

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 117/09
5115735

BETWEEN SUNISA JOLLY
 Applicant

AND SERAI LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Ian Thompson, for Applicant
 Richard Tapper, for Respondent

Investigation Meeting: Interview with Sunisa Jolly on 19 May 2009
 Interview with Richard Tapper on 27 July 2009

Determination: 30 July 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Jolly), alleges that she was unjustifiably dismissed on 3 January 2008 and that she was also unjustifiably disadvantaged. Those allegations are resisted by the respondent (Serai).

[2] Ms Jolly applied for a position as a waitress in Hanmer over the internet. The employer was Serai. At the time of her application, both she and her husband were in gainful employment in Nelson, although Ms Jolly told me that she had suffered an accident and was in the process of recovering from that at the point at which she applied for the job at Hanmer.

[3] Ms Jolly and her husband travelled to Hanmer and met Serai's director, Mr Tapper, after the email exchange. Ms Jolly was offered employment as a waitress by Serai and Mr Jolly was given a short term contract by Serai completing the painting of the new Serai premises.

[4] Ms Jolly commenced employment with Serai in mid-December 2007, shortly before the restaurant to be operated by Serai opened on 19 December 2007. Mr Tapper's evidence is that throughout the very brief employment relationship, he sought the appropriate details from Ms Jolly concerning her Inland Revenue Department number and her entitlement to work in New Zealand. Ms Jolly was born in Thailand but she told me unequivocally that she had had New Zealand residence since marrying her New Zealand husband in 2003, and that she obtained New Zealand citizenship in 2007. However, Mr Tapper is adamant that he was not aware of those facts, and in particular did not understand that marriage to a New Zealand national of necessity creates an entitlement for a foreign national to reside in this country.

[5] Furthermore, Ms Jolly was firm that she had provided Mr Tapper with her IRD number and he was equally certain she did not. The essence of the dispute between the parties revolves around the provision (or the lack of it) of these two pieces of information the IRD number and the right to work in this country. It was on the basis of Mr Tapper's conviction that he had not been provided with this information that he indicated to Ms Jolly that he could no longer continue to employ her.

[6] Sadly, this is a straightforward case of credibility where each party is adamant they behaved correctly and the other is to blame. There is no other evidence to assist the Authority in reaching any conclusion in the matter. Ms Jolly was understandably upset about the loss of her employment, particularly as it was difficult for her to find fresh employment in Hanmer, although she has now done so. Indeed, she seems to be successfully running her own restaurant now and she is to be commended for that. Conversely, Mr Tapper impressed me as a straightforward witness whose evidence had the ring of truth about it.

[7] On balance, it seems to me more rather than less likely that Mr Tapper's evidence is to be preferred. I accept his evidence that he did not know the significance of Ms Jolly being married to a New Zealand national for the purposes of giving her the right to be in New Zealand. The contention that Mr Tapper would be untruthful about the issue of the IRD number seems too fanciful to be true. Mr Tapper's company was, at the relevant time, the owner/operator of an ethnic restaurant and Ms Jolly would have been an absolutely ideal participant in that venture as she had all of the requisite skills and was well recommended by her

previous employer. In those circumstances, it seems inconceivable that Mr Tapper would have invented the story that he had not been provided with those key details. Certainly, I reject entirely the suggestion that Ms Jolly was dismissed because Mr Tapper had too many employees. The evidence does not suggest that was the position at the point that Ms Jolly's employment was brought to an end. Indeed, the converse appears to be the case; Ms Jolly's departure would, I fancy, have been a nuisance to Mr Tapper rather than a blessing.

[8] However, Mr Tapper was adamant that he could not continue to employ Ms Jolly in circumstances where there appeared to be a lack of clarity about her entitlement to work in New Zealand and her IRD number. I do not think that Ms Jolly deliberately kept that information from Mr Tapper, but I am disposed to think there was a breakdown in communication between the two of them on those points. I do not think that that breakdown makes Mr Tapper culpable for the subsequent dismissal. It seems to me that Mr Tapper acted in good faith in declining to continue Ms Jolly's employment in circumstances where he thought that, if there was a question about her entitlement to work in New Zealand, and about the provision of her IRD number, he could effectively get himself into difficulty.

[9] In a practical sense, I am reinforced in the conclusion that there ought to be no culpability sheeted home to Serai because I accept, on the evidence I heard, that Mr Tapper is personally insolvent and that Serai Limited, although still a registered entity, is effectively a shell, the business in which Ms Jolly worked having already failed.

Determination

[10] I am not satisfied that there is any personal grievance here. I think on the evidence I heard, there was some sort of misunderstanding or failure of communication between Mr Tapper and Ms Jolly, the upshot of which was that Mr Tapper was convinced that he could no longer continue to legally employ Ms Jolly.

[11] As I noted above, if I am mistaken in those conclusions, the practical reality is that Mr Tapper is personally insolvent and Serai Limited's business has already failed so there is no source upon which to pay compensation wages or other costs.

Costs

[12] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority