

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 527  
5415674

BETWEEN ABISHEK SHARMA  
Applicant

AND CHARGRILL BURGERS  
LIMITED  
Respondent

Member of Authority: Robin Arthur

Representatives: Poi Teei, Counsel for the Applicant  
Mark Ryan, Counsel for the Respondent

Investigation Meeting: 13 September 2013

Submissions: 13 September 2013 with further financial records lodged  
by the Respondent on 20 September 2013

Determination: 15 November 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. Abishek Sharma is declined leave to raise a personal grievance with Chargrill Burgers Limited (CBL).**
- B. By no later than 28 days from the date of this determination CBL must pay Mr Sharma the following amounts in respect of wages due to him:**
- (i) \$5142.74 in wage arrears; and**
  - (ii) \$335.30 in interest to the date of this determination;**  
**and**
  - (iii) An additional 0.70 cents per day from the date of this determination until the amount due is paid in full.**

- C. CBL must also reimburse Mr Sharma \$71.56 in expenses for the filing fee he paid to lodge his claim in the Authority. Costs are reserved.**

### **Employment relationship problem**

[1] Abishek Sharma worked from March 2010 to 22 July 2012 in a Central Auckland fast food business operated by Behzad Darvish. In 2010 Mr Sharma signed an employment agreement with Chargrill Kebab & Burgers Limited (CK&BL) but Mr Darvish alleged that around October 2011 Mr Sharma had signed a new agreement with Chargrill Burgers Limited (CBL) and that latter company became Mr Sharma's employer. Mr Sharma denied having signed a new agreement.

[2] CK&BL has since been removed from the Companies Office register but CBL remained a registered company as of the date of the investigation meeting and this determination. Mr Darvish was a shareholder of CK&BL and a director and shareholder of CBL.

[3] In the weeks following the end of his employment Mr Sharma sought payment of what he said were outstanding wages and holiday pay. He said Mr Darvish with a threat of physical violence against him but gave him two cheques with a combined value of \$1655.78 on 24 August 2012. Mr Sharma considered he was still owed further amounts in unpaid wages and sought assistance through a Labour Inspector but was advised to pursue other avenues of redress. He first lodged a personal grievance application and a wage claim in the Employment Relations Authority on a form dated 21 December 2012, some 152 days after his last day of work at the business. His grievance application (in a later amended form lodged on 4 April 2013) alleged his resignation was really a constructive dismissal caused by Mr Darvish repeatedly breaching Mr Sharma's terms of employment by underpaying his wages, paying him late and making threats and verbal abuse when he asked about his pay. CBL responded that the grievance was raised too late and Mr Sharma then sought leave to raise the grievance outside the statutory 90-day period.

### **Issues**

[4] There were two issues for investigation and determination:

- (i) Did exceptional circumstances cause Mr Sharma's delay in raising a personal grievance and, if so, would it be just for the Authority to grant him leave to raise his grievance outside the 90 day period; and
- (ii) Did CBL owe Mr Sharma any further wages and holiday pay and, if so, how much (including any interest to be awarded on any amounts still due)?

### **The Authority's investigation**

[5] In preparing this determination I took account of witness statements from Mr Sharma and Mr Darvish; relevant background documents lodged by both parties; answers to questions asked of the two witnesses by me and the two parties' representatives at the investigation meeting; and written submissions lodged by both parties after the meeting. As permitted by section 174 of the Employment Relations Act 2000 (the Act) this determination has not set out all evidence and submissions received but has stated findings of fact and law, expressed conclusions on the issues and specified orders made.

[6] At the end of the investigation meeting on 13 September Mr Darvish was provided with an opportunity to find and lodge wage records or any other documents providing evidence of payments made to Mr Sharma. He did provide some additional bank records which I considered in relation to Mr Sharma's evidence about payments made to him during and after his employment.

### **Raising a grievance out of time**

[7] Mr Sharma's application for leave to raise his grievance out of time, and his evidence about what had happened that might amount to exceptional circumstances causing the delay, relied on the following assertions (which I have paraphrased):

- (i) He was not aware of the requirement to lodge the grievance within 90 days because he was not told so during the communication he had with a Labour Inspector, a Youth Law advisor and an Authority support officer; and
- (ii) He was too frightened by threats and abuse from Mr Darvish.

[8] To raise his grievance within the statutory period Mr Sharma would have needed to have done so by 14 October 2012 (if calculated from his date of resignation) or by 20 October 2012 (if calculated from his last day of work).

[9] In support of his application Mr Sharma lodged copies of his correspondence with a Youth Law advisor. Those documents showed he was clearly told about the option of raising a personal grievance and the need to do so within 90 days. An email from Youth Law advisor Manawa Pomare dated 21 August 2012, included the following advice:

*If you think there are a number of legal issues (e.g. pay and him not giving enough working hours as promised, or that sort of thing) you might consider raising a personal grievance. You would need to do this within 90 days of the issue arising (so the time would start counting from whenever that issue last arose).*

[10] Mr Sharma did ask Youth Law to take further steps on his behalf but it is clear from the email responses he received that the advisor did not have time to do that and told him so. As a result this was not a case meeting the criteria for the exceptional circumstance described at s115(b) of the Act where an employee has made reasonable arrangements for a grievance to be raised but a representative has failed to act on those arrangements in time.

[11] On a complaint form dated 30 August 2012 Mr Sharma sought the assistance of a Labour Inspector over whether money was still owed to him. A Labour Inspector attempted to contact Mr Darvish but on 16 October talked with Mr Sharma about whether his wage claim (which was for more than minimum wage entitlements) would need to be pursued through mediation and an application to the Employment Relations Authority. The Labour Inspector, dealing with a wage complaint, was not obliged to advise Mr Sharma on the requirements of pursuing a personal grievance.

[12] Mr Sharma also said an Authority support officer told him in January 2013 that he had three years in which to file a personal grievance claim. However I was satisfied that it was more likely than not that this was a reference to s114(6) of the Act (about the period in which proceedings may commence about a grievance that has been raised within 90 days or granted leave outside that timeframe). The reference was made during a conversation about how he could pursue his wage claim and he was not provided with inaccurate or misleading information about whether or not he could pursue a grievance and, if he wished to do so, when he needed to make an application.

[13] While Mr Sharma and CBL dispute whether he signed an employment agreement with CBL, the agreement Mr Sharma had signed (with CK&BL) in 2010 included a clause referring to the need to raise a grievance “*within 90 days of the date of the alleged action giving rise to the grievance*”. There may have been a technical argument that when (according to Mr Darvish) CBL became the employer in October 2011 but had not (according to Mr Sharma) provided him with a written employment agreement, Mr Sharma’s circumstances met the exceptional circumstance defined at s115(c) of the Act of not having an employment agreement that complied with the statutory requirement for a term that referred to the 90-day period for raising a grievance.<sup>1</sup> However Mr Sharma would have been aware of that requirement if he had looked at the terms of his employment agreement with CK&BL (and which he said he thought applied to him at the time), so I have not considered it just to grant leave on the basis of such a technical argument.<sup>2</sup> The fact that Mr Sharma said he had not checked through what he thought was his current and applicable employment agreement at all (apart from looking for information relevant to his wage claim) makes no difference to that point – the statutory requirements refer to making the information about the 90 day period available, not whether the employee then remains oblivious to it by not reading it.

[14] Neither do I accept that Mr Sharma met the requirements of another example of exceptional circumstances given in s115 of the Act – that he was so affected or traumatised by the situation he found himself in that he could not properly consider raising the grievance.

[15] Mr Sharma said he was frightened by threats of physical violence and intimidating messages sent to him by Mr Darvish.

[16] Mr Darvish accepted he had sent a number of text messages to Mr Sharma that included threatening to make a complaint to the Police accusing Mr Sharma of being a drug dealer and saying that would affect Mr Sharma’s chances of getting a visa to remain in New Zealand. But Mr Darvish denied he was responsible for text messages from another mobile phone number that also referred to Mr Sharma as a drug seller and told Mr Sharma he was a “*ded man*” because “*we no wr u live and wr u work*

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<sup>1</sup> Section 65(2)(a)(vi) of the Act.

<sup>2</sup> Section 114(4)(b) of the Act.

*mothr fuker*". It is likely, I have accepted, that those messages were from Mr Darvish or someone associated with him because of the time that they were sent and some idiosyncratic spelling that was the same as or very similar to that used in the text messages from the mobile phone number that Mr Darvish did accept he had sent.

[17] For that reason, it is also more likely than not that Mr Sharma's account of a verbal threat from Mr Darvish is true. Mr Sharma said Mr Darvish told him that he should not ask about money owed to him because Mr Darvish could pay someone \$500 to have Mr Sharma kidnapped and thrown in the sea.

[18] However the evidence has not established Mr Sharma was so frightened by these threats that he could not properly consider raising a grievance. In fact Mr Sharma's efforts in speaking with a Youth Law advisor and a Labour Inspector and arranging a meeting with Mr Darvish to collect some payments show that he was capable and active in pursuing his rights during the 90-day period when he could also have raised a grievance. As Mr Sharma put it in answer to a question during the Authority investigation: "*I am not a coward*".

[19] This was demonstrated by some of his own text messages in reply to Mr Darvish. He told Mr Darvish not to threaten him and that he would make his own complaint to the Police. One message Mr Sharma sent back to Mr Darvish on 28 August read, in part:

*"I understand what you are trying to do. I have got a lot [to] say to IRD, police and immigration and you only got ur (sic) 500 dollar men. Dont threaten me time to time"*.

[20] Mr Sharma did complain to the Police about the threats from Mr Darvish and said in a witness statement, signed on 13 November 2012: "*I ignored the texts and I carried on with what I would normally do*".

[21] While Mr Sharma's actions were courageous and resolute in light of the threats from Mr Darvish, they were not the actions of someone who was too traumatised and so affected by the situation that he could not properly consider raising a grievance. The reality is that what Mr Sharma chose to do, in the light of the advice he got from a Youth Law advisor and information from a Labour Inspector, was to pursue a wage claim with his former employer rather than raise a personal grievance.

He was also busy with the requirements of working in a new job and preparing documents for an immigration application.

[22] Accordingly, although Mr Sharma's circumstances were difficult, I have found they were not of a nature that was sufficiently exceptional, in terms of the statutory requirements, to grant leave to raise his personal grievance outside the 90-day period.

### **Wages and holiday pay**

[23] From my review of the evidence of Mr Sharma and Mr Darvish and the documents provided I have concluded Mr Sharma has a valid claim for payment of outstanding wages from CBL. However, for two reasons, it is not for the same period or amount that he has claimed.

[24] Firstly, Mr Sharma's claim covered the period from 22 March 2010 to October 2011 during which Mr Darvish asserted Mr Sharma was employed by CK&BL, not CBL. Mr Darvish was not able to produce a copy of the employment agreement he said that he knew Mr Sharma had signed around October 2011. Mr Darvish gave two conflicting explanations for that failure, neither of which I found credible:

- (i) Mr Sharma's employment agreement must have been among documents taken by Mr Darvish's former wife and former business partner Polina Shchapova following their separation and his purchase of her shares in the business in late 2011; and
- (ii) Another employee told Mr Darvish in the days before the Authority investigation meeting that Mr Sharma had come into the store and "*took some documents*" that Mr Darvish suggested must have included CBL's copy of the employment agreement signed by Mr Sharma.

[25] The first explanation seemed unlikely given CBL has been able to produce copies of employment agreements for other staff members in a different matter brought to the Authority by a Labour Inspector and Ms Shchapova would be unlikely to have only taken documents concerning Mr Sharma.

[26] The second explanation was hearsay that provided no detail about what documents Mr Sharma might have taken or when this occurred. Mr Darvish gave it in

his oral evidence, only minutes after he had confirmed, under oath, the contents of his witness statement that contained the first explanation he offered.

[27] However there was also some evidence that Mr Sharma was aware of the different entity who appeared to be his employer. During the week before he resigned in July 2012 he had printed out an IRD summary of his earnings. That document showed his last payment from CK&BL was in September 2011 and that payments made to him since then were from CBL. He also referred to CBL in his resignation letter.

[28] On that basis I accept that, technically, Mr Sharma was employed – in the sense of working for and being paid by – CBL from October 2011, whatever other legal issues there may have been about whether he was properly aware of and had agreed to the transfer of his employment from one corporate entity to another.<sup>3</sup>

[29] However there was a second, purely practical, reason for limiting the period of Mr Sharma’s claim as running from October 2011 to 22 July 2012. It was the period during which CBL accepted, through the evidence of its director Mr Darvish, that Mr Sharma was employed by it. The other entity – CK&BL – had been struck off the Companies Office register, its registration ending on 17 August 2012. An award of wage arrears against CK&BL would be pyrrhic. Even if Mr Sharma were successful in having that company restored to the register for the purpose of enforcing such an award, the prospect of identifying funds or other assets to meet those amounts is most unlikely. CBL, by contrast, remained registered and, having accepted it was the employer of Mr Sharma in the period from October 2011 to July 2012 was liable for any shortfall in wages due to him.

[30] Mr Sharma’s claim for this period had three elements:

- (i) Wages for the weeks from 24 October 2011 to 22 July 2012 where he said he was paid at the rate of only \$10 an hour rather than his agreed hourly rate of \$14.00 resulting in a shortfall of \$5949 for the 1119.5 hours he worked in that period; and

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<sup>3</sup> *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1026 per Lord Atkins: a worker may not “without his knowledge and possibly against his will” be transferred from the service of one employer to another.

- (ii) Holiday pay which he said was not fully covered by the \$1655.78 given to him by Mr Darvish in two cheques on 24 August 2012; and
- (iii) Payment for 11 public holidays that fell in that period.

[31] CBL did not produce adequate time and wage records showing Mr Sharma's actual hours of work and the amounts paid in that period.<sup>4</sup> There were some MYOB payroll records provided by its accountant but those, I have found, did not accurately represent the actual situation. That did not reflect on the quality of the accounting but rather the information provided from the company for accounting purposes. For example those records showed Mr Sharma working 60 hours every month and being paid at the rate of \$14.50 for each of those hours producing a standard gross payment of \$870.00 a month which was reported to IRD. It was inconsistent with Mr Sharma's contractual hourly rate of \$14.00 and with Mr Darvish's witness statement that referred to Mr Sharma's hours varying regularly according to a roster. And I could not trace a matching pattern of such consistent payments in the bank statements for CBL that Mr Darvish provided when given the opportunity by the Authority to provide additional supporting information. The *pro forma* standard hours information provided to the IRD was most likely not what was actually worked and paid but was what CBL provided to meet what Mr Darvish referred to in his oral evidence as "*reporting hours for visa reasons*" – that was to show that an employee on a migrant work visa was working sufficient hours to meet the relevant immigration requirements.

[32] In light of the absence of adequate wage and time records from CBL, and based on my assessment of the relative credibility of the evidence of Mr Darvish and Mr Sharma, I considered the real situation appeared to be as stated in Mr Sharma's evidence – that he worked varying hours each month (sometimes less than the 60 stated in the supposed company records and sometimes more) and was paid by various means, sometimes in cash, sometimes by cheque and sometimes by internet transfer to his bank account.<sup>5</sup>

[33] The schedule Mr Sharma produced to set out the basis of his wage claim was based on his record of hours worked (showed in copies of diary notes he provided)

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<sup>4</sup> Section 130(1) of the Act applied.

<sup>5</sup> Section 132(1) and (2) of the Act applied.

and photographs (of variable quality) of the actual roster posted in his workplace. Its credibility was enhanced by the care he took not to include in his wage claim some days where he was sure he had worked but had no personal diary note or other documentary evidence of it (including a number of weeks from July through to the first three weeks of October 2011).

[34] Mr Sharma's evidence was that he worked a total of 1119.5 hours in the weeks from 24 October 2011 to his last day of work on 22 July 2012. His account of hours actually paid resulted in a shortfall of total gross pay of \$5949. From that must be deducted \$112 in the week beginning 24 October 2011 (because I could not establish from his evidence what the related hours were) and an additional \$290 for "*ordinary hours*" paid to him when he met Mr Darvish on 24 August 2012. The resulting shortfall was \$5547 that I have found were wages due to Mr Sharma but not paid.

[35] His holiday pay claim for the period had to be calculated from the 1119.5 hours he reported working. At \$14 an hour and on an eight per cent holiday pay entitlement, the holiday pay due to him was \$1253.84. The payment made to him for holiday pay on 24 August totalled \$1658.10 (being described on an accompanying pay slip as \$933.80 annual leave and \$724.30 holiday pay). The result was a surplus of \$404.26 that then needed to be deducted from the wage arrears of \$5547 giving a result of \$5142.74.

[36] The claim for additional pay for public holidays was not established because Mr Sharma's evidence (which gave total hours for the weeks rather than the actual days worked) did not establish that he would have worked on the days that those holidays fell or did in fact work.

[37] However he was entitled to an award of interest on the wages arrears due to him, for the period from 23 July 2012 to the date of this determination (that is 479 days).<sup>6</sup> At the current judicial rate of five per cent a year that was a daily amount of 70 cents a day amounting to \$335.30 for 479 days.

[38] I also considered whether Mr Sharma had waived his right to seek wage arrears when he signed a statement on 24 August 2012 that Mr Darvish wrote out for him and that read (with the spelling as used by Mr Darvish):

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<sup>6</sup> Under clause 11 of Schedule 2 of the Act and the Judicature (Prescribed Rate of Interest) Order 2011.

*I am Ebi Sharma Finish work at Chargrill Burger Ltd and all my Holiday and Tax Been paiyd and not complan to this company.*

[39] The statement did not include a declaration that the payment made was in full and final settlement and did not waive Mr Sharma's statutory rights.

[40] Accordingly I found Mr Sharma was entitled to the amounts calculated in wage arrears and to the orders for wage arrears and interest set out at the head of this determination.

### **Costs**

[41] Mr Sharma has been successful in his wage arrears claim and would usually be entitled to an award of a reasonable contribution to his costs in bringing it. Accordingly costs are reserved and the parties encouraged to resolve any issue of costs between themselves. If they are unable to do so, Mr Sharma may lodge and serve a memorandum on costs within 28 days of the date of this determination. CBL would then have 14 days from the date of service to lodge a reply memorandum. No submissions on costs will be considered outside this timetable unless prior leave has been sought.

[42] Subject to any information and submissions from the parties in those memoranda, the Authority would likely apply its usual daily tariff for this one day investigation meeting (being in this matter at the rate of \$3000) unless it should be adjusted due to the particular circumstances of the case and the application of the general principles set out in *PBO Limited v Da Cruz* [2005] 1 ERNZ 808.

[43] Either way Mr Sharma was entitled to reimbursement of his filing fee for lodging his claim in the Authority and an order for that amount has been included in the orders made in this determination.

Robin Arthur  
Member of the Employment Relations Authority

