

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Christopher Barry, (Applicant)

AND Anoop Investments Limited and 2 ors (Respondent)

REPRESENTATIVES Matt Young, for Applicant
Sanjay Sharma, for Respondent

MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 2 November 2006
SUBMISSIONS RECEIVED 18 December 2006

DATE OF DETERMINATION 18 January 2007

DETERMINATION OF THE AUTHORITY

[1] Christopher Barry was employed as the Butchery Manager¹ at the "Shop n' Save" supermarket in Otara until his employment ended effective 28 September 2006. He did not have a written employment agreement and says that consequently he is unclear who his employer was. He seeks that the Authority determine the identity of his employer and award a penalty regarding his employer's failure to provide a written employment agreement. Mr Barry says he was unjustifiably constructively dismissed and seeks remedies consequent to that alleged unjustified dismissal. Mr Barry seeks wage arrears for hours rostered less than 40 per week and payment of a loyalty bonus, which he says were terms of his employment. He has raised personal grievances for disadvantage relating to these claims.

[2] Mrs Balwinder Basra and Mr Gurpreet Singh are directors of Anoop Investments Limited. They say Anoop Investments Limited operates the "Shop 'n Save" supermarket and employed Mr Barry. They say there was never any agreement that Mr Barry would be employed for 40 hours per week or that he would receive a loyalty bonus. They say he resigned from his employment.

[4] During the course of the investigation of this employment relationship problem I received evidence from Mr Barry, Mrs Basra, Mr Singh and Mr Greg Shore, a friend of Mr Barry's.

[5] I record that the parties have attended mediation.

[6] To determine this employment relationship problem the Authority must resolve the following issues:

- (i) who Mr Barry's employer was;
- (ii) what the parties agreed regarding hours of work and the loyalty bonus; and
- (iii) whether Mr Barry's resignation amounted to an unjustified constructive dismissal.

[7] A timetable for the filing of written submissions was set at the conclusion of the investigation meeting. When, without explanation, the applicant did not comply with that

¹ Refer references Gurpreet Singh and Balwinder Basra dated 31 March 2006

timetable, minutes were issued on 1 and 11 December 2006 first suspending and then revising the timetable. Again, without explanation the applicant did not comply with the new timetable. After the return from the Christmas New Year break the Authority contacted Mr Young and asked when closing submissions would be filed. He advised that they would be filed on Wednesday, 17 January 2007. Regrettably this determination has been issued without the benefit of closing submissions being filed on behalf of Mr Barry.

Identity of the employer

[8] Mr Barry says he believes Mr Singh personally employed him. He says it was Mr Singh who approached him about working at "Shop n' Save", that at all times he said he was the boss, that he received hand written payslips which did not identify the employer and that he did not have a written employment agreement. He said he was aware of Anoop Investments Limited because that was the name on delivery dockets received in the butchery and that he heard the name Anoop but understood that was a reference to Mrs Basra's son.

[9] Mrs Basra and Mr Singh rely on IRD records which refer to Anoop Investments Limited as Mr Barry's employer responsible for payment of PAYE. They say Anoop Investments Limited employ all staff, pay all wages and hold the lease on the shop.

[10] I am satisfied that Anoop Investments Limited was Mr Barry's employer. The evidence is clear that that company paid his wages and operated Shop 'n Save and that Mr Barry was aware that Mr Singh was acting as a representative of that company. Mr Barry instructed Mr Young to raise his personal grievances with Anoop Investments Limited, naming Mr Singh as its Managing Director.

Terms of employment

(i) failure to provide a written employment agreement

[11] Mr Barry and Mr Singh have known each other for a number of years having operated neighbouring businesses prior to Mr Barry's employment with Anoop Investments Limited. In July 2004 Mr Singh asked Mr Barry if he would be interested in working at the Shop n' Save supermarket. Mr Singh told me that Anoop Investments Limited had recently purchased the business and he needed a qualified butcher (Mr Barry is a qualified butcher) to lift the standards in the butchery department. The parties entered negotiations over an employment agreement. Nothing was put in writing.

[12] Mr Barry said he asked for a written employment agreement several times during the negotiations but did not repeat that request after he started work at Shop 'n Save. Mr Barry said he did not turn his mind to the issue again until Mr Singh told him he could no longer employ him and he instructed Mr Young to raise the issue with his employer.

[13] Mr Singh said he distributed written employment agreements to all staff when the business opened on 13 September but that he overlooked Mr Barry's because he commenced his employment on 27 September and he (Mr Singh) was busy with the business. He said he would have given Mr Barry a written employment agreement if he had asked for one.

[14] An employer must provide a written employment agreement to an employee prior to employment commencing². There is no dispute that Anoop Investments Limited failed to meet this obligation.

[15] Mr Barry asks that the Authority impose a penalty against Anoop Investments Limited for its failure to comply with its section 65 obligations. I accept that this failure has created uncertainty about Mr Barry's terms of employment and this uncertainty has resulted in this matter now being considered by the Authority. I also accept that Anoop Investments Limited intended to provide written employment agreements to all staff and that Mr Barry's was

² Section 65 Employment Relations Act 2000

overlooked because of the pressures of starting a new business. Such an oversight is not evidence of wilful avoidance of section 65 obligations. I decline to award a penalty.

(ii) hours of work

[16] Mr Barry said he and Mr Singh agreed that he would work no less than 40 hours per week and no more than 50 hours per week. He recalled a specific exchange during the negotiation of the terms of his employment when he said to Mr Singh that he would not work 70 to 80 hours per week and would only work between 40 and 50 hours per week.

[17] Mr Singh says he and Mr Barry discussed starting times and agreed that Mr Barry would work Monday to Saturday, but that they never agreed what his hours of work would be. Mr Singh said Mr Barry was rostered the hours that were available. He said that it was his intention over time to reduce the skilled butcher's (i.e. Mr Barry's) hours once the butchery was running smoothly. There is no evidence that he discussed this intention with Mr Barry.

[18] Mr Barry's wage and time records have been made available to the Authority. They show that during the first two months of his employment Mr Barry consistently worked between 44 and 50 hours per week, that until August 2005 Mr Barry's hours fluctuated between 35 and 41 hours per week and from August 2005 until his employment ended his hours were in the mid to high 20s per week.

[19] Mr Barry said he raised his concerns about the reduced hours verbally with Raj another butchery employee (who is also referred to as the butchery manager) and Mr Singh. He was unable to give details of these discussions. Mr Singh said Mr Barry did not raise any concern. There is no evidence that Mr Barry raised any concerns about his rostered hours until Mr Young wrote raising the issue in April 2006, this was 18 months after he commenced employment with Anoop. Mr Singh said Mr Barry never raised such a concern.

[20] There is a clear dispute between the parties. Standing back from the detail of the evidence it is not credible that if Mr Barry understood he had an agreement with Anoop to work a minimum of 40 hours per week that he would wait 16 months to assert that agreement. I find that Mr Barry and Mr Singh did not have an agreement that Mr Barry would a minimum of 40 hours per week.

(iii) no Mondays and Saturdays from July 2005

[21] On 7 July 2005 Mr Barry says Mr Singh presented him with a new roster and told him that his hours would reduce to 35 per week, working Tuesday to Friday rather than Monday to Saturday. The new roster was to start the following week. Mr Barry said he was called up to Mr Singh's office and told his days would be reduced, but that when he protested Mr Singh said it would only be for a few weeks. Mr Singh agrees he presented a roster to Mr Barry on 7 July and in it he was not rostered on Mondays and Saturdays. He says he discussed the reduction in Mr Barry's days with Raj, and then with Mr Barry who agreed to the reduction.

[22] I am not satisfied that Mr Singh conducted a transparent consultation process with Mr Barry regarding the reduction in days in July 2005. Mr Singh did not refer the Authority to any specific information given to Mr Barry or discussed with Raj which would support his claim that business downturn required the reduction. There was no evidence that the store closed on those days. There was no evidence Mr Barry was compensated for the lost days or given a fair period of notice. I am not satisfied that Mr Barry agreed to a permanent reduction in his days of work in July 2005. I think it is likely that he agreed to a reduction of several weeks before he went on planned annual leave to accommodate a request from his employer but that he did not agree to a permanent reduction in hours.

[23] Mr Singh and Mr Barry had an agreement that Mr Barry would be rostered work on Mondays and Saturdays (however, there was no agreement as to the number of hours Mr Barry would be rostered). Mr Singh did not get Mr Barry's agreement to reduce his working days; he presented him with a roster and told him it would be implemented. This breached

the terms of the employment agreement.

[24] Anoop Investments Limited is ordered to pay Mr Barry wage arrears for Saturdays and Mondays rostered off from August 2005 until his resignation effective 28 September 2006, to be paid at the average number of hours worked on Saturdays and Mondays from 27 September 2004 until 7 July 2005.

[25] Mr Barry says he was unjustifiably disadvantaged by the manner in which his days were reduced. Mr Barry said he did not agree to the reduction and that his reduced pay left him unable to meet his obligations and embarrassed him in front of his friends and family. The grounds for this personal grievance arose in July 2005 but the personal grievance was first raised with the employer on 13 April 2006. The personal grievance is out of time³, no exceptional circumstances have been relied on. This claim cannot succeed.

(iii) loyalty bonus

[26] Mr Barry said that during the negotiation of his terms of employment in response to his claim for \$25 per hour Mr Singh offered \$22 per hour to increase to \$25 per hour after six months. There is no evidence that Mr Barry raised the increase of his hourly rate at the six months anniversary of his employment with Anoop Investments Limited.

[27] Mr Singh says no such agreement was reached and that Mr Barry accepted his offer of \$22 per hour.

[28] Mr Shore recalled a discussion about hourly rates but could not recall what was agreed.

[29] The evidence is insufficient to support Mr Barry's claim that this term was agreed between the parties. The claim is declined.

Constructive dismissal

[30] On 28 March 2006 Mr Singh told Mr Barry that he could no longer afford to employ him and that he should start looking for other employment. Mr Singh told me he wanted to maintain his relationship with Mr Barry but the business was experiencing a down turn and as Mr Barry was the highest paid employee he was selected to go. In support of his desire to maintain his relationship with Mr Barry Mr Singh has referred to the positive references he and Mrs Basra wrote for Mr Barry, at his request, at about this time.

[31] Mr Barry then instructed Mr Young to write to Anoop Investments Limited on 13 April 2006 raising a wage arrears claim and personal grievance regarding the reduction of his hours of work without consultation.

[32] Mr Barry says that from when he raised his personal grievance on 13 April 2006 his relationship with Mr Singh and Mrs Basra deteriorated and this placed him under so much stress that he was forced to tender his resignation. Mr Barry relies on three specific examples to support his claim:

- (i) he noticed the store cameras were trained into the butchery when, he says, they had always been trained on the opposite supermarket aisle;
- (ii) Mr Singh declined to require Mrs Basra to apologise when she challenged his long standing practise of taking home frozen expired meat for his dogs; and
- (iii) Mr Singh and Mrs Basra's attitude towards him changed – he had always prepared their personal meat, but they stopped asking him to do so and they spoke Hindi and Punjabi more frequently in situations where they had spoken English and this made him feel isolated.

[33] I asked Mr Barry if he had raised his concerns with Mr Singh and Mrs Basra that their

³ Section 114 Employment Relations Act 2000

relationship was deteriorating or had raised the specific examples he seeks to rely on. He said the only matter he raised was Mrs Basra's challenge to him taking the dog food home, that Mr Singh confirmed the arrangement but declined to require Mrs Basra to apologise to Mr Barry.

[34] Mr Barry resigned on 21 September 2006, while on a period of sick leave and following the parties attempt to mediate the employment relationship problem (as it was at that stage). I have found that Anoop breached Mr Barry's terms of employment in July 2005 when it reduced his days of work. However, that breach cannot be the cause of Mr Barry's resignation as it had been ongoing for over a year⁴. The other alleged breaches of duty Mr Barry says caused his resignation were not sufficiently seriousness that a risk of resignation would be foreseeable. Further, Mr Barry did not tell his employer about his concerns thereby providing an opportunity to address them.

[35] While I appreciate that raising an employment relationship problem when the employment relationship is ongoing in a small workplace between parties who have a long association would be stressful, the parties were actively engaged in a process to resolve those employment relationship problems and that process was not yet complete. Mr Barry has not made out that he was constructively dismissed.

Costs

[36] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to memorandum should be filed and exchanged within 21 days of the date of determination with any replies being filed within a further 14 days.

Marija Urlich
Member of Employment Relations Authority

⁴ *Auckland Electric Power Board, Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168, at 172