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Borisov v MSGS Holdings Limited (Auckland) [2017] NZERA 313; [2017] NZERA Auckland 313 (10 October 2017)

Last Updated: 19 October 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 313
3011131

BETWEEN TENESHA BORISOV Applicant

A N D MSGS HOLDINGS LIMITED Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Carleton Matter, Advocate for Applicant

Jasdeepak Sandhu, Director of the Respondent

Investigation Meeting: 27 September 2017 at Hamilton

Submissions Received: 28 September 2017 from the Applicant

3 October 2017 from the Respondent

Date of Determination: 10 October 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. The applicant, Ms Tenesha Borisov, was unjustifiably dismissed by MSGS Holdings Limited (the Company).

B. In order to settle Ms Borisov's personal grievance claim, the Company is to make payment of the following sums to her within 21 days of the date of this determination:

(a) Following reduction under [s124](#) of the [Employment Relations Act 2000](#) (the Act), \$6,400 compensation under [s.123\(1\)\(c\)\(i\)](#) of the Act for humiliation, loss of dignity and injury to feelings in respect of her unjustifiable dismissal.

(b) \$5,142.38 gross in lost remuneration under [s128](#) of the Act.

(c) \$252 gross in respect of unpaid statutory holidays.

(d) \$1,000 penalty for failing to pay statutory holidays pursuant to the [Holidays Act 2003](#) (the HA), the amount to be paid to the Authority for payment by it to the Crown Bank Account.

C. Costs are reserved. Employment relationship problem

[1] The respondent, MSGS Holdings Limited (the Company), owns and operates a takeaway pizza restaurant in Huntly called Pizza King. Mr Jasdeepak (Jas) Sandhu and his brother Mr Gurdeepak (Lally) Sandhu are joint directors and shareholders of

the Company. Mr Jas Sandhu is primarily responsible for running Pizza King.

[2] The brothers are also joint directors and shareholders of two other companies in Huntly. The first company is BS and AS Holdings Limited which owns and operates Fruit King and which is located next to Pizza King. Mr Lally Sandhu is primarily responsible for the running of Fruit King. The second company is G and J Sandhu Limited which owns and operates the Four Square store in Huntly.

[3] In November 2016, the applicant, Ms Tenesha Borisov, was employed by the Company to, among other things, make pizzas and serve customers at Pizza King.

[4] During the 2016/2017 Christmas break, Mr Lally and Mr Jas Sandhu each travelled to India for an extended break to attend a relative's wedding. They were to return to New Zealand in late January and early February 2017 respectively.

[5] At a meeting with Mr Jas Sandhu in early January 2017, Ms Borisov was told that during the time of their trip to India, she would be paid up to date and would be paid a further one week of her wages in advance. The balance of wages owing to her would be paid in late January 2017, upon Mr Lally and Mr Jas Sandhus' return from India.

[6] On 27 January 2017, when Ms Borisov was not paid the wages she thought she should have been paid, she became angry and left Pizza King without finishing her shift. Ms Borisov continued to work and to be paid as normal until 16 February 2017.

Ms Borisov's claims

[7] Ms Borisov says at a meeting with Mr Jas Sandhu on 16 February 2017, he raised with her the incident which had occurred on 27 January 2017, and told her that her behaviour had been unacceptable. Mr Sandhu also raised issues about Ms Borisov's performance, and told her to look for another job. Ms Borisov was shocked and upset by Mr Sandhu's actions.

[8] On 18 February 2017, Ms Borisov asked Mr Jas Sandhu whether she was still on the roster and was told no and that she was finishing that day. Ms Borisov says she was unjustifiably dismissed and seeks remedies including distress compensation and lost remuneration as a result of her grievance.

The Company's response

[9] Mr Jas Sandhu denies Ms Borisov's version of events. Mr Jas Sandhu says he met with Ms Borisov on 16 February 2017 to go through a number of complaints he had received from staff about Ms Borisov's behaviour while he was in India on holiday.

[10] On 18 February 2017, Mr Jas Sandhu says Ms Borisov asked to see him and at the meeting became aggressive. Ms Borisov stormed out without finishing her shift at Pizza King. Mr Jas Sandhu tried to contact Ms Borisov unsuccessfully about returning to work. Mr Jas Sandhu says Ms Borisov was not dismissed, she abandoned her employment. Mr Jas Sandhu says he tried making contact with Ms Borisov after 18

February 2017, but was not able to do so.

[11] In submissions filed on behalf of the company, it is claimed Ms Borisov's actions in leaving Pizza King while on duty, on 27 January and 18 February 2017, each amounted to serious misconduct and that her claims are lacking in merit.

The investigation meeting

[12] As permitted by [s.174E](#) of the [Employment Relations Act 2000](#) (the Act), this determination has not set out all the evidence received. The determination states findings, relevant facts, legal issues and makes conclusions in order to efficiently dispose of the matter.

[13] The investigation of the matter took a full day in the Authority.

[14] For the Authority's investigation, Ms Borisov filed a witness statement. For the company Mr Jasdeepak (Jas) Sandhu, Mr Gurdeepak (Lally) Sandhu, Mr (Bunny) Gursimram and Mr Hari Pantha each filed a witness statement.

[15] Each witness affirmed or swore on oath that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information, and did so.

The issues

[16] The issues for determination by the Authority are as follows:

(a) Was Ms Borisov dismissed by the Company or did she abandon her employment?

(b) If Ms Borisov was dismissed by the Company, was her dismissal justified?

(c) If the dismissal was not justified, is Ms Borisov entitled to remedies?

(d) If Ms Borisov is entitled to remedies, was there any contributory conduct on her part which would reduce the remedies?

(e) Was Ms Borisov paid for the statutory holidays falling on 25

December 2016 and 1 January 2017 which were normal working days? If not, what amount is she entitled to?

(f) If Ms Borisov was not paid for statutory holidays, is the Company liable to pay a penalty?

First issue

Was Ms Borisov dismissed by the Company or did she abandon her employment?

Commencement of employment

[17] Prior to her employment by the Company, Ms Borisov was employed at McDonalds in Huntly. In late November 2016, an opportunity arose to work at Pizza King. Ms Borisov met with Mr Jas Sandhu on 22 November 2016 to discuss the

position at Pizza King. Mr Jas Sandhu was keen to arrange to have an experienced employee working at Pizza King while he and his brother Mr Lally Sandhu travelled to India for several weeks from early January to early February 2017, to attend a wedding.

[18] Ms Borisov brought her curriculum vitae (CV) to the interview. Ms Borisov had experience working in the quick service industry. Hours of work and wages were discussed. It was agreed that Ms Borisov would work five days a week from Wednesday to Sunday and would be paid the minimum wage of \$15.25 gross an hour. Mr Jas Sandhu also informed Ms Borisov that she would be “entitled to all benefits under the [Employment Relations Act](#)”.

[19] Ms Borisov says she asked for an employment agreement in writing on a number of occasions but this was never provided. Mr Jas Sandhu disputes this. Mr Sandhu says he was very busy at the time, preparing for his overseas travel to India and the busy Christmas period and accepts he did not provide Ms Borisov with a written employment agreement.

[20] Ms Borisov says she asked that her wages each week be paid into her bank account as she had various outgoings which she wished to be covered. Also, she was uncomfortable about carrying cash with her to the bank for safety reasons.

[21] Mr Jas Sandhu disputes this and says all employees at Pizza King and at Fruit

King were paid in cash and that is how they liked it.

[22] Ms Borisov started work on 23 November 2016. Relatively soon after starting, Ms Borisov had to take some sick days off, firstly to take her grandmother to hospital and then her mother in law. Ms Borisov was also hospitalised in late December 2016. However, apart from two weeks in December 2016, Ms Borisov worked close to forty hours each week during the course of her employment.

Meeting before Christmas 2016

[23] Ms Borisov says that approximately one week before the Christmas break in

2016, she met with Mr Jas Sandhu in the back office at Pizza King. Ms Borisov was told that she would be paid wages in advance over the Christmas period and that when Mr Jas Sandhu and Mr Lally Sandhu returned from India the balance of wages owed would be paid to her.

[24] Ms Borisov says that she asked Mr Jas Sandhu if it were possible that she be paid weekly while he and Mr Lally Sandhu were away as she was concerned about her financial situation. Mr Jas Sandhu told her the arrangement was that she would be paid some of her wages in advance and the balance rest when he returned from India. Ms Borisov did not feel comfortable pushing the point further.

[25] Ms Borisov understood Mr Lally Sandhu would be returning to New Zealand on 24 January 2017 and this is when she expected to be paid for the balance of her wages owing. She planned her finances based on this arrangement.

[26] Staff at both Pizza King and Fruit King were paid in advance for work that they performed up to 15 January 2017. For work performed after 15 January 2017, staff were to be paid the balance when Mr Jas and Mr Lally Sandhu returned from India. Mr Jas Sandhu accepts this was how wages were going to be paid to staff while he and his brother were in India and that he cautioned staff to watch their spending over this time.

[27] While the Sandhu brothers were in India, Mr Gursimram who was employed at Fruit King opened up Pizza King each day and was responsible for lock up each day. Mr Gursimram was not paid for these extra duties, he was happy to help out.

Friday 27 January 2017

[28] Ms Borisov was not paid her wages as expected on 24 January 2017. Ms Borisov says it was a difficult time and she needed her wages. Ms Borisov went to Fruit King to talk to Mr Lally Sandhu about her wages. He was not there and so Ms Borisov spoke to Mr Gursimram. Ms Borisov asked him if Mr Lally Sandhu was back from holiday. Mr Gursimram told Ms Borisov that Mr Lally Sandhu was expected back the next day. Ms Borisov says she then asked Mr Gursimram if he could arrange for her wages to be paid as she needed them as soon as possible. Mr Gursimram's response was that he would see what he could do. Mr Gursimram told Ms Borisov he would come over to Pizza King after trying to talk with Mr Jas Sandhu.

[29] Ms Borisov went back to work at Pizza King. After about ten minutes Mr Gursimram came to Pizza King to tell Ms Borisov that he had tried to contact Mr Jas Sandhu but had not been successful. Ms Borisov was very unhappy about this.

[30] Mr Gursimram rang Mr Jas Sandhu again and spoke with him while Ms Borisov worked at Pizza King. After the phone call, Mr Gursimram told Ms Borisov that Mr Jas Sandhu had authorised him to pay her \$300. Mr Gursimram and Mr Jas Sandhu both say that Mr Jas Sandhu agreed to pay Ms Borisov "whatever she wanted".

[31] Ms Borisov says she was very upset and angry. She says she was owed approximately \$600/\$700 for the two weeks she had worked after being paid up to 15

January 2017 and was financially stretched. Ms Borisov told Mr Gursimram that she had "had enough", it was "not fucking good enough" and she felt like she was being "dicked around". Ms Borisov told Mr Gursimram that she was not working the rest of her shift. Ms Borisov says she then took the \$300, signed for it and left.

[32] Mr Gursimram was shocked by the outburst. Mr Pantha, who was left alone in the Pizza King kitchen, was very stressed as he had to service customers on his own and was relatively inexperienced. Ms Borisov says she did not work the weekend as she had already arranged in advance for a colleague to work her shifts.

Monday 30 January 2017

[33] On Monday 30 January 2017, Ms Borisov received a text from Mr Lally

Sandhu saying:

"Hi Tanisha,

Your wages are ready, you can pick it up from FruitKing

Thx"

Ms Borisov replied that she would be there in the next half an hour and received a text back saying thanks.

[34] Ms Borisov picked up her wages from Fruit King and wanted to apologise to Mr Lally Sandhu for her actions but he was not available. Ms Borisov was not rostered to work on 30 and 31 January 2017 and returned to her normal Wednesday to Sunday shift on Wednesday 1 February 2017. Nothing was said and no questions were asked of her upon her return.

[35] On 3 and 4 February 2017, Ms Borisov and Mr Lally Sandhu had the following exchange by text:

3 Feb, 2.15pm: Ms Borisov: Hi Lally are we back to normal with wages?

3 Feb, 3.17pm: Mr Lally Sandhu: Hi, Yes we are back to normal, would you like to collect it tomorrow when u back to work?

Ms Borisov: Yes that's fine thank you.

Sat, 4 Feb, 6.53pm Ms Borisov to Mr Lally Sandhu: Hi, so whats the plan with wages?

No response.

Mr Jas Sandhu returns - 8 February 2017

[36] On 8 February 2017, Mr Jas Sandhu returned from India. Mr Jas Sandhu says a number of staff complained to him about Ms Borisov's behaviour and performance when he was away. Complaints included lateness to work, excessive smoking breaks, customer service and performance. Mr Jas Sandhu decided that he needed "evidence" before he spoke with Ms Borisov. Mr Jas Sandhu was given letters of complaint from staff and from Mr Gursimram who had been opening and locking up Pizza King while Mr Sandhu was in India and had viewed Ms Borisov while working. Mr Gursimram had also been the one trying to sort the wage issue out on 27 January 2017.

[37] Ms Borisov says she continued working as usual after 27 January 2017 and was not spoken to about any issues. Ms Borisov was aware that another staff member had been spoken to by Mr Jas Sandhu and wondered what the meeting was

about. On

14 February 2017, Ms Borisov texted Mr Jas Sandhu asking what days she was working that week. The response was that she would be told when she came to work for her 3pm shift.

16 February 2017 – meeting with Mr Jas Sandhu

[38] On 16 February 2017, Ms Borisov says she and Mr Jas Sandhu met in the back office at Pizza King. Mr Jas Sandhu told her that her behaviour on 27 January 2017 had been totally unacceptable. Ms Borisov says that she agreed and apologised. She explained to Mr Jas Sandhu that she thought she was going to be paid on 24 January

2017 and did not think she had to wait until he returned after that. She needed her wages.

[39] At that point, Ms Borisov says she was told by Mr Jas Sandhu that “it’s not working out, you’re not the type of employee I need, you should start looking for other work”. Ms Borisov was shocked and asked how soon should she start looking. Ms Borisov was told “by the end of the week”, which was 18 February 2017. Ms Borisov worked her usual shifts on 17 and 18 February 2017.

18 February 2017- final day of employment

[40] After the meeting on 16 February 2017, Ms Borisov took some employment advice and was told to get clarity on her hours of work for the rest of the week.

[41] At between 2-2.30 pm, Mr Jas Sandhu came into Pizza King and in accordance with the advice she had received Ms Borisov asked to talk to him to clarify her hours of work. Ms Borisov says she asked Mr Jas Sandhu whether she was still on the roster and was told: “No, today’s your last day”. Ms Borisov says she asked for a letter of dismissal as she would need it for WINZ and was told by Mr Jas Sandhu that they would discuss that on the following Thursday when she would be paid her wages.

[42] Ms Borisov says she asked Mr Jas Sandhu why she was being dismissed and was told of staff complaints, that she was rude, unreliable and her pizza making was not up to scratch. Ms Borisov says she became very upset and said to Mr Jas Sandhu “if I’m that terrible why do you want me to work for the rest of the day?” When she received no answer from Mr Jas Sandhu, Ms Borisov left in tears, and did not finish her shift. Mr Jas Sandhu says, as had occurred on 27 January 2017, Ms Borisov had abandoned her employment. Mr Jas Sandhu says Ms Borisov was not dismissed, she abandoned her employment. Mr Jas Sandhu says he tried to contact Ms Borisov after she left but was not successful.

[43] Ms Borisov denies this and says the next she heard from Mr Jas Sandhu was when she received a text from him on 23 February 2017 which she understood was in respect of her final pay.

23 February 2017 text

[44] On 23 February 2017, Mr Jas Sandhu sent a text to Ms Borisov:

“Hi Tenesha, can I see you at 5pm today at Pizza King. Thanks.”

[45] Ms Borisov says they met and she was paid her final pay. Ms Borisov had forgotten her uniform and arranged to return it the next day from the Four Square and to get her holiday pay.

[46] There were conflicts in much of the evidence between Ms Borisov and the witnesses for the Company. I found the evidence of Mr Jas Sandhu and Mr Lally Sandhu to be inconsistent. I preferred the evidence of Ms Borisov. When Mr Jas Sandhu was asked about the issues he had with Ms Borisov he said there were always a lot of dramas with her, her reliability was a big issue and that he never knew whether she was going to be working or whether she would be at work on time. He was left wondering whether she would come into work or not. This evidence is not consistent with the pay records that were provided and with the text messages which were provided. From those text messages there were a couple of issues at the outset of Ms Borisov’s employment when there were personal matters which she had to take time off in respect of. She informed Mr Jas Sandhu of these issues and was apologetic.

[47] Mr Jas Sandhu and other witnesses for the company also talked in general terms about Ms Borisov’s poor performance, her excessive number of smoke breaks, excessive use of her mobile phone, her lateness for work and that when it became busy at Pizza King she would be sick or would not come to work. Again, this evidence is not supported by the documentary evidence that was provided, nor was it supported by Mr Jas Sandhu’s evidence when he was asked why he did not take steps to discipline Ms Borisov. His response was that he never had any intention of dismissing Ms Borisov, which seems at odds with his overall evidence about her performance and serious misconduct.

[48] It is my view that it is more likely than not that Ms Borisov was upset that she had not been paid her wages on 24 January 2017 when she expected them to be paid. At this stage, she was owed almost two weeks wages. She insisted on payment on

27 January 2017 and when she was paid less than half what she was entitled to, she became angry and did not work the rest of her shift.

[49] After receiving clarity from Mr Lally Sandhu that wages were back to normal on 3 February 2017, Ms Borisov continued to work as normal. Upon his return from overseas, Mr Jas Sandhu obtained letters from staff members and from Mr Gursimram

about Ms Borisov's performance as in his words he "needed evidence". The letters were all very similar in nature.

[50] I accept Ms Borisov's evidence that at the meeting on 16 February 2017, she was told that she would not be required after 18 February 2017 and on 18 February

2017 when this was confirmed to her she became upset and left. However, she left because she was told by Mr Jas Sandhu that she was finishing that day. In my view, this action amounted to a dismissal.

Second issue

If Ms Borisov was dismissed by the Company, was her dismissal justified?

[51] In my view, the dismissal was not justified. Mr Jas Sandhu was not happy with Ms Borisov on his return from India. He obtained "evidence" from staff members at Pizza King and at Fruit King which were put in writing. He did not meet with Ms Borisov before obtaining the statements. Mr Jas Sandhu informed Ms Borisov that her behaviour on 27 January 2017 when she had demanded her wages was unacceptable and her performance while he had been away was unacceptable. She was told to start looking for another job. On 18 February 2017 she was told her performance at Pizza King was not acceptable for a number of reasons and that that was her last day.

[52] As I have found, this amounted to a dismissal and this was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred¹.

[53] I conclude that Ms Borisov was unjustifiably dismissed.

Third issue

If the dismissal was not justified, is Ms Borisov entitled to remedies?

[54] Ms Borisov is seeking compensation of \$10,000 under [s.123\(1\)\(c\)\(i\)](#) of the Act for the distress caused to her by her unjustified dismissal and the manner in which it was carried out.

[55] Ms Borisov gave evidence of her humiliation and distress at being dismissed.

¹ Section 103A of the Act.

[56] I conclude \$8,000 to be the appropriate sum at which compensation for Ms Borisov's humiliation, loss of dignity and injury to feelings should be set.

[57] Ms Borisov was unable to find another job until 27 August 2017. Ms Borisov says her partner obtained a job in the Manawatu as a herd manager after she was dismissed. This was because he was not able to earn the money needed in his current position and while Ms Borisov was unable to find work.

[58] I order the company to pay Ms Borisov the equivalent of 10 weeks wages in lost remuneration suffered as a result of her unjustified dismissal pursuant to s.128(2) of the Act. This sum amounts to \$5,142.38 gross and is to be paid to Ms Borisov within 21 days of the date of this determination.

Fourth Issue

If Ms Borisov is entitled to remedies, was there any contributory conduct on her part which would reduce the remedies?

[59] As specified in s.124 of the Act, I am required to consider whether the evidence established any conduct by Ms Borisov, of a sufficiently blameworthy nature which may have contributed to the situation giving rise to her personal grievance.

[60] I consider Ms Borisov's conduct contributed to her personal grievance. As acknowledged by her, her conduct on 27 January 2017, when she demanded her wages and left when she did not receive what she thought she was entitled to, was unfortunate. This could have been managed better and was one of the main reasons why Mr Jas Sandhu subsequently met with her on 16 February 2017. I consider a reduction of 20% of the distress compensation appropriate. This reduces the distress compensation award from \$8,000 to \$6,400 which is to be paid within 21 days of the date of this determination.

Fifth Issue

Was Ms Borisov paid for the statutory holidays falling on Sunday, 25 December

2016 and Sunday, 1 January 2017 being Christmas and New Year's day which were normal working days? If not, what amount is she entitled to?

[61] Ms Borisov was not paid for the statutory holidays falling on Sunday, 25 December 2016 and Sunday, 1 January 2017. These were normal working days for Ms Borisov which she was not paid for.

[62] If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay or average daily pay for that day².

[63] Section 55 of the HA requires payment for the public holiday to be made in the pay that relates to the pay period in which the holiday occurs. This did not occur. I order the company to pay Ms Borisov her normal daily rate for those two statutory holidays, which amounts to \$252 gross, within 21 days of the date of this determination.

Sixth Issue

If Ms Borisov was not paid for statutory holidays is the Company liable to pay a penalty?

[64] Section 75 of the HA provides that an employer who fails to comply with provisions of the HA including sections 46 and 55 is liable to a penalty. If the employer is a company the penalty is up to \$20,000.

[65] Ms Borisov seeks a penalty against the company for failing to pay her public holidays. Penalties are designed to punish and deter others from engaging in similar conduct³.

[66] The full bench of the Employment Court set out a four step process which is to be adopted when a penalty is being assessed by the Authority to ensure that there is a consistent and reasonably predictable result with penalties across the board⁴.

[67] These factors have been taken into account by me when assessing penalties in this matter. Relevant factors include:

- A penalty is needed to act as a deterrent, not only to the Company but also to the wider community of employers.

² s.49 HA

³ *Tan v Yang and Zhang* [2014] NZEmpC 65

⁴ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143

- It is not appropriate for an employer to deliberately breach fundamental terms of an employment agreement or minimum standards legislation.
- The failure to pay Ms Borisov for the two public holidays was deliberate and the Authority must impose a penalty at a level that signals its disapproval of such conduct and which acts as a deterrent to the company and other employers who may not be minded to abide by their statutory obligations.

[68] The Company failed to pay Ms Borisov for 2 public holidays. There were 2 breaches by it of the HA. The Company is liable for penalties of \$20,000 each for the breaches, a total of \$40,000.

[69] The two breaches can be grouped into one category, as they relate to a similar course of conduct by the Company on 2 occasions. The liability, following grouping the 2 penalties, is to a penalty of \$20,000.

[70] Standing back and assessing the proportionality of the outcome, I consider a penalty of 5% of the total globalised penalty that the Company is liable for to be an appropriate penalty in this case.

[71] Accordingly, the Company is ordered to pay a penalty of \$1,000 under s.136 of the Act to the Authority for payment by it to the Crown Bank Account. The Company is to pay the penalty to the Authority within 21 days of the date of this determination.

Costs

[72] Ms Borisov has 14 days from the date of this determination to file and serve submissions as to costs. The Company has 14

days in which to file its submissions as to costs in reply.

Anna Fitzgibbon

Member of the Employment Relations Authority

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