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Catering Masters NZ Limited v Anand [2013] NZEmpC 135 (18 July 2013)

Last Updated: 31 July 2013

IN THE EMPLOYMENT COURT AUCKLAND

[\[2013\] NZEmpC 135](#)

ARC 52/12

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN CATERING MASTERS NZ LIMITED Plaintiff

AND SACHIN ANAND Defendant

Hearing: 2 July 2013

Appearances: Shean Singh, counsel for plaintiff

David Vinnicombe, advocate for defendant

Judgment: 18 July 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] Mr Anand was employed by Catering Masters NZ Ltd (Catering Masters) for a week and a half. He alleges that he was unjustifiably dismissed during a telephone conversation on 9 September 2011. Catering Masters contends that he abandoned his employment.

[2] Mr Anand pursued a grievance against Catering Masters. Following an investigation the Employment Relations Authority (Authority) determined that Mr Anand had been unjustifiably dismissed,¹ and awarded him a contribution to lost wages (of \$7,540 gross), compensation under s 123(1)(c)(i) of the Employment Relations Act

2000 (the Act) (of \$1,500) and disbursements. Catering Masters challenges the

Authority's determination on a de novo basis.

¹ [2012] NZERA Auckland 246.

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[3] Mr Anand was born in Fiji and came to New Zealand in 2008. He enrolled for a course of study at the New Zealand School of Education and obtained a student visa. Once his study was completed he undertook training to become a chef, qualifying in mid 2011. Mr Gounder, the director of the plaintiff company, offered Mr Anand a full time position as a chef in his catering business. Mr Gounder was aware of Mr Anand's immigration status. In a letter of offer dated 19 July 2011 Mr Gounder stated that he would keep the offer of employment open for an indefinite period to enable Mr Anand to organise his work visa. Mr Anand did organise his work visa and commenced work with Catering Masters on 29 August 2011 (although he undertook training from 19 July

2011).

[4] There is a dispute about the extent to which Mr Gounder assisted with the work permit process, and the expenses that were incurred in this regard. I return to this issue later.

[5] On 5 September 2011 Mr Anand assisted Mr Gounder moving equipment into a newly renovated kitchen. He did not work the following day. Mr Anand says that Mr Gounder told him to take the day off in recognition of his efforts. Mr Gounder's evidence was that he had not told Mr Anand that he could take 6 September off, and that Mr Anand simply failed to turn up to work. Although (on Mr Gounder's evidence) Mr Anand had taken an unauthorised day off work without explanation, Mr Gounder did not raise any issues with him when he returned to work on 7 September.

[6] Difficulties arose on 8 September, although what occurred is in dispute. Mr Anand says that he was icing a cake, that Mr Gounder took exception to the way in which he was undertaking the task, and that he struck him severely on the back. He says that the blow hurt him and he sat on the ground and began to cry. He says that Mr Gounder subsequently apologised. Mr Anand says that it was not the first time he had been assaulted by Mr Gounder. He says that Mr Gounder was often bad tempered, would yell at him and slap him from time to time.

[7] Mr Gounder denies that he ever struck Mr Anand. Ms Laisani Dean, who worked at the plaintiff company at the relevant time and who was the only other person

who was present on 8 September, said that she had seen Mr Anand icing the cake, that he had done a good job, and that she had not seen any assault.

[8] Mr Anand says that he visited his doctor on 9 September because of the pain that he was experiencing with his back. His doctor indicated that he should take three days off work in order to recover.

[9] Mr Anand and Mr Gounder had a number of telephone discussions on

9 September. It is clear from telephone records that Mr Anand telephoned Mr Gounder at 8.28 am and that Mr Gounder telephoned Mr Anand at 8.30 am, 10.20 am and again at 3.20pm. Mr Anand says that he rang Mr Gounder to tell him that he would not be coming to work because of his sore back. Mr Gounder telephoned him back two minutes later because, he says, he had not been clear about what Mr Anand had said. Both of these conversations occurred before Mr Anand had seen the doctor. Mr Gounder telephoned Mr Anand while he was at the doctor's, but after he had been seen. Mr Anand told Mr Gounder that the doctor had put him off work for three days. Mr Anand says that Mr Gounder threatened him, saying that if he did not return to work immediately he would have Mr Anand's work visa revoked. Mr Gounder denies saying this, and says that his call was motivated by a concern for Mr Anand's well-being and a desire to find out when he would be returning to work.

[10] It is common ground that Mr Gounder telephoned Mr Anand again later that day, at 3.20 pm. Mr Gounder says that the purpose of this call was to reiterate a request that Mr Anand bring a medical certificate in to work when he returned. Mr Anand says that Mr Gounder repeated his earlier comments that he must return to work immediately and if he did not he need not bother coming back again. Mr Anand says that he took it from what Mr Gounder had said that he had been dismissed, and that Mr Gounder refused to accept the fact that the doctor had "booked" him off work for three days. Accordingly he did not return to work.

[11] Mr Gounder says that Mr Anand abandoned his employment. Mr Anand says that he did not, and would not have abandoned his employment as he needed to work and he needed the job at Catering Masters, as it was linked to his work visa.

[12] To complete the chronology. Mr Anand laid a complaint of assault with the Police on 9 September 2011, and after he says Mr Gounder had terminated his employment. Mr Anand also lodged a claim with the Accident Compensation Corporation (ACC). ACC wrote a letter to Catering Masters on 15 September 2011, referring to a claim from Mr Anand for an injury said to have been suffered by him from a punch sustained in the workplace the previous week. Mr Anand received physiotherapy in relation to contusion on his thoracic spine with inflammation from 16

September 2011. Mr Gounder does not dispute that Mr Anand suffered from an injury to his back but contends that it was a pre-existing injury that he ought to have advised him of when he applied for work with his company.

[13] Mr Gounder did not take any steps to contact Mr Anand until 19 September

2011, 10 days after his 3.20 pm telephone call on 9 September. Mr Gounder says that he rang Mr Anand on 19 September to remind him that it was a term of his contract that he produce a medical certificate if he was off work; that he was expected to report to him whether he wished to continue with his employment; and that if he felt there were any issues relating to his work there was a problem solving procedure for him to follow. By this time Mr Gounder had received the letter from ACC. Mr Anand says that it was Mr Gounder's wife who telephoned him, wanting to know what had happened.

[14] A search warrant was executed on the defendant's premises by the Police on

27 September 2009. In the event no charges were laid.

[15] A grievance was notified on Mr Anand's behalf on 5 October 2011. The grievance alleged that Mr Anand's employment had been terminated on 9 September.

[16] Mr Gounder says that Mr Anand chose not to return to work and that he retained company clothing valued at \$250.

[17] It is apparent that there were three people present at the workplace on 8 September 2011, at the time the alleged assault took place – Mr Anand, Mr Gounder and Ms Dean. Mr Gounder firmly denied the assault and Ms Dean said that no assault had occurred. Mr Anand said that he was surprised by Ms Dean's evidence because he had approached her before the Authority investigation meeting and discussed with her what had occurred. He said that she had agreed that Mr Gounder had assaulted him, and that this was reflected in a transcript of their conversation. The transcript was put to Ms Dean, and she denied that it reflected an accurate record of a discussion that she initially said had not taken place and subsequently (in cross examination) accepted had occurred but not in the way contended for by Mr Anand.

[18] Ms Dean said that as at 9 September, and at the time of the subsequent Authority investigation, she had been confronting visa issues herself. It is apparent that she was unwilling to involve herself in the Authority's investigation. By the time of the hearing in this Court it appears that she was no longer working for the plaintiff company.

[19] I am not prepared to find, based on the evidence before the Court, that Mr Gounder struck Mr Anand on 8 September. In any event Mr Vinnicombe, advocate for the defendant, submitted that the key issue was not the alleged assault but rather whether Mr Anand was dismissed during the telephone conversation the next day. I also put to one side the concerns that were raised by Mr Anand about being forced to eat pork and beef. Mr Gounder and Ms Dean were clear that no pork and beef was cooked at the premises, and that Mr Anand was not required to eat any products containing pork and beef as part of his role.

[20] I was not drawn to Mr Gounder's evidence in relation to what occurred on 9 September. There were a number of inconsistencies with it and his evidence was illusive on various points. Mr Gounder says he made two of the three telephone calls to the defendant on 9 September out of an expressed concern about Mr Anand's well-being, and in order to find out when he would be returning to work. Despite the seeming importance of these issues to him (and the flurry of telephone calls on

9 September) he made no further contact with the defendant until 10 days later, and after he had received the letter from ACC. If he was as concerned as he says he was about the defendant's health and his return date it is most unlikely he would have waited so long to make contact with him (even allowing for the intervening weekend), particularly as he had been told by the defendant that he had been given only three days off work. Mr Gounder initially said that he had not contacted the defendant because he was too busy. He then indicated that the business was quiet at the time and he did not want to disturb Mr Anand. The silence that followed the 3.20 pm telephone conversation tends to support the defendant's version of events.

[21] Nor does Mr Gounder's evidence sit comfortably with how he says he approached the defendant's allegedly unauthorised absence from work two days previously. Although Mr Anand said that he had been told to take the day off because of the additional hours he had been working, Mr Gounder's evidence was that Mr Anand simply failed to turn up to work. Despite this unexplained absence he took no steps to contact Mr Anand on 6 September and nor did he raise any concern with Mr Anand on 7 September.

[22] Mr Gounder signed an invoice addressed to the defendant and dated 15 August 2011. It was expressed to be for accountancy fees associated with a number of itemised tasks, namely "preparing Immigration documents for work visa (Employment Contract, Job Offer Letter and Financial Statement)". He said that he had thought it appropriate to charge Mr Anand for these things as he had stayed only a brief time with the plaintiff company and costs had been incurred in relation to his employment.

[23] Mr Gounder's explanation as to the 15 August invoice is inconsistent with the date of the invoice, which pre-dated the commencement of Mr Anand's employment with the company. Mr Anand had never agreed to meet such costs, the invoice was never given to him, and he was unaware that an accountant had been engaged to carry out any work in respect of his visa application. The proposition that an employer can seek to recover from an employee the costs associated with preparing a letter of offer and an employment agreement is a startling one.

[24] I do not accept that Mr Anand has failed to return company clothing to the plaintiff company. Although Mr Gounder gave

evidence as to his careful approach to record keeping there was no record in relation to what items had been given to or returned by the defendant. As Mr Anand pointed out, he had no ongoing use for clothing that bore the plaintiff company's logo.

[25] It was put to Mr Anand that having secured a work visa he had achieved what he wanted to achieve and that he abandoned his employment accordingly. He denied this

was so and pointed out that he needed to work and that his visa was tied to his work at the plaintiff company. It is inherently unlikely that he would abandon his employment in these circumstances and in the absence of alternative work to go to. And Mr Gounder, who had employed a number of people on work visas in the past, accepted that it was important for such employees to be careful to ensure that their visas remained valid. The reality was that Mr Anand had a significant amount to lose.

[26] Mr Anand's evidence in relation to the sequence of events on 9 September was somewhat confused. However, he was clear about what Mr Gounder had said to him and I preferred his evidence. During the 3.20 pm telephone conversation of 9

September Mr Gounder made it very clear to Mr Anand that if he did not immediately return to work he was dismissed. Because Mr Anand could not immediately return to work, as Mr Gounder knew, Mr Anand reasonably believed he had been dismissed.

[27] There is a dispute as to whether it was Mr Gounder or his wife who spoke to Mr Anand on 19 September 2011. In either event it is more likely than not that the contact was prompted by receipt of the ACC letter. Mr Gounder said in cross examination that he knew that Mr Anand was not coming back when he received the letter from ACC, but it is unclear why, if this was so, he would have subsequently rung Mr Anand to remind him to bring in a medical certificate when he returned to work. I do not accept that the telephone call on 19 September 2011 supports the plaintiff's evidence as to what occurred 10 days earlier.

[28] I am satisfied that Mr Anand was dismissed during the telephone conversation at

3.20 pm. His dismissal was substantively unjustified and the procedure followed by the plaintiff was woefully inadequate.² As the Authority member pointed out in his determination,³ there was no opportunity for Mr Anand to be heard, no measured or reflective process, and no consideration of anything that Mr Anand might have offered in response. Nor could it be said that the procedural defects were minor and did not result in unfair treatment.⁴ What Catering Masters did, and how it did it, was not what a

fair and reasonable employer could have done in all the circumstances.

² Section 103A of the Act.

³ At [20].

⁴ Refer s 103A(2), (3) and (5).

[29] Reference was made to steps that Mr Anand took to find alternative employment during his time with the plaintiff company. This, it was submitted, demonstrated bad faith on his behalf and supported a view that Mr Anand was only interested in securing a work visa and (having done so) was keen to find better work. Mr Anand was not acting in bad faith in exploring other employment opportunities while employed. He was concerned that things might not work out at the plaintiff company and, while he diligently applied himself to the work he was provided while at Catering Masters, he wanted to keep an eye on alternative options.

[30] Mr Anand secured further employment on 12 December 2011, and took active steps to find other work before that date (from 9 September 2011). He did not earn any income during the intervening period.

[31] Mr Vinnicombe submitted that the awards made by the Authority (namely

\$1,500 by way of compensation under s 123(1)(c)(i) and \$7,500 by way of lost wages) were appropriate. I did not take Mr Singh to contend otherwise, if the challenge failed. I am satisfied that the orders made by the Authority fairly reflect the losses sustained by Mr Anand, and the compensation he ought to be entitled to. The Authority's determination is formally set aside pursuant to s 183(2) of the Act and the plaintiff is

ordered to pay the defendant:

\$7,500 by way of lost wages;

\$1,500 by way of compensation under s 123(1)(c)(i) of the Act;

\$71.56 filing fee (by way of disbursements).

[32] The defendant seeks costs in relation to the challenge and in the Authority. The parties are encouraged to agree costs if possible. Otherwise they can be the subject of

an exchange of memoranda, with the defendant to file and serve any submissions within

30 days of today's date and the plaintiff to file and serve within a further 15 days.

Christina Inglis

Judge

Judgment signed at 11.30 am on 18 July 2013

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