

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 220
3025086

BETWEEN DREW DESAI
 Applicant

A N D ANTARES RESTAURANT
 GROUP LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: John Crocker, Advocate for Applicant
 Peter Elder, Advocate for Respondent

Investigation Meeting: 26 June 2018 at Auckland

Submissions Received: 02 July 2018 from the Applicant
 06 July 2018 from the Respondent

Date of Determination: 17 July 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Antares Restaurant Group Limited (Burger King)

[1] Antares Restaurant Group Limited (“Burger King”) is a food and beverage company which owns and operates eighty two Burger King restaurants throughout New Zealand. Restaurants operate twenty four hours a day, seven days a week. Ms Desai was employed by Burger King for almost two years in its New Lynn restaurant.

Employment Relationship Problem

Ms Desai's claims

[2] Ms Desai claims that she was paid less than the minimum wage applicable at the relevant time, on several occasions during the course of her employment. She says that she was not given a reasonable opportunity to take rest and meal breaks and was required to be available to work in excess of her guaranteed minimum hours.

[3] In respect of each of these matters, Ms Desai says that Burger King acted in breach of the Minimum Wage Act 1983 (MWA) and the Employment Relations Act 2000 (the Act). Ms Desai says she suffered an unjustified disadvantage as a result of these actions by Burger King. Ms Desai says when she raised the matters with Burger King through the Unite Union ("the union"), she was subject to a disciplinary process which led to her resignation on 6 October 2017. Ms Desai says her resignation amounted to an unjustified constructive dismissal.

Burger King's response

[4] Burger King accepts that on three occasions Ms Desai was paid under the minimum wage and that when this was pointed out to it, an offer was made to Ms Desai to rectify the situation. Ms Desai did not accept the offer. In closing submissions, Burger King submitted that there was only one occasion on which Ms Desai did not receive the minimum wage.

[5] Burger King says that Ms Desai was given a reasonable opportunity to take meal breaks, that as a salaried employee her salary covered any extra hours worked and that no availability provision was required.

[6] Burger King says the disciplinary process which it undertook had nothing to do with the issues raised by Ms Desai about her hours of work and wages and that it was Ms Desai who voluntarily decided to resign. Burger King denies that Ms Desai was unjustifiably disadvantaged or that she was unjustifiably constructively dismissed.

Investigation meeting

[7] As permitted under s.174E of the Act, this determination has not set out all the evidence required. The determination states findings, relevant facts, legal issues and makes conclusions in order to efficiently dispose of the matter.

[8] The investigation in the Authority took one full day. Ms Desai filed a witness statement as did Mr Gary Cranston, an Organiser employed by the union.

[9] For Burger King, Mr Stone Tao, Multi-unit manager, Ms Karthika Sakale, Restaurant manager, Mr Bernard Oosthuizen, National operations excellence manager and Mr Arun Augustine, Operations manager each filed witness statements. Each of the witnesses either swore on oath or affirmed their evidence was true and correct.

Issues

[10] The issues for investigation and determination by the Authority are:

- (a) Did Burger King pay Ms Desai less than the minimum wage on a number of occasions during the course of her employment, in breach of s.6 of the MWA? And if not, should Burger King be subject to a penalty?
- (b) Was Ms Desai able to take rest and meal breaks in accordance with s.69ZD(i) of the Act?
- (c) Was Ms Desai disadvantaged because her employment agreement was allegedly not in accordance with s.67D of the Act and she was required to be available to work above her guaranteed minimum hours?
- (d) Was the disciplinary process undertaken by Burger King and the issuing of a written warning to Ms Desai unjustified actions by Burger King which amounted to unjustifiable disadvantages?
- (e) Was Ms Desai's resignation on 6 October 2017, a constructive dismissal which was unjustifiable in the circumstances?

Relevant facts**Ms Desai's employment - Crew Member**

[11] Ms Desai began working for Burger King at its New Lynn restaurant on 27 March 2015. She was initially employed as a crew member and her employment was covered by the applicable collective employment agreement. During this time, Ms Desai says she took her regular rest and meal breaks. Ms Desai clocked in when she came to work, clocked out when she left work and clocked in and out when she took her rest and meal breaks.

Trainee Manager

[12] In February 2017, Ms Desai was promoted to the position of trainee manager. She signed an individual employment agreement on 28 February 2017 signed also by the Area Manager, Mr Josh Harre. The schedule to the employment agreement provided that Ms Desai was employed in the position of trainee manager from 6 March 2017. It further provided that after completion of her training requirements her salary would be reviewed. Ms Desai's gross salary at the time was \$37,500 per annum.

[13] On 4 August 2017, Ms Desai was promoted to the position of salaried shift manager commencing on 7 August 2017. Ms Desai's new salary was \$39,500 per annum. The letter informing Ms Desai of her promotion referred to her employment agreement and confirmed that none of the terms and conditions of that agreement were to change. Ms Desai was invited to take independent advice on the variation of her employment agreement and chose not to. The variation to the employment agreement was signed by Mr Stone Tao for Burger King on 4 August 2017 and by Ms Desai on 8 August 2017.

First Issue

Did Burger King pay Ms Desai less than the minimum wage on a number of occasions during the course of her employment, in breach of s.6 of the MWA? And if not, should Burger King be subject to a penalty?

[14] Under her employment agreement Ms Desai was paid a salary and required to work forty five hours per week over a five day period between Monday and Sunday. The agreement goes on to state that it is expected, given the nature of the industry that

Ms Desai may need to work outside of, or additional hours for which payment would not be made.

Hours of work

[15] Clause 11 of Ms Desai's employment agreement is as follows:

11. Working Hours.

Your hours and days of work will be in accordance with the management shift of the restaurant you are assigned to. Specific management rosters will vary by posting. But, in general, your rostered shifts will cover 45 hours per week over 5 days, Monday to Sunday.

We operate in a 24/7 trading environment and all rostered shifts need to be appropriately scheduled in order to meet trading hours.

Given the nature of our industry, your position, and the operating requirements of the restaurants and the business generally, it is expected that at times you may need to work hours outside or in excess of the standard rostered shifts to meet the requirements of your position. No additional payment will be made for those extra hours.

Lunch and dinner breaks are 30 minutes each. The scheduling of meal breaks should not conflict with guest serving or general operational needs and requirements.

[16] Ms Desai says that after becoming a trainee manager she was not able to take her breaks due to the level of her workload. Ms Desai also says because of the hours she worked, she was paid on a number of occasions below the applicable minimum wage.

[17] In the statements of problem and reply filed in the Authority, Ms Desai claimed that in the fortnights ending 25 May 2017, 11 June 2017 and 9 July 2017 she worked hours over and above her contracted hours of 90 per fortnight. She says because her salary was so close to the minimum wage all three fortnights brought her below the minimum wage for the hours she worked.

[18] In the statement in reply filed for Burger King, this was admitted. Burger King offered to compensate Ms Desai for the underpayment. In his closing submissions on behalf of Burger King, the advocate for Burger King resiled from the position taken in the statement in reply and stated in fact there had been only one minimum wage breach.

[19] From the data provided to the Authority, there were occasions when Ms Desai worked less than 90 hours per fortnight and occasions where she worked more. There

were difficulties with Burger King providing accurate records of hours. Burger King stated that it did not require managers on salary to clock in and even if they do, as is their practice, these hours are not reconciled. This is a matter which Burger King is to investigate further as keeping accurate records of hours of work is important for both an employer and an employee and means both parties can accurately determine compliance with minimum employment standards. It is also required by section 4B of the Act.

[20] Having determined that Burger King did breach, and accepts that it did breach the MWA, I must now consider whether a penalty should be payable.

Penalties

[21] The full bench of the Employment Court in *Borsboom v Preet Pvt Ltd and Another*¹ considered the approach which is to be taken by the Authority and the Court when considering penalties for breaches of minimum employment entitlements.

[22] The Court in *Borsboom* set out the objectives of penalties in employment law generally at paras [61] – [63] of its decision. To summarise, they are to:

- (a) Punish those who breach statutory obligations;
- (b) Deter deliberate breaches;
- (c) Compensate the victim of the breach;
- (d) Eliminate unfair competition and business.

[23] The Court applied a four step process to the assessment of penalties by the Authority and the Court in order to provide a “uniform, reasonably predictable result”. The four step process is to ensure that “fixing the amount of the penalty, or penalties, is consistent and transparent”.

Step one – nature and number of breaches

[24] The evidence before the Authority at its investigation meeting was that there was an accepted breach on three occasions by Burger King of the MWA. The breach related to failure on those occasions to pay Ms Desai the minimum wage.

¹ [2016] NZEmpC 143.

Should global penalties apply?

[25] I consider it is permissible to consider the three accepted breaches of the MWA as being a consistent pattern of breach and therefore I consider it to be one breach. A global penalty therefore amounts to a maximum of \$20,000.

Step two – assessment of the severity of the breach in each case to establish a provisional penalties starting point and consider both aggravating and mitigating factors

[26] The representative for Ms Desai set out aggravating factors including that the evidence from Burger King is that they do not require salaried managers to clock in and if they do these hours are not reconciled. In this circumstance, it is very difficult for parties to be able to establish whether they have complied with minimum standards to provide meal and rest breaks and also complied with their obligations to pay the minimum wage. Another aggravating factor is that Burger King initially refused to provide the Union with clocking in and out data requested by it under s.130 of the Act.

[27] The failure to pay Ms Desai the minimum wage adversely affected her. Burger King is an organisation which should be aware of its obligations as an employer and should have systems in place which enable monitoring of whether or not they are in compliance with their employment obligations. Minimum code or employment entitlements and standards are universally known².

[28] The reluctance to co-operate with the Union who was assisting Ms Desai is an aggravating factor.

[29] The representative for Ms Desai has also sought a penalty for breach of s.4B of the Act in that by not requiring Ms Desai or other salaried managers to clock in or out for their breaks, they are not keeping accurate records as required by s.4B(1) which states:

An employer must keep records and sufficient detail to demonstrate that the employer has complied with minimum entitlement provisions.

[30] This claim was never raised in the statement of problem and therefore it is not a matter which I am able to consider in terms of a penalty. It is important that Burger

² *Labour Inspector v Cyprus Villas Limited* [2015] NZEmpC 157.

King is aware of its obligations under s.4B of the Act. It is my view that by not requiring its salaried managers to clock in and clock out and not reconciling their records, Burger King appears to be in breach s.4B of the Act. Burger King should immediately introduce a system which complies with s.4B of the Act. This would be as simple as requiring salaried managers to clock in and out when arriving and departing from work and when taking breaks.

Mitigating Factors

[31] After a period of time, Burger King did accept that it had breached its obligations under the MWA and offered to compensate Ms Desai. Ms Desai did not accept the offer.

[32] Taking into account the fact that breaches of the MWA were accepted by Burger King, the amounts involved were small and that Burger King offered to rectify the situation, I consider a reduction of 60% to be appropriate. The adjusted total for the penalty so far amounts to \$8,000.

Step three - means and ability to pay the provisional penalty

[33] There is no evidence as to Burger King's financial circumstances or means and ability to pay. However, it is well-accepted that Burger King operates multiple restaurants throughout New Zealand. A reduction in penalties on this ground is not appropriate in the circumstances.

Step four – proportionality of outcome

[34] The penalties imposed should be in proportion to the amounts of money unlawfully withheld.³ The shortfall for the accepted three fortnights amounted to \$194.57 gross. Burger King offered to make a payment to address this.

[35] Standing back in assessing the proportionality of the outcome for Burger King, I conclude an appropriate figure for a penalty under the MWA to be \$3,500 in the circumstances, following the four step approach and taking into account the Court's observations in *Borsboom*⁴.

[36] The penalty of \$3,500 is to be paid by Burger King.

³ *Borsboom* at [190].

⁴ Paras [190] – [194] with regard to proportionality and totality of outcome.

[37] Pursuant to s.136(1) of the Act, the penalty of \$3,500 is to be paid by Burger King directly to Ms Desai within 21 days of the date of this determination.

Second Issue

Was Ms Desai able to take rest and meal breaks in accordance with s.69ZD(i) of the Employment Relations Act 2000 (“ERA”)?

Legislative framework

[38] Ms Desai claimed that following her promotion to trainee manager she was no longer able to take rest or meal breaks when she was working at Burger King New Lynn and she says that was in breach of s.69ZD of the Act.

[39] Ms Desai says that there was a culture at the Burger King in New Lynn that managers do not take meal breaks, they are there to ensure that the restaurant’s guest serving and operational needs are met at all times. Ms Sakale, to whom Ms Desai reported says that she insisted on staff taking their rest and meal breaks. In her experience, she says Ms Desai took her 30 minute meal break and 15 minute breaks. She says Ms Desai would give the other team member working with her, the first break and then the team member would run a shift when Ms Desai took her breaks.

[40] Section 69ZD of the Act states:

- (1) An employee is entitled to, and an employer must provide the employee with, rest breaks and meal breaks that –
 - (a) provide the employee with a reasonable opportunity, during the employee’s work period, for rest, refreshment and attention to personal matters; and
 - (b) are appropriate for the duration of the employee’s work period.
- (2) The employee’s entitlement to rest breaks and meal breaks may be subject to restrictions, but only if the restrictions –
 - (a) are
 - (i) reasonable and necessary having regard to the nature of the employee’s work;...
- (3) An employee’s entitlement to rest breaks under this section is to paid rest breaks.

[41] Section 69ZE(1) and (2) of the Act provide for the timing and duration of rest breaks. There is an obligation on the employee and the employer to discuss and agree the times and durations of rest breaks/meal breaks. In the event there is no agreement,

the employer can specify reasonable times and durations that: “having regard to the employer’s operational environment or resources and the employee’s interests, enable the employer to maintain continuity of service or production”.

[42] Section 69ZE(3) of the Act places an obligation on the employer to provide an employee with a reasonable opportunity to negotiate regarding the timing and duration of breaks. Section 69ZE(4) emphasises that s.69ZE (3) does not limit the requirement of the parties to deal with each other in good faith as set out in s.4 of the Act.

Clock in and out records

[43] Clause 11 of Ms Desai’s employment agreement stated that lunch and dinner breaks were 30 minutes each and to be scheduled at times not conflicting with guest serving or general operational needs.

[44] There were rostering schedules with the names of employees alongside with suggested times for their breaks. These break rosters were posted in the restaurant and the staff were aware of them.

[45] As with the hours worked by Ms Desai, Burger King did not require her as a salaried manager to clock in or out for her rest and meal breaks. This made it difficult for the parties to establish whether or not breaks were actually taken.

[46] It is my view that Ms Desai was aware of the requirement to take breaks. As the manager, it was up to her to manage the staff on duty to ensure she could take her breaks. Ms Sakale says Ms Desai did not complain to her that she was not able to take her breaks and says Ms Desai did take her breaks.

[47] From the evidence there were systems in place for staff to take breaks and whether Ms Desai did so was largely left up to her. I do not consider that there has been a breach by Burger King of its requirement under s.69ZD to provide Ms Desai with rest breaks and meal breaks. I am not persuaded that Ms Desai had no reasonable opportunity to take breaks. There was no breach by Burger King.

[48] I do agree with the submission made by the advocate for Ms Desai that because of Burger King’s policy that managers are not required to clock in or out for their breaks, there is little evidence available for the parties to confirm whether or not

they are each complying with the requirements of the Act to provide reasonable rest and meal breaks and for the rest and meal breaks to be taken.

Third issue

Was Ms Desai unjustifiably disadvantaged because her employment agreement was allegedly not in accordance with s.67D of the Act and she was required to be available to work above her guaranteed minimum hours?

[49] Ms Desai claims that she was unjustifiably disadvantaged by being subjected to “an unlawful availability clause in her employment agreement under s.67D of the Act.”

[50] If there has been a breach of ss. 67C or 67D of the Act, in that the employee’s employment agreement is not in accordance with those sections, a personal grievance of unjustified disadvantage may arise.⁵

[51] Ms Desai’s working hours are specified as being: “in general, your rostered shifts will cover 45 hours per week over five days, Monday to Sunday...It is expected that at times you may need to work hours outside or in excess of the standard rostered shifts to meet the requirements of your position. No additional payment will be made for those extra hours.”

[52] Ms Desai says that she was required to be available to accept any work that the employer made available and that she was rostered to work practically any time during the week. Ms Desai says that she would often be asked to work at short notice, or she would receive a text asking her to start at a different time.

[53] Section 67D of the Act is as follows:

Section 67D availability provision

- (1) In this section and section 67E, an **availability provision** means a provision in an employment agreement under which –
 - (a) the employee’s performance of work is conditional on the employer making work available to the employee; and
 - (b) the employee is required to be available to accept any work that the employer makes available.
- (2) An availability provision may only –
 - (a) be included in an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and

⁵ s.103(1)(h) of the Employment Relations Act 2000.

- (b) relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.
- (3) An availability provision must not be included in an employment agreement unless –
 - (a) the employer has genuine reasons based on reasonable grounds for including the availability provision and the number of hours of work specified in that provision; and
 - (b) the availability provision provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the provision....
- (7) For the purposes of subsection (3)(b), an employer and an employee who is remunerated for agreed hours of work by way of salary may agree that the employee's remuneration includes compensation for the employee making himself or herself available for work under an availability provision.

[54] Ms Desai was aware that her rostered shifts would cover 45 hours per week over five days from Monday to Sunday. Rosters were posted approximately 10 to 12 days in advance of times of work. Ms Desai worked the rosters that were posted. Occasionally, Ms Desai worked in excess of her rostered hours and on occasion she worked less than her rostered hours.

[55] Ms Desai was not unilaterally provided with required hours of availability, rather if she had to work in addition to her rostered hours at any given time, those hours were not paid by Burger King.

[56] Both representatives referred me to the decision of the full bench of the Employment Court in *Fraser v McDonald's Restaurants (New Zealand) Limited*⁶ as authority for their respective positions.

[57] At paragraph [56] of *Fraser v McDonald's*, the Court stated:

The decision to be made in this case is that which counsel primarily focussed upon in their submissions. It is whether Mr Doran and Mr Fraser were compelled to be available for the hours included in the periodic rosters beyond the guaranteed hours. As a matter of detail, the focus was on the words "reissue your schedule at our discretion" contained in the clause of the letter or offer.

⁶ [2017] NZEmpC 95.

[58] For the reasons above, I do not accept that there was an availability provision in the current case.

Fourth Issue

Was the disciplinary process undertaken by Burger King and the issuing of a written warning to Ms Desai unjustified actions by Burger King which amounted to unjustifiable disadvantages?

[59] Ms Desai joined the union in July 2017 and became a union delegate in August 2017. Mr Cranston, the Organiser from the Union became involved shortly after and began requesting clock in/clock out records for her together with wages and time records.

[60] After Mr Cranston's involvement, Ms Desai says a personal grievance letter was sent to Burger King on 13 September 2017. The claim was that Burger King was in breach of the MWA and sought payment of the shortfall it says was due to Ms Desai. The union also raised a personal grievance claim that the breach of the MWA amounted to an unjustifiable disadvantage for which compensation was payable to her as a remedy.

[61] Two weeks after the letter was sent raising the personal grievance Ms Desai says she received a letter from Burger King on 27 September 2017, requesting that she attend a disciplinary meeting. The allegation was that on one of the shifts that she was managing, one of the employees on the shift was asleep for almost an hour and was allowed to have an additional break for which the employee in question was paid. It was alleged that Ms Desai edited the employee's clock in processing and the employee concerned had an additional break for which she was paid.

[62] The allegation was that this action could amount to serious misconduct in breach of Burger King's Code of Conduct. A disciplinary process was undertaken by Burger King, during the course of which, Ms Desai was represented by the union. I am satisfied the process undertaken by Burger King was in accordance with the requirements of s.103A of the Act.

[63] A meeting was held on 5 October 2017 to discuss the allegation. On 6 October 2017, Ms Desai resigned. On 10 October 2017, Ms Desai was issued with a first written warning in relation to the allegation.

[64] Ms Desai says that the written warning was unjustifiable and seeks a remedy in respect of it. From the evidence, Ms Desai did not deny that the employee working on the shift was asleep because she was sick. Ms Desai clocked her back in from her break and then clocked her out before the shift finished. Normally, Ms Desai says she would leave a note for the opening manager to correct the clock ins or breaks but forgot to do so as it was a busy night and she was short of one closing staff member. Burger King did not accept the explanation and issued her with a warning.

Meetings between Ms Desai and her representative

[65] At the disciplinary meeting Ms Desai's representative, agreed on her behalf to the issuing by Burger King of a "first written warning". This was in response to Burger King's indication that it intended issuing a final written warning. The transcript of the recording of the meeting is as follows:

Union Representative: "...So this is the first thing you wanted to say was this, we don't think it turns on the timing of when she clocked her out, a mistake was made, a mistake needs to be rectified. And in that context she does this thing, this kind of thing all the time, three or four times a week, and slipping up once, I mean the loss of wages to the company is less than \$20. That shouldn't be a final written warning. It's the first time that she has made this mistake, it's an administrative mistake, there's no malice involved, she forgot to do something, it is just a slip of the mind. If you want to take it really seriously you can so look it's very important you get all the clockings right for the staff so pay attention to all this, but being the first time she's made a mistake, an administrative error it shouldn't go through to a final. So we're counter- proposing that she should receive a first written warning.

[66] Burger King agreed to the counter proposal and a first written warning was issued to Ms Desai. In those circumstances I do not consider the claim for an unjustified disadvantage in relation to the warning has been made out. Ms Desai agreed to the issuing of the first written warning.

Fifth Issue

Was Ms Desai's resignation on 6 October 2017, a constructive dismissal which was unjustifiable in the circumstances?

[67] The onus falls on Ms Desai to establish whether or not her resignation on 6 October 2017 amounted to a constructive dismissal which in the circumstances amounted to an unjustifiable dismissal.

[68] The tests for a constructive dismissal claim to have foundation are set out in the decisions of *Auckland etc. Shop employees IUOW v (Woolworths NZ) Limited*⁷ and *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers*.⁸

[69] In the *Woolworths* decision, the Court considered three categories which may amount to constructive dismissals:

- (a) The employer gives the employee the option of resigning or being dismissed
- (b) The employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign
- (c) There has been a breach of duty by the employer which leads the employee to resign.

[70] I do not accept that the evidence establishes circumstances that gave rise to a constructive dismissal. None of the three categories referred to in the *Woolworths* decision were present in the current case.

[71] At the Authority's investigation meeting, Ms Desai relied on a meeting with Ms Sakale on 6 October 2017, as being the reason for her decision to resign with immediate effect.

[72] Ms Desai says when she came in for her shift Ms Sakale told her that she had already positioned the crew members on the shift. Ms Desai disagreed with the positioning of the staff and a heated argument ensued. Ms Desai rang Mr Tao and resigned. Ms Desai says this was the first time she had had such an argument with Ms Sakale. Ms Desai decided she had had enough and resigned.

[73] I do not accept that the circumstances of Ms Desai's resignation fell into any of the categories which may amount to a constructive dismissal. There was a disagreement between Ms Desai and her manager, Ms Sakale. Ms Desai had attended a disciplinary meeting on 5 October 2017, but was not subject to disciplinary action. Ms Desai resigned voluntarily before being issued with a first written warning on 10 October 2017.

⁷ 2 NZLR 372 (CA).

⁸ CA 109/92.

[74] Ms Desai's resignation did not amount to a constructive dismissal.

Costs

[75] The Authority has general power to award costs as set out in clause 15(1) of the Schedule to the Act.

[76] Counsel for Ms Desai has fourteen days from the date of this determination to file a memorandum as to costs. Counsel for Burger King has fourteen days from receipt of such memorandum to file a memorandum in response.

Summary of orders

[77] A summary of the orders by the Authority is as follows:

- (a) Antares Group Limited ("Burger King") acted in breach of section 6 of the Minimum Wage Act 1983 (MWA) by failing to pay the applicant, Ms Drew Desai, the minimum wage, on 3 occasions.
- (b) Burger King is ordered to pay a penalty of \$3,500 for the breach and to pay it directly to Ms Desai within 21 days of the date of this determination.
- (c) Burger King did not breach section 69ZD of the Act regarding the provision of rest breaks for Ms Desai. Accordingly, Ms Desai was not subject to an unjustifiable disadvantage.
- (d) Ms Desai's employment agreement with Burger King did not include an unlawful availability clause. Accordingly, Ms Desai was not subject to an unjustifiable disadvantage.
- (e) The disciplinary process and the warning issued to Ms Desai did not amount to unjustifiable disadvantages.
- (f) Ms Desai's resignation was voluntary and did not amount to a constructive dismissal which was unjustified.

Anna Fitzgibbon
Member of the Employment Relations Authority