

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 438/10  
5277857

BETWEEN

JAYESH MISTRY  
Applicant

AND

INTERNATIONAL  
SWAMINARAYAN  
SATSANG ORGANISATION  
First Respondent

KANAIYALAL  
GANPATRAM MEWADA  
Second Respondent

Member of Authority: R A Monaghan  
Representatives: J Mistry in person  
K Davis, counsel for respondent  
Investigation meeting: Heard on the papers  
Determination: 11 October 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Jayesh Mistry says his former employer, International Swaminarayan Satsang Organisation (ISSO NZ): did not pay him for the balance of a five-month contracted period when the period ended early; did not pay him for all of the hours he worked; forced him to work in excess of the agreed hours of work; did not provide him with accommodation of the kind that had been agreed; paid his remuneration into a bank account other than the nominated account; and forced him to resign from his employment.

[2] Mr Mistry also says in his statement of problem that he was employed to work for ISSO NZ through Kanaiyalal Mewada, and says Mr Mewada was responsible for

some of the actions set out above. He also says Mr Mewada harassed him when he raised his concerns. Mr Mewada is Mr Mistry's father-in-law.

[3] As well as listing the concerns set out above, the statement of problem says that Mr Mistry 'raised a personal grievance with the employer respondent as per the statutory requirement'.

[4] ISSO NZ says no personal grievance was raised with it within the 90-day period set out in s 114(1) of the Employment Relations Act 2000, and it does not consent to a grievance being raised out of time.

[5] This determination concerns whether a personal grievance was raised in time with ISSO NZ, or whether there should be a grant of leave to raise the grievance out of time. Before turning to those matters, I address the participation in this employment relationship problem of Mr Mewada.

### **Participation of Mr Mewada**

[6] Mr Mewada is ordinarily resident in India, and conducts business there. Section 4A of the Employment Relations Authority Regulations 2000 provides:

#### *4A Service outside New Zealand*

*Any document relating to a matter before the Authority may be served out of New Zealand –*

*(a) by leave of the Authority; and*

*(b) in accordance with regulations made under this Act.*

[7] When this provision was drawn to his attention Mr Mistry filed an application for leave to serve Mr Mewada outside New Zealand. In the application Mr Mistry said he was a member of a team engaged by Mr Mewada, which in turn contracted with ISSO NZ to provide Mr Mistry's services. He asserted that Mr Mewada was his employer jointly with ISSO NZ, and repeated that he has a claim against Mr Mewada in that Mr Mewada harassed and ill-treated him.

[8] ISSO NZ said it was Mr Mistry's employer. It engaged Mr Mistry as a specialist wood carver to work on the interior of a Hindu Temple it was constructing

in New Zealand, and said it did so through Mr Mewada as its agent. ISSO NZ facilitated Mr Mistry's obtaining of a visa allowing him to work in New Zealand. A written employment agreement was expressed to be between ISSO NZ and Mr Mistry. The agreement listed Mr Mewada as ISSO NZ's project manager, and identified him as the person to whom Mr Mistry was to report.

[9] I formed a preliminary view from the papers that the grounds for citing Mr Mewada as Mr Mistry's employer jointly with ISSO NZ were weak. I was concerned that attempts to serve Mr Mewada outside New Zealand and obtain his response would delay unnecessarily the commencement of the investigation, especially in the face of ISSO NZ's acceptance that it was the employer. Unfortunately there have been delays anyway, in part because Mr Mistry himself has been and remains resident outside New Zealand. Leave to serve Mr Mewada outside New Zealand was declined, although the decision was to be reviewed if information obtained in the course of the investigation indicated a need to involve Mr Mewada.

## **Background**

[10] Mr Mistry began his employment in New Zealand on 15 July 2007, under a written employment agreement that was expressed to expire five months from its commencement date.

[11] As well as relying on the alleged breaches of the employment agreement set out in his list of concerns, Mr Mistry said he was forced to resign from his employment on 18 August 2007 and to return to India because Mr Mewada required him to accompany a woman Mr Mistry says had been present in New Zealand illegally and was now returning home.

[12] ISSO NZ denies breaching the employment agreement, and says Mr Mistry's decision to leave his employment and return to India was prompted by his poor relationship with his father-in-law and concerns about his marriage. Mr Mistry advised the trustees of his difficulties and they agreed to let him leave early despite the continuing need for his services. A letter dated 24 August 2007 from Jayanti Patel, an ISSO NZ trustee, confirmed in effect that Mr Mistry had been released from his employment agreement and was free to return to India.

**Whether a grievance was raised in time**

[13] Section 103(1) of the Employment Relations Act 2000 defines a personal grievance as being a grievance against the employee's employer or former employer because of a claim:

- (a) that the employee has been unjustifiably dismissed; or*
- (b) that the employee's employment or 1 or more conditions of the employee's employment ... is or are or was ... affected to the employee's disadvantage by some unjustifiable action by the employer; or*
- (c) ...*

[14] It seems from a reading of the papers that the word 'grievance' has not always been used with reference to the above definition, and on occasion has been used to mean 'complaint' or 'concern'. I also apprehend the possibility that all matters within the jurisdiction of the Authority are being seen as 'grievances', when the term has a more limited meaning in that context. A 'personal grievance' is a matter falling within the definition in s 103(1) and associated provisions. Additional matters within the jurisdiction of the Authority are listed in s 161 of the Act. These additional matters are not subject to the 90-day time limit in s 114 of the Act, which applies only to personal grievances as defined, although some have limits of their own.

[15] Turning to what, if any, personal grievance Mr Mistry has raised and when, Mr Mistry said in his statement of problem that 'when the applicant objected to all these and many other unfair practices [being a reference to the concerns listed] and raised his personal grievance with the respondents ... the respondents turned a deaf ear and [Mr Mewada] started abusing and harassing the applicant'.

[16] The nature of the personal grievance, and when and how it was raised, was not specified in any more detail.

[17] Regarding what might be personal grievances under s 103(1)(b), an affidavit Mr Mistry filed in support of his claim that a personal grievance was raised in time indicated that some references to the raising of a grievance amounted to allegations that certain objections were raised and not responded to except to the extent that Mr Mistry was harassed as a result. There was nothing else in the affidavit capable of indicating that any personal grievance as defined in the Act was raised prior to the

termination of Mr Mistry's employment. Numerous other non-specific references to the oral raising of grievances do not suffice as evidence that personal grievances as defined were raised. I am not persuaded that personal grievance was raised with the employer prior to the termination of Mr Mistry's employment.

[18] There is also the possibility of a personal grievance arising out of Mr Mistry's resignation. His account of his concerns, and the allegation that these led him to resign, is capable of founding a personal grievance under s 103(1)(a) or more particularly a constructive and unjustified dismissal.

[19] Mr Mistry also made generalised statements that he raised his concerns about his ill-treatment by Mr Mewada and deposed that, instead of addressing his concerns about Mr Mewada, ISSO NZ told him Mr Mewada sought his resignation. That action, too, is capable of amounting to a constructive dismissal if it occurred.

[20] The third matter raised in support of the forced resignation was Mr Mewada's requirement that Mr Mistry accompany a woman on her return to India.

[21] Nothing in the account of the parties' discussions at the time of the resignation supports any raising of a grievance at the time.

[22] Mr Mistry also deposed that on his return to India he made a number of calls to ISSO NZ seeking payment. Since part of Mr Mistry's claim is that he was assured on his departure for India that he would be paid for the remainder of the agreed period of his employment, I understand that is the payment to which he referred. He may also be referring to the allegation that he was underpaid for the work he did. Mr Mistry says a grievance was raised orally during these calls.

[23] The chairman of ISSO NZ, Dr Kantilal Patel, deposed that he had several exchanges with Mr Mistry after Mr Mistry's return to India, but the exchanges were cordial. There was no discussion about Mr Mistry's dissatisfaction with his work conditions, or about any claim of Mr Mistry's against ISSO NZ.

[24] I find that, even if Mr Mistry had the conversations with Dr Patel he says he did, the conversations amounted to no more than demands for payment. Whether or

not my understanding of nature of the payment sought is correct, bare claims for payment of monies owed do not amount to personal grievances in terms of s 103(1) of the Act.

[25] Mr Mistry then relied on a 'legal notice' he said was dated November 2007. The notice was prepared and issued by a professional representative in India, on behalf of Mr Mistry who was also resident in India. It was directed expressly to Mr Mewada at an address in New Zealand. The document filed in the Authority was neither signed nor dated.

[26] The document detailed Mr Mistry's concerns about Mr Mewada's actions and made no allegation against ISSO NZ or any of its officers or employees. It alleged that Mr Mewada: by his behaviour caused Mr Mistry to become traumatised and ill; failed to pay Mr Mistry wages as agreed; forced Mr Mistry to work on Saturdays and Sundays despite an agreement to the contrary; took away Mr Mistry's ATM card and added another person's name to his bank account; did not provide adequate accommodation; failed to make payment for a job done at Mr Mewada's own home; influenced Mr Mewada's daughter (Mr Mistry's wife) against Mr Mistry; and caused Mr Mistry mental anguish and depression which led to a loss of his job.

[27] Some of these concerns are outside the relevant employment relationship, particularly those relating to work done on Mr Mewada's own home and to family relationships. They are not within the scope of this employment relationship problem and I take them no further.

[28] Otherwise, if for present purposes I accept that sending the document to Mr Mewada was a communication to the employer, the question remains of whether the content was sufficient to raise a grievance.

[29] I do not consider the content was sufficient to raise a dismissal grievance. The notice lists a set of allegations most of which might amount to allegations of breach of the employment agreement but do not go further.

[30] Further to whether a grievance in terms of s 103(1)(b) is raised in the document, the dates on which relevant incidents occurred are not identified. That,

together with the absence of a date on the notice itself, means I am not persuaded that, even if the notice amounted to the raising of a grievance, the relevant grievance was raised in time.

[31] By a further document headed 'legal notice,' signed and dated 26 June 2008 and directed to ISSO NZ as well as to Mr Mewada, Mr Mistry's advocate in India repeated the claims regarding hours of work and payment, and the concerns about accommodation and the bank account. The notice said at para 12 that: "... you ... have violated the labour rights of my client by your above acts. That ultimately my client was forced to resign from the job and return to India because of constant exploitation, violation of the contract terms and insult." It went on to say at para 13 that: "... on 18/08/07 you forced my client to resign from the job by exploiting him in terms stated above, but instead of accepting his resignation you issued him a letter wherein ... his work was over and he was free to leave for India."

[32] The letter referred to in the passage was the letter of 24 August 2007.

[33] ISSO NZ says this was the first time a personal grievance was raised with it. I do not construe the notice as raising any grievance other than, in effect, an unjustified and constructive dismissal. The grievance was raised out of time.

[34] Mr Mistry has subsequently written to a number of organisations about his concerns, including the Department of Labour's labour inspectors who investigated the concerns and reported on the outcome. Although out of time in any event, none of this correspondence amounted to the raising of a personal grievance with the employer.

[35] For these reasons I conclude that no personal grievance on the ground of constructive and unjustified dismissal was raised in time. No other personal grievance has been raised at all.

### **Leave to raise personal grievance out of time**

[36] In a document dated 12 April 2010 Mr Mistry sought leave to raise his personal grievance out of time. He did not specify the grievance being raised or refer

to s 114 or s 115 of the Act, which provide for the grant of leave to raise a grievance out of time.

[37] The relevant provisions read:

*114 Raising personal grievance*

...

*(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.*

*(4) on an application under subsection (3) the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –*

*(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include and 1 or more of the circumstances set out in s 115); and*

*(b) considers it just to do so.*

*115 Further provision regarding exceptional circumstances under section 114*

*For the purposes of section 114(4)(a) exceptional circumstances include –*

...

*(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65 ...*

[38] Several of the grounds Mr Mistry cited in support of the application concerned whether a grievance was raised in time rather than amounting to reasons why there should be a grant of leave to raise a grievance out of time.

[39] Of the remaining grounds most concerned whether it was just to grant leave, which is referred to in s 114(4)(b). However there are two limbs to s 114(4), both of which must be met in order to support a grant of leave to raise a grievance. To the extent I can discern the 'exceptional circumstances' being relied on in terms of s 114(4)(a), one of the grounds was that the 'respondent' failed to guide Mr Mistry on the procedure he should follow for getting his problems resolved. This may fall within s 115 (c). None of the grounds related to the remainder of the circumstances identified in s 115 and I do not refer to them again.

[40] The employment agreement set out at Schedule D a detailed procedure for the settlement of personal grievances. This included the necessary explanation of the services available for the resolution of employment relationship problems and a reference to the period of 90 days within which a personal grievance must be raised.

[41] I am not persuaded there were exceptional circumstances warranting a grant of leave to raise a grievance, and accordingly it is not necessary to address whether it is just to grant leave. Leave to raise a grievance is declined.

### **Remaining claims**

[42] I have found that no personal grievance was raised in time, and declined leave to raise a personal grievance out of time. However the statement of problem and associated documents include claims, such as those for the payment of monies owed, which are not within the definition of personal grievance and which can proceed.

[43] The Authority will approach the parties shortly to discuss arrangements for hearing the remaining claims.

[44] After the taking of evidence and submissions had been completed the Authority was informed that Mr Mistry had instructed an advocate in New Zealand. Now having the benefit of this determination, would the advocate confirm to the Authority at his earliest convenience whether he will be acting for Mr Mistry in the remaining matters.

### **Costs**

[45] Costs are reserved pending a final determination of this employment relationship problem, or the matter is otherwise resolved.

R A Monaghan

Member of the Employment Relations Authority