

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 84
5520686

BETWEEN VARINDER SINGH
 Applicant

AND PALANIAMMAH LIMITED
 First Respondent

AND WELLYWOOD GENUINE TALK
 LIMITED
 Second Respondent

AND RAVICHANDIREN NARAYANASAMY
 Third Respondent

Member of Authority: Trish MacKinnon

Representatives: Bede Laracy, Advocate for Applicant
 No appearance for or on behalf of Respondents

Investigation Meeting: 17 June 2015 at Wellington

Determination: 31 August 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Varinder Singh was employed in a full-time capacity from June 2013 until his dismissal on 1 August 2014. Mr Singh claims his dismissal was unjustifiable and that he was sexually harassed by his employer for the last several months of his employment.

[2] Mr Singh also claims to have been disadvantaged by a range of actions by his employer. These included being issued with two written warnings; being "fined" during his employment; being required to perform duties different from those for which he had been employed; and being verbally abused and threatened with action that could lead to the revocation of his work visa.

[3] Additionally, he says he was underpaid during his employment, and had unlawful deductions made from his wages (the "fines"). He says his employer breached good faith and failed to keep and produce wage, time and holiday records upon request. Mr Singh notified his employer of his personal grievances and other matters relating to wage arrears concerns by letter dated 18 September 2014. He requested a full copy of wage and time, holiday and leave records at that time. Mr Singh seeks remedies including recovery of wages, compensation for hurt and humiliation and for lost income, and costs. He also seeks the imposition of penalties against the respondents.

[4] Ravichandiren Narayanasamy (also known as Robbie Nara) is the director of the respondent companies. He is also the person accused of sexually harassing Mr Singh. Mr Narayanasamy denied all Mr Singh's claims in a response he filed to the statement of problem and says Mr Singh has not been honest in statements made to the Authority. He claims Mr Singh lost his employment due to laziness and was trying to blackmail him in order to obtain money.

The employer

[5] Mr Singh's statement of problem cited Palaniammah Ltd, Wellywood Genuine Talk Ltd, Wellywood Malbas Ltd and Ravichandiren Narayanasamy as respondents in this matter. His individual employment agreement, dated 11 June 2013, records the employer as "Palaniammah Ltd/Wellywood Genuine Talk Ltd". The majority of Mr Singh's employment took place at the hostel known as *Wellywood Backpackers* in Wellington, although for some months he was relocated to Nelson to work at *Wellywood Malbas Backpackers*.

[6] In the course of a telephone conference in March 2015 I discussed with Mr Singh's representative the appropriateness of including Wellywood Malbas Ltd and Mr Narayanasamy personally as respondents. As a result, Wellywood Malbas Ltd was removed from the list. While Mr Narayanasamy remained as a respondent at that stage, on reflection I am not satisfied an employment relationship existed between Mr Singh and Mr Narayanasamy and I am therefore unable to take that matter further.

The Authority's investigation

[7] Mr Narayanasamy did not take part in the telephone conference referred to above. In an email sent to the Authority 12 days before the scheduled telephone conference Mr Narayanasamy said he was too ill to take part. Since filing documentation in the Authority in October 2014 by way of a response to the statement of problem lodged by Mr Singh, Mr Narayanasamy has taken no part in these proceedings and did not attend the investigation meeting.

[8] Mr Narayanasamy was properly notified of the investigation meeting and I am satisfied that documentation was appropriately served on the respondent companies of which he is director. The commencement of the investigation meeting was delayed to allow for any late arrival by Mr Narayanasamy and/or any representative of the respondent companies. I then decided to proceed as provided for under Schedule 2 clause 12 of the Employment Relations Act 2000 (the Act).

[9] That section provides that if, without good cause shown, any party to a matter before the Authority fails to attend or be represented, the Authority may act as fully in the matter before it as if that party had duly attended or been represented. I have considered the unsworn statement from Mr Narayanasamy that formed part of his statement in reply. However, in the absence of any sworn evidence capable of being tested by way of questioning and cross-examination, I have preferred the sworn evidence of Mr Singh.

Issues

[10] The issues for the Authority to determine are:

- (a) Whether Mr Singh was sexually harassed in the course of his employment;
- (b) Whether Mr Singh was unjustifiably dismissed from his employment;
- (c) Whether Mr Singh was disadvantaged in his employment by:
 - i. being issued with two written warnings;
 - ii. being *fined*;
 - iii. being required to perform duties other than those for which he was employed; and
 - iv. being verbally abused and threatened with loss of his work visa.

- (d) Whether Mr Singh was underpaid in the course of his employment;
- (e) Whether money was unlawfully deducted from Mr Singh's wages during his employment;
- (f) Whether holiday pay is owing to Mr Singh; and
- (g) Whether penalties should be imposed on the respondents.

Was Mr Singh sexually harassed during his employment?

[11] Sexual harassment is a form of personal grievance under s. 103(1)(d) of the Act. Section 108 of the Act expands upon the issue of when an employee is sexually harassed, providing at subsection (1) that:

.....an employee is sexually harassed in that employee's employment if that employee's employer or a representative of that employer-

1. directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains –
 - i. an implied or overt promise of preferential treatment in that employee's employment; or
 - ii. an implied or overt threat of detrimental treatment in that employee's employment; or
 - iii. an implied or overt threat about the present or future employment status of that employee; or
2. by-
 - a. the use of language (whether written or spoken) of a sexual nature; or
 - b. physical behaviour of a sexual nature,-

directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance or job satisfaction.

[12] In this instance the allegations involve s.108(1)(b)(i). Mr Singh gave evidence that sexual harassment by Mr Narayanasamy commenced around January 2014 when his employer began asking him unwelcome personal questions. Mr Singh says he told Mr Narayanasamy that he did not like that behaviour. However, the behaviour escalated rather than stopping. Mr Singh provided the Authority with text messages between his employer and himself over a period from April to July 2014. A number of the texts were work-related but many others were of a personal, intrusive, and sexual nature.

[13] Mr Narayanasamy also included transcripts of text message exchanges between himself and Mr Singh with his statement in reply. Those text messages, which took place in July 2014, included some of the texts supplied by Mr Singh. Those dated between 18 July and 22 July 2014 support Mr Singh's claim of having been sexually harassed, including that of 22 July 2014 in which Mr Narayanasamy informs Mr Singh "*I need to have sex with u soon*". Mr Narayanasamy's statement in reply claimed that text was meant for another staff member, and not Mr Singh. I do not find that credible, given the content of texts he had sent to Mr Singh the previous day.

[14] I accept Mr Singh's evidence of having told Mr Narayanasamy that he did not like his behaviour. I find he was subject to sexual harassment in his employment both verbally and by unwelcome text messages of a sexual nature over a period of months. His employer failed to take any steps to stop the harassment when informed of Mr Singh's unhappiness with it.

Was Mr Singh unjustifiably dismissed?

[15] Mr Singh gave evidence that he complained to his employer's general manager, Mr Khan, about the sexual harassment he was experiencing from Mr Narayanasamy. He made the complaint on 22 July 2014 after receiving the text from Mr Narayanasamy that I have referred to above. Mr Singh says he was told that he would be dismissed for complaining.

[16] On 30 July 2014 Mr Singh says he received two letters from his employer. Both were signed by Adil Khan as General Manager and the letterhead of both was *Wellywood Backpackers*. Mr Singh provided both letters to the Authority. The first was dated 23 May 2014 and informed him he was rude to the director of the company

that day and that he had not been making the daily reports he was required to do. The letter informed him he had to *start picking up your work and also report your everyday tasks to the director of the company otherwise strict action will be taken against you.*

[17] Mr Singh's evidence that he received this letter for the first time on 30 July 2014 appears to be supported by a text message Mr Narayanasamy included in his statement in reply. The text was sent at 7.32 p.m. on 30 July 2014 and stated:

"We have email all your warning letter".

[18] The second letter Mr Singh received on 30 July was undated. It was headed *Warning Letter* and informed him that he was supposed to be at reception from 8 in the morning until 3pm but that he was *nowhere to be seen*. The letter said that in the last week more than five complaints had been received against reception. It said he had not been sending reports of what he had been doing during this working hours, and had not reported stock details on a weekly basis. The letter stated that Mr Singh would be suspended for two weeks on pay but that he would need to explain all the points made in the letter in writing within one week. It ended by saying that *based on your explanation management will take a decision whether to continue your employment with Wellywood or not.*

[19] Two days after receiving the second letter, Mr Singh received a letter dated 1 August 2014 which was headed *Termination Letter*. That letter advised him that he had been advised by his manager to give more attention to his duties and improve his work performance and that no improvement had been noticed in his performance. Accordingly, the letter informed him, his services had been terminated with immediate effect. The letterhead was again *Wellywood Backpackers* and was signed by Tracey Robinson as Managing Director.

[20] I accept Mr Singh's evidence that there was no process preceding the issuing of those letters: both were simply given to him on 30 July 2014. It is clear that he had insufficient opportunity to respond to the allegations made in the letter informing of his two-week suspension before his employment was terminated. He provided the Authority with a copy of his undated response to the allegations made in the second warning letter which he wrote after he had received notice of the termination of his employment.

[21] Whether or not a dismissal is justifiable is to be determined on an objective basis by applying the test in s.103A of the Act. The test is 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 action occurred.

[22] In this instance Mr Singh was given two warning letters on 30 July 2014 containing various allegations about his conduct. He was purportedly suspended from his employment for two weeks, and given one week to respond to the matters raised about his conduct. However the employer then pre-empted that timeframe by dismissing Mr Singh within the one week period for responding to the allegations.

[23] It was Mr Singh's evidence that when he replied to the letter of termination, the day he received it, Mr Narayanasamy came to his room in the backpackers' hostel and started throwing out his belongings, then threw eggs all over them. He said Mr Narayanasamy was racially abusive to him when he protested, and he physically abused Mr Singh, causing him to flee the hostel. After some time Mr Narayanasamy texted Mr Singh and asked him to pick up his belongings.

[24] Mr Singh also said Mr Narayanasamy subsequently offered to reemploy him but made it clear he would be making Mr Singh's life miserable and would dismiss him in accordance with a legal process. Mr Singh declined the offer.

[25] I find Mr Singh's dismissal to have been unjustifiable as his employer failed to follow any form of fair and reasonable process before terminating his employment.

Was Mr Singh unjustifiably disadvantaged by the two warning letters?

[26] On the evidence before me, there was no process involved in either of the written warnings issued to Mr Singh. Both were simply given to Mr Singh on 30 July without any prior discussion.

[27] Mr Singh had no opportunity to respond to the allegations made in the letters of warning before they were issued, and therefore no ability to have his responses taken into account. This is a breach of the fair procedure required by s. 103A of the Act.

[28] The letter notifying Mr Singh of his dismissal referred to the lack on improvement in his work performance, which appears to be a reference to the letters

of warning issued two days earlier. I find, therefore, that Mr Singh did suffer a disadvantage from receiving those letters as they were taken into account in terminating his employment.

Was Mr Singh unjustifiably disadvantaged by being "fined" during his employment?

[29] Mr Singh has also raised this matter as one of unlawful deductions being made from his wages. I consider it more appropriate to deal with it under that heading and will return to it later.

Was Mr Singh unjustifiably disadvantaged by being required to perform duties other than those for which he was employed?

[30] Mr Singh's employment agreement referred to his role as being that of an IT Technical Support Executive. He says he undertook IT duties but was also required to carry out duties in relation to property management and stock control, including at another property owned by Mr Narayanasamy.

[31] A schedule to Mr Singh's employment agreement provided a list of tasks under the heading "*Responsibilities*". In a section of his agreement headed "*Duties*" it was stated that Mr Singh's duty to carry out all reasonable instructions and to undertake any work reasonably required by the employer.

[32] Mr Singh provided no evidence of having protested at the imposition of duties that were unrelated to his Job Description. I do not find he was disadvantaged by being asked to perform duties other than IT duties in a situation in which his employer may have assumed his agreement to those duties.

Was Mr Singh unjustifiably disadvantaged by being verbally abused and threatened with action that could lead to the revocation of his work visa?

[33] The text messages provided in evidence show that Mr Narayanasamy made derogatory personal comments to Mr Singh. I accept it is likely he also made such comments verbally. I consider such abuse to be linked to the sexual harassment I have already found to have occurred.

[34] The only evidence relating to threats made by Mr Narayanasamy in relation to Mr Singh's work visa occurred in a text he sent to Mr Singh on Wednesday 30 July 2014 shortly before Mr Singh's dismissal. This happened on the date Mr Singh

received two letters of warning and so close to the date of his dismissal that it is more appropriately considered in relation to those events than as grounds for a separate personal grievance.

Was Mr Singh underpaid during his employment?

[35] It was Mr Singh's evidence that he started working on a part-time basis at *Wellywood Backpackers* in January 2013 but that he became a full time employee from June of that year. Mr Singh's evidence is that after signing his employment agreement on 11 June 2013, which provided for 40 hours of work per week to be paid at \$16.10 per hour, he was paid in accordance with that agreement for a short time. Thereafter, he claims to have been paid on the basis of 20 hours per week.

[36] Mr Singh claims underpayment of wages from 25 November 2013 to 13 April 2014. During this period his evidence is that he worked 84 hour weeks (12 hour days for seven days a week), but was paid on the basis of a 20 hour week based on the minimum wage at the time of \$13.75 per hour.

[37] At this time Mr Singh was working, on Mr Narayanasamy's instruction, in the Nelson backpackers' hostel owned by one or more of the respondents. Mr Singh says that from the time he returned to Wellington in mid-April 2014 he began to be paid on the basis of a 40 hour week at the minimum wage which was then \$14.25 per hour.

[38] I questioned Mr Singh about the hours he claimed to have worked and, although he maintained the accuracy of those hours he worked I am not satisfied that he was required by his employer to work those hours. However, I accept from the payslips provided by Mr Singh that his remuneration was reduced with effect from 25 November 2013.

[39] Payslips he produced for the period from 14 October 2013 to 24 November 2013 show he was being paid for 40 hours per week at \$16.10 per hour during that time, in accordance with his employment agreement. The two payslips he produced for the period from 25 November 2013 to 8 December 2013 show that he was paid for 20 hours per week at the rate of \$13.75. In the absence of evidence to the contrary from the employer I accept Mr Singh's evidence that he continued to be paid for those hours at that rate of pay until the pay period beginning 14 April 2014. Payslips produced from that date until 27 April 2014 show that he was paid for 40 hours per week at a rate of \$13.75.

[40] On the basis of the evidence before me I accept that Mr Singh was paid on the basis of fewer hour than he was contracted to work between 25 November 2013 and 13 April 2014. Mr Singh's employment agreement provided for a 40 hour week and payment at an hourly rate of \$16.10. He is entitled to be paid the difference between the remuneration he actually received for the period 25 November 2013 and 13 April 2014 and the remuneration he should have received for working his agreed 40 hours per week at \$16.10. I calculate that difference to be \$7,380 gross. Additionally, he says he was paid at ordinary rates for the ten public holidays he worked and was not given an alternative day off. In accordance with s. 50 of the Holidays Act he is entitled to an additional payment of \$644 gross in respect of those public holidays. In accordance with ss.56 and 60 of that Act he is entitled to payment for the alternative days off he should have received. I calculate that payment to be \$1,288 gross.

[41] For the period from 14 April 2014 to the termination of his employment, Mr Singh claims he was paid at the rate of \$13.94 per hour. The payslips he produced for four of the eight pay periods within that time support his claims. He is entitled to be paid at the rate of \$16.10 per hour throughout that time. I calculate the difference between the gross remuneration he was paid and that to which he was entitled to be \$1,380.96 gross.

[42] Additionally, Mr Singh said he was not paid annual holiday pay in accordance with the Holidays Act. I accept his claim from June 2013. I have no information to support a claim relating to his earlier part-time employment and he has not made a claim in respect of that period. From 11 June 2013 (the date cited as the commencement of employment in Mr Singh's employment agreement) to 10 June 2014 he was entitled to four weeks paid holiday. For the period from 11 June to 1 August 2014 he is entitled to 8% of his gross earnings. I calculate the total amount owing to Mr Singh in unpaid holiday pay to be \$2,957.25 gross.

Did Mr Singh have money unlawfully deducted from his wages?

[43] On two occasions between April and August 2014, Mr Singh had money deducted from his wages which he described as “fines” imposed by his employer. The payslips he received from the respondents’ accountants verify Mr Singh’s evidence on this matter. The first deduction was made in the pay period commencing 14 April 2014 in which \$20 was deducted from his salary. The payslip has recorded on it "*deducted \$20 for licence! Thanks, Kelly*".

[44] Mr Singh informed me Kelly David was the accountant for his employer. Mr Singh informed me that Mr Narayanasamy had asked him to obtain his driver's licence and, when Mr Singh had not done so by the time decreed by Mr Narayanasamy, his wages were docked as a fine. A text message from Mr Narayanasamy to Mr Singh corroborates Mr Singh's evidence.

[45] The next deduction from Mr Singh's salary occurred in the pay period 26 May 2014 to 8 June 2014. The deduction was \$397 and the payslip records "*deducted \$397 – so have deposited \$541.94 into your account. Thanks, Kelly*". Mr Singh informed me this fine was imposed by his employer after a guest at the hostel had not honoured his booking.

[46] Mr Singh had money unlawfully deducted from his wages. Section 4 of the Wages Protection Act provides that an employer must pay the entire amount of wages due to a worker without deduction subject to limited exceptions. In this case, those exceptions did not apply and there was no justification for Mr Singh's wages to be docked in the manner imposed by the respondents. The money unlawfully deducted, totalling \$417 should be reimbursed to Mr Singh.

Are penalties warranted?

[47] Mr Singh asserts that penalties should be imposed on the respondents for:

- (a) breach of good faith;
- (b) unlawful deduction from wages pursuant to s.4 of the Wages Protection Act 1993;
- (c) failure to keep and produce wage, time, and holiday pay records upon request pursuant to s.132 of the Act and s.83 of the Holidays Act.

[48] Section 4 of the Act requires both parties to an employment relationship to deal with each other in good faith. They are to be active and constructive in establishing and maintaining a productive employment relationship. Mr Singh relies on the matters that have formed the basis for his personal grievances and actions for the recovery of wages to sustain his submission for a penalty under s.4A of the Act.

[49] With respect to the matters forming the basis for Mr Singh's personal grievances it is more appropriate in my view to deal with them by way of awarding remedies to Mr Singh.

[50] In *Tan v Yang & Zhang*¹ Inglis J observed (citing *Xu v McIntosh*²) it was generally accepted that a penalty should only be imposed for the purpose of punishment and not as an alternative route for increasing compensation. The Judge noted the following non-exhaustive list of factors that might usefully be considered:

- a. the seriousness of the breach;
- b. whether the breach is one-off or repeated;
- c. the impact, if any, on the employee/prospective employee;
- d. the vulnerability of the employee/prospective employee;
- e. the need for deterrence;
- f. remorse shown by the party in breach; and
- g. the range of penalties imposed in other comparable cases.

[51] Taking those factors into consideration I consider a penalty to be appropriate with respect to the unlawful deductions made from Mr Singh's wages. I have insufficient evidence regarding failures to maintain and produce records relating to wages, time, and holidays. Mr Singh produced some payslips and he and his representative, Mr Laracy, provided summarised information relating to the wages paid throughout his employment.

[52] Two unlawful deductions were made from Mr Singh's wages. Additionally, text messages provided to the Authority evidence Mr Narayanasamy's belief that he could make such deductions by imposing such "fines" as he saw fit. One text sent to Mr Singh on 7 May 2014, for example, reads "*U need to fix WiFi now or \$50 fine*".

[53] I consider a global penalty of \$3,000 for two such breaches of s.4 of the Wages Protection Act to be appropriate.

Remedies

[54] I have found Mr Singh to have a personal grievance for the sexual harassment he endured in the course of his employment. I have also found he was unjustifiably dismissed and was disadvantaged in his employment by being issued two letters of warning on 30 July 2014, which were taken into account in dismissing him on 2 August 2014.

¹ [2014] NZEmpC 65

² [2004] 2 ERNZ 448 (EmpC)

[55] Mr Singh did not contribute to the situation that led to his personal grievances.

[56] Mr Singh gave evidence of the emotional toll on him of the sexual harassment and of his dismissal. I accept his evidence and do not find it necessary to repeat it here. I also that he attempted to find alternative employment in a timely manner and that he was without employment for several months following his dismissal. I find he is entitled to wages and compensation for his personal grievances. A global award of compensation is appropriate.

Determination

[57] The first and second respondents are jointly and severally ordered to pay Mr Singh:

- a. Compensation for his personal grievances in the sum of \$7,500 (without deduction) pursuant to s.123(1)(c)(i) of the Employment Relations Act;
- b. Four months' lost remuneration pursuant to s. 128 of the Act calculated at \$16.10 per hour on the basis of a 40 hour week, totalling \$10,948 gross;
- c. Wage arrears for the period 25 November 2013 to 13 April 2014 in the sum of \$7,380 gross;
- d. The unpaid portion of 10 public holidays worked, pursuant to s. 50 of the Holidays Act totalling \$644 gross;
- e. Payment for alternative holidays for working those 10 public holidays, pursuant to ss. 56 and 60 of the Holidays Act, totalling \$1,288 gross;
- f. Wages arrears for the period from 14 April 2014 to 1 August 2014 in the sum of \$1,380.96;
- g. Annual holiday pay, pursuant to s. 24 of the Holidays Act, in the sum of \$2,957.25 gross;
- h. Wage arrears of \$417, unlawfully deducted from his wages, in the sum of \$417.

[58] Additionally, the first and second respondents are jointly and severally to pay a penalty of \$3,000, pursuant to ss. 4 and 13 of the Wages Protection Act. Half of that penalty is to be paid to Mr Singh and the other half to the Crown account.

Costs

[59] The investigation meeting took half a day and I find it appropriate to make an award of costs on the basis of the Authority's current nominal daily tariff. The first and second respondents are jointly and severally ordered to pay costs of \$1,750 to Mr Singh and to reimburse him \$71.56, being the Authority's filing fee.

Trish MacKinnon
Member of the Employment Relations Authority