

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 255
5378831**

BETWEEN AKANESI SISIFA
 Applicant

AND BIG BLACK SACKS NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Terry Darby, Counsel for Applicant
 Anthony Drake, Counsel for Respondent

Investigation Meeting: 12 June 2014 at Auckland

Submissions received: 12 June 2014 from Applicant and Respondent

Determination: 23 June 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mrs Akanesi Sisifa, claims that she was unjustifiably disadvantaged in her employment by the non-allocation of work to her from 11 October 2010 by the Respondent, Big Black Sacks New Zealand Limited (BBS).

[2] Mrs Sisifa also claims that she is entitled to back pay arising because the piece-rate paid to her by BBS was below the New Zealand minimum hourly wage threshold.

[3] BBS denies that Mrs Sisifa was disadvantaged in her employment by the non-allocation of work to her after 11 October 2010, or that she is entitled to back pay as it denies that she was paid below the New Zealand minimum hourly wage threshold.

Issues

[4] The issues for determination are whether or not Mrs Sisifa:

- was disadvantaged by the non-allocation of outwork to her from 11 October 2010 by BBS

- is entitled to back pay arising because the piece-rate paid to her was below the New Zealand minimum hourly wage threshold

Background Facts

[5] BBS markets, packages and engages in the wholesale distribution of plastic rubbish bags. BBS employs piece-rate outworkers to roll the plastic bags.

[6] Ms Sisifa commenced employment as a cleaner with BBS in 1995 and in 1997 commenced working as a piece-rate outworker pursuant to a written employment agreement (the Employment Agreement) which she signed on 12 June 2008. She worked as a piece-rate outworker until her employment was terminated by BBS on 23 December 2010

The Employment Agreement

[7] Mrs Sisifa confirmed at the Investigation Meeting that she had been told by BBS to take away the Employment Agreement, read it and sign it. She confirmed that she had read and understood the Employment Agreement which includes:

3.1 The employee's duties are to package piece-rate out-work by the Employer as and when out-work is available by the Employer. The Employee may accept or decline work offered by the Employer. The duties of the employee will comprise of the following procedures:

- *At the Employee's designated out-workers time slot each business day that the employer's warehouse is open the employee can make contact with the Warehouse Manager by either coming down (or ringing up) to the Employer's warehouse (or send an agreed representative acceptable to the Employer) to check and see if there is any out-work available on a daily basis.*

5.1 ...

Piece-rate outwork may or may not be available on a daily basis or may not be available at the designated out-workers time slot. The Employee agrees and acknowledges that both the type (of products to be packaged) and the amount of piece-rate out-work offered (when

available) can and will vary/fluctuate (from nothing through to multiple boxes) from day to day.

The availability and the volume amount of piece-rate of out-work requiring to be done changes from hour-to-hour. If piece-rate out-work is available from the Employer to the Employee, then the out work will be offered to those out-workers that are available at the designated out-workers time slot corresponding to when the piece-rate out-work is requested by the Employer.

The employee acknowledges and understands and agrees that there is no expectation of piece-rate work out-work being available on a daily or on-going basis, and also that there is no expectation that the volume amount of piece-rate out-work available on a daily or on-going basis is going to be consistent. The Employee also agrees that they understand that there may be no piece-rate out-work at all on any given day or days or at the designated out-worker time slot.

[8] Directly above Ms Sisifa's signature the Employment Agreement provides the following clauses:

16 Variation

16.1 This agreement supersedes any previous employment agreement or oral or written undertakings between the parties. ...

17 Declaration

17.1

The Employee declares that he or she is entering into this agreement on a voluntary basis and is free to join a union. The Employee acknowledges that he or she has had the opportunity of seeking independent advice before entering into this agreement.

[9] Mrs Sisifa said that at the time of signing the Employment Agreement she had understood from the statements and conduct of BBS that she would continue to be supplied a similar volume of work to that which she had been supplied with in previous years.

[10] Mrs Sisifa also said that it had not been the Employment Agreement which she had taken away with her to read before signing it, but another piece of paper; however that document has not been provided to the Authority.

Reduction in piece-rate

[11] In August 2010 Mr James Taylor, Operations Manager, said that for commercial reasons BBS proposed reducing the piece-rate for one of its products, drawstring POR 5s which is rolled from drawstring POR 10s, from \$4.90 to \$4.40. Mr Taylor said that the new piece-rate had commenced on 20 August 2010.

[12] Mrs Sisifa said that on 2 September 2010 she had noticed from her payslip that her rate of pay had reduced from \$4.90 to \$4.40 per box of drawstring POR 5s rolled from drawstring POR 10s. As a result, on 3 September 2010 Mrs Sisifa said that she had met with Mr Taylor and Mr David Waddell, Director and Manager, to raise her objection to the reduction in the drawstring POR 5s piece-rate.

[13] Mr Taylor said as a result of this discussion with Mrs Sisifa, BBS had reinstated the \$4.90 piece-rate for the drawstring POR 5s rolled from drawstring POR 10s and had informed Ms Sisifa of this. Mr Taylor explained that all outworkers who had packed the work at the reduced rate had been reimbursed and paid the balance as if the rate had not been altered.

[14] On 16 September 2010 Mrs Sisifa had been paid \$211.00 which represented the balance between what she had been paid to roll the boxes at \$4.40 per box and what she would have been paid had the rate not reduced from \$4.90 per box.

[15] On 23 September 2010 a call had been made on behalf of Mrs Sisifa to the then Department of Labour (DOL), regarding her entitlements to minimum wage and holiday pay, and a file was opened by the Labour Inspector on 30 September 2010.

[16] Mrs Sisifa said that after she had raised the objection to the change in the piece-rate for the drawstring POR 5s from drawstring POR 10s to BBS she had noticed that the work allocated to her between 6 and 10 September 2010 had been reduced.

[17] Mrs Sisifa claims that following the complaint regarding the change in the piece-rate for the drawstring POR 5s from drawstring POR 10s to BBS and the DOL, the amount of out-work made available to her by BBS had reduced and that she had been allocated no work at all after 11 October 2010.

[18] Mr Henderson, Warehouse and Outwork Manager, disputed in his evidence provided at the first Investigation Meeting held on 20 December 2012 that the work allocated to Mrs Sisifa had reduced during 6 and 10 September 2010, and produced in evidence Mrs Sisifa's

outwork sheets which showed that she had received more work during that period than she had received during the three week period either side of those dates.

[19] Mrs Sisifa said that on 6 October 2010 she had collected some piece-rate work, and this had been the last time she had been allocated piece-rate work by BBS.

[20] Mr Henderson provided documentation in support of his evidence that Mrs Sisifa had also received piece-rate work on 7 and 11 October 2010, and that she had returned the piece-rate work duly completed on 15 October 2010.

[21] Mr Henderson said that on 29 October and 16 November 2010 Mrs Sisifa had contacted him regarding piece-rate outwork availability and he had advised that there had been no outwork available at that time, and to contact him on her designated outworker time slot.

[22] Apart from on these dates, Mr Henderson had said that Mrs Sisifa had not contacted him to see if there was piece-rate outwork available, and confirmed that there had been piece-rate outwork available which he had planned to offer to her between 19 October 2010 onwards until the termination of her employment on 23 December 2010.

[23] Mrs Sisifa initially denied that there had been telephone conversations with Mr Henderson on 29 October and 16 November 2010; however during cross examination she confirmed that she had telephoned Mr Henderson on two occasions, but she could not recall the dates.

[24] Mrs Sisifa said that she had not gone to the BBS premises on her designated outwork time slot following the telephone calls as she had been told to stay away from the BBS work premises by Mr Waddell and Mr Henderson.

Recovery of wages

[25] Mrs Sisifa was paid an hourly rate on the basis of how many boxes she could roll an hour. Mrs Sisifa's claim is that she was paid below the New Zealand minimum hourly rate threshold on the basis that she could only roll 2 boxes of drawstring POR 5s from drawstring POR 10s per hour.

[26] Mr Taylor stated in his evidence provided at the first Investigation Meeting held on 20 December 2012 that all outworkers were trialled for each type of BBS product that they package. He explained that if outworkers are unable to exceed the minimum packaging speed per box (to be above the New Zealand minimum hourly rate threshold), they will not be certified to package that product and are not allocated that particular product to package.

[27] On 19 February 2009 Mrs Sisifa signed a 'TRIAL Rolling Test' form stating in handwriting:

Bag *POR Drawstring 10's into 2 rolls of 5*

Date *19-2-09*

Speed *11.75 Boxes in 4.5 hrs = 2.611 Boxes/hour*

[28] Mrs Sisifa said that there had been no time trials undertaken by BBS. She also stated that she could not understand decimals and that the form she had signed on 19 February 2009 had been brought to her for signing by Mr David Waddell, Director and Manager of BBS, and it had not contained the wording itemising how many bags she could roll per hour. She claimed this had been added in handwriting, after she had signed the form.

[29] On 30 September 2010 Mrs Sisifa completed a further form headed: "*Out-Work confirmation of rate*" confirming that she could: "*package por 10 into por 5 (drawstring) for the following outwork rate of \$4.90/box and I can package at a rate of at least 2.6 boxes per hour*".

[30] In relation to the form she signed on 30 September 2010, Mrs Sisifa said she had been asked to attend the BBS premises. She had done so, and as English was her second language, she had been accompanied by her daughter, Ms Leva Faafua, to assist her language understanding. However on arrival at BBS Mr Waddell had excluded Ms Faafua from the meeting and had told her (Mrs Sisifa) during the course of the meeting that she had to sign the form in order to retain her job with BBS.

[31] Mrs Sisifa originally stated that she had not been allowed to show the form to Ms Faafua prior to signing it, however when questioned at the Investigation Meeting she agreed that she had shown the proposed form to Ms Faafua prior to signing it, but said she had explained to Ms Faafua that although it was not true that she could roll 2.6 boxes per hour, she intended to sign the form in order to keep her job.

[32] Ms Faafua confirmed that she had been excluded from the meeting with Mr Waddell and that Mrs Sisifa had told her that in order to retain her job, she had to sign the form confirming she could roll 2.6 boxes per hour.

[33] Mrs Sisifa's daughter Ms Nita Sisifa, who also worked for BBS, said that on the basis of her experience, it was impossible to roll 2.6 boxes per hour.

[34] Also submitted in her evidence was a form dated 8 May 2009 which had been signed by Ms Nita Sisifa and which stated:

Rolling bags (Packaging) Test:

I confirm that I have done a trial and can package DRAWSTRING 5s rolls (por10s into por 5s) for the piece rate of \$4.90/box and I have passed the trial time test and can package at the ongoing rate of a minimum of 2.9 boxes per hour or faster.

[35] Ms Sisifa said that Mrs Sisifa had presented the form to her at their home and asked her to sign it; however she had not read it prior to signing.

Determination

Was Mrs Sisifa disadvantaged by the non-allocation of outwork to her by BBS from 11 October 2010?

[36] Mrs Sisifa claims that following the making of the complaint to the DOL at the end of September 2010, she was disadvantaged by the non-allocation of work to her by BBS.

[37] The Employment Agreement, which was provided in evidence, consisted of 5 pages, plus 3 Schedules of 3 pages plus the Employee Handbook of 14 pages. It had been signed by BBS on 9 June 2008 and by Mrs Sisifa on 12 June 2008, and each page had been initialled by Mrs Sisifa.

[38] Mrs Sisifa claimed that it had not been that Employment Agreement that she had taken away and signed, but rather another piece of paper, however there is no documentary evidence to support this statement. I accept that it had been the Employment Agreement which she had been able to take away and read prior to signing it and initialling each page.

[39] Mrs Sisifa claimed that she had signed the Employment Agreement on the understanding that the level of work allocated to her would remain consistent with the level of work with which she had previously been supplied, thus that there was an implied term in relation to the amount of work to be allocated to her..

[40] I observe that implied terms cannot override the express terms of the contract¹. The Employment Agreement signed and initialled by Mrs Sisifa expressly provided at clause 16.1 that it: “*supersedes any previous employment agreement or oral or written undertakings between the parties*”. Further at clause 17.1 it stated that: “*The Employee acknowledges that he or she has had the opportunity of seeking independent advice before entering into this agreement*”.

[41] I find these express terms to be unequivocal and to clearly provide that the terms of the Employment Agreement superseded and replaced any previous understanding of the basis on which piece-rate work would be allocated to Mrs Sisifa.

[42] As regards any obligation regarding the provision of piece-rate outwork, the Employment Agreement signed by Mrs Sisifa on 12 June 2008 states:

2.1

The Employee is employed as a piece-rate out-worker with no fixed hours of employment or minimum amount of hours of employment and with no fixed amount of piece rate work or minimum amount of piece rate work

5.1

...

Piece-rate outwork may or may not be available on a daily basis or may or may not be available at the designated out-workers time slot. The Employee agrees and acknowledges that both the type (of products to be packaged) and the volume amount of piece-rate outwork offered (when available) can and will vary/fluctuate (from nothing through to multiple boxes) from day to day.

[43] I find that it is therefore quite clear that there was no obligation on BBS to provide Mrs Sisifa with piece-rate outwork on any given day.

[44] It is also clear that there was no obligation on BBS to provide work in any given quantity or indeed at all on any designated out-workers time slot, and Mrs Sisifa confirmed when questioned at the Investigation Meeting that she had read and understood the terms of the Employment Agreement, and that she had understood that the amount of out-work available varied from time to time. Indeed she confirmed that the amount of outwork provided to her had varied during the course of her employment.

¹ *Whitcomber & Tombs Ltd v Taylor* (1908) 27 NZLR 237 at p237

[45] Under clause 3 of the Employment Agreement headed: “*Duties*”, clause 3.1 states that there is an obligation on the outworker to check and see if work is available for him or her on their designated time slot, and at clause 5.1, that the work will be offered to those outworkers who are available at the designated time slot.

[46] Mrs Sisifa said that the work allocated to her following the lodging of her complaint to the DOL during the latter half of September 2010 had decreased. Apart from the fact that I have found that there was no obligation on BBS to provide her with piece-rate outwork, the evidence provided supports the fact that Mrs Sisifa had been allocated piece-rate outwork following the end of September 2010, specifically on 7 and 11 October 2010.

[47] There is a discrepancy between the evidence given by Mr Henderson and Mrs Sisifa concerning the dates when the telephone calls about the availability of out-work were made. However in light of the fact that Mrs Sisifa at the Investigation Meeting eventually conceded that two telephone calls had taken place, I accept Mr Henderson’s evidence that these took place on 29 October and 16 November 2010 and that during those calls he told her to attend the BBS premises to check whether there was piece-rate outwork available for her at her designated outwork time slots.

[48] Mrs Sisifa said that she had subsequently been prevented from attending the BBS premises to collect outwork. I find this to be inconsistent with Mr Henderson’s evidence that she was instructed by him on the telephone calls to attend on her designated time slot

[49] I find that although there was out-work available for her after the last date when she collected out-work on 11 October 2010, the onus was on Mrs Sisifa to attend at her designated time slot in order to collect it, however she failed to do so.

[50] I determine that Mrs Sisifa was not disadvantaged by the non-allocation of out-work to her by BBS from 11 October 2010.

Is Mrs Sisifa entitled to back pay because the piece-rate paid to her fell below the New Zealand minimum hourly wage threshold?

[51] Mrs Sisifa was paid on the basis of how many boxes she could roll of drawstring POR 5s from drawstring POR 10s in one hour. Although the piece rate for drawstring POR 5s from drawstring POR 10s had been reduced from \$4.90 to \$4.40 per box from 20 August 2010, I note that the \$4.90 rate had been reinstated following the meeting between Mr Waddell, Mr Taylor and Mrs Sisifa on 3 September 2010 and the shortfall in the outworkers’ wages had been reimbursed.

[52] The key base elements used in calculating the wages earned were the rate of boxes rolled per hour for each particular product and the piece-rate per packaged box. In respect of the product POR 5s from POR 10s, Mrs Sisifa had signed forms confirming that she had done a trial and could roll drawstring POR 5s from drawstring POR 10s at a minimum rate of 2.6 boxes per hour. The relevant piece rate in respect of drawstring POR 5s from drawstring POR 10 s was \$4.90 per box.

[53] The issue concerning the piece rate reduction from \$4.90 to \$4.40 per box had been investigated by the DOL Labour Inspector as a result of Mrs Sisifa's complaint, and by letter dated 8 November 2010 the DOL Labour Inspector had written to BBS confirming that there had been no breach of the Minimum Wage Act 1983 or the Holidays Act 2003.

[54] Mrs Sisifa therefore bases her claim for back pay on the basis that she was paid less than the New Zealand minimum hourly wage threshold due the fact that she could not roll more than 2 boxes per hour. I note that Mrs Sisifa's evidence on this issue has been subject to some fluctuation:

- In a *TRIAL Rolling Test* document dated 19 February 2009, Mrs Sisifa certified that she could roll drawstring POR 5s from drawstring POR 10s bags at the rate of 2.611 boxes per hour.
- In a *Confirmation of Rate* document dated 30 September 2010 Mrs Sisifa certified that she could roll bags at the rate of at least 2.6 boxes per hour.
- In a letter dated 28 October 2010 attached to the original Statement of Problem filed with the Authority on 23 April 2012, it is claimed by her then legal representative that Mrs Sisifa: "*knows it is impossible to make 2.6 boxes in one hour and that a realistic amount is 2 boxes per hour*".
- Mrs Sisifa's evidence was subsequently amended by her then counsel to state that she could roll 2.5 boxes per hour.
- At the Investigation Meeting held on 12 May 2014 Mrs Sisifa's reverted to her claim that she could only roll 2 boxes per hour.

[55] Mr Taylor had stated that BBS time trialled the outworkers on the various products. This is disputed by Mrs Sisifa.

[56] The form dated 19 February 2009 is headed ‘*TRIAL rolling test*’, and includes the statement that: “*I have completed a trial of rolling the bag above .*” Additionally the form completed and signed by Mrs Sisifa dated 8 May 2009 is headed: ***Rolling bags (Packaging) Test.***

[57] In a statement received by the Authority on 5 June 2014 Mrs Sisifa raised the issue that she did not understand decimals when providing an explanation for having signed the forms. However there is no evidence that either she, or Ms Sisifa, had at any time prior to the Investigation Meeting raised any issue with BBS or Mrs Sisifa’s legal representatives regarding the references contained on the forms they had signed relating to time trials. I therefore accept that the time trials were instigated by BBS and undertaken by outworkers, including Mrs Sisifa.

[58] Mrs Sisifa stated that the form she had signed on 19 February 2009 had not contained any handwritten notation at the time she had signed it, and in regard to the form signed on 30 September 2010 that she had been prevented from having Ms Faafua present at the meeting at which Mr Waddell told her she had to sign the form in order to retain her job with BBS, which was the basis for her having signed that form.

[59] When questioned at the Investigation Meeting Ms Faafua confirmed that she had been shown the letter by Mr Waddell prior to Mrs Sisifa signing it, and that it had stated that Mrs Sisifa could roll 2.6 boxes per hour. However she stated that she had not discussed that confirmation with Mrs Sisifa on the basis that the explanation provided by Mrs Sisifa of the requirement that the signing of the form was mandatory in order to retain her job.

[60] I note that Mrs Sisifa was able to show the proposed form to Ms Faafua prior to signing it, and that there was opportunity for Ms Faafua to have explained the implications of what it stated to her prior to her signing it and to have advised Mrs Sisifa against signing it. She had not done so.

[61] In these circumstances I find that BBS was entitled to accept the signed forms as confirmation that Mrs Sisifa could roll 2.6 boxes per hour.

[62] In support of this conclusion I take into account Ms Nita Sisifa’s evidence. She also stated that it was impossible to roll more than 2 boxes per hour; however she had herself signed a trial time form in May 2009 stating that she could even roll 2.9 boxes per hour.

[63] Ms Sisifa’s explanation for this was that she had not read the form before she signed it. Ms Sisifa is a tertiary level educated person with a good command of the English

language. I do not find it credible that she would sign a form acknowledging that she could roll 2.9 boxes per hour without having at least glanced at it and understood its meaning.

[64] In all the circumstances I find the evidence establishes that Mrs Sisifa was able to roll 2.6 boxes per hour, and that she was therefore paid above the relevant New Zealand minimum wage rate threshold during the period of her employment with BBS.

[65] I determine that Mrs Sisifa is not entitled to be paid back pay because the piece-rate paid to her was not below the New Zealand minimum hourly rate threshold during the period of her employment with BBS.

Costs

[66] Costs are reserved. I note that the Applicant is legally aided and while it is unlikely that a recovery of a contribution to its costs is available, the Respondent has 28 days from the date of this determination to file and serve submissions with the Authority should it wish to do so. In this event, the Applicant has a further 14 days to file and serve submissions in response.

Eleanor Robinson
Member of the Employment Relations Authority