

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 155
5322005

BETWEEN GAJENDAR SINGH
 Applicant

AND GUNVEER ENTERPRISES
 LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Richard Lewis for the Applicant
 Gunveer Singh for the Respondent

Investigation Meeting: 3 March 2011 at Masterton
 Further information received by 1 June 2011

Submissions: Due by 10 August 2011

Determination: 12 October 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Gajendar Singh, claims that he was unjustifiably constructively dismissed from his position as a chef at the respondent's restaurant, Plaza India in Masterton, through a number of breaches of good faith towards him, and in particular by not being paid the bulk of his wages. The payment of these outstanding wages also comprises part of his claims.

[2] The respondent (Gunveer/Plaza India) considers that it met all of its duties to Mr Gajendar Singh, including paying him in accordance with his employment agreement, and making the appropriate adjustments for income tax.

[3] The basis of Mr Gajendar Singh's claim is that he was only paid \$50 to \$100 per week out of the till, by the principal of Gunveer, Mr Manjit Singh, compared to a

minimum of \$560 per week gross as provided under their employment agreement. This sum would in fact be significantly more if, as alleged, more than 40 hours a week was worked. Gunveer denied ever underpaying him.

Credibility

[4] There can be no certainty about events that took place several years ago. The role of the Authority, however, is to determine what it considers occurred on the balance of probabilities, ie what is more likely than not. The balance of probabilities is a flexible scale and the more serious the allegations, the more convincing the proof required must be. The most serious aspect of the claim is the accusation that Mr Manjit Singh has doctored the company records involving Mr Gajendar Singh's income and PAYE records, by copying Mr Gajendar Singh's signature from another document.

[5] In support of Gunveer's position on all the claims was that Mr Gajendar Singh's evidence was inconsistent as between the statement of problem, his statement of evidence and his oral evidence. One explanation for that, however, is his limited English. In addition, Mr Gajendar Singh provided no supporting witnesses, including in particular his co-worker, who apparently left at the same time as him for associated reasons. Furthermore, Mr Manjit Singh deducted full PAYE to IRD as required for an employee earning \$560 per week. Finally, there is the unlikelihood of a worker working for nine months as a chef in a restaurant in Masterton for the pittance of less than \$100 per week.

[6] On the other hand, Mr Manjit Singh was given an initial two week period to provide to the Authority the original of the document that he said would prove that Mr Gajendar Singh's signature on the photocopy was an original one. He has not supplied any such information, despite being on notice that failure to do so may lead the Authority to assume that Gunveer did not want to provide the document. This situation still applies, despite the parties being given until 10 August to provide further submissions.

[7] The importance of this document is that Mr Gajendar Singh's signature appears as an exact copy of a signature provided by him to Mr Manjit Singh for the purposes of getting an immigration consultant to act on his behalf. Thus, when the

two pages are placed on top of each other, the signature, and the line underneath the signature, is exactly the same.

[8] The absence of the original document is a significant pointer that Mr Gajendar Singh may be correct in stating that he signed no such document, particularly as it relates to the period 2 June 2008 to 28 February 2009. 28 February 2009 is an unusual date to prepare such an account statement. If prepared for financial reporting purposes one would expect it to run until 31 December or 31 March or 30 June, rather than 28 February. These are significant pointers that lend themselves to a finding that Mr Gajendar Singh never signed such an account statement, and that it would only be proffered to the Authority to mislead it.

[9] Furthermore, Mr Manjit Singh gave evidence that when the relationship came to an end, it was he who first contacted Ms Gill Flower, a Masterton Police Constable, because he was concerned about the absence of Mr Gajendar Singh and another co-worker. Yet Constable Flower, when she finally contacted the Authority, some months later, stated that she was first approached by the former owner of Plaza India to assist the two workers obtain their possessions back from Mr Manjit Singh. She also noted that the workers were dependent on Mr Manjit Singh totally, who was holding onto their passports and had them pretty much "*under his control absolutely*". This was directly inconsistent with Mr Manjit Singh's evidence that he had approached the Police out of concern for the welfare of his staff, who had packed up and left one day. She also noted that the Police would not have become involved in matters that did not involve any criminal offence, such as workers leaving without notice. Furthermore, Constable Flower noted that the workers informed her that they were not going to get the money they were owed or their passports. However, that was not something for the Police to be involved in and they were advised to get a lawyer.

[10] In addition, Mr Gajendar Singh was tied to employment with Gunveer Enterprises because of his work permit, and this gives a reason why he may not have complained. Furthermore, Mr Gajendar Singh took legal advice and raised a grievance promptly within three weeks of leaving Plaza India. Finally, Mr Manjit Singh accepted that Mr Gajendar Singh was paid from the till, which at the rate of approximately \$445 net a week would have been a significant amount of cash to come out of a restaurant till. All of these factors support Mr Gajendar Singh's evidence.

[11] On balance, despite the seriousness of the allegations against Mr Manjit Singh and Gunveer Enterprises, I conclude that Mr Gajendar Singh's evidence should be preferred over that of Messrs Manjit and Gunveer Singh, despite the inconsistencies in Mr Gajendar Singh's evidence and his lack of supporting witnesses. I do so particularly on the basis of the unexplained perfect likeness between Mr Gajendar Singh's acknowledged signature (including the same line under the signature) on the request to the immigration consultant, that the wage record covered an unusual period of time and the inconsistency of Mr Manjit Singh's evidence with the information provided by Constable Flower. I find the facts as below accordingly.

Factual discussion

[12] Mr Gajendar Singh is an experienced Indian chef who was recruited by the previous owners of Plaza India in Masterton as a tandoori chef. However, by the time he came to New Zealand, the business had been taken over by Gunveer Enterprises Limited, controlled by Mr Manjit Singh. Mr Gajendar Singh commenced work on 28 May 2008 under an employment agreement that provided for him to work 40 hours per week at \$14 per hour.

[13] In November 2008, Mr Manjit Singh took Mr Gajendar Singh's passport in order to assist him to renew his visa, his employment being tied to Plaza India/Gunveer Enterprises. Mr Gajendar Singh never received it back during the course of his employment, despite asking for it.

[14] Mr Gajendar Singh was required to work seven days a week. He would work both lunches and dinners. However, his claim was limited at the investigation meeting to only 40 hours per week, although I accept that he worked in excess of that doing both lunches and dinners seven days a week. This was a responsible concession, given that Mr Gajendar Singh was provided with free lodgings and board.

[15] Mr Gajendar Singh was only ever paid between \$50 and \$100 a week out of the till, rather than the approximately \$445 per week that he was due. Mr Gajendar Singh knew that he was being wrongly paid and asked Mr Manjit Singh to remedy this on many occasions. However, Mr Manjit Singh always had an excuse and because of his lack of English and his lack of contacts in the community, Mr Gajendar Singh felt unable to do anything about it.

[16] It is perhaps significant that Mr Manjit Singh appeared to have lost confidence in Mr Gajendar Singh and his co-worker after a burglary at the restaurant in early 2009.

[17] Eventually, after about nine months (and with only one day off, namely Christmas Day), Mr Gajendar Singh had had enough and took Mr Manjit Singh to task about the issues. This was in some part because it had become particularly embarrassing to him not to be able to remit money to India so as to assist in paying to cure illnesses his father was suffering from, and to repay his brother moneys borrowed.

[18] Accordingly, on 12 March 2009, when Mr Gajendar Singh and his co-worker approached Mr Manjit Singh about getting paid, because his brother was again asking about it, he was told that he would get his money. They did not believe him and threatened to walk out. However, the next day, Mr Gajendar Singh was told that he would have to leave, but was not given any reason. By contrast he was also told that if he did leave he would be accused of stealing from the restaurant. Given the long history of the situation and the contradictory and false messages he was receiving Mr Gajendar Singh decided that he could no longer put up with things and decided to leave as told by Mr Manjit Singh. He and the co-worker stayed that night in the restaurant and then went to the Police station the next day, where Constable Flower assisted them to obtain their belongings.

[19] Subsequently, particularly given that he could only work legally for Gunveer Enterprises, Mr Gajendar Singh was unable to work for the next three months, until gaining a new visa to work for his present employer.

[20] Mr Gajendar Singh gave evidence of the feelings of hopelessness he had at being unable to assist his family in India, of being unable to work except for Gunveer Enterprises, of feeling taken advantage of and of the lack of support systems in New Zealand. Furthermore, he stated that he was very upset at having to rely on charity for a number of months.

Determination

[21] It is clear that Mr Gajendar Singh was unjustifiably dismissed. It is a fundamental right of all employees to be paid in accordance with their employment agreements for the work they do. Here, Mr Gajendar Singh continued to work for a

pittance until after nine months he had had enough, when he finally took the matter into his own hands and demanded payment. When Mr Manjit Singh realised that Mr Gajendar Singh was serious about getting his pay, he told him there was no more work for him and that if he left and/or complained he would be accused of stealing. None of these actions are those of a fair and reasonable employer.

[22] Even if Mr Gajendar Singh's employment did not terminate in such a way, he would have been entitled to resign after nine months of being paid less than \$100 a week on average (instead of \$445) and thus he would still have been constructively dismissed. The total amount of underpayments over the period of his employment constitute \$18,860 gross, allowing for a weekly payment to Mr Gajendar Singh equivalent to \$100 gross.

[23] I accept that Mr Gajendar Singh has suffered extremely badly as a result of his treatment by Gunveer and Mr Manjit Singh. He was, as a new immigrant, an extremely vulnerable employee who was taken advantage of to an extreme degree. Mr Gajendar Singh could see no way, as a new immigrant with very limited English, out of his predicament. It must have impacted on him greatly to come to New Zealand, expecting to be treated with common decency and to be able to remit significant funds to his family in India, and then to be so mistreated. He was then left out of work for several months and reliant on charity.

[24] The effect on Mr Gajendar Singh was obvious to see in person. In these extreme circumstances, I consider that compensation in the full amount claimed of \$15,000 is appropriate.

[25] I also accept that Mr Gajendar Singh is entitled to be reimbursed for three months' lost remuneration since he was unable find work in that period. That sum is \$7,280 gross.

[26] There are no grounds for reducing these sums on the basis of contribution. Mr Gajendar Singh, on the facts before me, was entirely blameless in this situation.

[27] I therefore order the respondent, Gunveer Enterprises Limited, to pay to the applicant, Mr Gajendar Singh, \$18,860 gross in unpaid wages, \$15,000 in compensation under s.123(1)(c)(i) and \$7,280 gross in lost remuneration.

Costs

[28] Costs are reserved.

GJ Wood

Member of the Employment Relations Authority