

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 60
5641892

BETWEEN AVINASH JHORAD
Applicant
A N D CAFÉ EPHEBUS LIMITED
Respondent

Member of Authority: T G Tetitaha
Representatives: K Usmar, Advocate for Applicant
N Gunaydin/M Bell, Representatives for Respondent
Investigation Meeting: 27 February 2017 at Tauranga
Submissions Received: 27 February 2017 from both parties
Date of Oral Determination: 27 February 2017
Date of Determination: 3 March 2017

**ORAL DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

- A. Avinash Jhorad was unjustifiably dismissed by Café Ephesus Limited.**
- B. Café Ephesus Limited is to pay Avinash Jhorad the sum of \$2,500 incorporating a 50% reduction due to contributory conduct pursuant to s.125 of the Act.**
- C. Café Ephesus Limited is to pay Avinesh Jhorad salary arrears of \$3,274 pursuant to s.131 of the Employment Relations Act 2000.**
- D. Café Ephesus Limited is to pay Avinesh Jhorad annual leave owed of \$10,111.73 pursuant to s.131 of the Employment Relations Act 2000.**

- E. The parties are directed to file submissions within 28 days if agreement is not reached between them regarding the outstanding money owed for the public holidays. The parties must specifically address:**
- (a) Whether Monday-isation affects the rate of payment for work undertaken on the Saturday or Sunday on which the actual date of public holiday fell?**
 - (b) What wages were received for working on the above public holidays and what is still owed?**
- F. Costs are reserved. If the parties are unable to agree costs, costs submissions within 28 days should be filed.**

Employment relationship problem

[1] Avinash Jhorad alleges he was unjustifiably dismissed on or about 8 July 2016. He also seeks payment of wage arrears for unpaid salary and holidays.

[2] Mr Jhorad was employed as a waiter by Café Ephesus Limited (CEL) in August 2010. CEL is a café business located in Rotorua. It is accepted he was dismissed on 8 July 2016 following an altercation about leave and behaviour.

Determination

[3] On 8 July 2016 an argument arose regarding Mr Jhorad's leave. He had requested time off to visit a specialist in Tauranga on Saturday. Saturday was his usual day of work. Nayazi Gunaydin, CEL director, did not accept the reason for leave. This is because he did not believe that Mr Jhorad had an appointment to see the specialist on a Saturday at Tauranga hospital as opposed to in Rotorua where the Café is located.

[4] From the evidence both men continued arguing about the leave throughout the day. Eventually Mr Gunaydin agreed to give Mr Jhorad two weeks leave starting Saturday.

[5] My impression from the evidence was Mr Jhorad was not particularly happy with Mr Gunaydin. At the end of his shift he obtained a takeout and then returned to

the Café to eat the meal. He was also drinking alcohol obtaining a glass of whisky from the Café.

[6] It appears an altercation occurred at the Café between Mr Jhorad and Mr Gunaydin. Mr Jhorad believed it was about his alleged non-payment for the whiskey. Mr Gunaydin says it was about Mr Jhorad's behaviour towards his manager and himself. Mr Jhorad was asked to leave but would not. Mr Gunaydin threatened to call the Police. Instead of leaving, Mr Jhorad remained. He finished his drink, took the glass back into the café and then left.

[7] In my view, this altercation could have been misconduct. There was a direction to leave the premises and his remaining on the premises to drink his whisky before leaving. An employer would have had a good reason to start a disciplinary process.

[8] However, that is not what happened. Instead, when Mr Jhorad returned on 14 July to pick up his pay cheque, he was handed a dismissal letter. The letter was signed by Mr Gunaydin and stated that:

Due to disrespectful behaviour we are informing you that we are terminating your employment and giving you two weeks notice from 8 July 2016 after that no services will be provide by the Café Ephesus Limited.

[9] The date of 8 July was later amended by hand to 14 July after Mr Jhorad pointed out to Mr Gunaydin that he was only receiving the letter on 14 July and therefore the date of the 8th was unfair.

[10] The onus is upon CEL to show the dismissal was what a fair and reasonable employer could have done in all the circumstances. There is a statutory test that all employers are required to meet. This is set out in s.103A of the Employment Relations Act 2000 (the Act). That section requires that an employer investigate concerns, raise those concerns with the affected employee, give that affected employee an opportunity to respond and consider that response before dismissal occurs. It does not matter whether the dismissal is dealt with summarily or whether it occurs after two weeks' notice. All action, including dismissals undertaken by an employer must meet the tests of justification. Failure to meet any of the requirements in s.103A of the Act will make a dismissal unjustified.

[11] This action of dismissal does not meet the legal tests. I do not accept Mr Gunaydin's submission that because it was not a summary dismissal he was entitled to dismiss Mr Jhorad in this manner. He was not entitled to do so. The law required that he follow a fair and reasonable process. The respondent did not.

[12] In these circumstances, Mr Jhorad was unjustifiably dismissed.

Remedies

[13] I will determine the personal grievance remedies. Mr Jhorad seeks lost remuneration and compensation.

Lost remuneration

[14] The lost remuneration are wages from 8 July 2016 until hearing today 27 February 2017.

[15] The recovery of lost remuneration requires applicants to show that they have mitigated their losses. A failure to mitigate means an employee has not lost remuneration and therefore shall not be compensated.

[16] The evidence today shows that Mr Jhorad did not have a work visa. I understand he has applied and is waiting to hear about a visa on the basis of his relationship with his New Zealand citizen partner.

[17] He cannot have lost remuneration if he had no legal right to work in New Zealand. Even if he did have a right to work in New Zealand, there is no evidence he was searching for jobs. To prove mitigation of lost remuneration requires copies of applications for jobs, dates and evidence of interviews. None of that is before me. I suspect that may be because Mr Jhorad was unable to legally work in New Zealand until his visa status has been clarified. I decline to grant any lost remuneration.

Compensation

[18] Mr Jhorad seeks compensation for hurt and humiliation of \$10,000.

[19] He gave some evidence of his hardship. It centres primarily around his inability to work and the financial hardship that it has created for himself and his partner. He gave evidence of the effect of being unable to work through the loss of

his job. He is stuck at home which he finds both depressing and very difficult mentally. He has not required any medical assistance.

[20] The evidence of the level of hurt and distress would normally attract compensation of approximately \$5,000. That would be subject to any reduction for contributory conduct.

Contributory conduct

[21] I am required in awarding any damages for personal grievances to consider whether the applicant has contributed towards the personal grievance arising. Their conduct must be both causative of the personal grievance and blameworthy.

[22] There is contributory conduct that was both causative and blameworthy. This is based upon my above findings about Mr Jhorad's conduct. It was causative of the decision to dismiss. It contributed towards it. It was blameworthy. There had been previous warnings, albeit verbal, about similar misconduct. There was a previous verbal warning about his behaviour and misuse of the café premises to fund a private party. There was also a verbal warning about non-compliance with a direction not to eat leftover food from the café. In my view, this justifies a reduction of 50%.

[23] In respect of the personal grievance the following orders are made:

- (a) Avinash Jhorad was unjustifiably dismissed by Café Ephesus Limited.
- (b) Café Ephesus Limited is to pay Avinash Jhorad the sum of \$2,500 incorporating a 50% reduction due to contributory conduct pursuant to s.125 of the Act.

Wages

[24] There is still the matter of outstanding wages. It is accepted Mr Jhorad is owed unpaid wages of \$3,274. These are due and owing.

[25] Initially there had been an agreed figure for annual leave. That is no longer the case because Mr Gunaydin, on behalf of the respondent, states that he has in fact paid more than the originally disclosed. However, there is no evidence of payment before me.

[26] I have declined to adjourn this hearing further to allow Mr Gunaydin an opportunity produce evidence of payment. He can produce that directly to the applicant's advocate to prevent enforcement if that is what is required.

Annual Leave

[27] Accordingly, I will be determining the issue of liability for annual leave. There are no leave records. I accept Mr Jhorad's evidence that he did not take any leave during the period of time he was employed. He was employed from 8 August 2010 until his dismissal on 8 July 2016. Accordingly there are 5 years 11 months (approximately) that he was employed.

[28] The Holidays Act 2003 requires me to calculate his annual leave at the average weekly wage he would have received at the end of his employment for each 12 month period anniversary. It seems relatively well accepted that he would have received on average \$675 gross each week at termination. Over 5 years 11 months he would have been entitled to 20 weeks annual leave and 8% of the gross earnings for the last 11 months.

[29] Mr Jhorad has produced to me evidence from his IRD records showing that he earned \$28,513 gross for the period of 8 August 2015 until 8 July 2016. 8% of \$38,513 is \$3,081.04. 20 weeks leave at \$675 per week is \$13,500. The total amount of annual leave owed to Mr Jhorad is \$16,581.04.

[30] Mr Jhorad accepts that he has received payments of \$6,469.31 for annual leave. This leaves an outstanding amount of \$10,111.73.

Public holiday leave

[31] This was the principle dispute between the parties. There was no agreement about how much public holiday leave was owed. There is no legally compliant leave record. Leave paid was recorded on the back of timesheets. This leave record was not in any great state for me to be able to determine the public holiday worked and the correct amount paid. It is conceded if he worked a public holiday he is still owed a day in lieu unless otherwise noted below.

[32] I have determined that Mr Jhorad did work the following public holidays:

2010 No public holidays

2011 2 public holidays

- 2 January (day after new year's day) and 6 February (Waitangi Day)

2012 No public holidays

2013 3 public holidays

- 2 January (day after new year's day), 29 April (Good Friday) and 26 December (Boxing Day)

2014 7 public holidays

- 1 January (new year's day), 2 January (day after new year's day), 6 February (Waitangi Day), 18 April (Good Friday), 21 April (Easter Monday), 25 April (ANZAC day) and 26 December (Boxing Day)

2015 6 public holidays

- 1 January (new year's day), 2 January (day after new year's day), 6 February (Waitangi Day) and 3 April (Good Friday)
- 25 April (ANZAC day – Monday-ised to 27 April and paid a day in lieu), 26 December (Boxing Day - Monday-ised to 28 December and paid a day in lieu).

2016 7 public holidays

- 1 January (new year's day), 2 January (day after new year's day - Monday-ised to 4 January and paid for the day in lieu), 6 February (Waitangi Day - Monday-ised to 8 February paid for the day in lieu), 25 March (Good Friday), 28 March (Easter Monday), 25 April (ANZAC day), 6 June (Queen's Birthday).

[33] I have not in the time and resources available been able to turn my mind to the effect of Monday-isation upon the correct rate to be paid. Given we are now at 3.15 in the afternoon in the District Court in Tauranga where I do not have ready access to the necessary legislation, there seems little point in holding the parties back to determine that matter. Both can confer about the rate paid to Mr Jhorad for working the above public holidays.

[34] If there remains an issue about the amounts received and yet to be paid for work on the actual public holiday day, I will give the parties an opportunity to address me about that. I will give the parties 14 days to discuss between themselves whether agreement is possible.

[35] The following orders are made in respect of wages:

- (a) Café Ephesus Limited is to pay Avinesh Jhorad salary arrears of \$3,274 pursuant to s.131 of the Employment Relations Act 2000.
- (b) Café Ephesus Limited is to pay Avinesh Jhorad annual leave owed of \$10,111.73 pursuant to s.131 of the Employment Relations Act 2000.
- (c) The parties are directed to file submissions within 28 days if agreement is not reached between them regarding the outstanding money owed for the public holidays. The parties must specifically address:
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 - ii. What wages were received for working on the above public holidays and what is still owed?
- (d) Costs are reserved. If the parties are unable to agree costs, costs submissions within 28 days should be filed.

T G Tetitaha
Member of the Employment Relations Authority