

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 88/09
5115830

BETWEEN BHAVIK THAKORLAL
Applicant

AND VALKERIE LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: In person, for Applicant
No appearance for Respondent

Investigation Meeting: 27 January 2009

Determination: 26 March 2009

DETERMINATION OF THE AUTHORITY

[1] Bhavik Thakorlal worked at Valkerie Limited's photo shop in Queen Street from December 2003 until October 2007 when his employment was terminated by was of redundancy. He worked sole charge Saturday and Sunday with some work during university holidays. He did not have a written employment agreement.

[2] Mr Thakorlal says his dismissal was unjustified. He seeks compensatory sums in relation to that claim. He also seeks orders relating to unpaid holiday pay, bereavement and sick leave, unpaid overtime rates and minimum wage increase.

[3] Valkerie admits a number of the statutory claims made by Mr Thakorlal, but denies Mr Thakorlal is owed any unpaid sick leave, bereavement leave or overtime. It also denies his redundancy was not genuine or that it was not conducted fairly and reasonably. Notwithstanding, it says Mr Thakorlal has failed to raise his grievance within the statutory time limit and that the Authority is barred from investigating his personal grievance claim.

[4] No representative of Valkerie attended the investigation meeting. The Authority had been put on notice prior to the investigation meeting this would be the case. The meeting was conducted in Valkerie's absence. I have considered the witness statements and documents filed by Valkerie and put them to Mr Thakorlal to comment on. Subsequent to the investigation meeting, the Authority wrote to Valkerie at its address for service providing a further opportunity to file any additional information. No response has been received. It is appropriate to move to determine this matter.

[5] To determine this employment relationship problem I need to consider:

- (i) Whether Mr Thakorlal is entitled to orders relating to statutory minima;
- (ii) Whether overtime is due and owing;
- (iii) Whether Mr Thakorlal is barred from raising his personal grievance; and
- (iv) If this question is resolved in Mr Thakorlal's favour; whether his dismissal was justified.

Statutory minima

(i) Sick leave

[6] Mr Thakorlal seeks payment for two days sick leave entitlement taken on 12 and 13 May 2007. Diana Smith, the respondent's director, says in her witness statement that the payment was not made because Mr Thakorlal did not provide a medical certificate for the second day's sick leave and he did not properly notify the respondent prior to his absence.

[7] In these circumstances there is no reasonable basis for denying payment of sick leave for failure to provide a medical certificate. There is no written employment agreement requiring a medical certificate for second and subsequent day's sick leave. Mr Thakorlal states that he took reasonable steps to notify his manager. I accept this is case.

[8] **Valkerie Limited is ordered to pay Bhavik Thakorlal two days sick totalling \$113(net), calculated at his usual daily rate of \$56.50(net).**

(ii) Bereavement leave

[9] The respondent does not dispute that it owes Mr Thakorlal three days bereavement leave.

[10] **Valkerie Limited is ordered to pay Bhavik Thakorlal three days bereavement leave totalling \$169.50(net), calculated at his usual daily rate of \$56.50(net).**

(iii) Annual leave

[11] Valkerie Limited accepts Mr Thakorlal's entitlement to annual leave remains outstanding. Mr Thakorlal took no annual leave during his employment with the respondent and was paid five days of that entitlement at the end of his employment.

[12] The matter is referred to the Labour Inspectorate to calculate. All relevant documents held by the Authority which would assist the Labour Inspectorate should be provided. Once the calculation is complete and the parties had an opportunity to comment this matter can then be determined.

(iv) Public Holidays

[13] Mr Thakorlal seeks payment of public holidays falling between November and March during 2005, 2006 and 2007. He worked some week days at these times because he was available during the university semester break. The claim does not extend to public holidays falling on weekend days.

[14] The respondent says Mr Thakorlal was not paid public holidays in the claimed period because his normal hours of work were Saturday and Sunday and any additional hours were worked on an ad hoc basis.

[15] Mr Thakorlal accepted that the respondent was not bound to offer him week day work during the semester break. I have reviewed the hours worked over the period of claim and find the hours do not establish any pattern of work, in addition to the weekend constant. The claim for public holiday payments does not succeed.

(iv) Minimum wage

[16] The respondent accepts Mr Thakorlal's entitlement to the minimum wage adjustment between 1 April 2007 and 21 May 2007 remains outstanding.

[17] Valkerie Limited is ordered to pay Bhavik Thakorlal outstanding minimum wage adjustment for period 1 April 2007 to 21 May 2007 totalling \$7.50(gross) being the difference between \$10.75 and \$11.25.

Overtime/2007 Christmas Bonus

[18] There is insufficient evidence to support these claims.

90-day issue

[19] An employee must raise a personal grievance with his or her employer within 90 days of the date on which the personal grievance arose¹. If an employee wishes to raise a personal grievance outside the 90 day period, and the employer does not consent to the late raising, he or she must seek leave of the Authority to raise the grievance out of time.

[20] Mr Thakorlal was dismissed on 10 October 2007. He sought to raise his personal grievance when he filed his application in the Authority on 15 February 2008. His grievance is out of time. This is a jurisdictional barrier to the Authority dealing with the personal grievance part of Mr Thakorlal claim.

[21] Mr Thakorlal seeks to raise his personal grievance out of time. In support of his claim he points to the failure of Valkerie to provide a written employment agreement and his lack of knowledge and experience with dispute resolution

¹ Section 114 Employment Relations Act 2000

processes. He told me the photoshop job was the first proper job he had held other than working in a family owed business.

[22] I am satisfied that Mr Thakorlal has made out the delay in raising his personal grievance was occasioned by an exceptional circumstance. That exceptional circumstance was the failure of Valkerie to comply with its legal obligations to provide a written employment agreement including an explanation concerning the resolution of the employment relationship problem, as section 65 of the Act requires. Mr Thakorlal is granted leave to raise his personal grievance out of time.

Was Mr Thakorlal's dismissal unjustified?

[23] Diana Smith is a director of Valkerie. She operated the photo shop in which Mr Thakorlal worked. She has filed a signed witness statement setting out her response to Mr Thakorlal's claims and her recollection of the details of events leading up to his dismissal.

[24] In her witness statement Mrs Smith said prior to her decision to stop weekend trading business had been poor for some time. At the direction of her bank she went to a business consultant for some advice. He identified weekend trading as one area where changes could be made. I accept Mrs Smith was trying a number of solutions to keep the business operating.

[25] Mrs Smith decided to cease weekend trading on 10 October. She telephoned Mr Thakorlal that day and told him he no longer had a job and he would be paid in lieu for the upcoming weekend 13/14 October. This telephone advice was followed with a letter dated the same day outlining the reasons for the redundancy (ongoing poor turnover), giving one weeks notice, confirming payment for the work falling in that week, outlining the makeup of the final pay and expressing wishes for the future.

[26] This redundancy was not carried out in an ideal fashion. The consequence of this decision impacted on Mr Thakorlal, the only weekend staff member. The telephone advice of 10 October was the first Mr Thakorlal knew his position was under threat and he had no opportunity to comment on the proposal to disestablish his position prior to the decision being made. However, I accept the business was facing

difficult financial circumstances and the decision to close the shop on weekends was genuine. I also accept the opening of the shop to sell ice-cream a few weeks after Mr Thakorlal's dismissal was unconnected and does not render his redundancy disingenuous.

[27] I find Mr Thakorlal's dismissal was unjustified. The process followed in implementing his redundancy fell short of what can reasonably be expected in such circumstances. Such a finding entitles Mr Thakorlal to a consideration of the claim he has sought under section 123(c)(i) of the Act. His claim for lost wages arising from his dismissal cannot proceed because I have found his redundancy was genuine.

[28] **Taking into account Mr Thakorlal's evidence of the impact of the dismissal I set the award at \$500 to be paid pursuant to section 123(c)(i) of the Act.**

Costs

[29] Mr Thakorlal is entitled to be reimbursed the \$70 filing fee incurred in lodging this application. **Valkerie Limited is ordered to pay Mr Thakorlal \$70 by way of costs.**

Marija Urlich

Member of the Employment Relations Authority