

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 224
3122712

BETWEEN AMAN SAGOO
Applicant

AND BLUE ORIGIN HOTELS
LIMITED
Respondent

Member of Authority: Michael Loftus

Representatives: Stephen Parry, counsel for the Applicant
Karan Singh for the Respondent

Investigation Meeting: 27 April 2022 at Wellington

Submissions Received: At the investigation with further exchanges up to and
including 10 May 2022

Date of Determination: 31 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Aman Sagoo, claims he was unjustifiably dismissed by the respondent, Blue Origin Hotels Limited (Blue Origin), on 10 April 2020. Mr Sagoo also claims he is owed unpaid wages earned during the period 19 to 23 April 2020 inclusive and holiday pay for the entire period of his employment.

[2] Blue Origin denies it dismissed Mr Sagoo on the grounds that would not be necessary as he was a casual employee. Blue Origin denies any wages are owing.

The Authority's investigation

[3] The Authority's investigation was originally intended to be face-to-face. However, on the preceding day, the respondent's witnesses found themselves unable to attend in person and asked to do so via Zoom. That occurred, with the Authority hearing from the applicant and the respondent's two directors, Karan and Amrit Singh. I also record that shortly after the investigation the respondent forwarded further information which was put to the applicant for comment.

[4] It should also be noted Mr Sagoo's immediate manager, Indrageet Halder, did not give evidence despite having the potential to be a key witness. That was because neither party knows his present whereabouts and neither is in contact with him.

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

Background

[6] Mr Sagoo, finding himself in Wellington without work, canvassed various acquaintances regarding possible leads. One suggested he contact Mr Halder, the manager of a hotel owned by Blue Origin. This Mr Sagoo did and the two arranged to meet, with that occurring on Wednesday 26 February 2020.

[7] Mr Sagoo says that after a short discussion, during which they discussed potential duties which included cleaning and general housekeeping at the hotel, Mr Halder asked if Mr Sagoo would undertake a job trial. He agreed and, according to Mr Sagoo, Mr Halder offered him the job at the trial's completion.

[8] Mr Sagoo says the only terms they discussed were the hours of work and rate of pay. Also raised was the fact he could live in the hotel. He says he was told he would work every day of the week starting around 9.30 and continuing till around 3 pm or possibly later with a half hour unpaid break each day. The wage was the statutory minimum which was then \$17.70 an hour. When asked about the lack of detail he says it was not an issue - he didn't think about it as he was desperate to have a job.

[9] Blue Origin's witnesses confirm they were aware Mr Halder was looking to employ and having discussed that they instructed he advertise the job and only engage a casual. Notwithstanding that it is common ground the job was never advertised. Where the parties differ is on the issue of Mr Sagoo's status, casual or permanent, and that is crucial to the outcome of his claim.

[10] Mr Sagoo says that on the third day of employment Mr Halder proffered a written employment agreement. It is Blue Origin's evidence the document in question had been "approved" by its witnesses. Contained therein, and pertinent to this dispute, is a provision entitled "Hours of work". It provides:

The employee is employed on a casual "as required" basis and may agree to work if the employer asked them to. The employer may offer work during its usual hours of business of Monday to Sunday between the core hours of 8AM - 9PM. There is no obligation on the employer to offer work or the employee to accept offered work. The employer will offer no minimum number of hours for each work session.

[11] That said, the agreement also contains a clause headed "Type of employment agreement" which provides:

The employee will start working for employer on and continue until either the employer or the employee ends this relationship.

[12] There is also a termination clause that provides that with exceptions either party is required to give two months notice in writing. The exceptions include, for example, two weeks notice during an initial 90 day trial or immediately in the event of serious misconduct.

[13] Mr Sagoo states that when he received the employment agreement Mr Halder reiterated that work would be available every day and, as a quid pro for Mr Sagoo being domiciled in the hotel, there was an expectation he work accordingly. Here it should be recorded that while Blue Origin's witnesses deny they were aware of that arrangement at the time, and they take issue with Mr Halder having inappropriately offered the accommodation, they accept this occurred.

[14] Mr Sagoo claims that approximately two weeks into the employment Mr Halder promoted him into a supervisory position. Blue Origin's witnesses have no knowledge of this and can offer no evidence about it.

[15] On 24 March New Zealand went into COVID Level 4 lockdown. It is Mr Sagoo's evidence that on that day Mr Halder advised staff the hotel was closing and those who resided therein would have to leave. Mr Sagoo says Mr Halder also advised he was going to rent an apartment in the same building; one not owned or operated by Blue Origin, and asked Mr Sagoo if he wished to move in. Mr Sagoo agreed and, as it turned out, was one of six, including another employee of Blue Origin, who occupied the apartment.

[16] Mr Sagoo says he soon became aware of the Government wage subsidies and asked Mr Halder whether he would receive one. He got no answer and decided to telephone Amrit Singh in what was the first contact he had with either of Blue Origin's directors. He says he raised the wage subsidy and both he and Mr Singh agree the conversation ended with the latter saying he would look into it.

[17] Having not heard anything back from Mr Singh, Mr Sagoo again raised the issue with Mr Halder. He says he was advised by Mr Halder "not to worry" and the company would look after things. He says he accepted that until discovering, on or about 10 April, that all other employees were receiving the subsidy. As he wasn't he chose to again ring Mr Singh.

[18] There are two very different views of that conversation. Mr Sagoo says Mr Singh was angry he had called and stated he had no right to do so. Mr Sagoo says he interjected and again asked about the wage subsidy to which Mr Singh replied "You're fired, we don't want you". Mr Sagoo says he tried, yet again, to raise the wage subsidy and Mr Singh said "Go ask the Government" then hung up.

[19] Mr Singh denies advising Mr Sagoo that he was "fired". He says he simply advised Mr Sagoo that the company had decided not to apply for a subsidy for him as he was a casual employee. Mr Singh goes on to say Mr Sagoo did not question the claim he was a casual and, in fact, didn't dispute his status until he raised the personal grievance nearly three months later. It is now being suggested the claim Mr Sagoo was not a casual results from the fact Mr Halder was no longer employed and Blue Origin could not, therefore, deny or defend his claims.

[20] That the relationship then ended is agreed, if not the reason why. Mr Sagoo was either dismissed or Blue Origin chose not to offer any further engagements.

[21] Mr Sagoo raised his grievance on 19 June 2020 which was followed by both a written response and a payment from Blue Origin on 23 June. The payment was for \$175.98 and made to Mr Sagoo's bank account. He says he has no idea what it was for while Blue Origin states it was the delayed payment of Mr Sagoo's holiday pay. Figures the parties have provided about what Mr Sagoo was paid throughout his employment would strongly suggest it was holiday pay incorrectly absent a deduction of PAYE as the amount owing would be \$175.98 gross. I therefore conclude that is what it was and will consider no further the original claim for holiday pay between commencement and 18 March 2020.

Discussion

[22] As already said Mr Sagoo claims he was both unjustifiably dismissed and is due unpaid wages.

[23] To determine the prime issue, namely whether or not Ms Sagoo was unjustifiably dismissed, the key is a conclusion as to whether or not he was engaged as a casual employee. If so, there was no right to ongoing employment and, as claimed by Blue Origin, no need to dismiss. If not, then irrespective of which version of the second telephone conversation I accept Blue Origin chose to end its relationship with Mr Sagoo's. As already said, Blue Origin either dismissed Mr Sagoo or simply chose to cease offering further work.

[24] Here it should be noted that in all probability a key witness was Mr Halder. As already said neither party knows his current whereabouts. Neither could call him as a witness and nor could they give the Authority any leads which might have allowed me to contact and call him. That then leaves, as the decisive factors, the employment agreement and the way the work was actually performed.

[25] With respect to the employment agreement it is well established that the use of a label such as "casual" does not, in itself, determine the true nature of the relationship and/or that the nature of the relationship can change over time.¹

[26] Here the appended label is "casual", but almost every other provision in the employment agreement is inconsistent with that. Aside from the "type of employment" clause which states the relationship will continue till either party ends it, there is the

¹ For example *Jinkinson v Oceana Gold(NZ) Limited* [2009] ERNZ 225 and *Barnes v Whangarei Returned Services Association (Inc)* {1997} ERNZ 626

requirement to give two months notice. There is also a redundancy clause, an abandonment of employment provision, a 90 day trial provision, a performance review clause which requires discussions about the employee's performance at approximately 12 monthly intervals and various termination provisions such as abandonment and dismissal for serious misconduct. None of these provisions would be required if the employment was truly casual – indeed the only provision in the agreement compatible with the concept of casual employment is that which labels the relationship casual.

[27] Even more importantly is the question of how the relationship actually operated. Putting aside Blue Origin's inability to offer any evidence to contradict or undermine Mr Sagoo's claims about his discussions with Mr Halder, there is a time record proffered by the company. It is interesting to note

[28] that both parties claim the record is inaccurate with Mr Sagoo going to so far as to allege it has been falsified by Blue Origin. Blue Origin claims it simply records start and finish times that were advised by Mr Halder and it is of the view that they are at best inaccurate but more probably dishonestly false. Putting those allegations aside, it is the company's document and both parties also rely upon it for other purposes. They also agree Mr Sagoo was paid for the hours recorded therein.

[29] The records show that, as claimed by Mr Sagoo, he did in fact work every day from Wednesday 26 February through to Wednesday 18 March 2020 though there was some variation in the hours each day. That said, they were minor and again consistent with Mr Sagoo's claims regarding Mr Halder's expectations. He started between 9 and 9.30 with only one exception and generally finished at either 3 or 3.30. Daily hours are virtually all between five and seven which is again consistent with the expectation he at least work 9.30 to 3 with a half hour break (five hours) and perhaps longer if needed.

[30] The pattern recorded is not consistent with a casual employment relationship though there is then the fact Mr Sagoo did not work two of the days between 19 and 24 March. He says this was because, having worked each and every day till then, he was tired and simply needed time off. He therefore asked Mr Holder for some leave and this was agreed. I find nothing untoward about that arrangement or Mr Sagoo's evidence in this regard.

[31] I also note a true casual would inevitably receive holiday pay as they go given the concept presupposes each engagement, in this case a day, is separate and ends upon its completion. That is not what occurred here.

[32] Furthermore I note that not only is Blue Origin incapable of refuting Ms Sagoo's claims there is evidence, proffered by the company, that it had concerns about Mr Halder's performance and that he was not acting in accordance with the Director's instructions. In this instance Blue Origin accepts Mr Halder did not act in accordance with their instruction he advertise the job Mr Sagoo filled and there is no evidence to contradict Mr Sagoo's claims the same did not happen with respect to hours he worked. Indeed Blue Origin can only be deemed to have accepted the situation by paying for those hours and, at least before me, claiming the payments were justified as they were properly supported by with "stamped" e-mails from Mr Halder.

[33] Finally I note I had an opportunity to question Mr Sagoo. Havin done so I see no reason not to accept his evidence which extends to the discussions he claims to have had with Mr Halder and which include a requirement he be available to work each and every day.

[34] For the above reasons I conclude Mr Sagoo has not employed as a casual and having done so it follows he was dismissed. In saying that I find the dispute about what occurred during the second telephone conversation between Messrs Sagoo and Singh irrelevant. At its simplest employment is an exchange of labour for remuneration. Therefore, and even if there was no express dismissal, Blue Origin ceased to pay Mr Sagoo thereby ceasing to provide its consideration. That is a breach by the employer tantamount to a dismissal.

[35] Having concluded Mr Sagoo was dismissed it falls to Blue Origin to justify that dismissal. Irrespective of whose evidence I accept Blue Origin simply can't provide justification as there is no evidence of any compliance with any of the requirements of s103A and particularly s 103A(b) to (d).

[36] The only thing that might exempt them from those requirements would be their small size and lack of resource² but that does not apply here given the Court's comment in *The*

² The possible exemption under s 103A(5) of the Employment Relations Act 2000

*Salad Bowl Ltd v Howe-Thornley*³ that all-encompassing procedural failure, as has occurred here, is neither excusable nor minor.

[37] The dismissal must be found unjustified and that raises the question of remedies. In his statement of problem Mr Sagoo sought wages between the date work ceased to be offered and the date of dismissal along with holiday pay on that amount; a further two months being the notice required under his employment agreement and an unspecified sum as compensation for hurt and humiliation. Wages for the period 19 to 23 March are covered by the arrears claim.

[38] When quantifying the claim in submissions he chose to take a conservative approach and remove the possibility of further dispute by only claiming what he says was the minimum contracted day of 5 hours and accepting he had, toward the end of the employment, taken some leave he is only claiming six days per week. That said the claim also used an hourly rate of \$17.70 when the minimum wage increased to \$18.90 with effect 1 April 2020. Statute compels me to use the later figure from 1 April.

[39] I find the money claimed between 24 March and 10 April is owing. I have already concluded Mr Sagoo was employed under an arrangement whereby he worked every day and there is no reason to think that had it not been for the covid lockdown that would have continued. Suffice to say irrespective of how the disparate evidence about the conversation of 10 April is viewed it is clear Blue Origin made it clear the employment was over that day whether expressly or by action. Notwithstanding covid, pay remained due for the intervening period absent any contrary agreement which the fact of covid enforced closures did not, in itself, provide. Holiday pay is also due on that amount. Applying the increase in the minimum wage the amount due is \$1785.24 (gross).

[40] Also payable is eight weeks in lieu of notice given the employment agreement's express provision requiring such notice. The two month period from 10 April to 9 June (which interestingly is the day before Mr Sagoo commenced a new job) is 8 weeks and four days. Using Mr Sagoo's five hours a day, six days a week and the new minimum wage the amount due is \$5307.12 (gross) including holiday pay.

³ [2013] NZEmpC 152 at [94] and [95]

[41] Turning now to the compensation. Mr Sagoo gave strong evidence of the injury he suffered which included increased poor health and a decline into depression amplified by his failure to meet obligations to his family in India and, indeed, himself. Having considered the evidence and recent awards I consider \$12,000 to be appropriate.

[42] There is then the wage claim. Mr Sagoo claims he worked three of the five days between 19 and 23 March. Here, and as an aside, this is one of the issues which leads the parties to say that the time record is false. It is Mr Sagoo's evidence he only had three days off during the period of engagement with two of those occurring during this period. Notwithstanding his evidence he had one other day off that is not recorded.

[43] Returning to the claim. As already said the evidence satisfies me Mr Sagoo worked until the hotel closed with the covid lockdown. That means he worked, or was at least employed, until 24 April yet there is no wage record after 18 March though that is not surprising as they were completed weekly and the then current period had not ended. It is for the employer to maintain the record and in its absence I am entitled to accept the claim.⁴ The amount claimed and due is \$286.74.

Conclusion and Orders

[44] For the above reasons I conclude Mr Sagoo has a personal grievance in that he was unjustifiably dismissed. I also accept he is due unpaid wages.

[45] As a result I order the respondent, Blue Origin Hotels Limited, pay Aman Sagoo:

- (a) \$7,092.36 (seven thousand and ninety two dollars and thirty six cents) gross as recompense for wages and lost as a result of the dismissal; and
- (b) A further \$12,000.00 (twelve thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- (c) A further \$286.74 (two hundred and eighty six dollars and seventy four cents) gross being payment of wages unpaid during the period prior to 19 to 23 March 2020.

⁴ Section 132(1) of the Employment Relations Act 2000

[46] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed Mr Sagoo may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date Blue Origin will 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.

Michael Loftus
Member of the Employment Relations Authority