

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 286  
5398947

BETWEEN                      AFFAAN AZAAN  
   Applicant

A N D                              UPINDER MANN  
   ENTERPRISES LIMITED  
   TRADING AS VEGE OASIS  
   Respondent

Member of Authority:      Rachel Larmer

Representatives:              Applicant in person  
   Radhe Nand and Anna Wu, Counsel for Respondent

Investigation Meeting:      26 June 2013 at Auckland

Date of Determination:      05 July 2013

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**DETERMINATION OF THE AUTHORITY**

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- A.      Upinder Mann Enterprises Limited trading as Vege Oasis (Vege Oasis) did not dismiss Mr Affaan Azaan so his personal grievance claim for unjustified dismissal does not succeed.**
- B.      Vege Oasis unjustifiably disadvantaged Mr Azaan in his employment by failing to respond to his attempts to clarify whether he still had a job to return to.**
- C.      Vege Oasis is ordered to pay Mr Azaan \$2,000 to compensate him for his unjustified disadvantage grievance.**

**Employment relationship problem**

[1]      Mr Azaan says he has personal grievance claims for unjustified dismissal and unjustified disadvantage. He began employment with Vege Oasis in August 2011 as

Store Manager of the Mangere East store. Mr Azaan was given leave from 08 February – 02 April 2012 because his wife was expecting their first baby on 18 February 2012.

[2] Whilst on leave Mr Azaan heard rumours Vege Oasis had employed someone else in his position. Mr Azaan attempted to contact Mr Baldev Singh the sole director of Vege Oasis (also a 50% shareholder with his wife, Mrs Manjit Kaur) to find out if the rumours were true.

[3] Mr Singh was unwell over the relevant period so was not attending work. Mr Azaan was told by other staff that Mr Singh was unwell but not that Mr Singh was not at work at all. Mr Azaan left messages with the accounts/payroll clerk asking for Mr Singh to call him, but it appears she did not pass Mr Azaan's messages on to Mr Singh.

[4] Mr Azaan did not return to work as scheduled on 02 April 2013 because he says he was concerned he no longer had a job to return to. Mr Azaan says he held off returning to work until he received confirmation from Mr Singh that he was wanted back at work and that there was still a job for him to do.

[5] I consider that was an unacceptable position for Mr Azaan to adopt because Vege Oasis had not said or done anything to him to lead him to believe he was not expected or required back at work as the parties had agreed at the time Mr Azaan went on leave.

[6] I accept Mr Singh's evidence that he did not know Mr Azaan had been attempting to contact him regarding rumours he had been replaced by a new employee. Although Mr Azaan sent Mr Singh text messages, because of Mr Singh's illness and unfamiliarity with technology he had not cleared those messages.

[7] When Mr Singh found out Mr Azaan had not attended work as scheduled on 02 April he told his wife not to worry because he believed Mr Azaan would return to work as soon as he was able to. Mr Singh assumed Mr Azaan's non-attendance at work was related to family problems because he was aware Mr Azaan's wife had been gravely ill after the birth of their child.

[8] Mr Azaan turned up at Vege Oasis on 20 April 2012 to ask for an ACC form recording his earnings to be completed. Mr Singh was not at work because he was still

ill but Mr Azaan saw his wife Mrs Kaur, who arranged for the ACC form to be completed and handed back to Mr Azaan.

[9] During this visit on 20 April Mr Azaan was also given his final pay. There is a conflict in the evidence about why that occurred. Mr Azaan claims Mrs Kaur just handed him his final pay, which he says confirmed his concern that he had been replaced by someone else whilst on leave. He says he was shocked to be presented with his final pay when all he was attempting to do was to obtain the completed ACC form so he could hand it in to ACC.

[10] Mrs Kaur says she gave Mr Azaan his final pay because he told her he was not coming back to work so wanted his final pay. Mrs Kaur says Mr Azaan told her he had relatives from overseas staying so he wanted to take them around and needed the balance of his final holiday pay to do that.

[11] Mr Azaan admits he had relatives staying but says he did not take them around and did not say he would not be returning to work or that he wanted his final pay. Mr Azaan admits he did not ask Mrs Kaur why she was giving him his final pay. Nor did he discuss with her his concerns that he had been replaced by another employee.

[12] I am satisfied that Mr Azaan's information about someone else replacing him was incorrect and that Vege Oasis wanted and was expecting Mr Azaan to return to work on 02 April or as soon as he could after that date.

[13] Mr Azaan claims he was dismissed by Mrs Kaur when she handed him his final pay on 20 April. Vege Oasis denies dismissing Mr Azaan. It says he resigned. Vege Oasis says Mr Azaan's employment only ended on 20 April because he told Mrs Kaur he would not be returning to work so he wanted to be paid his final pay.

## **Issues**

[14] The following issues are to be determined:

- a. Was Mr Azaan disadvantaged in his employment?
- b. If so, was the disadvantage justified?
- c. If not, what if any remedies should be awarded?

- d. Was Mr Azaan dismissed?
- e. If so, was Mr Azaan's dismissal justified?
- f. If Mr Azaan's dismissal was unjustified, what if any remedies should be awarded?
- g. What costs should be awarded to the successful party?

**Was Mr Azaan disadvantaged?**

[15] Mr Azaan left a number of messages with the payroll/accounts clerk asking Mr Singh to call him and sent text messages to Mr Singh asking for him to contact him. None of these attempts by Mr Azaan to contact Mr Singh to clarify his employment situation were successful. I consider this disadvantaged Mr Azaan because that left questions in his mind about whether he had been replaced and whether he had a job to return to.

**Was the disadvantage justified?**

[16] I find Vege Oasis was not justified in disadvantaging Mr Azaan by failing to respond to his attempts to contact Mr Singh.

[17] I accept Mr Singh was genuinely unwell and therefore not working in the business at the relevant times. However, Vege Oasis was still operating in Mr Singh's absence so it should have put processes in place to ensure Mr Azaan could obtain answers to his employment queries despite Mr Singh not being at work.

[18] Mrs Kaur had stepped into her husband's shoes to run the business while he was ill so it fell to her to ensure that Mr Azaan's communications were responded to. I find Vege Oasis was not justified in disadvantaging Mr Azaan by failing to respond to his communications about his job whilst he was on leave.

**What remedies should be awarded?**

[19] I accept Mr Azaan's evidence that he suffered significant distress, stress and uncertainty as a result of Mr Singh's failure to respond to his attempts to communicate with him to clarify his employment situation.

[20] I order Vege Oasis to pay Mr Azaan \$2,000 under s.123(1)(c)(i) of the Employment Relations Act 2000 (“the Act”) to compensate Mr Azaan for the humiliation, loss of dignity and injury to feelings the unjustified disadvantage caused him.

**Was Mr Azaan dismissed?**

[21] Mr Azaan bears the onus of establishing on the balance of probabilities that his employment ended as the result of a dismissal. I find he has been unable to do so.

[22] Mr Singh was relying on Mr Azaan to return to work. Mr Azaan was viewed as a critical part of Vege Oasis’ future and planned expansion. When Mr Singh found out Mr Azaan had not returned to work on 02 April he did not implement the abandonment clause in Mr Azaan’s employment agreement but instead assumed Mr Azaan would return to work as soon as he could.

[23] Vege Oasis was also generous to Mr Azaan because it provided him with paid annual holiday in advance, agreed for him to take unpaid leave, paid him his full sick leave entitlement in advance as well as supporting his application for paid parental leave. Vege Oasis also made no attempts to recover what would have been salary overpayments from Mr Azaan. Nor did it invoke the abandonment clause in his employment agreement when he failed to return to work on 02 April.

[24] Mrs Kaur as a shareholder in the business had to step in as a result of her husband’s illness to keep the business operating. She was not experienced in running the business and it was not something she wanted to do. Vege Oasis needed and wanted Mr Azaan to return to work. It had no reason to suddenly present him with his final pay because it was counting on him to return to work and alleviate Mrs Kaur of the pressure she was under in running the business.

[25] I therefore consider it more likely than not that Mr Azaan did ask Mrs Kaur for his final pay. That view is influenced by the fact Mr Azaan did not return to work as agreed on 02 April, he did not ask Mrs Kaur whether he had been replaced, he did have relatives from overseas staying so he must have told Mrs Kaur that, he did not query why he had been presented with his final pay, nor did he tell Mrs Kaur he wanted to return to work or ask if he still had a job to return to.

[26] It was a big loss and inconvenience to both parties that Mr Azaan's employment ended. However, I am not satisfied on the balance of probabilities that he was dismissed.

[27] I consider the problems that arose were a direct result of Mr Azaan's failure to return to work on the agreed date so he must bear the responsibility of that ill-considered decision. It would be very odd for Mrs Kaur to have given Mr Azaan his final pay if he had not requested it because he was needed to help run the business. Losing Mr Azaan was a real blow to Vege Oasis so I doubt it would have dismissed him on 20 April.

[28] I consider that Mr Azaan's reliance on unsubstantiated rumours, his failure to return to work as agreed on 02 April and his failure to discuss his concerns about his employment with Mrs Kaur on 20 April were the catalysts for his employment ending. These are all factors that arise from Mr Azaan, not from his employer. I therefore do not accept that Mr Azaan's employment ended at Vege Oasis' initiative, so I am not satisfied he was dismissed.

[29] Accordingly, Mr Azaan's unjustified dismissal claim does not succeed.

### **Costs**

[30] Each party has had a measure of success so my preliminary view is that this may be an appropriate matter for costs to lie where they fall. However, Vege Oasis advised it wants to be heard on the issue of costs because without prejudice except as to costs offers have been made.

[31] The parties are encouraged to resolve costs by agreement. If that is not possible then Vege Oasis has 14 days from the date of this determination to file a costs memorandum with Mr Azaan having 14 days from the date he receives it to respond.

**Rachel Larmer**  
**Member of the Employment Relations Authority**