

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2016] NZERA Auckland 189
5575546**

BETWEEN SHANEETA KUMAR
Applicant
AND SPA AYURDA LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Applicant in Person
Rippan Sandhu, Representative for Respondent
Investigation Meeting: 8 June 2016 at Auckland
Submissions received: 1 June 2016 from Applicant
2 June 2016 from Respondent
Determination: 13 June 2016

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Shaneeta Kumar, claims that she was unjustifiably constructively dismissed from her employment with the Respondent, Spa Ayurda Limited (The Spa).

[2] Ms Kumar further claims that she was unjustifiably disadvantaged in her employment by the Spa.

[3] The Spa denies that it unjustifiably constructively dismissed Ms Kumar and claims that she resigned of her own accord.

[4] The Spa also denies that it unjustifiably disadvantaged Ms Kumar during her employment.

Issues

[5] The issues for determination are whether or not:

- a. Ms Kumar was justifiably disadvantaged by the Spa:
- failing to provide her with an individual employment agreement;
 - failing to pay her the statutory minimum wage
 - not providing her with lunch breaks
 - failing to pay her regularly
 - not paying her sick leave entitlement
 - not paying her for the annual closedown period;
 - bullying her
 - not allowing her to take annual leave in accordance with her request;
 - failing to provide her with payslips
- b. Ms Kumar was unjustifiably constructively dismissed by the Spa, or resigned of her own accord

Background Facts

[6] The Spa is a day spa offering Ayurvedic treatments including facials and massages. Ms Rippan Sandhu is the joint director and shareholder with her husband Dr Ajit Singh.

[7] Ms Kumar commenced employment at the Spa as a full-time massage and beauty therapist in February 2014, working with another full-time therapist and a manager, Ms Nilofer Sumra. Ms Kumar also occasionally worked at Planet Ayurveda, another Spa of which Ms Sandhu and Dr Singh were shareholders, and Ms Sandhu the sole director.

Non-provision of an employment agreement

[8] Ms Kumar said that despite having made numerous requests for a written employment agreement throughout her period of employment, she had not received one prior to her employment ending in April 2015.

[9] As a result she had been unable to clarify terms of her employment when issues arose between her and the Spa, including her correct rate of payment and the notice period requirements.

[10] Ms Sandhu said that she intended to provide Ms Kumar with a written employment agreement and had stated her intention to do so at the meeting held on 9 April 2015. She said that prior to that time she had not been able to progress the matter due to work and family stresses.

Minimum Pay Issue

[11] Ms Kumar said that she was paid \$14.00 per hour when she commenced employment at the Spa in February 2014; however this rate of payment was not increased to \$14.25 per hour with effect from 1 April 2014 as required by the Minimum Wages Act 1983.

[12] Ms Kumar said she had informed Ms Sandhu of the increase in the minimum wage rate at the beginning of June 2014, and her rate of pay had then been increased to \$14.50 with effect from 10 June 2014. However she had not been paid back pay to cover the period 1 April to 7 June 2014 until after the parties had met in mediation.

[13] On 1 April 2015 the minimum wage rate had increased to \$14.75 per hour. Ms Kumar said that she had received payment at the new rate with effect from 7 April 2015, however she had not been paid any back-pay for the period 1 to 7 April 2015.

[14] Ms Sandhu explained that she had been unaware of the increase in the 2014 minimum wage rate until Ms Kumar raised the issue with her in early June 2014. She had then implemented the increase to the appropriate minimum wage rate and included an additional 25c per hour to cover the shortfall in the back-dated amount, continuing at the pay rate of \$14.50 per hour after the short-fall amount had been repaid.

[15] Ms Sandhu said the unresolved back pay issues had been resolved at mediation and the outstanding amounts have since been paid.

Rest and Meal Breaks

[16] Ms Kumar said that the statutory 30 minute lunch breaks were scheduled to take place on or about client treatments bookings. As a result she was unable to take a meal break for the majority of her employment with the Spa. She had raised this issue on a number of occasions during her employment.

[17] Ms Sandhu said that there was ample time for Ms Kumar to schedule meal breaks in accordance with client treatments. She provided Utilisation Records to the Authority which set out a weekly record of working hours available for each therapist, billable appointments and downtime i.e. time when the therapists were not providing treatments to clients.

[18] The Utilisation Records set out that Ms Kumar regularly had a significant amount non-billable time in which to take meal breaks, even taking into account client preparation time.

Irregular salary payments.

[19] Ms Kumar said that she had been inconsistently paid throughout her employment. Whilst she had been advised at the commencement of her employment that the pay day was Wednesday in each week, she said that this had rarely occurred and of 59 payment dates, 35 were inconsistent and 5 did not occur until the following week.

[20] Ms Sandhu said that whilst she accepted that Ms Kumar may have not been paid within the appropriate week, this had been an exceptional occurrence. She said that Ms Kumar's normal pay day was a Thursday; however she frequently paid a day earlier on a Wednesday.

[21] In particular she said that Ms Kumar had been paid for each week she had worked.

Sick leave payment

[22] Ms Kumar said that she had been absent from work on 20 November 2014, and 4 & 5 December 2014 as a result of sickness. She had not been paid for these leave periods.

[23] She had also been absent from work due to illness from 20 to 27 April 2015, and had provided a medical certificate to cover that period, although she had not received the remaining 2 days of her 5 day sick leave entitlement.

[24] Ms Sandhu said that the first period of sick leave entitlement had not been paid due to the Spa not having written notice of Ms Kumar's reason for absence. Ms Kumar said that she had verbally notified her Manager, Ms Sumra, of the sickness absence.

[25] Ms Sandhu said that the unresolved sick pay entitlement issue had been resolved at mediation and the outstanding amounts have since been paid

Payment for the annual closedown period

[26] Ms Kumar said that on 23 December 2014 Ms Sandhu advised her in a meeting that she would not be entitled to be paid for the Spa annual closedown period from 24 December 2014 to 12 January 2015.

[27] Ms Kumar was paid the statutory leave entitlement for 25 & 26 December 2014, and for 1 & 2 January 2015, and Ms Sandhu offered to make her a loan to assist with the unpaid portion of the closedown period.

[28] Ms Kumar said that she had felt humiliated by the offer of a loan.

[29] Ms Sandhu said that as the anniversary date of the commencement of Ms Kumar's employment would not occur until 14 February 2015, she was not required to provide Ms Kumar with paid leave during the Spa closedown period.

[30] The annual closedown period had been discussed with Ms Kumar both at the commencement of her employment and at the beginning of December 2014.

[31] Ms Sandhu said that she was surprised that Ms Kumar was alleging that she had felt humiliated by the offer of a loan to cover the unpaid leave period because she had received an email from Ms Kumar dated 18 December 2014 which stated: "*Thank you for your generosity in wanting to help me out with a loan over the Christmas and new year period.*".

Bullying

[32] Ms Kumar said that during a meeting in February 2015 with Ms Sandhu and Ms Sumra she and the other therapist had been told by Ms Sumra that any therapist who was found not to be wearing make-up on 5 occasions would have an hour's pay deducted from their salary.

[33] When she had told Ms Sumra that was unlawful, Ms Sumra had admitted that she had not been serious in the threat, it was just made to: "*scare you both*".

[34] Ms Sandhu denied that the threat by Ms Sumra had been serious or intended to bully Ms Kumar. Ms Kumar's failure to maintain a good appearance at work had been an ongoing matter of concern, and the comment by Ms Sumra had been an attempt to ensure Ms Kumar took the matter seriously but had been immediately withdrawn by Ms Sumra.

Annual Leave request

[35] Ms Kumar said that she had applied on 19 March 2015 for annual leave to be taken in April and in July 2015, but she had been told by Ms Sandhu that that was not enough notice and she would have to wait until another therapist was appointed before taking her leave.

[36] She said that Ms Sandhu had also suggested that she should be responsible for finding another therapist.

[37] Ms Sandhu said that she had not refused the leave but advised Ms Kumar that there was not enough notice and a replacement therapist would need to be recruited prior to leave being granted.

[38] She had asked Ms Kumar if she had known of a suitable therapist as this would speed up the process, but denied that she had told Ms Kumar she was responsible for finding cover for her leave. She had taken several steps after Ms Kumar had spoken to her to find a replacement therapist but without success at the time of Ms Kumar's resignation.

Non-provision of pay slips

[39] Ms Kumar had raised the issue of not having been provided with payslips during a meeting held on 9 April 2015.

[40] Ms Sandhu said this was the first time she had been advised that payslips had not been provided to Ms Kumar and she immediately ensured that they were printed out and provided to Ms Kumar during the meeting.

Medical problem

[41] Ms Kumar said that she notified the Spa that she had suffered a workplace injury on or about December 2014 which she attributed to working overtime, a lack of adequate breaks, and continuous client treatments. She provided no medical evidence in support of this claim.

[42] The Spa had suggested that another therapist massage her hands after work for 10 minutes when she was available, and also offered massage at Planet Ayurveda. Ms Kumar said the other therapist was not always available to provide her with hand massage and she had had to pay for some of the Planet Ayurveda massages herself.

[43] Ms Sandhu said that Ms Kumar had advised her on 18 November 2014 that she was experiencing a problem with some stiffness in her arms and fingers. Ms Sandhu was unaware of the reason for the stiffness, and Ms Kumar had subsequently advised her that she was suffering from a problem of cysts in her armpits for which she had undergone surgery prior to her employment at the Spa.

[44] Ms Sandhu said she had offered Ms Kumar monthly maintenance consisting of complimentary consultations to improve her health, and also offered her free massage treatments.

[45] She said Ms Kumar had not mentioned the issue again until it was raised as the reason for her resignation in the email dated 22 April 2015, and she believed the issue had been rectified.

Meeting held on 9 April 2015

[46] At a meeting held on 9 April 2015 at the request of Ms Kumar and attended by her, Ms Sandhu and Ms Sumra, Ms Kumar said she had raised the issues of concern to her, namely the provision of a written employment agreement, annual leave requests, non-provision of payslips and not having proper lunch breaks.

[47] She said that Ms Sandhu's response was to accuse her of being argumentative and she stated that her workplace performance was poor. She had been shocked and upset by the accusation of poor performance, and had left the workplace. After a 5 minute break she had returned to the workplace and apologised to Ms Sandhu for her conduct during the meeting, and Ms Sandhu had accepted the apology.

[48] Ms Sandhu said that she had been in the process of having an employment agreement drafted and advised Ms Kumar of this in the meeting.

[49] Ms Kumar's request for annual leave had been discussed and she had explained that she could not grant the request at that time due to the operational needs of the Spa at that time, but would do so once a new therapist was appointed.

[50] Payslips had been immediately printed out and provided to Ms Kumar.

[51] In response to Ms Kumar's complaint about not having time for lunch breaks, they had examined an appointments schedule and it was explained that the time was available to do so, and it was only Ms Kumar's poor time management that was preventing her having proper lunchbreaks.

[52] At this point Ms Sandhu said Ms Kumar had objected at what was being said, and had left the meeting.

[53] Ms Kumar attended for work as normal after the meeting held on 9 April 2015.

[54] On 14 April 2015 Ms Sandhu had written to Ms Kumar in an email headed: "*Warning memo*" in which she stated that Ms Kumar's behaviour during the meeting had been unacceptable, and itemised this as a major concern, as was Ms Kumar being late for client appointments for which repeated actions would incur disciplinary action.

[55] The letter also noted that Ms Kumar was having: “*some medical issue with your arm*” and that she had been advised to see her GP and take further advice. The email stated: “*We would like you to get a certificate from the doctor that you are fit to perform the massage*”.

[56] The letter concluded by stating that breaking the rules or a repeat of the itemised behaviour would result in immediate termination of employment.

[57] Ms Kumar did not respond to this email, and Ms Sumra emailed her again on 21 April 2015 stating: “*Rippan was hoping to have a meeting with you to address your concerns & we would like you to come for a meeting at the earliest. We can meet you tomorrow at 1 pm at the Spa. Do get back to me*”.

[58] Ms Kumar responded to this email in two separate emails on 22 April 2015. The first asked that the meeting be rescheduled in order that Ms Kumar could arrange to have a support person at it.

[59] The second email advised that Ms Kumar had seen her GP and stated:

Due to my hands slowly getting worse I did advise you that unfortunately I no longer will be able to continue working within your business or any other health and beauty business that requires massage. Massage is a contributing factor to the condition and will not heal unless I stop massaging. ... My referral to the Rheumatology clinic could take months, if not years due to the high volume of referrals. Therefore I am resigning from work, start date Tuesday 21st April. My last day of work will be the 12th of may. ... we have never discussed resignation nor do I have a written and signed contract stating that I need to give one months notice.”

[60] That same day, 22 April 2015, Ms Kumar emailed a medical certificate to the Spa certifying her as unfit from work from 20 April 2015, and stating that she would: “*be fit to return to work/school on 28/4/15.*”

[61] Ms Sandhu said that Ms Kumar had responded to the request that she attend a meeting to discuss her concerns by submitting her resignation, and the Spa required a certificate from her GP confirming that she was fit to work.

[62] When asked at the Investigation Meeting why she had not accepted the medical certificate which stated that Ms Kumar would be fit for work on 28 April 2015, Ms Sandhu said that in light of Ms Kumar’s resignation which stated that she could no longer work within the Spa, she considered it unsafe on health and safety grounds to allow her to work in the Spa without medical clearance for massage work.

[63] On 28 April 2015 Ms Kumar attended for work but was advised that her client appointments had been cancelled and she did not return to work after that date.

[64] Ms Sandhu said that as massage was the only work available, the Spa was unable to provide Ms Kumar with any work during the notice period she had provided and had therefore cancelled her appointments.

[65] Ms Kumar said that she had not been paid salary in lieu of notice by the Spa.

Determination

Was Ms Kumar unjustifiably disadvantaged by the Spa?

[66] Ms Kumar is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[67] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[68] Ms Kumar must therefore establish that there was some unjustifiable action or actions by the Spa which affected her terms and conditions of employment to her disadvantage.

Was Ms Kumar unjustifiably disadvantaged by not being provided with an individual employment agreement?

[69] Employers are required pursuant to s.63A(2) of the Employment Relations Act 2000 (the Act) to provide employees with a copy of the intended agreement, and to retain a signed copy of the employee's individual employment agreement pursuant to s. 64 (1) of the Act.

[70] Despite Ms Kumar requesting a written employment agreement on several occasions, the Spa had failed to provide her with one despite the statutory requirement to do so.

[71] I find that this failure to comply with the statutory requirements resulted in Ms Kumar not having written confirmation of her terms and conditions of employment, and resulted in unnecessary communications and unresolved issues between the parties. This in turn caused Ms Kumar stress.

[72] I find that Ms Kumar was unjustifiably disadvantaged in her employment by the failure to provide her with a written employment agreement.

Was Ms Kumar unjustifiably disadvantaged by not being paid the statutory minimum wage?

[73] Ms Kumar had not been paid the minimum wage rate with effect from 1 April 2014 until 10 June 2014 after she had raised the issue with Ms Sandhu, and she had not received a payment to cover the non-payment period from 1 April to 10 June 2014 during her employment with the Spa.

[74] In addition the Spa had not implemented the 2015 increase in the statutory minimum wage rate until one week after the date of implementation on 1 April 2015, and had not paid Ms Kumar the back-dated amount due during her employment.

[75] Whilst I accept Ms Sandhu increased the 2014 pay rate to take into account the non-payment period, and that the back-pay issue has apparently now been resolved, I find that Ms Kumar was unjustifiably disadvantaged by the employer not paying her at the correct minimum wage rate until after she had raised the issue, and by not implementing the back-pay amounts during her employment.

Was Ms Kumar unjustifiably disadvantaged as a result of not being provided with meal breaks and irregular salary payments?

[76] The Utilisation Records as provided support Ms Kumar having sufficient time within a normal working week to take the statutory meal breaks, although I accept that there may have needed to have been flexibility around the actual timing of the breaks, depending on client appointments.

[77] In regard to the irregular payment of salary I accept that there were a number of occasions when Ms Kumar was not paid in the week in which she worked, but that was the exception rather than the rule, which was that she was paid in the week in which she worked.

[78] I find that there was some confusion about the actual day on which Ms Kumar would be paid, however I accept that the day on which Ms Kumar was paid varied by only one day in each week, and on Ms Sandhu's evidence, that Wednesday was the more usual pay day in each week which accords with Ms Kumar's expectation.

[79] Considering all the evidence, I do not find that Ms Kumar suffered an unjustifiable disadvantage as regards the meal breaks and pay day variation.

[80] I do however observe that this issue arose as a result of a written employment agreement not having been provided to Ms Kumar by the Spa.

Was Ms Kumar unjustifiably disadvantaged not being paid sick leave entitlement?

[81] Employees are entitled to 5 days paid sick leave after he or she has completed 6 months' continuous service with the employer pursuant to s. 63 of the Holidays Act 2003.

[82] By November 2014 Ms Kumar was entitled to 5 days paid sick leave entitlement. I accept that Ms Kumar verbally notified her manager of the absence during the latter part of 2014, and provided a medical certificate to cover her sickness absence in April 2015.

[83] The Spa did not require employees to notify in any form of written documentation and there was no written employment agreement or house rules requiring notification to be in writing.

[84] Ms Kumar was statutorily entitled to 5 days paid sick leave and the failure to pay her accordingly during her employment caused her financial difficulty.

[85] Whilst the sick pay entitlement issue has now been resolved, I find that Ms Kumar was unjustifiably disadvantaged by the employer not paying her statutory sick leave entitlement when due, and that this unjustifiably disadvantaged her in employment.

Was Ms Kumar unjustifiably disadvantaged not being paid for the annual closedown period?

[86] Employees are entitled to 4 weeks' paid annual leave at the end of each completed 12 months of employment pursuant to s. 16(1) of the Holidays Act 2003.

[87] Employers are entitled to have a closedown period in accordance with the provisions of the Holidays Act 2003, and to require employees to take annual leave during that period pursuant to s.32 of the Holidays Act 2003.

[88] At the date of the Spa closedown period in December 2014, Ms Kumar did not have 12 months' of completed employment. She was required to cease work during the closedown period, as was permitted by the Holidays Act s 32(2) which states that any employee: "*who is not yet entitled to annual holidays at the commencement of a closedown period must, ... discontinue the employee's work during a closedown period*".

[89] However in that situation an employer must:¹ "*in respect of the closedown period, pay the employee 8% of the employee's gross earnings since the commencement of the employee's employment ..*"

[90] Alternatively, the Spa could have agreed that Ms Kumar:² "*take the period of the closedown as annual holidays in advance ...*" I find this would have been the action of a reasonable employer given her length of service at that date.

[91] Ms Kumar was required to take unpaid leave when she was entitled to some form of payment for the period, or indeed allowed by the Spa to take leave in advance.

[92] I find that Ms Kumar was unjustifiably disadvantaged by the Spa not paying her during the closedown period.

[93] I also note that the inclusion of the requirement that the Spa would have an annual closedown period in a written employment agreement could have clarified the situation for Ms Kumar.

Was Ms Kumar unjustifiably disadvantaged by being bullied?

[94] Bullying is defined on the Worksafe website as: "*...repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety*".

[95] The comment made by Ms Sumra to Ms Kumar and the other therapist in the meeting was not repeated and was retracted immediately it had been challenged.

[96] I do not find that Ms Kumar suffered an unjustifiable disadvantage as a result of bullying.

¹ s.34(2) Holidays Act 2003

² s. 34(4) Holidays Act 2003

Was Ms Kumar unjustifiably disadvantaged not being allowed to take annual leave as requested?

[97] At the time of requesting annual leave Ms Kumar had been employed in excess of 12 months, and had taken no annual leave to that point.

[98] Employers are required in accordance with s.18(1) of the Holidays Act 2003 to allow an employee to take annual leave within 12 months after the date entitlement to the holidays arises.

[99] Whilst an employer and employee should agree on when annual leave is to be taken, the consent to the taking of annual leave is not to be unreasonably withheld: s.18(4) Holidays Act 2003.

[100] Whilst Ms Sandhu said that the Spa had undertaken steps to obtain a relief therapist to cover Ms Kumar's leave during the requested periods, I note that withholding consent to Ms Kumar taking annual leave in July 2015, some three months later, was not reasonably withholding consent and as such an unjustifiable action.

[101] Whilst I accept that finding a replacement therapist to cover Ms Kumar's leave in April 2015 may have been short notice given the specialist nature of the massage offered, I find that Ms Kumar was unjustifiably disadvantaged by the Spa not allowing her to take annual leave in July 2015.

Was Ms Kumar unjustifiably disadvantaged by not being provided with payslips?

[102] Ms Sandhu's evidence was that she was unaware that Ms Kumar had not been receiving payslips, and that as soon as she had been made aware, these were immediately provided to Ms Kumar. I accept that had she been made aware of the issue at an early stage, it would have been rectified.

[103] I find that the Spa acted swiftly once notified by the employee that there was an issue. The issue had not been raised by Ms Kumar prior to the meeting held on 9 April 2015, and I do not find that Ms Kumar suffered an unjustifiable disadvantage as a result of payslips not having been provided during her employment.

Was Ms Kumar unjustifiably constructively dismissed by the Spa?

[104] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action or actions of the employer.

[105] In the Court of Appeal case *Auckland Shop Employees Union v Woolworths (NZ) Ltd*³ Cooke J listed three situations in which a constructive dismissal might occur, although he noted that these were not exhaustive. The three situations were:

1. Where the employees is given a choice of resignation or dismissal;
2. Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
3. Where a breach of duty leads a worker to resign.

[106] Ms Kumar resigned from her employment, she was not given a choice to resign or be dismissed. I find no evidence that the Spa followed a course of conduct with the deliberate and dominant purpose of coercing Ms Kumar to resign. I therefore consider whether or not there has was a breach of duty on the part of the Spa that lead Ms Kumar to resign.

[107] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*⁴ the Court of Appeal said regarding the correct approach to constructive dismissal:⁵

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[108] Therefore in examining whether a constructive dismissal has occurred the two relevant questions are:

³ [1985] 2 NZLR 372

⁴ [1994] 1 ERNZ 168

⁵ Ibid At p 172

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation. To determine that question all the circumstances of the resignation have to be examined, not merely the terms of the notice or other communication whereby the employee has tendered the resignation.
- ii. and secondly if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[109] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*⁶ observed in describing this type of constructive dismissal:⁷

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

(i) *Was there a breach of the duty owed to Ms Kumar by the Spa?*

[110] I have found that Ms Kumar was unjustifiably disadvantaged by several actions during her employment at the Spa, however I do not find that these actions, whilst inconsiderate conduct which caused her unhappiness and resentment, constituted dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship, especially in circumstances in which Ms Sandhu had notified her willingness to continue to discuss Ms Kumar's concerns after the meeting held on 9 April 2015.

[111] Whilst Ms Kumar had made the Spa aware in November 2014 that she was experiencing some stiffness in her hands which she considered was caused by the massage work she was undertaking at the Spa, she provided no medical evidence in support, and did not raise the issue again until in her written resignation in the email dated 22 April 2015, some 5 months later.

[112] Given these circumstances I find no breach of duty on the part of the Spa. On the contrary the evidence is that the Spa provided free massage to help alleviate the stiffness Ms

⁶ [1983] ACJ 965

⁷ at [975]

Kumar was experiencing in her hands and recommended that she consult her GP. These were the actions of a fair and reasonable employer given that there was no medical evidence provided to the employer.

[113] In regards to the various concerns Ms Kumar was experiencing concerning her terms and conditions of employment, Ms Sandhu met Ms Kumar as requested on 9 April 2015 to discuss her concerns, and was prepared to have a further meeting with her after that date as advised in the email dated 21 April 2015. It did not do so because Ms Kumar resigned on 22 April 2015.

[114] Whilst I find the email dated 14 April 2015 from the Spa, which referred to disciplinary action being a possibility should Ms Kumar further breach any rules, to be inappropriate, especially in circumstances in which there were no written policies and rules, there is no indication in the emails sent by Ms Kumar on 22 April 2015 that the email influenced her decision to resign.

[115] The resignation email refers only to her health issue, and the second email dated 22 April 2015 requests that the suggested meeting to discuss her concerns be rescheduled in order that she could obtain a support person.

[116] I determine that Ms Kumar was not unjustifiably constructively dismissed by the Spa but that she resigned voluntarily.

Reasonably foreseeable

[117] Having already found no breach of the duty of good faith, I further find there was not any fundamental breach of duty so serious to make it reasonably foreseeable to the Spa that Ms Kumar would resign.

Remedies

Unjustifiable Disadvantage

[118] I have found that Ms Kumar was unjustifiably disadvantaged in her employment by the Spa not paying her the minimum wage rate when due, by not paying her sick leave entitlement, by non-payment during the closedown period, and by unreasonably withholding consent to her taking annual leave.

[119] Underpinning these unjustifiable disadvantage grievances is that of the non-provision of a written employment agreement. Had Ms Kumar been provided with a written

employment agreement at the commencement of her employment, both she and Ms Sandhu would have had clarity about her entitlements and these issues now before the Authority may not have arisen

[120] I order that Spa Ayurda Limited pay Ms Kumar the sum of \$4,000.00 as compensation pursuant to s.123(c)(i) of the Act.

[121] Although the Spa has made some payment to Ms Kumar since her employment ended, she was not clear about what has been included in that payment. I note that it is not clear whether or not the payment included to Ms Kumar also included a payment in respect of a one week notice period to which she would have been entitled.

[122] I order that Spa Ayurda Limited make an itemised statement of what has been paid, and should Ms Kumar become aware of any shortfall in payment, she may revert to the Authority for that matter to be further determined in the event that it is not resolved between the parties.

Recommendation

[123] The issues that arose between Ms Kumar and the Spa were caused primarily by the non-provision of a written employment agreement to Ms Kumar at the commencement of her employment, and the ignorance of Ms Sandhu regarding the statutory requirements which the law places upon her as an employer in New Zealand, especially in regard to minimum standards of employment.

[124] I make a recommendation pursuant to S.123(1)(ca) of the Act that Ms Sandhu seek advice as soon as possible in order to ensure that the Spa is compliant with the statutory employment requirements binding employers.

Costs

[125] Costs are reserved. I consider that this is an appropriate case for letting costs lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve the matter between them. If they are unable to do so, the Applicant may file and serve memorandum to costs within 28 days with reply submissions from the Respondent to be lodged within 14 days of the days of receipt. I will not consider any costs submissions outside that time frame.

[126] While costs are reserved, I note here that, subject to her submissions, Ms Kumar represented herself and, unless she incurred legal costs, it is therefore unlikely she has grounds to claim a contribution to any fair and reasonable costs.

[127] Should costs be sought, the parties are advised that all submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority