

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 126/09  
5145281

BETWEEN                      ALI RAFIEI  
   Applicant

AND                                      TROY RESTAURANT AND  
   BAR LIMITED  
   Respondent

Member of Authority:        R A Monaghan

Representatives:              G Pollak, counsel for applicant  
   A Ziba and R Amani advocates for respondent

Investigation Meeting:      27 February 2009

Determination:                20 April 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Ali Rafiei says his former employer, Troy Restaurant and Bar Limited (“TRBL”) dismissed him unjustifiably. He also seeks payment in lieu of notice, and holiday pay at 8% of his earnings for the part year in which he worked.

[2]     TRBL denies that Mr Rafiei was dismissed, and says he was a casual employee who was told that work would not be available for a period. It also says Mr Rafiei received the payments he was owed.

[3]     A claim for a penalty for the failure to provide a written employment agreement was withdrawn at the investigation meeting.

**Entry into the employment relationship**

[4]     Adel Ziba and Rasoul Amani are the directors and shareholders of TRBL, and manage the company’s restaurant business. They are immigrants to New Zealand, as is Mr Rafiei. Through this link, the men became friends.

[5] Mr Rafiei worked in a number of different positions after coming to New Zealand. Several of the positions were in Turkish takeaway bars or cafes, and some were associated with the construction industry. In or about mid-2007 Messrs Ziba and Amani believed Mr Rafiei's income was limited, and sought out of friendship to help him.

[6] Mr Rafiei assisted at the restaurant while renovations were carried out during June and July 2007 on a casual or ad hoc basis. Then in or about late July or early August there was a conversation about Mr Rafiei's coming to work in the kitchen. There was no written agreement, but it was common ground that Mr Rafiei was to start work at 4 pm, with the finish time dependent on how busy the restaurant was. He would work four days a week, from Tuesdays to Fridays.

[7] As for payment, commencing with the week ending on 18 August 2007, Mr Rafiei received a gross weekly payment of \$240. This continued until the week ending 19 October 2007. The arrangement was that Mr Rafiei receive the recorded \$240 per week, plus a further \$40 in cash, pursuant to an agreement that he be paid at \$70 per day for a four day week.

[8] In late October Mr Rafiei's hours of work reduced to three days per week, because the business was quieter. The payments of \$70 per day ceased, and payment was made with reference to hours worked as recorded on a timesheet. The rate was \$12 per hour.

### **Events leading to termination of employment**

[9] Mr Ziba's evidence was that, on or about 13 January 2008, he advised the staff that the restaurant would be closing on weekdays to allow re-tiling work in the toilets to be completed. The work would take two weeks, after which normal opening hours would resume. Mr Rafiei responded by saying he would 'stop now', and he wanted his holiday pay. There was a discussion about whether he was entitled to holiday pay calculated at 6% or 8% of his total earnings. Mr Ziba believed (wrongly) that the entitlement was to 6%, but agreed to make a payment of 8%.

[10] Mr Rafiei's evidence was that he was told he would not be required because the restaurant was quiet. He denied any discussion about completing re-tiling in the toilets, and that there was any mention of a two-week break before work would resume.

[11] Overall, however, he at least accepted there was tiling to be completed in the toilets, and that the work was carried out. I find Mr Ziba's account more likely.

[12] On either 14 or 15 January 2008 there was a further conversation in which Mr Ziba said Mr Rafiei was angry and aggressive, while Mr Rafiei acknowledged he was upset. Mr Rafiei told Mr Ziba that, if Mr Ziba was firing him, he should receive two weeks' notice.

[13] Mr Ziba had understood from the response of 13 January that Mr Rafiei wanted to leave. However, also on or about 14 or 15 January, Mr Rafiei told Mr Ziba he did not want to stop his job. Mr Ziba told Mr Rafiei he could not keep changing his mind about whether or not he worked. He was referring not only to what he viewed as a change of mind at the time, but to an exchange in December 2007 during which Mr Rafiei had indicated he was moving to Napier for work but subsequently changed his mind, as well as to dissatisfaction over Mr Rafiei's frequent failures to start work on time. For that reason, and because of ongoing problems with Mr Rafiei's aggressiveness, he did not wish to continue to work with Mr Rafiei.

[14] Accordingly Mr Ziba treated Mr Rafiei's employment as being at an end.

### **Whether the employment was casual**

[15] Casual employment is often referred to as employment on an 'as and when' basis. More formal tests of whether or not employment is casual address whether the employee concerned is occasionally and irregularly called in for some limited or purely casual purpose, or whether there is continuity in the relationship.

[16] Here, even if Mr Rafiei's attendance was unreliable in practice and his actual hours of work fluctuated, the set days of work and rate of pay during the first several weeks of employment mean the arrangement cannot be characterised as casual.

Similarly, the change in October still required Mr Rafiei to work on set days every week, so that the change did not transform the nature of the employment from part time to casual.

[17] I find accordingly.

### **Whether there was a dismissal**

[18] Mr Ziba's advice to staff on 13 January that there was to be a two-week shutdown on weekdays did not necessarily amount to a dismissal in and of itself, and I accept it was not intended to be taken as a dismissal. Among other things the reaction of the staff members concerned was relevant to whether the advice subsequently underpinned any dismissal. In Mr Rafiei's case, the reaction was to demand his holiday pay in terms that led Mr Ziba to conclude Mr Rafiei did not wish to continue to work.

[19] However any misunderstanding about whether Mr Rafiei wished to leave was removed when, a day or so later, Mr Rafiei told Mr Ziba that he did not want to 'stop' his job. For the reasons he gave, Mr Ziba did not wish to continue Mr Rafiei's employment and did not continue it. Those actions amounted to a dismissal.

### **Whether the dismissal was justified**

[20] The test of justification is whether the employer's action at the time was the action a reasonable and fair employer would have taken in all of the circumstances.

[21] Even if Mr Rafiei was not a model employee the concerns that led directly to the dismissal - namely his aggressive conduct and his unreliable intentions or attendance - were not raised with him in any form of disciplinary context.

[22] Further, I am prepared to accept that Mr Rafiei's demand for holiday pay in response to the advice about the two-week shutdown was made in an unduly aggressive manner. It amounted to the last straw for Mr Ziba, but it, too was not properly addressed with Mr Rafiei. For example - and particularly given my finding that Mr Rafiei was a part time employee rather than a casual employee - the parties

could have discussed applying to the two-week shutdown Mr Rafiei's accruing entitlement to annual leave. Instead Mr Ziba decided to make the payment and treat the employment as at an end.

[23] For these reasons I conclude that the dismissal was unjustified.

### **Remedies**

[24] Mr Rafiei sought two weeks' wages in lieu of notice, as well as the reimbursement of three months' wages lost as a result of his unjustified dismissal. I address these matters together.

[25] Mr Rafiei obtained alternative employment on or about 1 March 2008, at the starting rate of \$12 per hour. His evidence was in effect that he suffered no further loss in remuneration after the date of commencement of that employment. Meanwhile he obtained temporary work from an employment agency, earning the nett figures of \$63.90 and \$33.76. The best assessment I can make of a gross equivalent is \$120. Mr Rafiei also said he worked for a week at a fish and chip shop, earning 12 hours x \$12 per hour = \$144 (gross). Accordingly he earned \$244 (gross) during January and February.

[26] Mr Rafiei's average gross weekly earnings for the period during which he worked three days per week was \$223.62. I apply that average to the 7-week period 13 January – 1 March, to give a loss of remuneration in the sum of \$1,565.38. From that I deduct earnings of \$244, leaving \$1,321.38.

[27] Mr Rafiei must take some responsibility for his conduct towards Mr Ziba in the period 13 – 15 January. Accordingly I find he was guilty of some contributory conduct, and apply a modest reduction in the amount of lost remuneration to which he would otherwise be entitled. TRBL is therefore ordered to reimburse Mr Rafiei for remuneration lost as a result of his dismissal in the sum of \$1,200 (gross).

[28] There was minimal evidence of injury to feelings. Bearing that in mind, as well as the modest reduction in remedies reflecting Mr Rafiei's contributory conduct, I order TRBL to compensate Mr Rafiei for injury to his feelings in the sum of \$1,000.

**Holiday pay**

[29] Mr Rafiei's total gross earnings for the period to mid-October 2007 was 9 weeks x \$280 per week = \$2,520 (gross). That part of the payment was made as a gross payment in cash is not the Authority's concern, although some accounting for it to the IRD may be required. Similarly, the calculation is not affected by the fact that some of the payments were used in part repayment of a loan made to Mr Rafiei.

[30] Regarding the period from late October 2007, Mr Rafiei worked for three days per week and was paid at an hourly rate for the hours he worked. Documents provided in response to an order for the production of timesheets were undated and of no assistance. However Mr Rafiei's bank statements showed nett payments which coincided with those TRBL recorded for December at least, and there was no suggestion of any underpayment in November. Accordingly I find Mr Rafiei's total gross earnings for the period late October to Christmas 2007 was \$2,171.88.

[31] There was difficulty in identifying the basis for a gross payment of \$590.40 which TRBL recorded in respect of the period 28 December 2007, and whether any payments were made to Mr Rafiei in January 2008. The nett equivalent of the payment recorded against the 28 December date was \$470.98. I was told variously that the payment was for 3 weeks' work, less cash payments made to Mr Rafiei, and that the payment comprised holiday pay of \$139.24 (nett), with the remainder being wages owed.

[32] Since the answer remains unclear, I approach it as follows. Bank statements which Mr Rafiei provided after the investigation meeting show he received no payment on or about 28 December 2007, but received nett payments of \$230.98 on 14 January 2008 and \$139.98 on 21 January 2008. Those payments total \$370.96 (nett). No further payments were recorded on his statements for the relevant period.

[33] TRBL asserted after the investigation meeting that Mr Rafiei was paid \$239.24 as holiday pay. Further, of that sum, TRBL says \$100 was paid in cash and the remaining \$139.24 was banked. Mr Rafiei did not dispute in general that he received cash payments from the till, and did not comment on the restaurant's

assertion that such a payment was made here. I therefore regard Mr Rafiei as having received holiday pay of  $\$139.98 + \$100 = \$239.98$  (nett).

[34] Mr Rafiei's final pay appears, therefore, to have been  $\$230.98$  (nett). I am unaware of how the amount was calculated, or of the gross equivalent. A rough approximation of a gross equivalent if the final pay was for two weeks' work is  $\$288$  for that period.

[35] TRBL also said after the investigation meeting that cash payments totalling  $\$240$  were made to Mr Rafiei in January 2008. However the record it provided in support is merely an undated handwritten list of what may be payments to various people including Mr Rafiei. Even if I accept the document as a record of payments made from the till to the individuals named, the lack of any note of a date on which any of the payments was made means the record does not assist. I do not take those alleged payments into account.

[36] Returning to the claim for holiday pay, on the best calculation I can make, Mr Rafiei's total gross earnings for the period of his employment were  $[\$2,520 + \$2,171.88 + \$288] = \$4,979.88$ . The entitlement to holiday pay is  $8\% \times \$4,979.88 = \$398.39$  (gross). Mr Rafiei has received  $\$239.98$  nett.

[37] The Authority cannot determine the amount of tax payable on any sum. If there is any difference between the nett equivalent of  $\$398.39$  and the sum of  $\$239.98$  Mr Rafiei has received, and the result is that Mr Rafiei has been underpaid, TRBL is ordered to pay the difference.

[38] If there is a difference to be paid, interest is to be paid on the amount owed calculated at 3.1% pa from 13 January 2008 to the date of payment.

### **Summary of orders**

[39] TRBL is ordered to pay to Mr Rafiei:

- a.  $\$1,200$  in reimbursement of remuneration lost as a result of his personal grievance;

- b. \$1,000 as compensation for injury to his feelings; and
- c. such holiday pay as may be owed after the calculation set out at [37];  
and
- d. interest on the sum identified in (c) above calculated at 3.1% pa from  
13 January 2008 to the date of payment.

### **Costs**

[40] Costs are reserved. The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum setting out the party's position on the matter. The other party shall have a further 14 days in which to file and serve a written response.

R A Monaghan

Member of the Employment Relations Authority