

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 133/09
5146821

BETWEEN ROCHELLE SUSAN MARIE
ASKIN
Applicant

AND AMIT GULATI
First Respondent

AND AVINASH ENTERPRISES
LIMITED
Second Respondent

Member of Authority: Philip Cheyne

Representatives: Rochelle Askin, the applicant in person
Amit Gulati, the first respondent in person
Amit Gulati, Advocate for the second respondent

Investigation meeting: 17 July 2009 at Christchurch

Documents supplied: 5 August 2009 by the respondents

Further submissions: 12 August 2009 by the applicant
21 August 2009 by the respondents

Determination: 21 August 2009

DETERMINATION OF THE AUTHORITY

[1] Rochelle Askin worked on a casual basis in a business in Rangiora called La Tandoor Restaurant/Takeaways between about July and September 2008. In her statement of problem Ms Askin says her employment relationship problems are *sexual harassment I suffered while working for Amit Gulata, mismanagement – no work contract, no pay slips, no work roster, drop in wages, and wages not paid*. The statement of problem names the respondent as *Amit Gulata, Manager/Owner Avinash Enterprises Ltd*.

[2] Although identified as Amit Gulata in these proceedings, the correct name of the person who is the sole shareholder and director of Avinash Enterprises Limited is Amit Gulati and I make an order amending the proceedings accordingly. I am satisfied that the statement of problem was served on Mr Gulati on 29 April 2009. Despite that, no statement in reply was received by the Authority. I scheduled an investigation meeting and had the notice of meeting and a notice of directions served on Mr Gulati and on the company called Avinash Enterprises Limited. It was made clear that the identity of Ms Askin's employer and therefore the correct respondent would be considered as part of the Authority's investigation.

[3] Mr Gulati attended the investigation meeting and gave evidence on oath, as did Ms Askin. During the meeting I required Mr Gulati to provide various records which he eventually did on 5 August 2009. That material was copied to Ms Askin and she wrote to the Authority in response. Her correspondence in turn was copied to Mr Gulati with a request for any comment by 21 August 2009 which he provided.

The employer's identity

[4] Ms Askin was not provided with a written employment agreement or any other way of identifying the legal entity that she entered into an employment relationship with. She simply dropped off her CV at the La Tandoor business premises and later received a phone call from Mr Gulati who employed her.

[5] There is a registered company called *Avinash Enterprises Limited*. Mr Gulati is the sole director and shareholder. The Companies Office website currently reports that the registrar is satisfied that the company has ceased to carry on business and has initiated action to remove the company from the register. The last filing recorded on the website is *Online Particulars of Directors* dated 15 June 2007.

[6] Ms Askin was sometimes paid by cash and sometimes by cheque. A cheque account in the name of *Avinash Enterprises Limited T/A La Tandoor Takeaway* was used. That is the only way that Ms Askin could identify that her employer was apparently a company. However, when she was employed by Mr Gulati he failed to disclose that he was employing her on behalf of a company or an entity other than himself. Given that, Ms Askin is entitled to sue Mr Gulati personally as she has done. Any orders resulting from these proceedings will be made against both respondents jointly and severally.

Sexual harassment

[7] The complaint against Mr Gulati is that he sent a text message and phoned Ms Askin asking her to go for a drive in his car. Ms Askin responded by telling him she was not interested and the matter went no further. The evidence of both Ms Askin and Mr Gulati amounts to no more than that.

[8] It is sexual harassment if an employer makes a request of an employee for sexual activity that contains an express or implied threat about the employee's employment: see s.108(1)(a) of the Employment Relations Act 2000 for the full definition. While Mr Gulati's text message and phone call could possibly be regarded as an indirect request for some sexual activity they were not accompanied by any implied or overt threat about Ms Askin's employment. Accordingly Mr Gulati's conduct did not amount to sexual harassment under s. 108.

[9] It is also sexual harassment if the employer by use of language, visual material or physical behaviour of a sexual nature subjects the employee to unwelcome behaviour that either by its nature or through repetition has a detrimental effect on the employee's employment: see s.108(1)(b) of the Employment Relations Act 2000 for the full definition. Here, Mr Gulati's advances were unwelcome but they were not of such a nature, nor were they repeated, so as to have a detrimental effect. In addition, there is no evidence that the text and phone call were of a sexual nature. Again, the situation falls short of the statutory definition of sexual harassment.

[10] There is a third definition of sexual harassment under the Employment Relations Act 2000. If an employee is subjected to behaviour defined in s.108(1)(a) or (b) described above by someone other than a representative of the employer but who is an employee, a customer or a client, that can amount to sexual harassment by the employer if other circumstances also apply. The employee must complain about the behaviour to the employer, the employer must then inquire into the facts, and if satisfied that the behaviour took place, they must then take all practicable steps to prevent any repetition of the behaviour. If there is any repetition of the behaviour and it is established that the employer had not taken all practicable steps, the employee is then deemed to have a sexual harassment grievance against the employer.

[11] Here, on her account, Ms Askin was being touched inappropriately and was the subject of sexual advances by another employee. She complained about this to Mr

Gulati. Mr Gulati spoke to the other employee and the unwelcome behaviour stopped. Mr Gulati says that he never received any complaint from Ms Askin but observed himself the touching and kissing between Ms Askin and another employee. Mr Gulati says that he was not satisfied having spoken to the other employee that the touching and kissing was actually unwelcomed by Ms Askin. That is disputed by Ms Askin who says the attention was unwelcome. However it is not necessary to resolve the dispute since it is common ground that there was no repetition of the behaviour after Mr Gulati spoke to the other employee, and (on his account) to Ms Askin. The circumstances do not therefore amount to a sexual harassment personal grievance against the employer.

Compensation

[12] This claim is based on Ms Askin's losses after she ceased employment at *La Tandoor*. To succeed, Ms Askin must establish a grievance relating to the termination of her employment.

[13] Ms Askin says that after she rejected Mr Gulati's advances he dropped her wages from \$12.50 per hour to \$9.00 per hour. A short while after this she left, having had enough of the mismanagement mentioned above. Ms Askin wrote a letter dated 11 September 2008 to Mr Gulati which included her complaints about sexual harassment, mismanagement and the drop in her wages.

[14] Mr Gulati says that Ms Askin's work deteriorated so he reduced her pay. He denies that the pay reduction had anything to do with Ms Askin rejecting his invitation to go for a drive with him. Mr Gulati also says that the reduction was from \$12.50 to \$11.25 per hour, not to \$9.00 per hour.

[15] I reject Mr Gulati's evidence about any deterioration in the standard of Ms Askin's work. Even if the standard of her work had deteriorated, Mr Gulati was not entitled to unilaterally reduce her pay. I find that Ms Askin resigned in response to Mr Gulati's unlawful behaviour of reducing her pay. It was a very serious breach of the respondents' obligations to Ms Askin and I find that it was reasonably foreseeable that an employee would resign in response. Ms Askin has a personal grievance of unjustified dismissal as a result.

[16] Ms Askin's claim is for compensation of \$5,000.00 to cover her outstanding wages, wages short paid and the *severe stress* suffered working at the restaurant and during her period of unemployment while looking for other work.

[17] I will deal with the arrears of wages separately so that cannot be used to support this claim. I was not given any details of Ms Askin's lost remuneration following the termination of this employment so I am not in a position to assess any compensation under that head. Part of Ms Askin's complaint is about the casual nature of the employment such as a lack of advance rosters and so on but that is not relevant to the established personal grievance. To some extent her indignation is also connected to her sexual harassment claims but I must set that aside as those claims have not been upheld. A just approach in the present case is to order the respondents to pay Ms Askin a modest sum in compensation for the upset caused by the termination of her employment. I assess that sum as \$2,500.00.

Arrears of wages

[18] There are difficulties assessing this because of the lack of proper records. Mr Gulati provided a notebook in which are recorded start and finish times and hours worked. However it is not possible to say when the work was performed or to identify pay periods. Ms Askin says that the note book does not record all her hours of work but she does not have any separate record.

[19] Mr Gulati also provided company cheque butts from one cheque book. There are three butts (100553, 5/8/08, \$315.00; 100560, 14/8/08, \$290.00; and 100590, 3/9/08, \$184.50) on which there is handwriting indicating a payment to Ms Askin. The last of those matches the copy of Ms Askin's final pay cheque which she attached to the statement of problem. However it is not possible to relate the cheques to hours worked as recorded in the notebook. The evidence of both Mr Gulati and Ms Askin is that she was sometimes paid in cash rather than by cash cheque.

[20] Lastly, Mr Gulati provided a receipt for a payment on 30 October 2008 of \$240.00 to IRD on which there is handwriting that refers to *Rochelle*, presumably Ms Askin. There are no records of PAYE deductions from Ms Askin's wages during the employment. It seems that Mr Gulati simply paid tax to IRD once the employment had ended.

[21] I am satisfied that the contractually agreed rate of pay was \$12.50 per hour. I am satisfied that there has been a default in payment in respect of the last period of Ms Askin's employment. I am satisfied that Mr Gulati and/or the company failed to keep proper time and wage records. Because of that failure it is not possible to accurately quantify the arrears of wages and holiday pay. This is an appropriate case in which to apply s.132(2) of the Employment Relations Act 2000 which reverses the usual burden of proof. Ms Askin's claim to have been paid for her last period of work at only \$9.00 per hour has not been disproved by the respondents. Ms Askin's claim to have worked 20.5 hours during the last period of her employment has not been disproved by the respondents. On those figures she should have been paid \$256.25 gross not \$184.50 so the respondents must now pay her a further \$71.75 gross.

[22] Ms Askin will also be entitled to holiday pay at 8% of her gross earnings. Mr Gulati says that Ms Askin worked 156.5 hours and refers me to the notebook. Although Ms Askin says that she worked more hours I have not been given any details about that so I will base a holiday pay calculation on the notebook. Her gross on those hours should have been \$1,956.25 so holiday pay should have been \$156.50 (gross). The respondents are to pay that sum to Ms Askin.

Minimum standards

[23] Mr Gulati is fortunate that Ms Askin did not instruct an experienced representative to pursue this matter for her. There are a number of breaches of the law for which penalties could have been sought and probably would have been ordered: a failure to provide a written employment agreement; a failure to keep proper time and wage records; a failure to pay holiday pay; and breach of the employment agreement by reducing Ms Askin's pay.

[24] Mr Gulati should seek assistance from the Department of Labour or a professional advisor to ensure that his (or the company's) employment practices comply fully with the law.

Summary

[25] Ms Askin has a personal grievance of unjustified dismissal.

[26] The following orders are made against both Mr Gulati and Avinash Enterprises Limited jointly and severally.

[27] The respondents are to pay Ms Askin compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 of \$2,500.00.

[28] The respondents are to pay Ms Askin arrears of wages totalling \$71.75 (gross).

[29] The respondents are to pay Ms Askin arrears of holiday pay totalling \$156.50 (gross).

[30] The respondents are to pay Ms Askin \$70.00 being the lodgement fee paid by her.

Philip Cheyne
Member of the Employment Relations Authority