

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Sushila Lakhan (Applicant)
AND Eurest New Zealand Limited (Respondent)
REPRESENTATIVES David Patten for Applicant
Karen Sagaga for Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Wellington, 8 June 2005
AFFIDAVITS AND SUBMISSIONS 3 June, 12, 15 and 18 & 19 July 2005
DATE OF DETERMINATION 31 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. Sushila Lakhan commenced employment as a cook with Fisher Catering Services in 1994. Her original terms and conditions of employment existed under an individual employment agreement dated August 1994. She was initially paid \$11 per hour Monday to Sunday. In addition she was entitled to 15c per hour skills allowance from 7 August 2000. She says that she has never seen a job description.
2. In May 2004 she signed a new employment agreement with Eurest New Zealand Limited (Eurest). She always worked as a cook at the Department of Internal Affairs (DIA). She worked for a short time (three months) at the Massey University site. This was pre-arranged and for a set period of time.
3. In mid-2004, a proposal was made to introduce a new food concept in the DIA cafeteria. This was called "*Taste Life*".

4. Eurest, through its managers, Nick Parker, Brent Wong and Mark Collins, met and consulted with Sushila Lakhan and Perin Gajadhar (her husband), and David Patten (Ms Lakhan's lawyer) about the *Taste Life* concept. The discussions related to the implementation of the *Taste Life* concept and the applicant's literacy skills in implementing the concept and how she would fulfil her role at the DIA cafeteria.
5. Meetings occurred on the following dates:
 - 4 August 2004 – (Ms Lakhan, Mr Gajadhar, Mr Patten, Mr Parker and Margaret Simmonds)
 - 11 August 2004 – (Ms Lakhan, Mr Wong)
 - 12 August 2004 – (Ms Lakhan and Mr Wong)
 - 26 August 2004 (Ms Lakhan and Mr Wong)
 - 7 September 2004 – (Ms Lakhan and Mr Wong)
 - 10 September 2004 – (Ms Lakhan and Mr Wong)
 - 14 September 2004 – (Ms Lakhan and Mr Wong)
 - 24 September 2004 – (Ms Lakhan and Mr Wong)
 - 30 September 2004 – (Ms Lakhan and Mr Wong)
 - 12 October 2004 – (Ms Lakhan and Mr Wong)
 - 13 October 2004 – (Ms Lakhan, Mr Gajadhar, Mr Wong and Mr Collins)
6. Mr Wong came to the conclusion that little progress was being made by the applicant in regard to her literacy and the requirements of the change of food concept to *Taste Life* in the DIA cafeteria. He concluded it meant she was not able to perform the tasks without significant assistance supported by the documentary requirements of the *Taste life* concept. Nothing turns on it or any issue about performance, which an employer is entitled to address. The evidence is not sufficient that Mr Wong intimidated or acted in any improper way towards Ms Lakhan, although her literary difficulties could have been the source of any anxiety she had. This cannot be used to criticise Eurest.
7. Mr Wong met with Ms Lakhan and Mr Gajadhar in September 2004 to discuss the applicant's literacy and the impact of this on the DIA cafeteria. Mr Wong concluded that in the interests of both parties, Ms Lakhan should be transferred to another site. He assessed suitable sites

and considered the Ministry of Education site where Mr Gajadhar was employed, as a facility support officer, by the Ministry of Education, to be appropriate.

8. Mr Wong considered that this would work well for the following reasons:
 - Ms Lakhan and Mr Gajadhar could arrange transport;
 - Mr Gajadhar could attend meetings regarding Ms Lakhan's development (his wish to attend meetings with her confirmed in an email of 6 October 2004 – document 4); and
 - Ms Lakhan could have more time to develop her literacy skills.
9. Euresst also took into account an injury that Ms Lakhan had to her knee and that she was waiting for an operation. Another factor was that the Education site had a lower turnover and therefore there would be less work and this would minimise any further harm to her knee.
10. Mr Gajadhar was not available to meet over the transfer. An offer was made by Mr Collins to defer a meeting to allow Mr Gajadhar to attend. Mr Gajadhar advised that he could not make himself available and there was no other suggestion made of a suitable meeting time. The process of transferring Ms Lakhan continued but without Mr Gajadhar's input.
11. On 12 October Mr Wong met with Ms Lakhan where he says he explained the problems to her about her literacy with regard to the implementation of the *Taste Life* concept. She did not think her level of literacy was causing any problems at all. He pointed out how she would benefit from changes and expressed Euresst's views that her skills and experience would benefit the team at a new site and allow her time to development and get experience.
12. On 13 October, Mr Collins and Mr Wong attempted to deliver the letter of transfer to her but she called Mr Gajadhar and asked him to come to the site to discuss the matter. He turned up and upon receiving the letter wanted to obtain legal advice. This request was met and the respondent advised Mr Gajadhar the transfer was scheduled for 18 October 2004 and that he should seek any advice as soon as possible.
13. What developed next was that the Ministry of Education opposed the applicant's transfer because it perceived it could cause a conflict of interest for Mr Gajadhar. This response was accepted by Euresst and it attempted to look for another site. It then decided that Ms Lakhan should be transferred to the Massey University site on a temporary basis.

14. On 18 October 2004, Ms Lakhan was required to work from the Massey University site at the Wellington campus cafeteria. She says she was not told that this was a temporary placement but did as she was instructed to attend work there.
15. Gretchen Baker, a customer service manager, was given the responsibility to outline what Ms Lakhan's duties would be and to induct her into the Massey site. She says she inducted her by introducing her to the team and showing her the site. She then delegated the chef, Jason Pring, and sandwich hand, Nikki Gordon, the task of showing Ms Lakhan the food prep and cafeteria job.
16. At the Massey cafeteria she was required to work on average 40 hours per week instead of the 42.5 hours per week she was working at the DIA cafeteria. She was paid for 40 hours but on this being taken up with Eurest, a decision was made to pay her 42.5 hours per week anyway.
17. Ms Lakhan says that she had worked as a cook for most of the time she had been with Eurest. However her duties at Massey she says did not require her to do much cooking but instead to do dishes, sweep the floors, clean the food cupboards and shelves, skirting boards, plumbing pipe work, break down boxes and put out the rubbish. She says this caused a great deal of pain and anguish because of her knees: she had to struggle to complete the work which she felt she had to do to keep her job.
18. On 9 November 2004 at approximately 12.30 pm, she slipped on some ice that was on the floor of the freezer as she came out of the freezer. She says she damaged her knee and subsequently was required to go to the hospital in an ambulance, but it was only after Mr Gajadhar intervened with Eurest that attention was given to her injury.
19. Ms Lakhan has not returned to work since her accident.

The issues in the employment relationship problem

20. The primary issues are:
 - Was Eurest's action of moving the applicant to another site unjustified?
 - Was there any discrimination?
 - Was the applicant placed in an unsafe situation at the new site she was required to work in?

- Does the applicant have a personal grievance? This will require consideration of any disadvantage to the applicant in her employment or in regard to her terms and conditions of employment.

Consideration of the facts

21. The introduction of the “*Taste Life*” concept at Internal Affairs meant that the applicant could have difficulties providing grading and menu planning in writing due to her lack of literary skills. In the past she had been assisted in her work and her lack of skills had no impact on her employment. However various meetings were held with Ms Lakhan on the “*Taste Life*” requirements. The very first meeting involved the applicant and her partner and lawyer. After this Eurest relied upon Ms Lakhan’s partner making himself available, which was not always suitable to him.
22. Attempts were made to address Ms Lakhan’s literary skills but Mr Wong came to the conclusion she would not be able to perform the tasks without significant assistance. The only assistance provided by Eurest was on the job from Mr Wong and Ms Simmonds, including them meeting with Ms Lakhan and Ms Simmonds giving Ms Lakhan one-on-one assistance. Ms Lakhan was using an English tutor that she and her partner had arranged. Because of availability difficulties with the tutor Ms Lakhan and Mr Gajadhar tried to arrange for another tutor who was not immediately available. This proved to be unsatisfactory for Eurest and not much progress seemed to occur.
23. A performance measure was the documentary requirements of the *Taste life* concept.
24. Mr Wong decided to move Ms Lakhan to another site when he determined that Ms Lakhan could not fulfil the requirements and he made the decision and informed Ms Lakhan on 12 and 13 October 2004. The decision was made without any input from Ms Lakhan and her representatives.
25. The meetings before 12 and 13 October, with Ms Lakhan, were not to consult her on a move to another site, but were about her meeting the literacy requirements. In good faith a fair and reasonable employer could be expected to consult the decision having regard to the consultations about her skills, the involvement of representatives to assist her and where she had engaged a lawyer to also assist. A fair and reasonable employer could still have been expected to contact Ms Lakhan’s lawyer, who was initially involved, and when Mr Gajadhar was not immediately available.

26. Although, Ms Lakhan's employment agreement allowed the respondent to transfer her from location to location, in these circumstances, a fair and reasonable employer could still be expected to consult. This is especially so when it emerged that the first plan to transfer her to the Ministry of Education proved to be unsuitable and there were implications on her duties, payment of hours, induction and the duration of the change.
27. Eurest's action of unilaterally deciding to move Ms Lakhan without proper representation and consultation was not fair. Eurest had the responsibility for training and managing Ms Lakhan in her employment with the changes. Eurest previously found that representation was desirable and helpful as Ms Lakhan's literacy skills were poor when she had a lawyer present in the first meeting on the changes required. Later Eurest considered that Ms Lakhan was not doing enough to address her skill deficiencies and it did attempt to assist her and reasonably relied upon her to take some responsibility too. Also, since Eurest has suggested that a move to another site would benefit Ms Lakhan in her employment then there was a reason to consult her before the decision was actually made.
28. I am not satisfied that the action was discriminatory because there was a genuine literacy problem with Ms Lakhan and the introduction of the "*Taste Life*" concept. There is no evidence that the Ms Lakhan was being discriminated against personally, given the attempts by Mr Wong and Ms Simmonds to help her, although the extent of the assistance has been challenged.
29. When Ms Lakhan was moved to the Massey site there was the possibility of Eurest losing the contract. Indeed this did happen later. It happened after Ms Lakhan's accident and she remains employed by Eurest. She has not been disadvantaged and there is no evidence that she was being set up personally because contracts do come and go and provision does exist to move from location to location.
30. It does appear that Ms Lakhan's induction to the Massey cafeteria site was not as full and comprehensive as it should have been. She was injured in circumstances where the induction may have been inadequate but she had also passed her training requirements during her employment and had experience.
31. Any changes in her duties that might have included more cleaning (given there was a chef at the Massey site) were within the scope of the job description. Also she did not raise any difficulties impacting on health and safety after she started, although she may have been dissatisfied. There was insufficient evidence that the situation threatened her employment.

32. To summarise, I hold, that Eurest failed to act as a fair and reasonable employer by deciding to transfer Ms Lakhan without proper consultation and representation before the decision was made to move her from Internal Affairs where there were no special arrangements. However Eurest is permitted to transfer staff from location to location. Ms Lakhan's employment was affected by the change in her pay but this was rectified quickly by Eurest. Her duties changed but were consistent with her job description and what she could have been expected to do at Internal Affairs. Such changes are not necessarily a disadvantage in employment in these circumstances. Ms Lakhan gave no notice of any problems she had that could have impacted on health and safety once she started at Massey. There has been no casual link established between the accident at the Massey site and her move to that site and the duties of the job and the failure of the employer to involve her in the transfer decision with a representative and where her employer's motive was in part to try and assist in her situation. She was waiting on knee surgery that her employer knew about for an injury that occurred before these events. I conclude that she was not disadvantaged.
33. Ms Lakhan does not have a personal grievance because she was not disadvantaged.
34. Even if she did have a grievance (on a point of fairness) there is no issue on wages due to her unavailability to work and any compensation would have been at the very low end of the scale. Ms Lakhan would not have been eligible for compensation for the injury or any compensation for distress directly, or indirectly resulting from a work accident, because of ACC.
35. Costs are reserved.

P R Stapp
Member of Employment Relations Authority