IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 277
3019431

	BETWEEN	DOUGLAS RUPA Applicant
	A N D	TH89 LIMITED t/a VIET FLAMES RESTAURANT Respondent

Member of Authority:	T G Tetitaha
Representatives:	D Rupa in person No appearance by the Respondent
Investigation Meeting:	1 August 2018 at Auckland
Submissions Received:	1 August 2018 from Applicant
Date of Determination:	31 August 2018

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. Douglas Rupa was unjustifiably dismissed by TH89 Limited.

B. Douglas Rupa was unjustifiably disadvantaged in his employment by the TH89 Limited's comments about his age and its effect on his ability to work and the requirement he employ staff based upon their race, nationality and skin colour.

C. I order TH89 Limited to pay the following wage arrears:

a) $480 carparking expenses;

b) $4,615.40 less PAYE for the one month notice period;

c) $369.23 less PAYE holiday pay for the one month notice period;

d) $608.24 Kiwisaver employers contribution

D. I order TH89 Limited to pay Douglas Rupa the sum of $5,000 (inclusive of a reduction of 50% for contributory conduct) pursuant to s 123(1)(c)(i) and 124 of the Employment Relations Act 2000.

E. I order TH89 Limited to pay Douglas Rupa the sum of $71.56 being his filing fee.

Employment Relationship Problem

[1] Douglas Rupa alleges he was unjustifiably dismissed on or about 18 September 2014. He also alleges he was unjustifiably disadvantaged by various actions including discrimination.

Non-appearance by respondent

[2] The respondent employer, TH89 Limited has filed a statement in reply but failed to engage any further with the Authority. Efforts to contact the respondent at the address for service and on the telephone number provided in the statement of reply have been unsuccessful.

[3] A telephone conference was set down for 20 July 2018 and a hearing notice sent to the respondent's address for service. Calls to the contact number provided in the statement in reply went unanswered. A minute was issued and forwarded together with the notice of the investigation meeting to the address for service.

[4] The respondent then failed to attend the investigation meeting. No good cause has been shown for its absence. Therefore I have heard and determined this matter without hearing from the respondent.

Relevant facts

[5] Douglas Rupa is a New Zealander of Indian descent. He was employed as a restaurant manager by the respondent on or about 17 June 2014. The role involved food and beverage management, employment and rostering of restaurant staff, completion of the staff payroll each week (which was forwarded to the respondent's accountant) and cost analysis of the restaurant's turnover. He understood his hours of work were 45 hours per week. He received $60,000 per annum.

[6] There was no written employment agreement. Instead Mr Rupa was sent a letter dated 16 June 2014 containing the following:

> Congratulation! We are pleased to confirm you have been selected to work for VIET FLAMES RESTAURANT. We are delighted to make you the following job offer.
>
> The positon we are offering is RESTAURANT MANAGER at a wage of 55k to 60k per year plus commission (will be consider after three months ~~of trial~~).
>
> Probation from 17/06/2014 to 23/08/2014.
>
> One month's notice in writing will be required by either party to terminate this agreement or as agreed by both.
>
> We would like you to start work on 17/06/2014 at 10.30 am.
>
> Please sign the enclosed copy of this letter and return it to me to indicate your acceptance of this offer.
>
> We are confident you will be able to make a significant contribution to the success of our company and look forward to working with you.
>
> Sincerely
> Director Harry Nguyen

[7] Mr Rupa started work on 17 June 2014. The previous manager was still employed. During his interview for the job, Mr Nguyen had expressed concerns about her abilities and explained that Mr Rupa was being brought in to replace her. She was to remain as his assistant. Unfortunately this had not been conveyed to her and it came as a surprise. The previous manager became upset then left and did not return to work. Little did Mr Rupa know that this scenario was to occur again during his employment.

[8] Harry Nguyen, respondent director later promised the respondent would also pay for a carpark. Mr Rupa then signed and returned the letter containing the job offer on 23 June 2014.

Racial Discrimination

[9] One month after he started Mr Nguyen emailed Mr Rupa on 18 July 2014. He discussed amongst other things the characteristics the respondent sought for front of house staff:

> Doug – as discussed we are looking at Kiwi and European markets so I want staffs at front house are Kiwi or European with one or two Vietnamese girls, must be good experience and have trained properly. Please advertise to get qualify staffs to improve our front of house.

[10] It was around this time Mr Rupa recalls a meeting with Mr Nguyen. He was told that he had to get rid of one of the two staff members, D and C. Mr Rupa distinctly recalls being told that this was because "there were too many black people" and Mr Nguyen wished to hire fairer skinned people. D was of Indian descent. C was of Peruvian descent. Both were darker skinned than average.

[11] He produced an email from Mr Nguyen dated 29 July 2014 advising, amongst other things:

> … I want more Kiwi and better experienced people at FOH so you should consider between [D] and [C] one has to go. If you think [D] qualified then please send him the job offer letter.

[12] Mr Nguyen then advised he wished to hire smaller girls so they could fit the Vietnamese costumes. He made remarks about C being overweight. Mr Rupa became upset and refused to fire staff on this basis. He also became concerned that he too may be discriminated against because he was of Indian descent.

Pressure regarding Immigration

[13] An employee D approached Mr Rupa to assist him in obtaining his visa. He wanted Mr Rupa to confirm a senior management position had been advertised and that there were no suitable candidates other than D. D had then approached Mr Nguyen. Mr Nguyen asked Mr Rupa to "deal with this matter."

[14] Mr Rupa understood he was being asked to write a letter supporting D's appointment to the bar manager job that was not required given the size of the restaurant. Mr Rupa was concerned he would be misleading Immigration if he was to support the application. He refused to do so and told D to speak to Mr Nguyen. Mr Rupa believes he was disadvantaged by this.

Age discrimination

[15] By 7 September 2014, the parties' relationship had somewhat deteriorated. Mr Rupa had been asking for a written employment agreement due to excessive work

hours and uncertainty around his duties including employment of staff. Mr Nguyen was annoyed and emailed Mr Rupa on 8 September 2014 below:

> Hey Doug
>
> What do you want now? In the signed agreement I offer you the job saying clearly that "one month's notice in writing will be required by either party to terminate this agreement or as agreed by both" so why you listen to somebody without my notes then blame me it is not fair for me, you are an older man you should not have that little boys thinking.
>
> …
>
> I was very nice to you why you rude to me? You make me so disappointed. I know you are old now so you are moving slow and lack of knowledge about new technologies but I have given you a lot of chance and try to advise you what to do to promote our business but you don't listen to me.
>
> …

[16] Mr Rupa was very upset by these comments. He believed the respondent was threatening to dismiss him on one month notice due to his age and working ability. This disagreement had arisen because Mr Rupa refused to work seven days per week meaning the restaurant had to close for one day. He was already working between 63 to 74 hours per week at that stage.

Misconduct

[17] On 9 September 2014 an unknown woman came into the restaurant at around 11:30am. Mr Rupa asked if she was a guest and if she wished to be seated for lunch. She said no, she wished to work there. Mr Rupa asked her three or four times what her name was and what she wanted. Each time the woman would refuse to say her name and kept looking towards the kitchen. In the kitchen was the brother of the director Harry Nguyen, Ty Nguyen, who was a chef.

[18] Mr Rupa understood there was no money to hire additional staff. He told her they were not hiring anyone. At the time they were quite busy preparing for the start of the day and an influx of people in the restaurant. Mr Rupa then asked everyone in the kitchen if they knew who she was. Mr Nguyen's nephew, Ken, then said *"She's your new boss"*.

[19] Mr Rupa admitted he was shaken by this statement. He was also worried because the woman remained seated by the till and bar area where the staff kept their bags, was inappropriately dressed for work and seemed intoxicated. He then told her if she did not go he would call the police. However, she refused. She would not tell him her name or what she was doing there. Mr Rupa alleges she then approached him and said *"You're too old to be working here"* and took a swipe at his hand. It was then Mr Rupa turned and told her to *"Fuck off"*.

[20] Ty Nguyen left and went outside speaking on his cellphone. He returned and told Mr Rupa that Harry Nguyen was on his way. Harry Nguyen arrived and Mr Rupa asked him what was going on. Harry Nguyen stated she was his assistant. Mr Rupa expressed some surprise. Mr Nguyen then raised the issue of Mr Rupa's refusal to work seven days a week. Mr Rupa left the premises. He later texted Mr Nguyen saying that he was sick and did not return to work again.

Correspondence post 9 September

[21] With Mr Rupa out of the workplace, the parties communication from 9 September was limited to letters, email and text messaging. Several letters dated 11, 12, 15, 16 and 18 September 2014 have been produced by the respondent. All are addressed to Mr Rupa care of the Vietflames Restaurant. It is clear Mr Rupa never collected any of these from the Restaurant because from 12 September he had been suspended from the workplace.

[22] Mr Rupa appended to his statement of problem a letter dated 10 September 2014. This letter was not appended to the respondent's statement in reply. The significance of this letter is discussed later in the decision.

[23] The respondent also attached to its statement in reply copies of emails with attachments. There are no copies of the attachments to these emails.

[24] Mr Rupa gave evidence about the difficulties with email communication. He had no internet at his home at the time. He was reliant upon the free WiFi at the local library to download email. He also had difficulties downloading email attachments due to the age of his personal laptop.

[25[] At hearing Mr Rupa produced copies of text messages between himself and Mr Nguyen from 11 to 16 September 2014.

[26] Given the respondent failed to attend the investigation meeting I have had to rely upon Mr Rupa's evidence only about the correspondence he received leading to his dismissal.

Suspension

[27] On 11 September 2014, Mr Rupa texted Mr Nguyen stating he was unwell and would not return to work until Saturday 13 September.

[28] Mr Nguyen texted his reply the same day stating he had sent a letter to Mr Rupa's personal email address about a meeting on Tuesday. He asked he read the letter today.

[29] Mr Rupa states he downloaded the letter dated 10 September 2014 addressed to him care of the Vietflames restaurant that is attached to the statement of problem. It is almost illegible due to formatting issues. This letter alleged on 9 September 2014 Mr Rupa:

a) Acted in an offensive and inappropriate way to "Kathy";

b) Used bad language when you spoke to "Kathy";

c) Was not authorised to tell "Kathy" to leave the restaurant.

[30] It invited him to a disciplinary meeting on 12 September 2014. No other allegations were set out therein.

[31] Mr Rupa texted a reply at 6:17 pm complaining about being harassed and abused when he was unwell by Mr Nguyen and "his legal team".

[32] Mr Rupa denies receiving the letter dated 11 September 2014 attached to the back of the respondent's statement in reply. Mr Rupa states he had never seen this letter before he received the statement of reply in 2017. He produced his gmail inbox to show no record of its receipt.

[33] The 11 September 2014 letter repeated the allegations in the 10 September letter but added one further allegation. This was sending text messages to a supplier and employees that "recorded confidential information about their financial situation". These are set out below:

> Hi [supplier], I have enjoyed our meeting as common people from the first time we met, and I have appreciated our working relationship and you fabulous service. It is for these reasons, and because I see you are expanding your family that I must advise you that Vietflames is having financial problems and that you need to proceed from here on in with financial caution to protect your business and family needs. Regards Doug.
>
> Hi [employees], the owners of Vietflame have written several letters stating they have run out of money and maybe unable to pay extra staff. That having been established and being the case I cannot in good conscience employ you on their behalf knowing you will not get paid. I suggest for the time being until matters improve at Vietflames you look for other employment. Of course I will gladly be a referee for you. Sorry. All the best. Doug.

[34] He was invited to a meeting on 16 September 2014 at 11:30am. The letter also referred to a proposal to suspend his employment. It gave until 12 September to provide any feedback.

[35] On 12 September Mr Nguyen texted a reply to Mr Rupa's text of 11 September. He denied harassment and referred to a meeting next Tuesday 16 September. He then stated:

> Other than your text, I have not received any feedback from you about the proposal to suspend you from work. Therefore I have decided to suspend you until we have our meeting on Tuesday.

[36] Mr Rupa states he never received any indication of a proposal to suspend prior to this message.

Other misconduct?

[37] The respondent has appended an email dated 15 September 2014 from Mr Rupa to a discount reseller of lunches at the respondent's restaurant copied to Harry Nguyen. The email stated amongst other things that the respondent was "*having severe financial management and cash flow issues*" the directors of the company are unable to guarantee my salary" and "*they may well not be able to guarantee and make good any promotions with [your business]*."

[38] Although this email was never raised with Mr Rupa prior to dismissal, it is similar conduct to the text messages he sent earlier to a supplier and employees.

Dismissal

[39] Mr Rupa had emailed on 13 September seeking copies of the video surveillance of the 9 September incident.

[40] Mr Nguyen emailed the below reply on 15 September at 3.05 pm:

> Thank you for your emails, both dated 13 September 2014.
>
> The video surveillance is not relevant to my disciplinary letter dated 11 September 2014 and therefore I am not required to provide you with a copy.
>
> Specifically Viet Flames video surveillance does not record sound, only images. I have not relied on any of the video surveillance taken at Viet Flames in preparing my 11 September 2013 (sic) letter because it did not record what you or [the woman] said to each other. The allegations about [the woman] are based on information provided to me directly from [the woman]. I did not use the video surveillance to prepare my allegations or to provide me with any information for the allegations.

[41] Mr Rupa was unhappy with this reply. He then made a request at 3.18 pm for the same material under the Privacy Act. Mr Nguyen forwarded the reply to its lawyers whom drafted a reply.

[42] At 4.35 pm the respondent's lawyer replied directly to Mr Rupa by email about his request. It noted Mr Rupa's request for copies of the video surveillance of the incident on 9 September 2014 pursuant to the Privacy Act 1993. These would be provided to him within 20 working days, but not in advance of the following days meeting.

[43] In the evening of 15 September 2014 at 6.05 and 6.32 pm Mr Rupa again sent emails seeking the video surveillance and raising issues of breaches of the Privacy Act and natural justice.

[44] On 16 September at 9.38 am Mr Rupa emailed the respondent requesting the video surveillance again "*so that, I can proceed and obtain suitable legal advice and prepare in earnest a defence* …". He also asked "*what the evidence do you have which supports and substantiates your claims*…" He then referred to public notices and media releases he intended sending out.

[45] At 10:17 am the respondents lawyers replied by email. The email noted it had 20 working days to respond to his request under the Privacy Act 1993. The email repeated that the video surveillance was not relevant to the allegations and the respondent did not reply upon it. It required he attend a disciplinary meeting today at 11.30 am. Failure to attend would not prevent a decision being made in his absence about his continued employment. It also warned about defamation.

[46] The same day Mr Rupa sent a text message to Mr Nguyen at 10:35am referring to his earlier emails and seeking a reasonable response. He also wished to lodge a personal grievance regarding the respondent's "*unlawful, immoral instructions of hiring white staff only; instructions to write illegal letters to defraud NZ immigration, who you and your staff must consider to be 'simple or stupid' servants of the nation state I call my home*".

[47] Mr Rupa then sent a further email at 11.09 am. He rejected the respondent lawyers refusal to release the video surveillance. He also questioned how they could know the recordings were not relevant to his defence. He sought "*a fact finding meeting to establish the relevance of evidence and substantiate the supporting premises of the allegations …*".

[48] The respondent replied by text message at 11.17 am that Mr Nguyen was at the Restaurant and ready to begin his disciplinary meeting at 11.30 am. Failure to attend may result in a decision about his continued employment being made in his absence.

[49] Mr Rupa replied by text message at 11.21 am complaining the respondents lawyer was texting not Mr Nguyen. At 11.23 am he stated he wanted to go to the Department of Labour for mediation which he was going to lodge as soon as practical. At 11.23 am the respondent asked again if he was attending the meeting. At 11.24 am Mr Rupa repeated his request for mediation and at 11.29 am he stated it was best "we write all and discuss for the moment".

[50] Mr Rupa did not attend the disciplinary meeting on 16 September 2014. Instead he sent further texts at 12.19 pm, 12.30 pm, 12.55 pm and 12.59 pm alleging amongst other things this was causing "*ill health and harm*" and seeking mediation or for it to "*go to court*".

[51] On 17 September 2014 at 2.55 pm Mr Rupa emailed asking that the attachments be sent in another format. This referred to the difficulties he had opening them on his personal laptop.

[52] On 17 September 2014 at 3:32 pm the respondent emailed and copied into the body of the email a letter with their preliminary decision. It found there was serious misconduct in respect of both allegations. It advised of a preliminary decision that his

employment be terminated immediately without notice. The respondent gave Mr Rupa until 18 September 2014 3pm, to provide any written response to the preliminary decision and outcome. His suspension was to continue until then.

[53] The following day the respondent emailed a further letter dated 18 September 2014 terminating his employment immediately without notice.

[54] Mr Rupa states he never received the letters dated 17 or 18 September until 22 September 2014. He referred to being too unwell to access the free internet at the Library to download email until 22 September. As a result he could not provide any reply prior to dismissal.

[55] On 16 December 2014 Mr Rupa sent a letter through his representative raising a personal grievance of unjustified dismissal and some but not all of the unjustified disadvantages. The letter refers to, amongst other things, a letter dated 10 September 2014 not 11 September 2014 from the respondent.

[56] A statement of problem was filed on 11 September 2017 in the Authority.

Issues

[57] At the telephone conference on 20 July the following issues were identified for determination:

(a) Was Mr Rupa unjustifiably dismissed on or about 18 September 2014?

(b) Was Mr Rupa unjustifiably disadvantaged by TH89 Limited's:

(i) failure to provide him with a written employment agreement resulting in no defined duties or hours of work;

(ii) Discrimination because of his age (55 years);

(iii) Being required to discriminate in employing employees based upon skin colour and nationality;

(iv) Requirement he write a false misleading and unlawful letter to immigration on behalf of another employee by a respondent director;

(v) Requirement to work up to 70 or more hours six days per week on a salary of $60,000 per annum. Mr Rupa refers an email noting the agreement of 45 hours maximum per week and the use of an assistant. He was then required to work seven days per week with hours in excess of 70 hours per week.

(c) Should a penalty be awarded for –

(i) The failure to provide a written agreement pursuant to s.65 of the Employment Relations Act 2000 ("the Act") and

(ii) The failure to provide upon his request a copy of the wage and time record pursuant to s. 130(2) and (4) of the Act.

(d) Are the penalty applications filed in the Authority out of the twelve month time limitation period? Can time be extended to file these applications outside of the time limitation?

(e) Should Mr Rupa be awarded wages arrears for the following:

(i) Hours worked in excess of 45 hours per week?

(ii) The one month notice period following termination of his employment?

(iii) Remuneration for carparking expenses of $480 in lieu of the carpark he was promised but never received?

(iv) Holiday pay of 8% on any additional wages owed?

(v) KiwiSaver employment contribution of 3% on any additional wages owed?

Was Mr Rupa unjustifiably dismissed on or about 18 September 2014?

[58] There is little doubt Mr Rupa was dismissed by the letter he received 22 September 2014. Therefore the respondent must show its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (See s103A(2) Employment Relations Act 2000 (Act). The Authority must consider the matters set out in s.103A(3) including whether having regard to the

resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.

[59] Mr Rupa's evidence accepts he used the words "*fuck off*" in the middle of the restaurant but only after provocation including an attempt to slap his hand. This could have been a mitigating circumstance in terms of outcome.

[60] The video surveillance of this incident was highly relevant to any decision to dismiss. It was a pictorial view of what occurred. Given there were also strident requests for it to be viewed (even without sound) and the fact the footage was readily available to the employer on a laptop, there was little reason why it could not view the material prior to taking any dismissal action. It was unreasonable for this employer to refuse to consider an accurate record of the events in the form of a video recording. This does not appear to be a genuine consideration of Mr Rupa's responses to the concerns.

[61] The remaining misconduct regarding text messages and emails to suppliers and employees is not remedied by the video surveillance. Mr Rupa confirmed he sent the texts. I viewed one of the texts on his mobile phone.

[62] The texts and the later email dated 15 September were aimed at undermining the respondent's relationship with the recipients. This conduct breached the implied duties of fidelity, good faith and trust and confidence in every employment relationship. Employees are expected to conduct themselves in a way that does not harm the employment relationship. These texts were harmful because they would have affected the respondent's ability to obtain supplies and maintain its staff. An employer could have lost trust and confidence in Mr Rupa's continued employment. This was serious misconduct that could have resulted in dismissal.

[63] However the process was defective. Mr Rupa did not receive the letter dated 11 September containing the text messaging allegations. Further he did not receive by email the preliminary decision dated 17 September (that referred to the text messaging) or the termination letter dated 18 September until 22 September. The statutory duty of good faith in s4(1A) of the Act requires Mr Rupa be given access to information relevant to the continuation of his employment and an opportunity to be

heard before the decision is made. These defects were not minor and were unfair to Mr Rupa. Douglas Rupa was unjustifiably dismissed by TH89 Limited.

Was Mr Rupa unjustifiably disadvantaged by TH89 Limited?

Failure to provide a written agreement

[64] The only written agreement between the parties is contained in the letter dated 16 June 2014. Mr Rupa raised concerns about the lack of a written employment agreement orally on several occasions. However he did not raise this as a personal grievance at the time or in his letter dated 15 December 2014. There was no basis to grant leave to raise a personal grievance out of time. This is especially when it is raised for the first time in a statement of problem filed on 11 September 2017. This grievance is dismissed.

Letter to support Ds immigration application

[65] There was no evidence he was required by his employer to provide a letter to support employee D's immigration application. Mr Nuygen was away and had left it to Mr Rupa to decide. Mr Rupa's felt pressured by D to write the letter but refused to do so. This does not give rise to any disadvantage in his employment by the respondent.

Age discrimination

[66] There is evidence Mr Nguyen made negative comments about Mr Rupa's ability to work due to his age. Discrimination because of age is expressly prohibited by ss104 and 105 of the Act.

[67] Section 104(1)(b) defines when an employee is discriminated against in that employee's employment. This includes where an employer:

> (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment

[68] A prohibited ground for discrimination under s105(1)(i) of the Act is on the basis of age.

[69] Mr Rupa was certainly subjected to detriment by these comments. He believed he may be dismissed. No other employee was subject to this detriment. There was also no justification especially given his hours of work of between 63 to 74 hours per week. Mr Rupa was unjustifiably disadvantaged.

Racial discrimination

[70] There is evidence Mr Rupa was being pressured to hire (and fire) staff based upon their race, nationality and skin colour. This a prohibited ground of discrimination under s105(1)(f) and (g) of the Act that forbids discrimination on the basis of race, ethnic or national origins. Mr Rupa raised his concerns (and personal grievance) about the employer's action on 16 September 2014. This does not appear to have been investigated at all prior to dismissal.

[71] There is an implied term in every employment contract that an employer would not, without reasonable cause, conduct itself in a manner calculated to destroy or damage the relationship of trust and confidence. These actions by the employer were not reasonable in the circumstances. Mr Rupa was being asked to act in a way that would be discrimination towards these employees. He believed these actions may eventually affect his employment because of his Indian heritage. There is no basis to show these actions were justified. Mr Rupa was unjustifiably disadvantaged.

[72] All of the disadvantaging actions were not minor and were unfair in the circumstances.

[73] Therefore Douglas Rupa was unjustifiably disadvantaged in his employment by the TH89 Limited's comments about his age and its effect on his ability to work and the requirement he employ staff based upon their race, nationality and skin colour.

Should a penalty be awarded?

[74] The applications for penalties for failing to provide a written agreement and wage and time records were filed as part of the statement of problem dated 11 September 2017. This is well outside of the time limitation set out in s135(5) of the Act. An action for a penalty must be commenced within 12 months after the cause of action became known or should reasonably have become known to the applicant.

[75] Mr Rupa knew or should have reasonably known about the above possible causes of action by 22 September or when he received copies of the wage records in October 2014. He also had representation in December 2014. He filed his penalty action on 11 September 2017 nearly 2 years outside of the 12 month time limitation. There is no evidential basis for extending the time for filing the action. The penalty actions are dismissed.

Should Mr Rupa be awarded wages arrears?

[76] Mr Rupa seeks wage arrears for hours worked in excess of 45 hours, carparking, non-payment of one month notice period, holiday pay and Kiwisaver.

Excess hours

[77] Throughout his employment Mr Rupa was required to work at times up to 74 hours per week. At hearing he produced a table that shows his total hours of work were 813. When he raised his excessive hours of work, he was told that he had to work seven days per week without break. This concern may have been more appropriately raised as a personal grievance of disadvantage or penalty. However it was not. This is an application to recover wage arrears.

[78] Mr Rupa referred to an agreement he work 45 hours per week. However there is no evidence of any further agreement regarding payment for hours worked in excess of 45 hours per week.

[79] Further there can be no claim for additional payments on the basis of being paid less than the applicable minimum wage rate. Mr Rupa was paid $60,000 per annum. He received $1,153.85 gross each week. He worked a total of 813 hours at $20.95 per hour. This was above the applicable minimum wage rate of $15.25. This claim is dismissed.

Carparking

[80] There is evidence of an agreed term for Mr Rupa to be provided with a carpark. He has incurred and shall recover $480 carparking expenses.

Notice Period

[81] The letter of offer refers to a one month notice period. Given the finding of unjustified dismissal he is entitled to recover payment for the notice period of $4,615.40 less PAYE.

Holiday Pay

[82] The wage record provided by the respondent does not set out the leave entitlements accrued or paid. The final pay is higher than what Mr Rupa usually received but there is no explanation about what it is comprised of.

[83] Mr Rupa usually received $1,153.85 gross per week. His final pay was $2,030.76. He was dismissed on 18 September 2014, 4 days prior to the end of the pay period. Assuming a daily pay rate of $164.38 he should have received $657.53 for the 4 day period he worked. This leaves an unaccounted for balance of $1,371.42 of final pay. His gross pay should have been $15,659.39 8% holiday pay being $1,252.75. Therefore he appears to have been paid out his holiday pay owed on termination. I make no adjustment for the possible overpayment because the respondent has not provided evidence explaining it.

[84] Mr Rupa is owed further holiday pay for the one month notice period being 8% of $4,615.40 equalling $369.23 less PAYE.

Kiwisaver

[85] Mr Rupa did not sign a notice opting out, so he would have been compulsorily enrolled in a Kiwisaver superannuation scheme.[1] Therefore the respondent had a compulsory requirement to pay 3% of Mr Rupa's gross wage to a Kiwisaver scheme.[2] The respondent employer did not comply with the requirements of the Kiwisaver Act 2006 in either obtaining the notice to opt out or providing the papers to enrol in the scheme. Mr Rupa has lost the benefit of the employer's contribution as a consequence. He is entitled to recover the same.

[86] His gross wage including the notice period was $20,274.79, 3% of the Kiwisaver employers contribution would be $608.24.

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1 Kiwisaver Act 2006 s10.
2 Kiwisaver Act 2006 s. 101D.

Remedies

[87] Mr Rupa has a proven personal grievance of unjustified dismissal and disadvantage. He is entitled to lost wages and compensation. I intend making a global award for both grievances.

[88] Since dismissal he has been unable to work for 15 months due to back issues. He has been in receipt of ACC. He has not been able to mitigate his losses due to ill health and inability to work. There was no suggestion his back issues were related to his employment. In the circumstances I decline to award lost remuneration.

[89] In setting compensation I have taken into account the following factors:

a) This grievance involved at least two prohibited grounds of discrimination;

b) Repeated behaviours - the discriminatory behaviour occurred several times. There was also evidence this employers actions in engaging a new employee without notifying the manager had occurred previously;

c) Effect upon Mr Rupa - Mr Rupa gave compelling evidence about the discrimination making him feel vulnerable in respect of his employment prospects. The respondents actions were hurtful and offensive and caused bouts of depression;

d) The short duration of the employment of 12 weeks;

e) Similar cases in the Authority that have awarded $10,000 subject to any reduction for contributory behaviour.[3]

[90] In my view an award of $10,000 is appropriate, subject to any reduction of contributory behaviour.

Contributory behaviour

[91] Contributory behaviour must be both causative and blameworthy. Where there is contributory conduct I am required to reduce remedies accordingly.

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[3] *Corbett v UDP Shopfitters Ltd* [2012] NZERA Christchurch 151; *Bashir v Ladbrook Law Ltd* [2016] NZERA Auckland 73.

[92] There was contributory behaviour that was causative of the dismissal only. This behaviour includes:

a) The finding of serious misconduct in respect of Mr Rupa's texts and emails to employees and suppliers advising of the respondents financial status;

b) Mr Rupa acceptance he told the unknown woman to *"fuck off"* albeit there was an explanation that required further investigation. At best it may have been misconduct;

c) The failure to attend the disciplinary meeting to explain his position. Although he cited health reasons, he appeared capable of texting and emailing the respondent several times throughout the day of the meeting.

[93] Given the above factors, a reduction of the personal grievance by 50% is justified.

Outcome

[94] I order TH89 Limited to pay the following wage arrears:

a) $480 carparking expenses;

b) $4,615.40 less PAYE for the one month notice period;

c) $369.23 less PAYE holiday pay for the one month notice period;

d) $608.24 Kiwisaver employers contribution

[95] I order TH89 Limited to pay Douglas Rupa the sum of $5,000 (inclusive of a reduction of 50% for contributory conduct) pursuant to s 123(1)(c)(i) and 124 of the Employment Relations Act 2000.

[96] I order TH89 Limited to pay Douglas Rupa the sum of $71.56 being his filing fee.

T G Tetitaha
Member of the Employment Relations Authority