

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 133
5407732

BETWEEN

LORRAINI DISOIBAU
Applicant

AND

BOB N LAL t/as THE BAKE
HOUSE
Respondent

Member of Authority: R A Monaghan

Representatives: M Moncur, advocate for applicant
V Raman and S Goundar, counsel for respondent

Investigation meeting: 3 September and 25 October 2013

Additional information provided: 22 November 2013 from applicant
29 November, 17 and 23 December 2013 from respondent

Submissions received: 17 February 2014 from applicant
24 February 2014 from respondent

Determination: 7 April 2014

DETERMINATION OF THE AUTHORITY

- A. Bob N Lal is ordered to pay wages and holiday pay to Ms Disoibau calculated as the difference between the net equivalent of \$13,025 (gross), and \$7,750 (net).**
- B. Bob N Lal is ordered to pay to Ms Disoibau \$4,000 as compensation for the injury to her feelings arising from sexual harassment in her employment.**
- C. Ms Disoibau was dismissed unjustifiably, but the level of her contributory conduct means no remedy is awarded.**
- D. No personal grievance on the ground that Ms Disoibau was disadvantaged in her employment by an unjustified action of the employer's is properly before the Authority.**
- E. There are no orders for the payment of penalties.**

Employment relationship problem

[1] Bob N Lal, trading as The Bake House, employed Lorraini Disoibau as a kitchen hand. Mr Lal had secured contracts to provide catering services at the Manukau Golf Club (Manukau) and the Ngaruawahia Golf Club (Ngaruawahia), and Ms Disoibau worked at both of these clubs.

[2] Ms Disoibau says:

- (i) her wages were underpaid;
- (ii) she was sexually harassed in her employment;
- (iii) she was dismissed unjustifiably for misconduct;
- (iv) she was disadvantaged in her employment by an unjustified action of her employer's and
- (v) penalties are payable for,
 - the failure to provide a written employment agreement,
 - failure to pay the minimum wage, and
 - failure to pay holiday pay.

Are wages owed

[3] Mr Lal's statement in reply denied there was an employment relationship between the parties. However at the investigation meeting he acknowledged the existence of an employment relationship, commencing on 11 February 2012. I proceed accordingly.

[4] The issues in respect of the payment of wages are:

- (i) what were the terms of the agreement regarding the payment of wages;
- (ii) were wages underpaid under any of these terms; and
- (iii) if, so, in what amount.

1. The terms of the agreement regarding the payment of wages

[5] There was no written employment agreement, and no wage and time record was kept in respect of Ms Disoibau's work. Because Mr Lal and Ms Disoibau had been brought together as part of an attempt by their church pastor to assist Ms

Disoibau, Mr Lal considered at the time that he was engaging Ms Disoibau as a volunteer. He told her he would make cash payments to assist her, but there was little discussion about terms and conditions of employment.

[6] There was not enough evidence to identify relevant terms agreed orally. As a result I turn to the way in which the relationship operated in practice to ascertain the terms of the parties' agreement on:

- the hours of work, and
- the rate of pay.

[7] Regarding hours of work, Ms Disoibau claimed in her written statement of evidence to have worked for 6 or up to 7 days per week as her employment progressed, although she did not identify where the work was done. She acknowledged that the claim was based on an attempted reconstruction after the end of her employment. There was nothing to support that particular reconstruction and I find the written account unreliable.

[8] Mr Lal said in evidence that Ms Disoibau worked at Manukau on Tuesdays and Wednesdays, for 4 hours on each day. Ms Disoibau said in oral evidence that she worked at Manukau on Thursdays and Fridays, between the hours of 8.30 am and 2.30 pm. There was no other information capable of verifying which account was correct.

[9] It was common ground that Ms Disoibau worked at Ngaruawahia on Saturdays and Sundays. Ms Disoibau said in oral evidence that she worked 11 am – 6.30 pm on both days. Mr Lal agreed these were the club's opening hours on Saturdays and Sundays, but said Ms Disoibau actually worked for 6 hours on those days. Again there was no other information capable of verifying which was correct.

[10] Inevitably the absence of a wage and time record prejudiced Ms Disoibau's ability to bring an accurate claim. In such circumstances - and without proof from Mr Lal that Ms Disoibau's oral claim was inaccurate - s 132 of the Employment Relations Act 2000 permits me to accept Ms Disoibau's oral claim as proved. I take that approach to find Ms Disoibau worked for 7.5 hours (less a one-hour lunch break) on Saturdays and Sundays, and for 6 hours on Thursdays and Fridays. In total she worked for 25 hours per week.

[11] Regarding the rate of pay, no hourly rate was expressly agreed and the information available does not allow me to infer the terms of any agreement.

[12] I therefore apply the minimum hourly rate prescribed under the Minimum Wage Act 1983.

[13] The Minimum Wage Act allows the setting of minimum rates of pay for workers who: are aged 16 or more (the adult rate)¹; or who fall within the starting out provisions applicable to employees aged 16 – 19² or the training provisions applicable to employees aged 20 or more.³ Ms Disoibau is aged over 20 but was not a trainee in terms of the minimum wage orders applicable at relevant times.⁴ She was not required by her employment agreement to undertake at least 60 credits a year of an industry training programme for the purpose of becoming qualified for the occupation to which her employment agreement related.⁵

[14] Accordingly I do not accept Mr Lal's assertion that the appropriate rate is the rate prescribed for a trainee. The appropriate minimum rate is the adult rate.

2. Payments made

[15] Ms Disoibau said she received cash payments as follows:

- \$100 for the week ending 12 February 2012;
- \$150 per week between 14 February and 3 June 2012;
- \$200 per week between 5 June 2012 and 12 August 2012;
- \$250 per week between 14 August 2012 and 21 October 2012.

[16] These payments total \$7,750 (net).

[17] During the investigation meeting Mr Lal said he paid Ms Disoibau at \$150 per week in cash for 12-13 hours per week during the first three weeks of her employment, then subsequently, when her hours increased to 20 hours per week he paid her at the rate of \$250 per week.

¹ Minimum Wage Act 1983 s 4

² s 4A

³ s 4B

⁴ S 4B(1)(c)

⁵ Minimum Wage Order 2011 and Minimum Wage Order 2012, cl 3

[18] When the Authority sought further information Mr Lal said after the investigation meeting that he paid Ms Disoibau \$250 per week in cash throughout her employment. He also said she was absent from 3 – 17 July 2012 and again from late July – 25 August 2012. Thirdly he said the Ngaruawahia Golf Course was closed for a week in March and a week in September. Bearing all of that in mind, he said Ms Disoibau has been paid all sums due to her.

[19] None of this evidence was reliable, or adequately supported by any record. Again, with reference to s 132 of the Act, while I do not accept Ms Disoibau's written account I accept her oral claim as proved.

3. Payments owed

[20] The minimum adult hourly rate from 11 February - 1 April 2012 was \$13.00. The minimum adult hourly rate commencing on 1 April 2012 was \$13.50. Ms Disoibau's employment ended on 22 October 2012.

[21] Ms Disoibau should have been paid:

7 weeks x \$13.00ph x 25 hours =	\$ 2,275.00
plus	
29 weeks x \$13.50ph x 25 hours =	\$ 9,787.50
 Total (gross)	 \$12,062.50

[22] Holiday pay is payable on that amount, calculated as 8% x \$12,062.50 = \$965.

[23] The result is that Ms Disoibau has been paid \$7,750 (net) and was owed \$13,025 (gross)⁶. It is not appropriate for the Authority to determine what amount of tax would be payable on the gross amount, so Mr Lal is ordered to pay to Ms Disoibau the difference between the net equivalent of \$13,025, and \$7,750. The responsibility to account to the IRD remains his as the employer.

Was Ms Disoibau sexually harassed

[24] Mr Lal sexually harassed Ms Disoibau in her employment if - by using language, visual material or physical behaviour of a sexual nature - he directly or

⁶ Being wages plus holiday pay

indirectly subjected her to behaviour that was unwelcome or offensive to her, and which had a detrimental effect on her in her employment.⁷

[25] Ms Disoibau alleged that Mr Lal sexually harassed her,

- in general by looking her up and down, making improper comments about the size of her chest and buttocks, touching and slapping her bottom, pressing himself up to her from behind, making suggestive comments about her to his friends at the golf clubs, and staring at female golfers and commenting to Ms Disoibau about their appearance in a way that made her uncomfortable (the general allegations);
- by making comments appearing to suggest that the two embark on a sexual relationship; and
- during a particular incident in July 2012, while driving her home from work.

[26] Mr Lal denied all of these allegations. The issues are:

- (i) did the alleged conduct occur;
- (ii) if so, did it amount to sexual harassment; and
- (iii) if so, what are Ms Disoibau's remedies.

1. Did the conduct occur

The general allegations

[27] With the exception of the July incident Ms Disoibau's allegations about the conduct towards her were not specific about date, place and time. In addition there was no more detailed evidence about the surrounding circumstances, and no other witnesses to the alleged conduct.

[28] There was not enough evidence for a finding that the incidents referred to in the general allegations occurred.

⁷ Employment Relations Act 2000 s 108

Comments suggesting a sexual relationship

[29] Two types of behaviour were invoked in respect of the comments suggesting a sexual relationship.

[30] Regarding the first type of behaviour, Ms Disoibau alleged that, from time to time while Mr Lal was driving her home, he would suggest that the two stop at a motel. She would decline and Mr Lal would be annoyed, but the matter went no further. Even so the suggestions upset her. Again, there was little further detail, and Mr Lal denied the allegations.

[31] There was not enough evidence for a finding that these incidents occurred.

[32] Regarding the second type of behaviour, the evidence centred on Mr Lal's behaviour at Ngaruawahia. Ms Disoibau said Mr Lal would chat with another female employee, then comment to Ms Disoibau on the employee's body and on his hope that the employee would go out with him. Mr Lal accepted that he made light-hearted comments to the other employee, but not that there was anything suggestive in them. He denied the conversations with Ms Disoibau.

[33] The other employee did not make a complaint about Mr Lal's behaviour.

[34] Ms Disoibau also said Mr Lal commented to her that 'you and I would make lovely babies'. Mr Lal denied that, and said he merely responded to a comment from the other employee that his own baby was lovely.

[35] There was some support for Ms Disoibau's accounts. Sharon Mataafe and Heather Paterson worked at Ngaruawahia and were friendly with Ms Disoibau. They gave evidence that they heard Mr Lal commenting that attractive female members of the club 'should be my girlfriend'. They said they did not take much notice of the comments. Finally they said Ms Disoibau reported to them that: similar comments were being made to her; and she felt she was being pressured to sleep with Mr Lal. She was afraid of losing her job if she complained about his behaviour.

[36] From this evidence I find it likely that comments were made to Ms Disoibau which she took seriously as attempts to initiate a sexual relationship. There was not

enough evidence for a finding that Mr Lal actually attempted or intended to initiate a sexual relationship, but otherwise I find it more likely than not that he made comments to Ms Disoibau of the kind set out above.

The July incident

[37] Ms Disoibau said she was working late in Manukau on an occasion in July 2012, when Mr Lal and his brother-in-law offered to drive her home. It was a Saturday night. Ms Disoibau had received another offer and said she was reluctant to travel with Mr Lal, but did so. As the vehicle was travelling along Auckland's southern motorway, it appeared to Ms Disoibau that the driver did not intend to take the off ramp she considered provided the most direct route to her home. She protested. She said Mr Lal responded that she would be dropped off after he had finished drinking at a friend's house. When she protested further he took her home using the off ramp she sought, and told her he could 'pay for a woman' if he wanted to.

[38] Mr Lal said he had intended to take the next off ramp. He called his proposed route the 'main route' to Ms Disoibau's home and acknowledged the initial disagreement over which off ramp would be taken. Reference to a map shows that either off ramp would have sufficed, and although it was less direct Mr Lal's planned route could be described as a 'main route' in that it followed major local roadways.

[39] Mr Lal denied saying Ms Disoibau would be taken home after he had finished drinking, and that he could pay for a woman if he wanted to.

[40] If Ms Disoibau's fears about Mr Lal were well-founded, and her accounts of his behaviour were accurate, this could be a disturbing incident. However the effect of my findings in this part of this determination is that, while Mr Lal's general behaviour was unwise and inappropriate, I am not persuaded there was anything more sinister in it.

[41] Regarding the July incident I take into account that Ms Disoibau had a choice of rides home, and was not forced to travel with Mr Lal. I also take into account that Mr Lal complied with Ms Disoibau's wishes regarding which off ramp to take. I find it likely Ms Disoibau was sensitised to Mr Lal's conduct, and interpreted his behaviour accordingly. This led her to suspect his motives when he sought to take a

different route to her home from the one she expected. Overall I prefer Mr Lal's account of the incident.

2. Did the conduct amount to sexual harassment

[42] Mr Lal produced a number of statements attesting to his good character, but none of the authors was in a position to comment on the above matters. Such general statements did not assist me to make findings on the more specific matters.

[43] I have found that Mr Lal commented to Ms Disoibau about a female employee at Ngaruawahia, about making lovely babies, and about being his girlfriend. These comments amounted to using language of a sexual nature towards Ms Disoibau. The behaviour was unwelcome and offensive to her, and had a detrimental effect on her employment. It amounted to sexual harassment.

3. What is the remedy

[44] Ms Disoibau is entitled to compensation for the injury to her feelings resulting from the sexual harassment.

[45] The behaviour complained of was at the low end of the scale, although there was evidence of injury to Ms Disoibau's feelings. Overall I consider an award of \$4,000 appropriate and order accordingly.

Was Ms Disoibau dismissed unjustifiably

[46] On Monday 22 October 2012 (Labour Day) Mr Lal's 13 year-old son Sajal Lal, an associate of the Lals', and Ms Disoibau worked at Ngaruawahia. They were to clean the kitchen after a function the previous night, and prepare for a group scheduled to arrive at about 4 pm. Mr Lal was not present. Sajal, Ms Disoibau and the associate had travelled to Ngaruawahia together, by car. They arrived at or about 11.00 am.

[47] On Ms Disoibau's account, Mr Lal telephoned her at about 1 pm to enquire about cleaning a fryer and changing its oil. When she went to the kitchen to check, she found both of the fryers were on. Sajal and the Lals' associate were working on the fryers while they were hot. Because of the obvious hazard she told them to stop.

An argument followed, in which Sajal effectively informed her that he was not obliged to do as she said and that he was the boss. Ms Disoibau pushed him away, and completed the cleaning.

[48] Ms Disoibau went on to say that Sajal and Ms Mataafe, who was on the premises at the time, both spoke to Mr Lal on the telephone again. When the telephone was handed to her, Mr Lal told her she was fired. Mr Lal refused to listen to her explanation. Ms Disoibau said she would see Mr Lal in court.

[49] Ms Mataafe gave evidence that she also telephoned Mr Lal that afternoon. She said Mr Lal confirmed to her that Ms Disoibau was dismissed.

[50] On the accounts of Mr Lal and Sajal, Sajal reported to his father during a phone call at about 1 pm that Ms Disoibau had spent all of her time chatting at the bar and had not done any work in the kitchen. The matter went no further at the time, but Mr Lal called again at 3 pm. Sajal told him Ms Disoibau was still in the bar chatting.

[51] When the telephone was then handed to Ms Disoibau, Mr Lal told her he wanted to speak to her about her work when she returned to Auckland. He also asked her why he should pay her if she was not working. Sajal said that, after that call, Ms Disoibau was angry with him for reporting her. There was a heated exchange and Ms Disoibau placed her hands around his neck, squeezing. Sajal telephoned his father again to report that matter.

[52] The Lal family said that, later that evening, bruising began to appear around Sajal's neck as a result of Ms Disoibau's actions. They did not seek medical attention, but they photographed the bruising. Copies of the photographs were produced in the Authority. An analyst deposed that the photographs were taken in the early hours of 23 October 2012, and that there was no evidence of tampering.

[53] Mr Lal also said that, during the 3 pm telephone call, he spoke to Ms Disoibau who told him that Sajal had been overruling her. Mr Lal suggested to her that she had become angry because Sajal had reported her inactivity. He asked her to hand the car keys to the Lals' associate, and said that on her return to Auckland he would also discuss the incident with Sajal with her. He denied telling anyone that Ms Disoibau was dismissed.

[54] Mr Lal said he and his wife arrived at Ngaruawahia in the early evening, and attempted to discuss the incidents with Ms Disoibau. Ms Disoibau refused to enter into any discussions, and repeated that she would see Mr Lal in court. Mr Lal made a third attempt to discuss the incidents by telephone later that night, but Ms Disoibau's response was the same.

[55] Subsequent requests to meet were declined, and Ms Disoibau did not return to work.

[56] The issues are:

- (i) was there a dismissal
- (ii) if so, was it justified; and
- (iii) what are Ms Disoibau's remedies.

1. Was there a dismissal

[57] Mr Lal said there was no dismissal, and that Ms Disoibau abandoned her employment. I therefore turn first to whether Mr Lal told Ms Disoibau she was dismissed, or merely asked her to give the car keys to the Lals' associate so that the associate had charge of the car for the return trip to Auckland.

[58] Elsewhere in this determination I have made various findings against both Mr Lal and Ms Disoibau on matters of accuracy or credibility. Because of that I am unable to make an overall finding that one of them is a more reliable witness than the other, or to apply such a finding to resolve the conflict in the evidence here.

[59] Instead I accept that Sajal told his father that Ms Disoibau had been chatting at the bar rather than working, and later that she had squeezed his neck. In these circumstances I find it unlikely that he would take the more measured response he contended. I also take into account Ms Mataafe's evidence - albeit denied - that she obtained confirmation from Mr Lal that Ms Disoibau was dismissed. I have taken care with Ms Mataafe's evidence because I do not consider her an independent witness, but on balance I have accepted it.

[60] The question of whether there was a dismissal was not easy to decide, but by a small margin I find it more likely than not that Mr Lal told Ms Disoibau she was dismissed.

2. Was the dismissal justified

[61] I must now consider whether the decision to dismiss, and how the decision was made, was what a fair and reasonable employer could have done in the circumstances at the time.⁸ An employer called on to justify a dismissal must show that it has: sufficiently investigated the allegations against the employee before taking action; advised the employee of its concerns; offered the employee an opportunity to be heard; and taken the employee's responses into account before making its decision.⁹ Other factors may also be taken into account.¹⁰ However the Authority cannot find a dismissal unjustified solely because of defects in process if the defects were minor and did not result in the employee being treated unfairly.¹¹

[62] The misconduct of concern to Mr Lal was Ms Disoibau's failure to attend to her duties, and her alleged assault on Sajal. However the dismissal during the telephone conversations on 22 October was imposed without allowing Ms Disoibau a sufficient opportunity to be heard, and without taking her responses into account before the decision to dismiss was made. I do not consider these defects to be minor.

[63] Accordingly I find dismissal was not the action a fair and reasonable employer could take in the circumstances, and was unjustified.

3. What is the remedy

[64] Ms Disoibau has sought the reimbursement of remuneration lost as a result of her personal grievance, and compensation for the injury of her feelings resulting from the grievance.

[65] I stop short of quantifying the relevant amounts because I find it more likely than not that Ms Disoibau assaulted Sajal as he described. Even on her own account

⁸ Employment Relations Act s 103A(2)

⁹ s 103A(3)

¹⁰ s 103A(4)

¹¹ s 103A(5)

she ‘pushed him away’, which she was not entitled to do. It was common ground that there was a heated exchange at the time, and the cumulative effect of: the exchange; the acknowledgement that Ms Disoibau at least made physical contact with Sajal; Sajal’s evidence; his family’s evidence about the bruising to his neck; and the photographs have led to my conclusion.

[66] This conduct amounts to blameworthy contributory conduct to such an extent that no remedy is warranted. I reduce all remedies sought accordingly.¹²

[67] I also find it more likely than not that Ms Disoibau was spending time chatting at the bar when she should have been working. She accepted that time was spent doing this, but denied the extent of it. I found unconvincing her explanation of why she was absent from the kitchen while Sajal and the associate were cleaning the fryer, and her account of the length of her absence. I prefer Sajal’s evidence on that matter.

[68] I consider this to be blameworthy contributory conduct warranting a reduction in remedies, but the above finding means there is no need to take that matter further.

[69] Finally, I find Ms Disoibau’s refusals to engage with Mr Lal in the afternoon and evening of 22 October, and subsequently, amounted to blameworthy contributory conduct warranting a reduction in remedies. Making statements such as ‘I will see you in court’ is not consistent with her own duty to be responsive to and communicative with her employer. She should have taken the opportunity to further discuss the day’s incidents, and in refusing to do so she lost an opportunity to secure an early resolution. Again the above finding means there is no need to take that matter further.

Was there an unjustified disadvantage

[70] A number of assertions of disadvantage were made on behalf of Ms Disoibau. However the basis of a personal grievance on the ground that she was unjustifiably disadvantaged was not identified in the statement of problem or in any of the evidence. There was no written record of when or how such a grievance was raised, or what it comprised. The matter was not addressed in submissions.

¹² Employment Relations Act s 124

[71] No such grievance is properly before the Authority. There will be no orders in respect of the assertions.

Penalties

[72] The claims for penalties were not pursued at the investigation meeting or in submissions. There will be no order for the payment of penalties.

[73] I note in any event that penalties for breach of the Holidays Act 2003 are recoverable by a Labour Inspector,¹³ and no alternative ground for seeking a penalty in respect of holiday pay was raised. The same applies in respect of failures to pay the minimum wage,¹⁴ and failures to provide a compliant written employment agreement.¹⁵

Costs

[74] Costs are reserved.

[75] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority

¹³ Holidays Act s 76

¹⁴ Minimum Wage Act 1983 s 10

¹⁵ Employment Relations Act s 65