

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 349  
3002678

BETWEEN	BABU PANDIT Applicant
AND	AKUTHOTA JWALA NARSIMHA SWAMY First Respondent
AND	SATYA MT EDEN LIMITED t/a SATYA SOUTH INDIAN RESTAURANT Second Respondent

Member of Authority: Robin Arthur

Representatives: Mohammed Shahadat, Advocate for Applicant  
Komal Kumar, Advocate for Respondent  
Shona Carr, Counsel for Immigration New Zealand

Investigation Meeting: 22 August 2017

Determination: 10 November 2017

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**DETERMINATION OF THE AUTHORITY**

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- A. Babu Pandit was entitled to pursue his personal grievance for unjustified dismissal against Akuthota Jwala Narsimha Swamy, who is personally liable for any remedies awarded.**
- B. Mr Pandit's employment ended due to actions by Mr Swamy that were unjustified in all the circumstances at the time and amounted to an unjustified dismissal.**
- C. In settlement of his personal grievance for unjustified dismissal, Mr Swamy must pay Mr Pandit the following sums within 28 days of the date of this determination:**
- (i) \$18,465 (net) as lost wages; and**

- (ii) **\$15,000 as compensation for humiliation, loss of dignity and injury to his feelings.**

**D. Costs are reserved with a timetable set for memoranda to be lodged if an Authority determination of costs is needed.**

**Employment Relationship Problem**

[1] Babu Pandit raised a personal grievance for unjustified dismissal. He said his employer unfairly ended his employment and got Immigration New Zealand (INZ) to cancel his work visa while he was out of New Zealand on leave.

[2] Satya Mt Eden Limited (SMEL) lodged a statement in reply to Mr Pandit's application to the Authority saying he had wrongly named Akuthota Jwala Narsimha Swamy as his employer. It said SMEL, using the trading name Satya South Indian Restaurant, was Mr Pandit's employer. Mr Swamy and his wife Padmaja Akuthota are the directors and shareholders of SMEL. The Authority directed SMEL be joined as a second respondent for the purpose of resolving that issue and whether, if its existence was not disclosed to Mr Pandit, he could elect to pursue his grievance against Mr Swamy personally, as an agent of the company, rather than the company itself.<sup>1</sup> Both Mr Swamy and SMEL denied Mr Pandit's employment ended due to any unjustified action by them.

**How Mr Pandit's visa came to be cancelled**

[3] Mr Pandit worked as a chef at the Satya restaurant in Mount Eden from April 2013 to September 2016. Mr Swamy recruited him for the role after an interview in his home city of Hyderabad in India in late 2012. He was employed under the terms of three work visas issued between 2013 and 2016. His most recent work visa was issued on 13 April 2016 with an expiry date of April 2018.

[4] By arrangement with his employer Mr Pandit left New Zealand on 21 September 2016 for an extended period of leave in Hyderabad. He was due to return to Auckland on 5 January 2017 and continue working in the restaurant from then. He planned to bring his wife and their child with him to live in New Zealand for the

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<sup>1</sup> *Cuttance (t/a Olympus Fitness Centres) v Purkis* [1994] 2 ERNZ 321 at 332-3.

remainder of that visa period. They had stayed in India during his previous years of work in Auckland.

[5] However this plan did not go ahead because INZ cancelled Mr Pandit's visa on 16 November 2016. INZ took that action based on the contents of two emails and a letter from Mr Swamy. In an email sent to an INZ manager on 2 November 2016 Mr Swamy said Mr Pandit had disguised a diagnosis of diabetes and manipulated his medical condition by taking medication during the process of his application for his most recent work visa. Mr Swamy wrote that "based on this information, we request to terminate his visa as we will not be employing him further". He asked for his email to be kept anonymous and to be advised "when action taken". In a further email sent to an immigration officer on 3 November Mr Swamy wrote that "Mr Babu Pandit's employment is terminated due to the reasons provided". INZ evaluator Nathan Fu contacted Mr Swamy about those emails and asked for their contents to be confirmed in a signed letter. Mr Swamy then sent Mr Fu a letter, dated 4 November 2016, stating he had information that Mr Pandit had "somehow manipulated" a health test in order to get his visa renewed and "we would therefore wish to terminate his services". Mr Swamy asked INZ to take "further action".

[6] INZ sent Mr Pandit a letter by email on 7 November advising that it had received information he was no longer employed by the restaurant and intended to cancel his visa on 16 November. He was invited to provide comments or further information by 14 November. Mr Pandit said he did not receive that email correspondence. However he did receive a subsequent email from INZ, attaching a letter dated 16 November 2016. That letter repeated the statement that INZ had information he was no longer employed by the restaurant. It then advised that his visa was cancelled because the basis on which it was granted no longer remained.

[7] As part of the process for applying for that visa Mr Pandit had a medical health assessment in January 2016. The assessment included an HbA1c test. The test measures bloodstream sugar levels over the previous eight to 12 weeks. It is used as a screening test to identify and monitor diabetes. His results showed elevated blood sugar levels. Mr Pandit was required to take that test again eight weeks later. When Mr Pandit talked to his GP about those results he was advised to change his diet and to exercise. The GP also prescribed some iron supplement tablets. When Mr Pandit

repeated the test on 18 March 2016 the result was satisfactory. The doctor who completed his finalised medical examination included the following comment on the health report submitted to INZ: “Repeat HbA1c is improved after diet and lifestyle modification which was recommended by his GP”. Mr Pandit was then granted a work visa for the two year period from 13 April 2016 until 13 April 2018.

[8] Once he got INZ’s 16 November letter advising his visa was cancelled, Mr Pandit could not return to New Zealand to work. INZ also posted a border alert to have him stopped at check in from boarding any New Zealand bound flights. The INZ alert note said Mr Pandit should be interviewed and “health matters” carefully determined if he again sought to enter New Zealand.

### **The issues for determination**

[9] Two main issues required determination. The first concerned whether SMEL was an undisclosed principal at the time that the employment relationship was formed so that Mr Pandit could elect to pursue Mr Swamy.

[10] The second issue was whether the employer’s actions were justified. This concerned whether Mr Swamy’s contact with INZ in early November, making allegations about Mr Pandit’s conduct and asking INZ to “terminate his visa”, were what a fair and reasonable employer could have done in all the circumstances at the time. In the event those actions were found to fail the statutory test of justification, orders for remedies of lost wages and distress compensation also had to be considered. Those remedies could be reduced if Mr Pandit’s own conduct had contributed to the situation in a blameworthy manner.

### **The Authority’s investigation**

[11] Evidence for the Authority’s investigation of Mr Pandit’s personal grievance came from four people: Mr Pandit; Mr Swamy; Mr Fu of INZ and Venkata Ramana Swanapuri, a manager of a Satya restaurant in Sandringham. The Authority issued a witness summons requiring Mr Fu to give evidence. The parties and INZ provided relevant documents about Mr Pandit’s employment and immigration applications.

[12] Mr Pandit attended the investigation meeting by a Facetime connection from Hyderabad. The other three witnesses attended in person. All four answered

questions from me and the parties' representatives. Mr Pandit had the assistance of an interpreter of Hindi, provided by the Authority, in answering questions. The representatives also gave oral closing submissions.

[13] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all evidence and submissions received. It has expressed conclusions on issues requiring determination, stated findings of fact and law necessary to explain those conclusions and has specified orders made.

### **Was Satya Mount Eden Limited an undisclosed principal?**

[14] Mr Swamy and Ms Akuthota own the Satya business that operates four restaurants under that trading name in central Auckland – one in Ponsonby, one in Karangahape Road, one in Sandringham and one in Mount Eden. As well as SMEL Mr Swamy and Ms Akuthota are directors and shareholders of four other registered companies: New Zeandia Impex Limited, Worldwide Enterprises Limited, Satya Services Limited and Import Export NZ Limited. Mr Swamy travels to India once or twice a year for his import business and to recruit staff for his restaurants.

[15] SMEL was incorporated in 2010. Mr Swamy said SMEL was the entity that employed Mr Pandit for the outset of the employment relationship in 2013. He pointed to monthly PAYE schedules submitted to IRD in the name of SMEL which gave tax information about Mr Pandit and three other employees at the Mount Eden restaurant. He also pointed to Employer Supplementary Forms submitted to INZ in 2014 and 2016 that included reference to the SMEL company name. Those forms have to be completed by employers who offer a position to a person from overseas who applies for a work visa. While those forms were given to Mr Pandit to submit with the other documents required for his visa application, he had not filled out those details in them himself. There was nothing to suggest Mr Pandit had read and understood the contents of those forms to indicate Mr Swamy had acted in his capacity as a director of SMEL in employing him at the outset of the employment relationship in 2013.

[16] Other documents that could be expected to refer clearly to SMEL, if it were being identified as the employing entity, did not. Most important of those was the employment agreement. A new employment agreement was submitted to INZ in

support of each visa application. Both the 2014 and the 2016 version of the agreement identified the employer as “Satya South India Restaurant”. There is a reference to “the company” in a clause on redundancy but no company named in that or any other clause.

[17] Similarly the letters of offer made to Mr Pandit, for submission with his visa applications in 2014 and 2016, do not refer to SMEL as the employer. The 2014 letter had a letterhead bearing the name Satya South India Restaurant and referred at its foot to two other registered companies in which Mr Swamy is a director. Neither was identified as the employing entity.

[18] Those two letters of offer made clear the employment relationship was already in existence and intended to continue. The 2014 letter refers to an offer of “an extension of the job as a South Indian chef at our restaurant for a further period of two years”. The 2016 letter refers to being “pleased to offer you back the job ... for a period of three years from the date of visa grant”.

[19] Even if the employment relationship were considered to have begun afresh on 15 March 2016 when Mr Swamy signed the employment agreement, its wording clearly failed to identify SMEL as the employing entity.

[20] The work visas issued to Mr Pandit in 2013 and 2014 both referred only to Satya South Indian Restaurant. His most recent visa, issued on 13 April 2016, said he could only work for Satya Mt Eden Ltd in Auckland. Even if that latter visa could be taken to have disclosed the company as the principal in the employment relationship, it was some years into it rather than at its outset.

[21] Against that background, and on the balance of probabilities, the identity of SMEL was not disclosed to Mr Pandit at the outset of his employment. He most likely understood his employer to be Mr Swamy personally. However even if an independent but knowledgeable observer would have assumed that the actual employer was likely to be a registered company, it would not have been apparent to such an observer that SMEL was that company.<sup>2</sup>

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<sup>2</sup> *Mehta v Elliot (Labour Inspector)* [2003] 1 ERNZ 451(EmpC) at [22].

[22] Even accepting Mr Swamy intended SMEL to be the actual employing entity, the evidence did not support a conclusion that he, as its director, had disclosed the existence of the company to Mr Pandit at the outset of the employment. The result was that Mr Swamy's actions in recruiting Mr Pandit, and assisting him with arrangements to renew his work visa on three occasions, were as an agent of that undisclosed principal. Mr Pandit could, as he elected to do, proceed against Mr Swamy personally. Mr Swamy, rather than SMEL, was liable for any remedies awarded.

### **Were the employer's actions justified?**

[23] Mr Pandit, Mr Swamy and Mr Swanapuri gave different accounts of what led to the allegation that the satisfactory result of Mr Pandit's blood sugar level tests in March 2016 was achieved by some improper manipulation.

[24] Both Mr Pandit and Mr Swamy agreed Mr Pandit had talked openly in January 2016 about the high level revealed by the first test and the requirement he be re-tested. However Mr Swamy said he heard, for the first time, in November 2016 that Mr Pandit had obtained and used some form of medication to mask his symptoms and achieve the satisfactory March result. Mr Swamy said this occurred during a discussion with another employee and that employee's wife at the restaurant in November 2016. Both those people knew Mr Pandit and his wife. They were discussing a request Mr Pandit had made to Mr Swamy for Mrs Pandit to be offered a job in the restaurant. Mr Swamy said he was told Mrs Pandit had recently been in hospital and had health problems and that Mr Pandit had taken medication to manipulate his blood sugar level test results. Mr Swamy said he was told by that employee to talk to Mr Swanapuri who had more details about what Mr Pandit was said to have done.

[25] Mr Swamy said he did talk to Mr Swanapuri who told him Mr Pandit had asked if Mr Swanapuri's nephew, a doctor, could get him diabetic medicine without a prescription.

[26] Mr Swanapuri's own evidence to the Authority was that Mr Pandit did talk to him about his health issues on 16 February 2016. The evidence in Mr Swanapuri's written statement was different from what he said, when questioned at the Authority investigation meeting, in his oral evidence. His written statement said Mr Pandit had

asked about getting some medicine to reduce the sugar level and to “manipulate his medical record”. However, in his oral evidence Mr Swanapuri accepted that Mr Pandit, talking in Hindi, had not referred to manipulation. Rather Mr Swanapuri said Mr Pandit told him that “my level is high and somehow I want to reduce it”. Mr Swanapuri said he had told Mr Pandit that, although he tried to get him some medication, he was unable to do so.

[27] Mr Pandit’s evidence was markedly different. He said he told Mr Swamy in January about the high blood sugar level test result and it was Mr Swamy who then suggested Mr Pandit talk to Mr Swanapuri about getting some medication to help. Mr Pandit said Mr Swanapuri did give him some tablets of some form but he had not taken them. Mr Pandit said he did not act on his GP’s advice to do more exercise but he had changed his diet and drank large amounts of water. He said those were the changes to his lifestyle that he believed resulted in the satisfactory test result received in March 2016.

[28] Among the documents in the evidence was a Doctor’s note from an appointment Mr Pandit had in January 2016. The note referred to the HbA1c result and referred to discussing “lifestyle changes” including diet and exercise. It included a prescription for iron tablets. Mr Pandit said he had not taken those tablets and did not know what they were for.

[29] Ultimately the reliability of those competing accounts from Mr Swamy, Mr Swanapuri and Mr Pandit did not need to be resolved by the Authority investigation. Instead, what was really at issue was how Mr Swamy dealt with information he said was of concern to him as a result of his conversations with another employee in November 2016. Mr Swamy said he was concerned at the prospect Mr Pandit may have achieved a renewed work visa in April 2016 by masking his true state of health and that Mrs Pandit also had recent health problems that might make her an unsatisfactory employee if, as Mr Pandit wanted, she was offered a job at the restaurant. The latter concern about Mrs Pandit’s state of health was not directly related to Mr Pandit’s employment relationship problem but it too was dealt with in the same way that Mr Swamy dealt with his concerns about what Mr Pandit was said to have done. Mr Swamy made no direct inquiry of Mr Pandit or Mrs Pandit about their account of events or the true state of affairs. Instead, he acted on what was, at best, a second hand account and invited INZ to act on it without himself first checking

whether there was any truth to it. This was clear from the emails, referred to earlier in this determination, Mr Swamy sent to INZ and his letter to Mr Fu of 4 November:

Hi Mr Nathan Fu,

Thanks for your phone call and the email  
Details of the employee;  
Name: Mr Babu Pandit  
Passport: [number redacted]  
DoB: 15.10.1977

I have been informed that Mr Babu Pandit was diagnosed for diabetes.

Babu did manage to cover up the diabetes and somehow manipulated to disguise his condition for the second test. He managed to get a visa extension once, it appears.

He applied for a visa for his wife and son. His wife was operated upon in India.

I understand that he did not want to declare the factual medical conditions.

This is a very risky situation and we have our own apprehensions of he [sic] safely working in a kitchen as a chef. In addition we did not like the fact that he wanted to conceal the health conditions, as one concealment could lead to the other. This will also put us into a very delicate position as others may also follow suit.

We would therefore wish to terminate his services.

This is for your further action please.

Please keep us informed the action taken by you.

Kind regards,

Akuthota Jwala Narsimh Swamy  
Director  
Satya Mt Eden Ltd (registered company name)  
4<sup>th</sup> Nov 2016.

[30] The evidence available to the Authority showed Mrs Pandit had been in hospital in 2009. She had hernia repair surgery. Mr Swamy said Mr Pandit took leave in 2014 to return to India, partly due to concerns about his wife's health. There was, however, no evidence she had undergone any hospital operation since 2009. Mr Swamy's belief that she had was a further instance of him relying on speculative and unverified comments.

[31] At the time in November 2016 when Mr Swamy said he was told the concerning story about Mr Pandit manipulating his test result, Mr Pandit was already on leave in India. However Mr Pandit remained Mr Swamy's employee at that time. He was due to return to Auckland and continue work at the restaurant from January 2017. Mr Swamy was, either in his personal capacity or as a representative of SMEL, bound by the statutory good faith obligation to be active and communicative in maintaining a productive employment relationship with Mr Pandit. This included providing Mr Pandit with the opportunity to comment about information that would or was likely to have an adverse effect on the continuation of his employment.<sup>3</sup>

[32] There was no real impediment to Mr Swamy providing that opportunity to Mr Pandit even though he was on leave in India at the time. Mr Swamy had email and phone contact information for Mr Pandit. They had been in touch by those means shortly beforehand when Mr Pandit asked Mr Swamy to consider giving Mrs Pandit a job at the restaurant. There was also no rush for Mr Swamy to act on the story he had heard. Mr Pandit was not due to return to New Zealand until early January. There were several weeks during which he had time to give Mr Pandit the opportunity to provide a response that might have put Mr Swamy's mind at ease.

[33] Mr Swamy said he had to act promptly because he did not want to compromise the status of his business in having visa applications approved as those visas were vital in getting the South Indian trained chefs needed for the Satya restaurants. This was not a satisfactory explanation for what he did. He could have advised INZ he had some information that was of concern, that he was investigating it and he would provide updated information as soon as he could. Instead, he acted on that information without any attempt to verify its veracity. He told INZ Mr Pandit's employment was terminated and, as a consequence, asked INZ to cancel Mr Pandit's visa. There was no doubt Mr Swamy was aware the consequence of his request would be Mr Pandit could not return to New Zealand and could not continue his employment at the restaurant.

[34] Two other explanations Mr Swamy offered were also unsatisfactory.

[35] Firstly, he said he had to act quickly because all other employees seemed to know what Mr Pandit was said to have done and he had to show that was

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<sup>3</sup> Employment Relations Act 2000, s 4(1A)(c).

unacceptable. A fair and reasonable employer could not have acted on that supposed information without providing an opportunity to comment and possibly correct it. This obligation was not overridden by Mr Swamy's concern that other employees might take similar, supposedly "irregular" steps.

[36] Secondly, Mr Swamy said he expected INZ would first check the allegation with Mr Pandit before taking action to cancel his visa. Mr Swamy's evidence on this point was clearly inconsistent with what he wrote in his correspondence to INZ in November 2016. His email of 2 November, which he asked INZ to keep anonymous, included this unequivocal statement: "[W]e request to terminate his visa as we will not be employing him further."

[37] INZ actions, in doing so little to try to verify Mr Swamy's allegation or to inquire into its source or veracity before cancelling Mr Pandit's visa, may give rise to some legitimate concerns. Its 7 November letter to Mr Pandit, sent to him in India by email, supposedly gave him an opportunity to comment or provide further information. Mr Fu had already checked border control records and knew Mr Pandit had left New Zealand. He also informed another INZ officer who promptly put a border control alert in place to prevent Mr Pandit from being allowed to board a plane to return to New Zealand. No steps were taken to check if Mr Pandit had received the 7 November letter. No attempt was made to contact him by any other means. Instead the 16 November cancellation letter was issued. Its text noted Mr Pandit had not responded to the 7 November "opportunity to comment". Even if Mr Pandit had received the 7 November letter from INZ, he would have been none the wiser as to the real reason INZ was proposing to cancel his visa on 16 November. The letter simply said INZ had received information he was "no longer employed by Satya South Indian Restaurant" and that the basis on which he was granted a visa no longer remained. Mr Swamy had not directly told Mr Pandit that his employment was terminated and INZ did not disclose the reason Mr Swamy told it that Mr Pandit's services were no longer needed.

[38] The Authority often hears evidence of unscrupulous employers, particularly from migrant communities, threatening migrant employees that they will contact INZ and have INZ cancel their work visas. This is a means by which such workers, widely recognised as being vulnerable to exploitation, are discouraged from seeking to have their employer honour obligations in New Zealand law.

[39] No such threat was made in Mr Pandit's case but how INZ officers dealt with Mr Swamy's request to INZ assisted him to act in an arbitrary manner that clearly breached his obligations to treat Mr Pandit fairly.

[40] More might reasonably be expected of INZ to verify the allegation Mr Swamy made rather than automatically acting on it to cancel a worker's visa. Mr Fu's evidence, and brief oral submissions from INZ counsel, were to the effect that what he and his colleagues had done in Mr Pandit's case was consistent with INZ's present standard policies and its powers under the relevant legislation. It was not within the Authority's jurisdiction to examine that point further. What could be considered was whether Mr Swamy acted justifiably in what he did, and how he did it, to end Mr Pandit's employment in the way he did.

[41] Three particular submissions made on Mr Swamy's behalf at the Authority investigation meeting failed to negate a conclusion that his actions were unjustified.

[42] Firstly, Mr Swamy was said to be justified in what he did because Mr Pandit had acted dishonestly by concealing a problem with his blood sugar levels. There was no reliable evidence Mr Pandit had acted improperly to secure a better HbA1c result. His employer was not required to have established there was such conclusive evidence but Mr Swamy was obliged to show he took reasonable steps to investigate the allegation so that he could have fairly reached such a conclusion. That was where Mr Swamy's case fell down. He had simply not done anything to give Mr Pandit a reasonable opportunity to respond to those concerns. Instead, Mr Swamy acted on what was rumour or speculation.

[43] There was more he could reasonably and fairly have done. Before sending his requests to INZ for Mr Pandit's visa to be cancelled, Mr Swamy could have rung Mr Pandit and talked to him. He did try unsuccessfully to telephone Mr Pandit on 7 November but this was well after the correspondence to INZ of 2, 3 and 4 November. The content of that correspondence made it clear Mr Swamy had already decided to end Mr Pandit's employment. And, as he accepted in answer to a question at the Authority investigation meeting, Mr Swamy could instead have first told Mr Pandit of the allegation and asked him to go to an independent and reliable laboratory in Hyderabad to take a further Hb1Ac test. The results of such a test could have

alleviated his concerns or provided a fair basis to take further action. Mr Swamy confirmed he had family and business associates in Hyderabad who could have been asked to help him make such arrangements locally, so it was a practical measure reasonably open to him.

[44] Secondly, Mr Swamy submitted he had not dismissed Mr Pandit. This submission appeared to be based on the notion that there was no direct communication to Mr Pandit telling him that his employment was at an end and that situation had occurred instead by INZ's actions in cancelling his visa. A dismissal is a termination of employment that occurs at the initiative of the employer.<sup>4</sup> The fact and intention of employer's actions are considered in determining whether such a termination of employment has occurred. Mr Swamy's actions in telling INZ that Mr Pandit's employment had been terminated and requesting a cancellation of his visa were clearly actions intended to terminate or repudiate Mr Pandit's existing employment agreement. Those actions, when objectively viewed in context, were sufficiently clear and unambiguous to amount to a termination of Mr Pandit's employment. In *Angus v Ports of Auckland Limited* the Employment Court referred to the "extreme and, these days, unlikely" example of an employer dismissing an employee for misconduct on the say so only of another employee as "very likely" to amount to an unjustified dismissal.<sup>5</sup> This was what happened to Mr Pandit. Mr Swamy acted on the 'say so' of another employee without providing any opportunity for Mr Pandit to comment on or correct the allegations made. It was not a minor defect in the process Mr Swamy followed and it resulted in Mr Pandit being treated unfairly. This failure made the actions Mr Swamy took to end Mr Pandit's employment, and remove his ability to return to work at the restaurant, an unjustified dismissal.

[45] Thirdly, Mr Swamy submitted what he had done to investigate his concerns was justified having regard to the resources available to the Satya restaurant business. Although the business was a member of the Restaurant Association, Mr Swamy said he had not known, in November 2016, that he could have got assistance from the Association's professional advisers about how to deal with the situation. However Mr Swamy has been in business in New Zealand for 18 years, with many workers

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<sup>4</sup> *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cas 95 at [102].

<sup>5</sup> [2011] NZEmpC 160 at [26].

employed at the four Satya restaurants during that period. There was no reason a business of that nature should be permitted to operate to a lower standard of what could fairly and reasonably have been done in all the circumstances at the time Mr Swamy took the actions that amounted to termination of Mr Pandit's employment.

### **Remedies: lost wages**

[46] Section 123(1)(b) of the Act provides that the Authority may, in settling a personal grievance, order reimbursement of a sum equal to the whole or part of the wages or other money lost by the employee as a result of the grievance. In making such orders s 128 requires the Authority to order the employer to pay the employee the lesser of a sum equal to the lost remuneration or to three months' ordinary time remuneration. Section 128 also provides a discretion to order the employer to pay a greater sum.

[47] Assessment of Mr Pandit's claim for lost wages considers, firstly, the period for which he could fairly have expected to work for his employer if he had not been unjustifiably dismissed. Mr Swamy, in his oral evidence, described Mr Pandit as a "nice" worker. He had no complaints about Mr Pandit's work ethic or the quality of the dishes he made as a chef. There was no reason to doubt that, if he had been able to return to his job in January 2017, Mr Pandit would most likely have stayed there for at least the 16 months until his visa expired in April 2018. Given his employment had already continued through three separate visa periods, there was also some reasonable prospect his employment could even have continued beyond April 2018. Taking sixteen months as the period of actual loss was therefore a conservative assessment.

[48] From that period some allowance should be made for contingencies of life.<sup>6</sup> Mr Pandit might have found better paid or more enjoyable work with another employer and successfully transferred his visa for that purpose. It was also possible his wife and his son, coming to New Zealand for the first time, might not have settled well, and they might have opted to return to India earlier. There was, as already noted, no reliable evidence of any ongoing health concerns that might have brought an earlier end to the employment. Allowing for such or other contingencies, financial losses associated with Mr Pandit's unjustified dismissal could be assessed on the basis of twelve months' remuneration.

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<sup>6</sup> *Telecom New Zealand v Nutter* [2004] 1 ERNZ 315 at [73].

[49] His net weekly earnings were \$502.94. This gave a net annual amount of \$26,152.

[50] From that amount deductions needed to be made for earnings Mr Pandit made in India in mitigation of his loss. Those earnings comprised 32,000 rupees from work he got during the first three months of 2017 (amounting to around NZD 708) and, for the remainder of 2017, the sum 315,000 rupees (amounting to around NZD 6979) he earned or expected to earn from a job he secured from April onwards. Deducting those amounts left a total of NZD 18,465 (net) to be awarded as lost remuneration under s 123 and s 128 of the Act.

**Remedies: compensation for humiliation, injury to feelings and loss of dignity**

[51] Mr Pandit was also entitled to an award under s 123(1)(c)(i) of the Act for the distress caused to him by his unjustified dismissal. His evidence in support of that remedy focussed on the financial anxiety caused by what had happened. He had travelled abroad to gain better paid employment in order to create an eventually more financially secure life in India and to save for the education of his son. This involved extended periods of absence from his wife and son but they had planned to be all together in New Zealand as he continued work from January 2017. Those financial and family plans were shattered by his unjustified dismissal. As was evident from Mr Pandit's oral evidence, he felt humiliated and a loss of a dignity as a result of what Mr Swamy had done. An award of \$15,000 compensation was warranted for those effects and the unexpected shock of finding his employment had been terminated while on leave.

**Contribution: was any reduction of remedies required?**

[52] The remedies awarded to Mr Pandit could be reduced if blameworthy conduct by him had contributed to the situation giving rise to his grievance.<sup>7</sup>

[53] There was no evidence supporting a conclusion, on the balance of probabilities, that Mr Pandit had improperly manipulated or masked his actual blood sugar levels to secure a satisfactory result in the HbA1c test in March 2016.

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<sup>7</sup> Employment Relations Act 2000, s 124.

[54] Neither was he in any way blameworthy for the failure of Mr Swamy to give him the opportunity to address that allegation in November 2016.

[55] No reduction of remedies awarded was required.

### **Costs**

[56] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Mr Pandit may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Swamy would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. The parties could expect the Authority to determine costs on its usual notional daily rate of \$4500 for a one day investigation meeting unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>8</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>8</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].