

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 246
5363065

BETWEEN SACHIN ANAND
 Applicant

A N D CATERING MASTERS NZ
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Mike Harrison, Advocate for Applicant
 Dhirendra Singh, Counsel for Respondent

Investigation meeting: 18 July 2012 at Auckland

Date of Determination: 24 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Anand) alleges that he was unjustifiably dismissed by the respondent (Catering Masters) on 9 September 2011. Catering Masters says that Mr Anand abandoned his employment.

[2] Mr Anand started employment with Catering Masters on 29 August 2011. He worked for the first week of his employment from that date down to 2 September 2011 without incident and was paid for the 40 hours work he performed in cash. Mr Anand said that he provided to the employer his IRD number when he commenced the employment but Catering Masters disputes that and its records do not disclose evidence of its having Mr Anand's IRD number. In particular, the time, pay and wages record for Mr Anand which was completed at the time of his employment does not show his IRD number and Catering Masters told the Authority that if it had been given the number, it would have included it on his wage and time record held in

the business. Certainly, there is a space on the employer's pre-printed form for the IRD number, but the number is not written in the appropriate place.

[3] The second week of Mr Anand's employment commenced on Monday, 5 September 2011 and Mr Anand maintains that he worked beyond the normal span of hours on this day. He would normally finish work by 5pm but on this day he says that he was asked to work additional hours at one of the offsite venues that Catering Masters serviced. Catering Masters denies that Mr Anand is entitled to payment for the additional hours; it says he was invited to attend at one of its offsite venues as a familiarisation visit only and was not required to work. Accordingly there is dispute between the parties as to whether any additional payment is required for Mr Anand who is claiming additional hours for Monday, 5 September 2011 and two days later on in the same week.

[4] The following day, 6 September, Mr Anand says he was told to take off by the employer, but the employer denies that that arrangement was ever made. If no such arrangement was made, it is surprising that the employer made no effort to find out where Mr Anand was on that day. There is no evidence before the Authority that Catering Masters took any steps to establish where Mr Anand was on Tuesday, 6 September 2011. That tends to suggest that Mr Anand was taking that day off by agreement with the employer.

[5] The following day, Mr Anand says that he worked from 8am to 9pm with the extra hours being completed again at one of the employer's offsite venues. Again, the extra hours are disputed and for similar reasons to those advanced for Monday, 5 September.

[6] On 8 September, Mr Anand says that he worked a normal day but that during the day, in remonstrating with him about an error that he had allegedly made, the employer's Mr Vishwa Gounder, struck him between the shoulder blades with such force as to cause an injury. Mr Anand's evidence is that he did not sleep well that night as a consequence of the pain and that he sought medical advice the following day, 9 September 2011, after ringing Mr Gounder at 8.28am to advise him that he was seeking medical attention. Mr Anand put into evidence his cellphone records which disclose a call to Mr Gounder at that time. Also put into evidence by Mr Anand is a certificate from a physiotherapist who he consulted about the alleged injury who recites that the injury is consistent with a blow between the shoulder blades.

[7] Mr Gounder's evidence is that he rang Mr Anand on three occasions on 9 September 2011 to try and get information about what was happening, and again Mr Gounder caused the telephone records to be made available to the Authority to confirm his evidence on the point. Mr Anand says that on one of those telephone calls, at around 3pm in the afternoon (actually 3.20pm), Mr Gounder dismissed him. Mr Anand's evidence is that he told the employer as soon as he had seen the doctor that he had been put off work for several days, was having x-rays taken and was being prescribed medication. Mr Anand says that Mr Gounder told him that if he did not report to work immediately he would not have a job and that he need not consider returning to the workplace.

[8] Also on that same day (9 September 2011), Mr Anand attended at the Police station to make a complaint of assault against Mr Gounder. Again, there is no doubt that that information was laid with the Police; Mr Gounder gave evidence that he was confronted by party of Police officers with a search warrant wishing to uplift film in closed circuit television cameras in the workplace to see if they would confirm the alleged assault. In fact, the closed circuit television cameras were fake and were not recording at the relevant time.

[9] Mr Gounder's evidence on the end of the relationship is simply that Mr Anand did not return to the workplace after going to see the doctor and as a consequence he abandoned his employment. But of course that explanation is also consistent with Mr Anand's evidence that he had been told by Mr Gounder not to bother coming back unless he came back to work immediately.

Issue

[10] The only issue for determination here is whether there was in truth "*a sending away*" or not. The issue of the alleged assault can be taken no further. It is clear on the evidence before the Authority that Mr Anand suffered an injury which was consistent with his description of a blow from Mr Gounder, but Mr Gounder denied absolutely that he struck Mr Anand. There was evidence offered from a co-worker who was allegedly present working alongside Mr Anand on the day that he was supposed to have been assaulted, but her very clear evidence to the Authority was that she did not wish to get involved; she, like Mr Anand, had visa issues which effectively meant that she was in the employer's debt to some extent and while there appeared to the Authority to be some evidence of two different versions of events

being given by that witness, in the result, the applicant, Mr Anand, sensibly proposed during the investigation meeting that the question of the assault simply be taken out of the equation.

Was Mr Anand unjustifiably dismissed?

[11] The Authority thinks, on balance, that Mr Anand was unjustifiably dismissed. This was an employment of short duration and Mr Anand had sought out the employment which had the benefit to him of conferring a full time permanent position which underpinned his work visa. It is difficult to understand why he would have just abandoned that employment unless there was some supervening event.

[12] Mr Anand's evidence is that in the telephone discussion at 3.20pm on 9 September 2011, he was told by Mr Gounder that if he did not return to work immediately, then he should consider himself dismissed and that that was the reason that he never returned to the employment. Conversely, Mr Gounder's evidence, as the Authority noted earlier, was that the employment relationship came to an end simply because Mr Anand never returned to the employment after going to see the doctor. But, as the Authority has already observed, it seems most unlikely that a young man who was effectively bound to the employer by the terms of his visa would simply walk away and it seems much more likely that there was a sending away.

[13] Certainly, the evidence of the two men could not have been more different. Mr Gounder denied any physical violence in the relationship whereas Mr Anand referred to it as a regular event, culminating in the episode which resulted in him attending the doctor. While the Authority is unable to form a view about the alleged assault, Mr Anand was certainly able to interest the Police in the matter to such an extent that they sent a team around to Catering Masters to initiate a search warrant.

[14] While the Authority preferred the evidence of Mr Anand to that of Mr Gounder in relation to the dismissal, the position is otherwise in respect to the other subsidiary issues that Mr Anand raised. The Authority was not persuaded that Mr Anand was owed wages as a consequence of working nights in the second week. Mr Gounder's evidence on that point, as already mentioned by the Authority, is that the extra hours were not intended to be paid and were simply part of familiarising Mr Anand with the various places in which Catering Masters provided its services. The Authority accepts that evidence at face value.

[15] Furthermore, the Authority is not persuaded that Mr Anand provided Mr Gounder with an IRD number; as the Authority has already noted, Mr Gounder appears to have kept good wage and time records which comply with the law and his pre-printed wage and time record has a space on it for an IRD number which was not filled in. If the IRD number had been provided by Mr Anand (as the latter contends), it seems inconceivable that Mr Gounder would not have included that information. The IRD number has been provided by Mr Anand's advocate to Catering Masters' counsel, and the Authority would expect Catering Masters to now account to the Inland Revenue Department for the PAYE generated by Mr Anand's work hours.

[16] Similarly, Mr Anand protests that pay slips were not provided to him. He was, of course, only in the employment for less than two weeks and his first week was, by common consent, paid in cash and is not the subject of any dispute. In all the circumstances, the Authority is not persuaded that Catering Masters has done anything wrong in relation to the pay slips. Clearly the pay slips existed; copies of them were provided to the Authority as part of the evidence and while they could have been manufactured after the event, it seems more likely that they were available at the time of the employment but were simply not provided to Mr Anand or not sought out by him.

[17] On balance, the Authority prefers Mr Gounder's evidence on the wider subject of record keeping and the like because, first there was a signed employment agreement between the parties which is supported by a clear offer of employment from Catering Masters; secondly, pay slips have been provided to the Authority for the two weeks of the employment; and third, the time and wage record for Mr Anand for the period of the employment complies with the law in every respect.

[18] One final matter needs to be addressed. Mr Anand claims that he was forced to eat beef and pork during the employment and that, as a Muslim, that was against his religion. Mr Gounder said that he was required to cook beef and pork because that was part of the business Catering Masters was in in this country, but that there was no requirement that he eat it. There was some discussion during the investigation meeting about whether a chef (for such Mr Anand was) could cook food without tasting it, but it seems clear to the Authority that that was precisely what chefs with a religious affiliation which disentitles them to certain product, must do. Again, on this aspect, the Authority prefers Mr Gounder's evidence and accepts that while Mr Anand

was required to cook beef and pork, he was not expected to taste the food because Mr Gounder understood the nature of his religious objection to it.

Determination

[19] Mr Anand has satisfied the Authority that he has a personal grievance by reason of having been unjustifiably dismissed and the Authority is not persuaded that Mr Anand has contributed in any way to the circumstances giving rise to that grievance. Whatever the cause of the injury to his back, there is no doubt in the Authority's mind that Mr Anand did suffer an injury, that he sought treatment for that injury and that he sought to explain to the employer that he had been put off for a short number of days to allow the injury to heal. None of that suggests contribution in terms of the law.

[20] In reaching its conclusion, the Authority has applied the test set out for justification in s. 103A of the Employment Relations Act 2000. (the Act). The Authority's considered position is that a fair and reasonable employer could not have done what the Authority has concluded Catering Masters has done. On the facts the Authority heard, none of the considerations in s 103A(3) of the Act will avail Catering Masters. There was no opportunity for Mr Anand to be heard, no measured and reflective process, no consideration of anything that Mr Anand might have offered in response. Nor could it be said that defects in process were minor or did not result in the employee being treated unfairly: s. 103A(5) considered.

[21] It follows that the applicant, Mr Anand, is entitled to the consideration of remedies. This was an employment of less than two weeks and it appears that although Mr Anand had difficulty finding work immediately, he eventually found employment at a better rate of pay. However, he was out of work for some months after the employment ceased.

[22] Mr Anand told the Authority that he had suffered hurt, humiliation and injury to his feelings but the Authority's view is that while that was demonstrated to some extent, it was at the lower end of the scale.

[23] In all the circumstances, the Authority thinks it appropriate to award the following remedies in response to Mr Anand's personal grievance:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$1,500;
- (b) A contribution to lost wages in the sum of \$7,540 gross being three months' wages at the weekly rate of pay that Mr Anand earned during the employment;
- (c) Reimbursement of the Authority's filing fee in the sum of \$71.56.

Costs

[24] Costs are reserved.

James Crichton
Member of the Employment Relations Authority