

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 167/10
File Number: 5305829

BETWEEN Veenus Kumar
 Applicant

AND Vasant Ranchhod t/a Maharaja's
 Indian Restaurant
 Respondent

Member of Authority: Denis Asher

Representatives: Joe Richardson for Mr Kumar
 Mr Ranchhod represented himself

Investigation Meeting Wellington, 13 & (by telephone) 18 October 2010

Submissions Received On the days of the investigation

Determination: 19 October 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] What outstanding wages and holiday pay are owed to Mr Kumar? Did the failure to pay these monies result in his constructive dismissal? Should interest be awarded on any outstanding monies? Should a penalty be applied?

[2] The parties have not undertaken mediation in respect of their employment relationship problem. Because of the unsuccessful attempts by the parties to date to undertake mediation I was satisfied the use of mediation would not add constructively

to resolving the matter: s. 159 (1) (b) (i) of the Employment Relations Act 2000 (the Act) applied.

The Investigation

[3] During a telephone conference call on 20 September 2010 the parties agreed to a one-day investigation in Wellington commencing at 10.00 a.m. on Wednesday 13 October 2010.

Background and Discussion

[4] During the Authority's investigation the following was either agreed or emerged:

[5] Mr Ranchhod agrees he owes Mr Kumar unpaid wages and holiday pay: at issue between the two men is the amount owing.

[6] The parties agree that Mr Kumar was employed as a chef by Mr Ranchhod at the latter's restaurant during 2006. An employment agreement between the applicant and Maharaja's Indian Restaurant was signed by both men (see attachment to statement of problem). Mr Ranchhod is the sole director of Maharaja's Indian Restaurant Limited but he did not argue that his company was Mr Kumar's employer, and not himself.

[7] Mr Kumar's claim for unpaid wages arises out of the parties' employment agreement which provided that the applicant would be paid \$11.80 gross per hour and that his normal hours were "*at least 55 hours per week*" (clause 6.1). Mr Ranchhod said he was unable to provide the applicant with those hours each week. Mr Kumar now seeks to recover payment of his contract hours less hours actually worked.

[8] The parties agree that in May 2008 the applicant resigned but returned to employment several days later. No new employment agreement was signed. Mr Ranchhod says Mr Kumar agreed to resumed employment at \$2,200 in the hand per month, which he received. The applicant said the signed agreement applied at all times and was varied only by way of agreed pay increases. The respondent agreed he

had approved Mr Kumar receiving several pay increases. I note here the pay increases may or may not have been related to adjustments to the adult minimum wage rates during the time of Mr Kumar's employment.

[9] During the Authority's investigation Mr Ranchhod agreed no wage or time records were kept in respect of the applicant's employment.

[10] The Hutt Valley Community Law Centre's letter of 30 April 2010 to the respondent, based as it was on his bank records detailing wages paid him, set out the following claims on Mr Kumar's behalf:

February –November 2006

Based on his contracted hourly rate and hours to be worked, Mr Kumar should have received \$20,900.00 nett but received only \$15,012.00, i.e. he was short-paid \$5,888.00

November 2006 – February 2007

Following an agreed pay increase and based on his contracted hours to be worked, Mr Kumar should have received \$7,266.00 but was paid only \$6,000.00, i.e. he was short-paid \$1,266.00

February 2007 – February 2008

Mr Kumar should have received \$31,486.00 but was paid only \$24,500.00, i.e. he was short-paid \$6,986.00.

February 2008 – February 2009

Mr Kumar should have received \$34,086.00 but was paid only \$28,600.00, i.e. he was short-paid \$5,486.00.

February 2009 – February 2010

Mr Kumar should have received \$34,086.00 but was paid only \$28,600.00, i.e. he was short-paid \$5,486.00.

Holiday Pay & Public Holidays

Mr Kumar received no holiday pay or time in lieu and payments for public holidays (44 days) from 2006, i.e. he was short-paid \$3,933.16.

Total Owing \$38,836.12

[11] Mr Ranchhod disputes the calculation underlying these claims only to the extent that he was unable to provide the contracted hours.

[12] During the Authority's investigation Mr Kumar also claimed two months lost wages for the period when he left Mr Ranchhod's employment because of his employer not paying monies owed to him, and before he found employment in Auckland.

[13] The applicant seeks costs of \$1,500.

[14] During the Authority's investigation Mr Kumar acknowledged he had received a payment of \$500 from Mr Ranchhod that should be deducted from his claim.

[15] As is made clear above, Mr Ranchhod agrees he owes Mr Kumar unpaid wages and holiday pay but says it amounts to just over \$10,000. Mr Ranchhod did not provide a calculation in support of his calculation, and cannot rely on any wage and time records.

[16] Mr Ranchhod said he was willing to pay the monies owing to Mr Kumar by monthly instalments of \$1,000.00.

[17] Mr Kumar did not contest this evidence as to the respondent's ability to pay.

[18] During the resumed investigation (by telephone) on 18 October Mr Ranchhod said that he had evidence of having paid more monies to Mr Kumar than (as I

understood it) was reflected in the Hutt Valley Community Law Centre's letter of 30 April 2010, and that the applicant had borrowed \$9,000 from the restaurant earlier in his employment.

Findings

[19] Mr Ranchhod agrees he owes his employee, Mr Kumar, unpaid wages and holiday pay. The amount of the debt is disputed but the respondent is unable to provide any wage and time records with which to contradict the applicant's claim as set out on the latter's behalf in the letter dated 30 April 2010.

[20] I find in favour of Mr Kumar's uncontested claim for holiday pay.

[21] On the basis of the agreed, contracted provision of 55 hours per week, I also find in favour of Mr Kumar's claim for unpaid wages but only up to May 2008 when the applicant resigned his employment before returning a few days later. I am satisfied Mr Kumar's wages claim should be cut off at that point as no fresh employment agreement was signed by the two men at that time and the applicant must have known, by then, of the respondent's inability to provide 55 hours per week.

[22] After having regard to Mr Ranchhod's ability to pay I am also satisfied that repayment of monies awarded Mr Kumar should be made at the rate of \$1,000 per month: s. 138 (4A) of the Act applied.

[23] I am also satisfied that Mr Ranchhod's failure to adhere to the applicant's contracted terms and conditions and statutory entitlements and to satisfactorily address the latter's claims for unpaid wages and holiday pay, resulted in the unjustified constructive dismissal of Mr Kumar. I accordingly accept his claim for two months lost wages, i.e. \$4,400. No claim has been made for compensation for hurt and humiliation.

Penalty Application

[24] A penalty is claimed against Mr Ranchhod in accordance with ss 133-136 of the Act. No argument or submissions in support of this remedy have been provided.

[25] In *Xu v McIntosh* [2004] 2 ERNZ 448, 451 the Employment Court found that:

In determining the quantum of penalties to be imposed for the breaches of the ERA ... the first question to ask was, how much harm had the breach occasioned? Further, how important was it to bring home to the party in default that such behaviour was unacceptable, or to deter others from it? The next question ... was: was the breach technical or inadvertent, or was it flagrant and deliberate?

[26] The importance of adhering to employment agreements is self-evident: they are a record of parties' obligations to one another and, as the Court of Appeal has observed, "*agreements are made to be kept*" (par 21, *Fuel Espresso Ltd v Hsieh* [2007] ERNZ 60).

[27] Mr Ranchhod's breaching of his undertakings to Mr Kumar commenced almost before the ink on their employment agreement was dry. His failure to pay holiday pay continued to the time of the applicant's unjustified constructive dismissal, earlier this year. The failure to meet statutory obligations including recognition of holiday pay and days in lieu, and to keep wage and time records, shares the same profile. In other words, the respondent's failure to meet his obligations was broad, longstanding and sustained.

[28] On the other hand, it is not clear why Mr Kumar tolerated these breaches for nearly all of his 4-years of employment.

[29] Significant harm has been occasioned Mr Kumar which will not be fully put right by paying him, with interest, the monies he is owed. A penalty will bring home to Mr Ranchhod that his behaviour was unacceptable, and will clearly deter others also. The breaches are not technical or inadvertent, but were clearly deliberate and sustained. On balance, and by way of applying *Xu* (above), I am satisfied a penalty of \$1,000 is appropriate and that it should be paid in full to the applicant: s 136 (2) of the Act applied.

[30] I also place Mr Ranchhod on notice, should he fail to meet the requirements of this determination, of the powers of the Employment Court to deal with defaulting

powers by way of fines not exceeding \$40,000.00, imprisoning a person in default for up to 3-months and/or sequestering their property.

[31] Mr Ranchhod is able to pursue any monies owed him by the applicant either by way of fresh proceedings in the Authority or in the Disputes Tribunal.

Interest Application

[32] I am satisfied that, having been denied the use of monies to which he was entitled for over 4-years, Mr Kumar should enjoy payment of interest on the outstanding sum until it is received in full by him.

Costs

[33] The applicant seeks costs of \$1,500.00 and the \$70.00 filing fee. Mr Ranchhod did not dispute or comment on the costs claimed. The Authority's investigation was completed in well under half a day. Having regard to well-established costs principles, in particular *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808, I am satisfied that a fair and reasonable contribution to Mr Kumar's costs is \$1,000.00 and the \$70.00 filing fee.

Determination

[34] By way of monthly repayments of \$1,000.00 (one thousand dollars) commencing 28 days from the date of this determination and continuing until the sum is fully repaid, Mr Ranchhod is to pay to Mr Kumar the following amounts:

- a. For February until November 2006 inclusive, a wages short fall of \$5,888.00 (five thousand, eight hundred and eighty-eight dollars) nett;
- b. For November 2006 until February 2007 inclusive, a wages short fall of \$1,266.00 (one thousand, two hundred and sixty-six dollars) nett;
- c. For February 2007 until February 2008 inclusive, a wages short fall of \$6,986.00 (six thousand, nine hundred and eighty-six dollars) nett;

- d. For February 2008 until May 2008 a wages short fall to be calculated and agreed by the parties, failing which leave is reserved to return the matter to the Authority for determination.
- e. For unpaid holiday pay and public holidays, \$3,933.16 (three thousand, nine hundred and thirty-three dollars and sixteen cents) nett.

[35] Mr Ranchhod is also to pay to Mr Kumar the sum of \$4,400 (four thousand and four hundred dollars) nett, being two months lost wages arising out of his unjustified constructive dismissal.

[36] Mr Ranchhod is also to pay to Mr Kumar the penalty awarded against the former of \$1,000 (one thousand dollars).

[37] Bearing in mind the present Reserve Bank 90-day bill rate, Mr Ranchhod is also to pay to Mr Kumar interest of 5% on monies outstanding from the date of this determination until the amount is paid in full. Leave is reserved to the parties to refer that calculation back to the Authority if agreement on the same is not forthcoming.

[38] Finally, Mr Ranchhod is to pay to Mr Kumar costs of \$1,000.00 (one thousand dollars) and the \$70.00 filing fee.

[39] The total payment required by the above is to be reduced by the \$500 (five hundred dollars) Mr Kumar agrees Mr Ranchhod recently paid him.

Denis Asher
Member of the Employment Relations Authority