



New Zealand Employment Relations Authority Decisions

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Pillay v Caterers on the Run Limited (Auckland) [2017] NZERA 32; [2017] NZERA Auckland 32 (3 February 2017)

Last Updated: 10 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 32
5437977

BETWEEN YADESHWAR PILLAY Applicant

AND CATERERS ON THE RUN LIMITED

Respondent

Member of Authority: Nicola Craig

Representatives: Applicant in person

Jale Valentine, Director of Respondent

Investigation Meeting:

Further information received:

19 and 20 September 2016

10 October and 3 November 2016 from Applicant

Determination: 3 February 2017

DETERMINATION OF THE AUTHORITY

A. Caterers on the Run Limited (Caterers OTR) is ordered to pay

Yadeshwar Pillay (Mr Pillay) the sum of \$7497.60 gross as holiday pay, within 28 days of the date of this determination.

B. Caterers OTR is ordered to pay Mr Pillay the sum of \$220.00 gross as sick pay, within 28 days of the date of this determination.

C. Mr Pillay is ordered to pay to Caterers OTR \$3000.00, as damages for breach of his duty of fidelity, within 28 days of the date of this determination.

D. The Authority has no jurisdiction to deal with the Applicant's claims regarding his kitchenware, the Respondent's claims

regarding its kitchenware, or the Respondent's other remaining claims against the Applicant.

Employment relationship problems

[1] Caterers on the Run Limited (Caterers OTR or the company), operated an Indian restaurant and catering business, trading as Jzaac King and later Jzaac Curries. Jale Valentine is the sole director and shareholder of the company.

[2] Yadeshwar Pillay worked for Caterers OTR from 2013 onwards, primarily as a cook and sweet maker.

[3] In early 2014 Mr Valentine and Mr Pillay discussed the possibility of Mr Pillay buying the company's business. Mr Pillay was in the process of applying for permanent residence in New Zealand. He needed a higher rate of pay to assist with that application.

[4] Caterers OTR says that Mr Pillay ran the business from around May 2014, and was responsible for its various obligations from then until late 2015. Mr Valentine stepped back in to active involvement from about September 2015, after he was informed by the Inland Revenue Department (IRD) of various tax obligations which the company had not met.

[5] Mr Pillay was dismissed by Caterers OTR, finishing on 28 October 2015. He never took ownership of Caterers OTR shares.

[6] Mr Pillay now makes claims for amounts which he says are outstanding to him from the company. Caterers OTR makes claims that Mr Pillay took money and property from the company without authorisation.

[7] Mr Valentine has been to the Police regarding Mr Pillay, including making a written statement in support of his complaint. He also says that he has approached the Serious Fraud Office, although there is no indication of any investigation by that office.

[8] An investigation meeting was held on 19 and 20 September 2016. I heard

from Mr Pillay and Mr Valentine. Evidence was also given by Shaheem Rah'Mani

(Mr Valentine's new accountant), Irene Nalini (who was involved with Caterers OTR), Joe Taliai (whose business contracted with Jzaac King regarding a stall) and Kunjamun Nair (who was involved in a business in which Mr Pillay later worked).

[9] As permitted by [s 174E](#) of the [Employment Relations Act 2000](#) (the Act) this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[10] Mr Pillay does not bring an unjustified dismissal claim. Rather Mr Pillay's

issues for investigation and determination are whether he is owed by Caterers OTR: (i) holiday pay, and if so how much?

(ii) sick leave pay and if so, how much?

(iii) unpaid wages for time worked; and if so how much? (iv) wages for a notice period, and if so, how much?

(v) the cost of kitchenware property which he left at the company's

premises when he was dismissed?

[11] Caterers OTR counter claimed that Mr Pillay:

(i) stole Caterers OTR's cash (direct from sales and also by withdrawing money from the company's accounts using its ATM card);

(ii) did business (catering and sweet making) using company equipment, then not paying the profits to the company;

(iii) diverted business opportunities from the company to himself; and

(iv) stole its kitchen equipment.

[12] At the start of the investigation meeting Caterers OTR also raised an allegation that Mr Pillay had breached his employment agreement with it by establishing, after his dismissal, his own business next door to Caterers OTR's restaurant. Orders to enforce non-competition, and non-solicitation of clients, clauses were sought. However, those clauses specified a six month period after termination of employment. By the start of the investigation meeting on 19 September 2016 more than six months had passed since Mr Pillay's dismissal, so this claim was not pursued further.

Purchase and control of the business

[13] The parties agree that in 2014 there was discussion about Mr Pillay buying the Caterers' OTR business. However, they disagree on the extent to which Mr Pillay was in control of the company's business from 2014 to 2015.

[14] Mr Valentine says that Mr Pillay was in control. Mr Pillay denies that and says that Mr Valentine was still the boss. Mr Pillay accepts that he became the manager of the business. He accepts that at times he had the company's ATM card and would get sums of cash out, sometimes hundreds of dollars, to pay company bills. He also made cash deposits with the company's card. He knew how much was in the company's accounts as he got statements from the bank.

[15] Mr Pillay's access to the company's ATM card, its bank statements, internet access to its bank account, and a company receipt book which he held, suggest that he had a level of control of the business. However, he was clearly an employee of the company, did work for it and thus has entitlements under his employment agreement and the holidays legislation.

Hours of work

[16] A 2014 employment agreement states that Mr Pillay's pay rate was \$22.00 gross per hour and that his hours of work were 60 per week. Another employment agreement to the same effect was signed by the parties in May 2015. There was no system in place to record actual hours of work.

[17] Mr Pillay said at the investigation meeting that he worked Monday to Saturday but that at some point this changed to Tuesday to Sunday. He was unable to recall when that change occurred. When asked regarding events in late September 2015 he suggested that Monday was his day off at that time. However, it seems unlikely that he would not recall the change of days off if it occurred in his last weeks of employment.

[18] Although there was some evidence at the investigation meeting to suggest that on occasion Mr Pillay may not have been consistently working the hours specified in

the employment agreement, it is clear that he was an employee of the company who undertook work for it.

[19] The only pay slips which were filed were for a period from November 2014 to March 2015. They indicate that Mr Pillay's standard weekly pay was \$1320.00 gross (\$1039.10 net), which is in keeping with the \$22.00 per hour rate, for 60 hours per week, in the two employment agreements.

Pay issues in October 2015

[20] Mr Valentine was back more actively involved in the business from around September 2015. In October Mr Pillay's pay was somewhat irregular. No pay records or wage slips were provided by either party for that period. Mr Pillay's bank statements showed the net amounts which he received from Caterers OTR.

Holiday pay

[21] The company had obligations under the [Holidays Act 2003](#) (the [Holidays Act](#)) to Mr Pillay as a company employee. Mr Pillay claims that he was owed six weeks' holiday pay, totalling \$6234.60 net, as he had worked for the company for about two years but had only taken a two week holiday in 2014.

[22] Mr Valentine produced a holiday and leave record for the period from December 2013 to early May 2014, which shows two weeks of annual leave taken in the April to May 2014 period. No later leave records were provided.

[23] Mr Pillay, when asked by the Authority, initially denied having taken any other paid holidays during his employment. However, there was evidence in Mr Pillay's bank statements of his eftpos card being used in Wellington and other North Island sites from Monday 28 to Tuesday 29 September 2015. Mr Pillay accepted that he had been away for a day's holiday plus his usual day off work. Under the heading "Unpaid wages" below, pay information is set out showing that Mr Pillay was not paid for this holiday, and therefore it is not deducted from the holiday pay now owing to him.

[24] Also, Ms Nalini and her family went on a short holiday with Mr Pillay and his family. However, she was not completely certain regarding the dates, and guessed it as being on a public holiday period. It may have been that with a public holiday day and the day the shop usually closed, there was sufficient time for Mr Pillay to have a two day break without taking annual leave. I am not satisfied that the evidence is sufficient to establish this holiday as having been taken in paid time.

[25] Looking now at Mr Pillay's entitlements, although the evidence was not entirely consistent, Mr Pillay appears to have started work on 21 November 2013. He finished on 28 October 2015. Therefore he did not quite reach his second anniversary.

[26] Under [s 24](#) of the [Holidays Act](#), as Mr Pillay's employment had come to an end, and he was entitled to annual holidays for the November 2013 to November 2014 year, he must be paid for that, less the two weeks' holiday which he took. His ordinary weekly pay is the applicable rate, for the purposes of [s 24\(2\)](#) of the [Holidays Act](#). Two weeks' pay for Mr Pillay was \$2640.00 gross.

[27] Mr Pillay finished work about a month short of his next anniversary and so under [s 25](#) of the [Holidays Act](#) he must be paid 8% of his gross earnings for his employment since 21 November 2014.

[28] Using Mr Pillay's bank account records of net payments received, I calculate that Mr Pillay should have received gross pay for the period of \$60,720.00. Eight per cent of \$60,720.00 is \$4857.60. That sum and the \$2640.00 remaining for the first year of service, make a total of \$7497.60 gross holiday pay owing. I am satisfied on the evidence that this amount is owing to Mr Pillay.

[29] I order Caterers OTR to pay Mr Pillay the sum of \$7497.60 gross within 28 days of the date of this determination.

Sick Pay

[30] Mr Pillay claims that he was not paid for sick leave when he took time off work for sickness in October 2015.

[31] Mr Pillay provided a medical certificate from his doctor dated 9 October 2015, which states that Mr Pillay would be unfit to work for three days from 9 October

2015. Mr Pillay says that this certificate was provided to Mr Valentine at the time.

[32] The extent of Mr Pillay's claim for sick leave is somewhat unclear. In the calculations which he filed in support of his claim, he specified a figure which was slightly more than a usual day's pay.

[33] At the investigation meeting Mr Pillay indicated that he may have been sick for longer, but that he only took one day off work sick at this time. Mr Valentine accepted that Mr Pillay had had some time off sick.

[34] I find that the company owes Mr Pillay for one day's sick leave, and order it to pay the sum of \$220.00 gross to Mr Pillay within 28 days of the date of this determination.

Unpaid wages

[35] Mr Pillay claims that he was under paid in October 2015. However, a close examination of events during that period and payments made, shows that these underpayments largely relate to the failure to pay holiday pay and sick leave as outlined above.

[36] Mr Pillay received a lesser amount than his usual weekly wage for the payments into his account on 5 and 9 October 2015. These two payments are less than a week apart and I take both as relating to the pay period finishing on 4 October. The sum of \$173.19 net, which amounts to one day's pay, is outstanding when both payments are considered against the usual net amount received weekly.

[37] The one day's underpayment in the pay period finishing 4 October 2015 can be explained by the day Mr Pillay was on holiday, on either Monday 28 or Tuesday

29 September 2015. Therefore this underpayment will be covered by the holiday payment ordered above.

[38] In the next pay period Mr Pillay received \$744.69 net. How this pay was calculated is not clear. This pay period covers the time when Mr Pillay has a medical

certificate, so it appears that the under payment is the failure to pay sick leave. This has already been dealt with above.

[39] Mr Pillay also complains about his final pay which was less than his usual pay. However, during the investigation meeting he said that there was an arrangement between himself and Mr Valentine that money would be deducted from his final pay. His evidence in this regard was hard to follow, but seemed to support an agreed deduction from the final pay.

[40] In conclusion I am not satisfied that any of the under payments claimed by Mr Pillay provide a separate basis for an unpaid wages claim. The claim for unpaid wages by Mr Pillay is dismissed accordingly.

Notice period

[41] Mr Pillay claims that he was entitled to be paid a notice period for his dismissal. In the statement of problem this was specified as four weeks. However, Mr Pillay's employment agreement provided for a one week notice period, or two weeks in the event of redundancy.

[42] Mr Valentine says that Mr Pillay was instantly (or summarily) dismissed. This was due primarily to Mr Valentine's belief that Mr Pillay took large sums of money from the company without his knowledge or agreement.

[43] Mr Pillay has not raised an unjustified dismissal personal grievance claim. His employment agreement provides that employment may be terminated summarily and without notice for serious misconduct. Serious misconduct is defined to include theft and dishonesty. I am satisfied that Mr Pillay was summarily dismissed and that no notice is therefore payable.

Jurisdiction issues

[44] I need to determine whether the Authority has jurisdiction to decide several other issues raised by the parties. Firstly, this concerns the respective claims of both parties that the other stole their kitchenware and is liable to pay for it. Each denies the other's claim.

[45] In addition, Caterers OTR claims that Mr Pillay:

(i) stole money from the business (both by taking money from cash sales and by withdrawing money from the company's account using its ATM card);

(ii) diverted business opportunities from the company to himself; and

(iii) did business (catering and sweet making) using company equipment, then not paying the profits to the company.

[46] There is some overlap between the second and third categories. Mr Pillay denies that he did any of these three things.

[47] I indicated to the parties that there was a jurisdiction issue prior to the investigation meeting. However, I decided to proceed to an investigation meeting on all issues (including jurisdiction), as Mr Pillay clearly had some claims which were within the Authority's jurisdiction and there were difficulties getting clear and adequate evidence from both the parties prior to the meeting.

The Law

[48] Under s 161 of the Act the Authority has exclusive jurisdiction to make determinations about employment relationship problems generally. This includes jurisdiction to consider under subs (1)(b) "*matters related to a breach of an employment agreement*" and under subs (1)(r) "*any other action...arising from or related to the employment relationship...(other than an action founded on tort)*".

[49] In *JP Morgan Chase Bank NA v Lewis* 1 the Court of Appeal considered the jurisdiction issue arising out of a non-disparagement clause in a settlement agreement. The Court rejected the notion that all issues which arise between employer and employee are exclusively within the Authority's jurisdiction because of the existence of that relationship. Rather, in order to come within the description of "employment relationship problem" the problem must be one that "directly and essentially concerns

the employment relationship". 2

¹ [\[2015\] NZCA 255](#)

² Above n 1 at [95]

[50] The Court accepted a distinction drawn by Panckhurst J in *Pain Management Systems (NZ) Ltd v McCallum* 3 between a claim which may have its origins in the employment relationship, and one, the essence of which, is related to or arises from the employment relationship. In other words, is the subject matter of the claim some right or interest which is not directly employment related?

[51] The Court in the *JP Morgan* case considered that the application of that test should have led to a different conclusion (namely that there was no jurisdiction for the Authority under s 161) than that reached in *Hibernian Catholic Benefit Society v Hagai* 4. There the employer sued to recover money stolen by an employee in the course of her employment.

[52] In *JP Morgan* the Court of Appeal recognised that, in *Hibernian* case, Ms Hagai was in breach of her employment agreement and that her actions would have justified dismissal, but the essence of the claim was the dishonest theft of the money so:

While the claim may have had its origins in the employment relationship in the sense that the relationship created the opportunity for her theft, Ms Hagai's conduct was such that it would have made her liable to the plaintiff *without* any such relationship. In other words the existence of the employment relationship was not a necessary component of any of the causes of action that could have been asserted against her. 5

[53] Turning to the present case, there is some difficulty in that many of the claims are not pleaded clearly. It may not be clear whether a claim is based for example, on a contractual duty, or has a tortious, equitable or statutory basis. This is not unusual in the Authority, particularly where lay people often represent themselves or their company.

[54] Before looking at each claim I note that the company took punitive action against Mr Pillay, on the basis of its belief that he had stolen from it, by summarily

dismissing him. As Mr Pillay has not challenged his dismissal, the Authority has not

³ HC, Christchurch, CP 72/01, 14 August 2001 at [22]

⁴ [\[2014\] NZHC 24](#)

been required to investigate whether or not in the context of the dismissal Mr Pillay took money from Caterers OTR.

Money taken from company

[55] Caterers OTR claims that Mr Pillay took money from the company, both by taking cash from sales and from the company's bank account. These claims fall within the Court of Appeal's indication in *JP Morgan* of matters which are not within the Authority's jurisdiction.

Property taken

[56] The claims by each party that the other has their kitchenware are essentially theft claims, and on the basis of the approach in *JP Morgan*, I do not consider that the Authority has jurisdiction to consider them.

Business opportunities

[57] Then there are the claims that Mr Pillay used catering business opportunities for himself and did not pay the profits to the company. This claim could potentially be seen as a breach of the duty of fidelity in the employment agreement, which would likely then bring it within the Authority's jurisdiction.

[58] The lack of evidence of company records, particularly in terms of invoices for catering work and receipts, made it difficult to assess whether money went into company's funds or bank accounts, or not.

[59] In my view the evidence in most of the instances raised by the company, although somewhat limited, suggests that the relevant business transactions were done in the company's name with the issue then being whether the money received by Mr Pillay, for the services provided, made it into the company's funds. The company argues that Mr Pillay took the cash for himself.

[60] One example concerns a food stall operated at an event. Mr Taliai produced an agreement form between his radio station and Jzaac Curries, which covered money being paid by Jzaac to purchase the right to run the stall at the station's anniversary event. The agreement is expressed as being with Jzaac Curries, although "Babu" (a name by which Mr Pillay is known) is also mentioned. The company's physical address is referred to.

[61] Mr Taliai understood the stall was to be run by Jzaac Curries. He went to the company's restaurant at least three times in relation to the stall arrangements. Although members of Mr Pillay's family were working in the stall, so was Ms Nalini from the shop.

[62] In this instance the catering business appears to have been done under the company's 'Jzaac' trading name, rather than in Mr Pillay's own name. The question is then an accounting for the money, and as the allegation against Mr Pillay concerns theft, this is also not a matter which is within the Authority's jurisdiction.

[63] Further, the evidence in most instances is simply insufficient to support claims by the company for damages against Mr Pillay.

[64] In one instance I am satisfied that Mr Pillay diverted a business opportunity to himself that should have gone to the company. Mr Pillay arranged catering for the wedding of his immigration consultant's daughter. According to Ms Nalini, who was present when the discussion occurred between the consultant and Mr Pillay, it was agreed that \$3000 from the catering would be set off against Mr Pillay's bill from the consultant. Mr Pillay denied this but I found Mr Nalini to be the more credible witness on this issue.

[65] I am satisfied that Mr Pillay's use of this business opportunity for his own advantage was a breach of his duty of fidelity or faithfulness to the company. The loss to the company was \$3000.00 and the company's damages claim succeeds in this regard. I order that Mr Pillay pays \$3000.00 to the company within 28 days of the date of this determination.

Sales of sweets and snacks

[66] Mr Valentine alleges that Mr Pillay was selling sweets and snacks without his consent. This included changing of the colour on company stickers for food packs. Although there was not a substantial amount of evidence on these sales, the evidence that there was, supported the business being conducted under the Jzaac name, using

the company's address and landline number, although Mr Pillay's own cell phone

may have been used too.

[67] Again the issue was whether the proceeds were going into the company's accounts, or to Mr Pillay personally. I also do not consider this to be within the Authority's jurisdiction. Also, the evidence is insufficient to support a claim for damages.

Costs

[68] As neither party was represented by a paid representative no costs are awarded.

Nicola Craig

Member of the Employment Relations Authority

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