “the management”, the executives' powers are delegated powers, subject to the scrutiny and supervision of the directors.

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<sup>138</sup> above n 137, at [74] (citations omitted)

Responsibility to manage the company in this primary sense remains firmly with the directors.

[284] While in many small closely held companies, directors fulfil the dual roles of governance and management, this does not obviate a director's responsibility to establish the policy or rules that are to be implemented, or to scrutinise and supervise the implementation of those policies. In the case of a licensee holding a licence to sell or supply alcohol, a director cannot avoid her responsibilities as director of the licensee company by saying that she had no role in the company and that she was not aware of what was going on.

[285] That the ERA did not find Mrs Singh to be the architect of the breaches or that she even knew of them at the time, does not mean that she fulfilled her obligations as licensee. To the extent that Mr Singh was considered to be for all intents and purposes the CEO of Nekita responsible for managing the day to day business of the business, that does not absolve Mrs Singh as a director of Nekita of her responsibilities under the Act, or more generally, to ensure the licensee company complies with the Act.

[286] Section 214 of the Act reinforces this when it says that at all times when alcohol is being sold or supplied on licensed premises the licensee must take all reasonable steps to enable the manager to comply with the conduct of the premises with the aim of contributing to the reduction of alcohol-related harm. By her own admission, Mrs Singh did not take any steps in relation to Nekita's premises.

[287] In so far as Nekita failed to provide minimum employment entitlements to staff and to maintain proper record keeping practices, the Authority considers that Mrs Singh is tainted by association in circumstances where rather than relying on Mr Singh to undertake his delegated responsibilities, Mrs Singh abdicated her responsibilities completely by taking a hands-off approach to her obligations as licensee.

[288] When Mrs Singh received the Labour Inspector's report in November 2019 she said that she took advice and accepted that she had to take some responsibility for what it contained as director and shareholder. This responsibility, however, did not arise in November 2019 but arose when Mrs Singh became a director in 2002. It was then that her obligations in relation to Nekita arose.

[289] To the extent that unsuitability is established on the part of Nekita, that is necessarily shared by Mrs Singh as a director of Nekita. Her unwillingness to make even the most modest of inquiries into the operations of Nekita, and the breaches admitted by her co-director husband, even when these were spelled out in the termination letter from Super Liquor goes to Mrs Singh character. By her own admission, upon being faced with what can only be described as serious allegations, all Mrs Singh did was express disappointment in her husband.

[290] These matters go directly to Mrs Singh's character. As The Authority has said before, in *Deejay Enterprises Limited*:<sup>139</sup> "The law and human desires of patrons frequently tug in different directions. The police cannot be everywhere ... Self-imposed standards in accordance with the law must be set by licensees and by holders of general Manager's Certificates who control and manage licensed premises". This is more apt today under the current Act than it was under the previous 1989 Act under which *Deejay* was decided.

[291] The Authority considers that Mrs Singh is not suitable to be manager of licensed premises and that the grounds of the application against her pursuant to s 285(3)(b) are made out.

### **Desirability**

[292] Given that the grounds of the applications have been established, the question for the Authority is whether it is desirable to make an order cancelling or suspending Nekita's licence and Mrs Singh's manager's certificate.

[293] The Authority agrees with the ERA that the breaches of Nekita are significant. Of concern is the blatant nature of Nekita's disregard for minimum employment standards and for its employees.

[294] It is recognised that Mr Singh was the directing mind and will of Nekita at the time of the breaches and that he has since resigned as a director of Nekita and has undertaken to have no further involvement with the management of Nekita. That goes to whether or not it can be said that Nekita will continue to be controlled by him notwithstanding that he has transferred most of his shares to Mrs Singh. While on the face of it these changes are such that Mr Singh

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<sup>139</sup> *Deejay Enterprises Limited* 531/97-532/97 (15 April 1997) at page 6

will not be in a position to exert control over Nekita, the Authority has residual concerns about Mr Singh's ongoing influence given Nekita was his 'baby', his relationship to Mrs Singh and because he has not stepped away from Nekita completely.

[295] The appointment of Mr John Yoon an independent director, and the engagement of an expert employment lawyer, as well as the services of the ACG, along with the downsizing of Nekita's stores are all positive steps and mean that Nekita is less likely to undertake the kinds of practices it has in the past.

[296] That Nekita has already been sanctioned by the ERA is not a matter on which we place much weight. The Authority's focus is on the likely risk of alcohol-related harm in the future and the suitability of its directors.

[297] Notwithstanding the changes made by Nekita, the Authority considers that it is desirable to cancel Nekita's licences. The primary reason is that Mrs Singh remains a director of Nekita and we do not find Mrs Singh to be a suitable person in her own right.

[298] Before the Authority Mrs Singh said repeatedly said that she could not comment on allegations of which she knew nothing about and was at pains to attribute the past issues with Nekita on Mr Singh and that they were historical. As already stated, the Authority does not accept that Mrs Singh can divorce herself from the actions of the company so easily.

[299] Moreover, despite the evidence of Mr Gulati before the ERA to the effect that he was responsible for the dual payment system when he was not, at a time when Mrs Singh said she was actively involved in the company, and knowing of the outcome of the ERA determination, Nekita rehired him only to now advise, in the face of the proceedings before us that he will be leaving the company at some date in the next month. That Mrs Singh does not appear to appreciate the seriousness and significance of the ERA decision until now is of concern.

[300] Before the Authority, Mrs Singh also accepted that Nekita's Pages Road premises in Aranui is in one of the most deprived suburbs in Christchurch. Despite this, when questioned about why a fridge for single sales was located at the entry to the store and why there was a trolley of single sale ciders and beers on display with a sign saying "Seven for \$10.00" (which ACG said equated to a unit price of \$1.43 and said was "extremely cheap alcohol"),

Mrs Singh replied that they only have a handful of customers who buy those and they are not promoted.

[301] Moreover, in response to whether Mrs Singh saw a problem with her Wainoni Road manager (also in deprived Aranui), saying that Woodstock (a ‘ready-to-drink’) and single cans were the most popular purchase at Wainoni Road, Mrs Singh replied that Woodstock was ‘just a core product’ and that ‘they have not caused any harm by selling single beers’.

[302] The Authority finds these responses most underwhelming. These responses demonstrate that Mrs Singh either does not understand or is not bothered by the risks associated with single sales, and the promotion of very cheap alcohol in deprived localities. These matters are of considerable concern to the Authority in such localities and are matters that go to the object of the Act.

[303] As we said in *Shady Lady Lighting v Lower Hutt Liquormart Ltd*,<sup>140</sup> the vulnerability of an area, in effect, raises the threshold of suitability in terms of whether the grant of the licence will result in a reduction or an increase in alcohol-related harm. On appeal, Churchman J found no error of law in this approach.<sup>141</sup> While that case involved an application for a licence, the same principle applies in relation to a manager’s certificate. In terms of managing the risk of alcohol-related harm, the vulnerability of an area makes it all the more important that managers of premises understand the risks associated with the sale and supply of alcohol.

[304] Even when these matters were pointed out by ACG, Mrs Singh failed to appreciate the seriousness of these concerns and sought to promote the fact that ACG had reviewed each premises. This touches on the very concerns about implementation raised by the Applicants.

[305] Mr Yoon is also an inexperienced licensee. While there is no doubt Mr Yoon’s legal acumen will assist with the governance and obligations of Nekita to comply with the law, Mr Yoon will not play a part in the day to day management of Nekita when the issues facing Nekita are ones of implementation.

[306] In the same vein, while it is undoubtedly positive that Nekita now seeks to engage expert employment advice and the services of the ACG, the pressing issue is about how well

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<sup>140</sup> *Shady Lady Lighting v Lower Hutt Liquormart Ltd*, [2018] NZARLA 198 at [126]

<sup>141</sup> *Lower Hutt Liquormart Ltd v Shady Lady Lighting Ltd*, [2018] NZHC 3100, [2019] NZAR 403 at [65]

Nekita's premises will be managed on the ground and this will fall on Mrs Singh's shoulders alone. For the reasons stated, the Authority is not satisfied that Mrs Singh is suitable for this task.

[307] The Authority is not satisfied that Mrs Singh has taken the breaches by Nekita and her husband seriously until such time that the applications were filed with the Authority. While the Authority is satisfied that Mrs Singh has taken steps to remedy past failings, these can only be described as having been implemented very late, after the applications were filed with the Authority.

[308] There can be no doubt that Mrs Singh's past complacency has been reflected in systemic failures of the licensee in the past. While she may not have been aware of what her husband was doing at the time, as a director she ought to have been, or at least made inquiries. When she did become aware, nothing was done until she faced the threat of cancellation of the licence and of her manager's certificate.

[309] This past complacency reflect not only on her suitability but Nekita's suitability to hold a licence while she remains involved with the company.

[310] As the Authority has previously said, it does not take cancellation of a licence or a manager's certificate lightly. The Authority has no confidence, however, that Mrs Singh even with the guidance and support of Mr Yoon and others, is suitable to hold either a licence or a manager's certificate.

[311] For this reason, the Authority considers that the merits of these applications warrant cancellation of the off-licences and Mrs Singh's manager's certificate.

[312] As we said in *Miklos v Shen*:<sup>142</sup> "It is clear that by virtue of the provisions contained in the Act (s 4 and ss 288 to 290), that the Authority is mandated by Parliament to take a more vigorous approach to breaches of this Act and the penalties it imposes, including cancellation of licences and certificates."

[313] Given that the key concerns include the suitability of Mrs Singh and Nekita, adjournment of the applications is not appropriate.

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<sup>142</sup> *Miklos v Shen* [2015] NZARLA PH 285

## Conclusion

[314] By way of conclusion, the Authority is satisfied that the grounds of the application in relation to s 280(3)(a) and (b) of the Act have been established in relation to Nekita and Mr Singh.

[315] The Authority is also satisfied that the grounds of the application in relation to s 285(3)(b) of the Act have been established in relation to Mrs Singh and that she is unsuitable to hold a manager's certificate.

[316] The scheme of the act is that in the case of cancellations pursuant to s 280 and s 285, these are to take effect on being satisfied of the grounds of the applications, and that it is desirable to make an order. There is no corresponding provision to s 228 in the Act (which applies in the case of a decision not to renew a licence and provides for expiry within a period of up to three months). This is appropriate given the nature of the finding.

[317] For this reason, the cancellation of the licence and Mrs Singh's manager's certificate, are to take immediate effect from the date of this decision.

## Orders

[318] For the reasons stated, the Authority orders:

(a) pursuant to s 280(5)(d) of the Act, off-licence numbers:

- i. 60/OFF/28/2017;
- ii. 60/OFF/113/2018;
- iii. 60/OFF/38/2019;
- iv. 60/OFF/100/2017; and
- v. 60/OFF/45/2019 —

issued to Nekita Enterprises Limited are cancelled with effect from the date of this decision; and

(b) pursuant to s 285(5)(b) of the Act, manager's certificate number 60/CERT/612/2016 issued to Shereen Vandana Singh is cancelled with effect from the date of this decision.

[319] For completeness, had Mr Singh retained his manager's certificate the Authority would also have ordered its cancellation.

Judge K D Kelly  
Chair, Alcohol Regulatory and Licensing Authority