

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 61
5609250

BETWEEN AVTAR SINGH
Applicant
AND FULL TANK LIMITED
Respondent

Member of Authority: M B Loftus
Representatives: Peter McKenzie-Bridle, Counsel for Applicant
Jess Dempsey and Fernanda Burgo for Respondent
Investigation Meeting: 31 May 2016 at Wellington
Submissions Received: At the investigation meeting
Determination: 31 May 2016

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Avtar Singh, claims he was unjustifiably dismissed on or about 11 November 2015.

[2] The respondent, Full Tank Limited (Tank), claims Mr Singh abandoned his employment.

Background

[3] Tank operates a number of juice bars across New Zealand. It initially engaged Mr Singh in June 2014 as a Casual Store Assistant in Auckland. In December 2014 he was offered promotion to Store Manager but declined as he was relocating to Wellington. The offer was later amended to Store Manager in

Wellington and Mr Singh signed the applicable employment agreement on 11 March 2015.

[4] He initially worked in Featherston Street but later moved to Courtney Place. The hours of work were flexible with weekly rosters being advised three or four days prior to their commencement. They were drafted by the Store Manager and then reviewed, approved and issued by the Area Manager.

[5] Ms Singh adds he could then swap shifts for personal convenience and often did so with Blake Ervin, a Senior Store Assistant who was deemed capable of acting as a manager. Mr Singh says his Area Manager, Sireesha Dasari, was aware of and accepted his swapping shifts and that claim is not contradicted by Tank.

[6] The employment was not without incident with Tank of the view Mr Singh's performance deteriorated once he was promoted. It records a number of performance management events which include the issuing of formal warnings for various breaches. They include having long fingernails, poor personal hygiene, speaking in a language other than English along with inefficient and incorrect work practices.

[7] In August 2015 Mr Singh applied for leave so as to visit family in India. This had to be approved by head office and after discussion over the fact Tank wanted Mr Singh to be available in November his request was approved on 29 August. It covered the period 5 to 31 October.

[8] Mr Singh says the discussion over availability did not canvass a requirement he be available for the full month but it was clear Tank did not want him away for a couple of weeks than month. He therefore booked a ticket departing 2 October and returning 3 November.

[9] Mr Singh was rostered to work on 3 October. He arranged a shift swap and advised Ms Dasari, who he says, agreed. Tank does not challenge this.

[10] On or about 25 October Mr Singh tried to contact Mr Ervin though this was done via another employee as he did not have Mr Ervin's contact details in India. He says he did so to advise he was returning on 3 November and was available for rostering from the 4th onward. Mr Ervin, acting as Manager in Mr Singh's absence prepared a roster accordingly. It was approved by Ms Dasari and issued on 26 October. It had Mr Singh as next working on 4 November.

[11] On 29 October Mr Singh had dental treatment for an issue that had arisen while he was away. The dentist advised *Rest for 5 days at least* but Mr Singh chose to leave as originally booked that evening. He intended spending a couple of days with friends in Kuala Lumpur on route and was to continue from there on 2 November, arriving in Wellington the following day.

[12] During his stay in Kuala Lumpur he had become sick due to an infection attributable to the dental treatment. He sought medical assistance and was advised to postpone his travel for a couple of days. He advised Mr Ervin, copied to Ms Dasari, of his illness via email on 3 November and asked Mr Ervin arrange cover for his shifts through to 6 November. Mr Ervin replied the same day advising the roster had been sorted. Again Ms Dasari was copied in but did not respond to either message.

[13] Mr Singh then changed his ticket on 4 November and left Kuala Lumpur that evening. He returned to Wellington about 11pm on 5 November. He was initially rostered to work at 7.30am but says he had received a message saying his shift had been changed and to come in at 2.00pm.

[14] While Ms Dasari had not responded to the correspondence about Ms Singh's continued absence it appears she was put out by it. She raised it with Fernanda Burgo, Tank's National Area Manager, who tried to telephone Mr Singh on 5 November. She was unsuccessful as the later was in transit so left a message advising she wished to discuss the absence of 4 November. He received the message on the 6th and telephoned at about 11am.

[15] Mr Singh says he explained his sickness and the effect it had on his travel. He says Ms Burgo was not satisfied with the response and advised she was of the view Mr Singh had abandoned his employment. He was told not to work his shift that day (6 November) and asked to provide a written explanation for his absence. He did by e-mail at 1.59pm. He advised he did not have a medical certificate but did have details about the medication he had been prescribed after the treatment as he needed these for *immigration* and attached those.

[16] At 3.15pm Ms Burgo replied. She says she was sorry to hear about the illness but could not *accept that you failed to return to work on 1st November without any notice*. Ms Burgo demanded proof Mr Singh had booked his ticket so as to enable a return to work on 1 November and a medical certificate. She goes on to say *As you have*

breached clause 13.5 of your employment agreement, until I receive reasonable proof that you did intend to return to work and were incapable of doing so due to medical issues, Tank have deemed that you have abandoned your employment. Mr Singh was given 24 hours to reply and was, in the interim, removed from all further shifts.

[17] Clause 13.5 provides Mr Singh will be deemed to have abandoned his employment if he fails to *present for work at the agreed times for two consecutive days, without reasonable explanation or excuse.*

[18] Mr Singh replied that evening advising he was originally booked to return on the 3rd and commence work on 4 November and this was done in consultation with Mr Ervin. He also advised there would be difficulties with a medical certificate from Malaysia given a lack of appropriate contacts there.

[19] On 10 November Mr Singh sought clarification as to what was happening. Ms Burgo replied advising she would *get back to you by tomorrow.* At 7.08pm the following evening Mr Singh again sought a response. It came at 9.45pm in the form of a dismissal letter.

[20] Other than the phone call on the morning of 6 November there were no discussions about the situation with all dialogue occurring by e-mail.

Determination

[21] Tank accepts it dismissed Mr Singh. In doing so it accepts it is required to justify the dismissal.

[22] In the letter of dismissal Tank says:

Regardless of your illness, it is clear from your flight itinerary that you did not intend to return until 4th November, 3 days past your approved return to work date. Further, you made no attempts to contact or explain your absence from work until 3rd November, 2 days past your approved return to work date.

[23] In the Statement in Reply it says:

Avtar Singh breached his employment agreement. Avtar did not present to work after approved leave and did not inform his managers of any roster changes or illness until three days after his approved leave had finished. Following two previous written warnings, Full Tank Limited (Tank) elected to terminate his employment on the grounds of Abandonment of Employment.

[24] That said it appears there were other matters in Tank's mind. The letter via which Tank responded to the raising of Mr Singh's grievance advises:

You have been informed of the company rules and given multiple verbal warnings and opportunities to improve. In line with our performance management process, one more written warning would result in your termination.

[25] The Statement in Reply records that while the performance issues were not the reason for termination they impacted Tank's decision. Both the Statement in Reply and Ms Burgo's brief also advise there were concerns Mr Singh had used his position to influence the behaviour of [Mr Ervin] and it is implied that only by doing so had he been able to manipulate the roster so as to not be required to work before 4 November.

[26] Section 103A of the Act states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[27] In applying the test the Authority must consider whether, having regard to the resources available to the employer, it sufficiently investigated the allegations. A sufficient investigation requires, as a bare minimum, that the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[28] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and procedural perspective. While issues of substance and process overlap and there is no firm delineation though separation provides a useful means of analysis especially as some of the requirements of s 103A have a procedural focus.

[29] Tank's resources and knowledge are not, in my view, an issue. This is a substantial employer with an internal human resource capability.

[30] Tank is going to have some difficulty providing a substantive justification for Mr Singh's dismissal. The ostensible reason for the dismissal was abandonment but

this faces two problems. The first is abandonment implies the disappearance of the employee and an inability to ascertain their intentions regarding future employment despite attempts to do so. That is not the situation here. Tank knew where Mr Singh was and that he intended returning.

[31] The second issue is the clause upon which Tank relies (13.5) states abandonment occurs when the employee fails to present for work at agreed times for two consecutive days. In other words it requires the employee fails to attend when rostered to do so. Again that did not occur here.

[32] Tank contends Mr Singh should have been available to work from 1 November and improperly manipulated a scenario under which he was not required till 4 November. It says Ms Desari felt she had no choice but to approve the roster once she became aware Mr Singh was not returning till the 4th. That may be so but the fact remains she did approve the roster. Mr Singh was not required to present before 4 November and when he became incapable of fulfilling that obligation he advised Tank. It knew where he was and why. That, I conclude, cannot be considered abandonment and the justification tendered by Tank fails.

[33] That raises the other significant problem with this dismissal. As already said there were indications other factors influenced the decision to dismiss. When this was put to Ms Burgo she conceded the dismissal was primarily attributable to Mr Singh's failure to communicate through proper channels and follow Tank's procedures. She repeated this rationale more than once and added Tank was put out by a belief Mr Singh never intended returning at the expiry of his leave and conceded the decision to dismiss was influenced to a significant degree (estimated at 50%) by his previous warnings.

[34] That these were the reasons for dismissal was confirmed by Ms Dempsey, Tank's Human Resources Manager, in her closing. She said this was the third major time Mr Singh had not followed procedure and not done what was expected of a manager.

[35] This raises another significant failure. These are performance concerns. Section 103A requires they be put to Mr Singh, he be allowed to respond and his responses be considered with an open mind. There is no evidence this occurred and issues of failing to follow procedure were put. Similarly there is no evidence the

other concern Tank mentioned, namely that Mr Singh had improperly influenced Mr Ervin to do his bidding was ever put. To that I add strong evidence, via the early conclusion Mr Singh had abandoned and continual reference to his previous performance history, the outcome was predetermined. Tank had had enough of Mr Singh and his performance.

[36] The failure to put the real reasons for dismissal must, given the provisions of s 103A, mean Tank is incapable of justifying the dismissal.

[37] The conclusion the dismissal is unjustified leads to a consideration of remedies. Mr Singh seeks lost wages and compensation for hurt and humiliation.

[38] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis.

[39] Mr Singh's evidence is he did not attain another job for some six months but his evidence about attempts to mitigate his loss was weak. It does not persuade me to go beyond the statutory three months.

[40] Mr Singh averaged, as a Manager, some 44.3 hours a week. 13 weeks wages, assuming 44.3 hours a week, is \$9,790.30. Section 128(2) states this is payable.

[41] Turning to compensation. Mr Singh did not quantify his claim and the evidence tendered in support was sparse. He spoke of financial pressure, the angst about not being able to repatriate money to his family in India and the confusion which emanated from the conflicting reasons which were given for his dismissal and the inconsistencies there-in. For example he spoke of receiving a written warning which was followed within 24 hours by praise about the way he was managing his store. Having considered the evidence I conclude an award of \$5,000 appropriate.

[42] The conclusion remedies accrue means I must, in accordance with s 124 of the Act, address whether or not Mr Singh contributed to his dismissal in a significant way. My initial reaction, conveyed to the parties, was the answer may be yes and reference was made to evidence which suggested Mr Singh had never intended returning at the end of his leave and *gamed* the system to his advantage. There was also the evidence about previous performance deficiencies.

[43] That said Mr McKenzie-Bridle's submissions convinced me not to reduce the remedies. As he pointed out Mr Singh simply used the roster system, which was designed to benefit the employer, in a way well accepted and regularly applied. Furthermore Mr Singh could, and did, pay to amend his ticket and could have done so had an earlier return been required. There is then some inconsistency in relation to the warnings such as that referred to in [41] above.

Costs

[44] Mr McKenzie-Bridle also asks I determine the issue of costs. He advises Mr Singh was legally aided and the legal aid bill now totals \$4,000.

[45] It is accepted in the normal course of events costs follow and the Authority usually applies daily tariff.¹ The normal starting point is \$3,500 per day and adjustment may be made depending on the circumstances.

[46] This investigation took the better part of a day. In the absence of any argument as to why I should depart from the above approach I choose to adopt it.

Conclusion and orders

[47] For the above reasons I conclude Mr Singh has a personal grievance in that he was unjustifiably dismissed. As a result I order the respondent, Full Tank Limited, pay the applicant, Avtar Singh:

- i. \$9,790.00 (nine thousand, seven hundred and ninety dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- iii. A further \$3,500 (three thousand, five hundred fifty dollars) as a contribution toward the costs Mr Singh incurred in pursuing his claim.

M B Loftus
Member of the Employment Relations Authority

¹ refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808