

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 131  
5424965

BETWEEN

DHAN SINGH  
Applicant

A N D

DONUT INCORPORATED  
LIMITED trading as LITTLE  
INDIA MERIVALE  
Respondent

Member of Authority: M B Loftus

Representatives: Dean Kilpatrick, Counsel for Applicant  
Hugh Matthews, Counsel for Respondent

Investigation Meeting: 6 and 7 May 2014 at Christchurch

Submissions Received: 12 May 2014 and 30 May 2014 from Applicant  
26 May 2014 from Respondent

Date of Determination: 28 August 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Dhan Singh, claims he was unjustifiably dismissed by the respondent, Donut Incorporated Limited (DIL), on 22 April 2013. Mr Singh also claims he is owed a significant sum for unpaid annual leave and days in lieu of having worked on public holidays.

[2] DIL accepts it dismissed Mr Singh but contends its decision was justified by reason of redundancy. It also claims to have met its obligations in respect of leave entitlements and the payment thereof.

## **Background**

[3] Mr Singh was originally employed by DIL in 1996. He was engaged as a chef. In early 2000 he resigned to return to India. He soon concluded that was a poor decision and returned to DIL in November 2000.

[4] Like many of DIL's Indian staff, Mr Singh took his leave in lengthy periods and used it to return home. After reengagement he had five trips to India and his only other leave was a couple of days to visit Dunedin. There is agreement on when the leave was taken but not about its payment.

[5] There was a period of leave (13 weeks) taken prior to the resignation in 2000. Mr Singh says he was not paid during that absence and initially claimed recompense. The claim was withdrawn after the resignation was discussed during the investigation meeting.

[6] His next trip (and the first after reemployment) was of nine weeks duration between 19 January 2003 and 21 March 2003. Mr Singh states he cannot confirm whether or not he was paid for all or part of that period.

[7] The second trip was of eleven weeks length and commenced 25 November 2004. Mr Singh claims he received two days pay. The next visit to India was twenty weeks long and commenced on 30 October 2006. Mr Singh claims he was only paid for one week and two days. Trip four was of ten weeks duration commencing 30 November 2010 and Mr Singh claims he was paid for five and a half of those weeks.

[8] Mr Singh was away for eleven weeks and one day on the final trip which commenced on 29 November 2012. He says he was paid in full for that trip.

[9] Between the last two trips Christchurch suffered the February 2011 earthquake. At the time DIL operated two restaurants in the city. One, in the CBD, employed either four or five chefs while a second in Merivale employed three. Mr Singh worked in Merivale.

[10] Merivale closed temporarily but, as events transpired, the CBD restaurant would never reopen though there was no indication of that until September 2012. It was then DIL was informed the building was to be demolished and the lease

terminated. That was followed by some legal wrangling and closure was not finally confirmed until February 2013.

[11] DIL is one of a number of franchisees operating Little India restaurants throughout the country. Given an initial belief the CBD restaurant would reopen, a decision had been made to retain the total complement of chefs. Seven remained at the beginning of 2013 which exceeded Merivale's requirements. The surplus was addressed by a series of arrangements with other franchisees whereby DIL chefs were lent out to cover those on long term leave in India.

[12] In November 2012 the Little India franchisor recommended restaurant owners update their staffs' employment agreements. A suggested form was distributed. For various reasons DIL did not act immediately and raised the issue with staff in February 2013. There was discussion in the investigation meeting about this and the fact Mr Singh took exception to some of the altered / new provisions. At the time of his dismissal, discussions over the agreement's content were ongoing and a conclusion had not been reached. Mr Singh suggests this influenced his selection for redundancy but there is no evidence supporting that contention.

[13] On 7 March 2013 there was a staff meeting. The chefs say they called it to raise health and safety concerns. Mr Jose Pallipat, a director of DIL, portrays those concerns as little more than an attempt to leverage a pay increase. He adds they also discussed the staffing situation and the possibility of redundancy at the meeting.

[14] As already said, DIL had, for a couple of years, retained what it considered an excessive number of chefs in the hope its CBD restaurant would reopen. The excess was loaned out to other franchisees but by early 2013 DIL had concluded its ability to continue doing this was nearing an end. There had been a level of planning around the loans and other operators were now running out of staff who sought leave in India. Furthermore DIL concluded the arrangement had, to some extent, left it at the mercy of other businesses and created risks it no longer wished to take.

[15] A further meeting followed on 18 March 2013. At that meeting Mr Pallipat handed out a document entitled *Proposed Restructure*. The document, written in English, has a five paragraph introduction explaining that the CBD restaurant would not reopen. It concludes *We currently employ 7 chefs. A maximum of 5 chefs are required to operate the Merivale restaurant.*

[16] The document outlines a proposed structure based on the assumption DIL only required five chefs. It says *the proposal is that we would disestablish 2 of the chef roles. The seventh Chef is expected back in Merivale only on 15 May 2013, which leaves a couple of months to decide about the second position to be disestablished.*

[17] The document then went on to advise it was only a proposal and staff were asked to provide feedback and/or alternate suggestions by 25 March.

[18] Mr Pallipat says that while the documentation was in English, all staff meetings were conducted in Hindi and the content was explained in that language.

[19] Mr Pallipat goes on to say a further meeting was held on 25 March at which he hoped he would receive feedback from the chefs. The only response was DIL should keep lending surplus chefs to other franchisees. He goes on to say:

*My response was that the option of lending staff to other franchisees had come to an end at that time, as none of the other franchisees required further chefs. I said that LIM [Little India Merivale] was reluctant to carry extra staff, effectively putting LIM at the mercy of other franchisees.*

[20] A further meeting was held on 15 April. Individually addressed but otherwise identical letters were distributed to the chefs. The letter opens by advising *as part of the ongoing restructuring of the company, as of today all the existing chef's positions have been de-established.*

[21] The letter, along with accompanying attachments, went on to identify that DIL was of the view it required two tandoori chefs; two curry chefs and one mise-en-place chef. Staff were asked to indicate which of those positions they sought and a series of parameters to be used to select the successful candidates.

[22] Mr Pallipat was initially accompanied by a solicitor who had been assisting with the process. The staff objected and the solicitor was asked to leave. Mr Pallipat says he then read and explained the documents. He says Mr Singh, who appeared to be the staff's spokesperson, reacted with disdain, returned his copies and stated he would not complete them. Mr Pallipat says Mr Singh then convinced his colleagues to do likewise before advising this was the last meeting they were prepared to attend. Mr Pallipat says he was told he should go ahead and do whatever he wanted to do.

[23] Mr Pallipat says he was unhappy with the meeting and still sought staff feedback and input. He therefore prepared a further letter which he handed to all staff on 18 April. It refers to the 15 April meeting and the fact a decision had been made to reduce the number of staff. It goes on to say *as each of you decided not to look at those documents which were handed back to me* further copies were attached. It then says:

*I attach further copies of those documents. Despite your unwillingness to discuss these matters I do wish to have your feedback and an indication from each of you as to which of the positions you would like to apply and to interview each applicant. I do seek your participation in this process. I ask that you let me have your response by 10pm Saturday, 20 April 2013 ... If you are not prepared to engage in the process then I will proceed in the absence of that."*

[24] There was no response and, as advised, Mr Pallipat made his decisions as to who would be retained. Mr Singh was not chosen. Mr Pallipat then concluded Mr Singh's previous behaviour raised the possibility he might act improperly when advised of the decision and it was therefore conveyed by letter delivered to Mr Singh's residence prior to his scheduled commencement on 22 April 2013. The letter also advised Mr Singh he would be paid three months' in lieu of notice and would not be required to perform any further work.

## **Determination**

### ***The dismissal***

[25] DIL accepts it dismissed Mr Singh. Its justification is redundancy.

[26] It is well established that when reviewing a redundancy decision the Authority or Court will look at two factors. They are the genuineness of the redundancy and the procedure by which it was carried out. The enquiry into each factor is carried out separately (*Coutts Cars Ltd v Baguley* [2001] ERNZ 660 (CA)).

[27] The facts speak for themselves and I conclude it difficult to consider the redundancy substantively unjustified. Two restaurants employing eight or so chefs is a very different economic proposition from one which previously employed three chefs. Putting aside the decision to increase the workforce in Merivale, the evidence clearly supports DIL's conclusion it could no longer meaningfully employ its previous

workforce and that is not seriously challenged by Mr Singh. His challenge is largely procedural.

[28] Section 103A of the Employment Relations Act 2000 (the Act) requires an employer must, before dismissing an employee, raise its concerns, allow the employee an opportunity to respond and consider the response with an open mind (ss.103A(3)(b) to (d)).

[29] That these requirements remain in the form of a consultation process in a redundancy setting is confirmed by s.4(1A)(c) of the Act. The relationship was confirmed by the Court in *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102.

[30] As already said, the prime focus of Mr Singh's challenge is procedural. He claims the situation which gave rise to his redundancy was not adequately explained and the selection process deficient.

[31] These are not contentions with which I concur.

[32] The evidence is DIL met with the chefs on 7 March. Mr Pallipat says he explained the situation. Mr Singh initially denied there was a meeting and said DIL met with staff individually over the next day or two. For the following reasons I prefer DIL's evidence.

[33] Contemporaneous notes support DIL's position as does the evidence of Heramani Joshi, a witness called by Mr Singh. He accepts DIL met with the chefs and raised the fact the CBD restaurant would not reopen. He says the meeting was followed by individual discussions. This occurred on the 8<sup>th</sup>. There is then Mr Singh's evidence. Despite the initial denial a meeting occurred he accepted, when questioned, the health concerns were discussed at a meeting at which staff were then told the loan arrangement was coming to an end. While he was unclear as to when this occurred the only meeting at which either party mentions the airing of health concerns occurred on 7 March. I must say Mr Singh's evidence on this was confusing and contradictory.

[34] There is then the meeting of 18 March. It is agreed that occurred and documents were distributed which outline the situation, the fact redundancies were possible and asked for feedback. Mr Singh conceded this under questioning along with the fact that while he may not have agreed he understood the import of what was being said. Similarly Mr Joshi's evidence and answers (including acceptance the

explanation was given in Hindi, the chef's native language) support a conclusion staff were made aware of DIL's concerns.

[35] Similarly both Mr Singh and Mr Joshi accept the situation was again explained on 25 March but the chefs took the view the loan arrangement should be allowed to continue and no further feedback was offered.

[36] That led to the meeting of 15 April. Again answers given by both Mr Singh and Mr Joshi support DIL's claim the staff refused to participate in the process and returned the documents DIL had distributed. Both accept staff advised DIL they would engage no further and the company could do whatever it chose (or words to that effect). Notwithstanding that DIL gave the chefs another opportunity which they chose to squander.

[37] As already said the procedural obligation upon DIL is to consult. Indeed, the duty to act in good faith and be active and communicative in such circumstances falls upon both parties. There can, given the evidence, be no doubt DIL tried to meet its obligations but its efforts were stymied by the chef's failure to engage meaningfully. Furthermore, it is difficult to criticise DIL for doing exactly what its staff instructed – continue and complete the process without their input.

[38] I now turn to the decision to make Mr Singh redundant as opposed to one of his colleagues. Selection was an issue DIL raised during its attempt to consult. Again staff refused to participate and it should be noted Mr Singh's answers indicate he was, effectively, their leader and spokesperson. For two reasons I conclude he cannot now complain about his selection. First staff had a chance to influence the process and Mr Singh was instrumental in the decision not to accept that opportunity. Similarly he failed to answer a request staff suggest alternatives to redundancy. Secondly, and more importantly, DIL explained how and why the decision was made and its rationale for selecting Mr Singh was not disturbed under questioning.

[39] Finally there is the way in which Mr Singh was advised of the decision. I take this no further for two reasons. While arguably callous given Mr Singh's years of service, the rationale was explained and survived challenge. Secondly, Mr Singh's answers indicate DIL's concerns about how he might have reacted had some validity.

[40] For the above reasons I conclude DIL could reasonably conclude it had surplus staff. The consultation process it adopted was fair and reasonable, as was the

subsequent decision to dismiss Mr Singh. The claim Mr Singh was unjustifiably dismissed therefore fails.

***The wage arrears***

[41] Mr Singh claims DIL owes \$51,426.08 gross for unpaid annual leave and public holidays. Of this \$31,679.26 is attributed to unpaid annual leave with the balance pertaining to payments in lieu of public holidays.

[42] Here I note there have recently been a number of recent reports concerning the exploitation of migrant labour. I must reiterate this is not one of those cases. I also note the claim covers leave entitlements which accrued many years ago but hold this is not barred by the normal six year limitation. That is because the amounts only became payable upon termination (*Burns v Radio Pacific Ltd* [1998] 3 ERNZ 559) and that is less than six years ago.

[43] DIL's position is the money has been paid though not in accordance with the Holidays Act which generally requires payment at the time leave is taken. Instead DIL contends that for some time it paid its chef's an annual lump sum which covered the amounts due. It claims it did this at the chef's behest and often the money was remitted to India for family purposes. In Mr Singh's case this generally, but not always, occurred in March and there was evidence of some payments with others being alleged but without documentary support.

[44] DIL's defence faces some problems as Mr Singh's time and wages records are not available with these having been lost with the CBD restaurant. Instead it argues the obligation to pay at some time in the future may be discharged by an earlier payment (*Drake Personnel v Taylor* [1996] 2 NZLR 644 (CA) when the situation is permitted by s.28(1) of the Holidays Act 2003). That argument, however, will only go so far and will not cover the claim in totality.

[45] Mr Singh claims \$31,679.26 in respect of unpaid annual leave. I do not accept that for two reasons. First, the amount claimed includes the nine weeks taken between 19 January 2003 and 21 March 2003 ([6] above). As already recorded Mr Singh accepted, when answering questions, he could not confirm whether or not he was paid for all or part of that period. That uncertainty means he has not established the claim and is an inadequate base upon which to make an award. The claimed amount will be reduced accordingly.

[46] Secondly there is the issue of payments already made. The *Drake* argument has some validity as while Mr Singh denied he either sought or agreed to lump sum payments in lieu of annual leave, he accepts he received the four payments DIL can evidence and did not dispute the timing of the payments. Those payments, made on 26 March 2008, 30 March 2009, 7 December 2010 and 27 July 2013 total \$11,849.12. That should be taken into account but not a fifth payment as it covered the period of leave in 2012 for which Mr Singh accepts he was paid.

[47] The residue of the claim remains despite DIL's claim payments were made. Given the lack of records there is no evidence of the payments or that they are identifiable as holiday pay as required by s.28(1)(c) of the Holiday Act. Note must also be taken of the concessions of both Mr Pallipat and Sukhmohan Gill, a principle of the Little India franchisor, that the method of payment varied (cash, cheque or direct credit) as did the time of payment. More importantly it was conceded the payments which were made could not be correlated with, or credited against, any specific leave accrual. In other words there is no evidence of further amounts which can be identified as a specific holiday pay competent a required by s.28(1)(c) of the Holidays Act. These concessions lead me to conclude this is the type of situation covered by s.28 (4) and the balance of the claim remains payable. After deductions for the amounts referred to in [45] and [46] above I conclude the payable residue is \$9,477.44 gross.

[48] Turning to public holidays. Mr Kilpatrick has tabulated the claim in respect of public holidays. Given the evidence I accept his calculation and the conclusion Mr Singh is owed \$19,746.82 gross in respect of unpaid public holidays. It may be marginally overstated as Mr Singh did not work seven days a week and a few of the public holidays may have fallen on days he might not otherwise have been required to work. However I do not, given the lack of wage records, have sufficient information upon which to base a remedial calculation.

[49] Mr Singh asks that I also award interest in respect of the above awards. An award of interest is discretionary and I do not consider it appropriate in this instance. Notwithstanding the above awards which are (a) compelled by s.28(4) of the Holidays Act and (b) perhaps overstated in respect of public holidays, I feel it safe to conclude from some of Mr Singh's answers it is probable he has already been paid for some of

the claimed leave. I consider such payments sufficient recompense for the delay in receiving the balance.

[50] Finally there is the issue of a \$10,000 loan Little India made to Mr Singh. It is yet to be repaid and is the subject of proceedings in the District Court. Those proceedings are currently stayed pending an outcome here. Mr Singh accepts the money is payable and the parties agree it is better to dispose of all matters simultaneously.

[51] The parties agreed I address the issue by either making an order for the monies repayment or offset the amount against any award I may make in Mr Singh's favour. Given the outcome it will be an offset and the amount due to Mr Singh by way of arrears is to reduce by \$10,000.

### **Conclusion and Orders**

[52] The claim Mr Singh was unjustifiably dismissed is rejected.

[53] The claim Mr Singh is owed money in respect of unpaid annual leave and public holidays is successful though not to the claimed extent.

[54] Mr Singh is to repay \$10,000 to Donut Incorporated Limited.

[55] As a result Donut Incorporated Limited is ordered to pay Mr Singh the sum of \$29,224.26 twenty nine thousand, two hundred twenty four dollars and twenty six cents) gross. From that PAYE is to be deducted before the residue, minus a further \$10,000, is forwarded to Mr Singh.

[56] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority