

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 145
5644327

BETWEEN ANKIT MALAWALIYA
Applicant
AND ANJANI LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Patrick Lee-Lo, Advocate for Applicant
Annie Talakai & Raj Singh, Counsel for Respondent
Investigation Meeting: 6,11&12 April 2017 at Auckland
Submissions received: 15 March 17 from Applicant
28 March 17 from Respondent
Determination: 15 May 2017

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Ankit Malawaliya, claims that he was unjustifiably dismissed by the Respondent, Anjani Limited (Anjani).

[2] Mr Malawaliya also claims that he is owed unpaid wages and holiday pay entitlement by Anjani.

[3] Anjani accepts that it owes Mr Malawaliya holiday pay, but denies that it owes Mr Malawaliya any monies in respect of unpaid wages.

[4] Anjani further denies that it dismissed Mr Malawaliya, and claims that his employment was terminated by abandonment.

Issues

[5] The issues for determination are whether or not Mr Malawaliya:

- was unjustifiably dismissed or did he abandon his employment
- is owed monies in respect of unpaid wages
- is owed holiday pay

Background Facts

[6] Mr Malawaliya arrived in New Zealand in February 2013 on a student visa in order to study for a Diploma in Business Studies. During his study period he had a number of part-time jobs, including an internship with Barfoot and Thompson, as a visa advisor, and as a garage attendant. He had been provided with individual employment agreements whilst employed in those positions.

[7] In May 2015 Mr Malawaliya said he was offered full-time employment as an Assistant Manager at Shamiana (the restaurant), a fast food restaurant outlet owned by Anjani and located in the food court in a shopping mall.

[8] Anjani is owned by Mr Anil Kumar, sole director and shareholder, who at the date Mr Malawaliya was employed was also the chef at the restaurant. Apart from Mr Kumar and Mr Malawaliya, Mr Kumar's wife worked on a part-time basis at the restaurant during the busy lunch times.

[9] During the first day of the Investigation Meeting on 6 March 2017, Mr Malawaliya was asked if he had been provided with an employment agreement when he commenced work at Anjani. He said he had not been given an employment agreement although he had asked for one, Mr Kumar stating that he would provide one to him subsequently.

[10] However it transpired that Mr Malawaliya had applied for a work visa with New Zealand Immigration (NZ Immigration). Attached to the Visa application documentation which I had requested and which was supplied prior to the resumed Investigation Meeting on 11 March 2017, was a copy of an individual employment agreement (the First Employment Agreement). This included the following clauses:

1.1 Position

The Employee is being employed as Assistant Manager.

2.1 Individual Agreement of Ongoing and Indefinite Duration

... This agreement is ongoing for you only if you have valid work visa the entire time or residence visa.

5.1 Full Time Hours of Work

The Employee's hours of work will be 32 hours per week on Mondays to Saturday.

5.2 Lunch Breaks

The Employee shall be entitled to a lunch break on each working day of employment, of 30 minutes, to be taken at 12.00pm or such other time as the parties agree from time to time.

5.3 Tea Breaks

The parties agree that the Employee shall be entitled to a tea break of 10 minutes at 1pm and 4pm.

6.1 Wage Packet

The employee shall be paid according to an hourly rate which shall be \$17.00 per hour.

12.1 General Termination

The employer may terminate this agreement for cause, by providing three weeks' notice in writing to the Employee. Likewise the Employee is required to give three weeks' notice of resignation.

[11] Both Mr Kumar and Mr Malawaliya had signed the First Employment Agreement on 1 July 2015. Mr Malawaliya had signed beneath the statement:

I, Ankit, declare that I have read and understand the condition of employment detailed above and accept them fully. I have been advised of the right to seek independent advice in relation to this agreement, and have been allowed reasonable time to do so.

[12] Mr Kumar said that he had initially offered Mr Malawaliya the position of Supervisor at the restaurant; however Mr Malawaliya informed him that he needed a different job title in order to comply with NZ Immigration requirements for a work visa as a skilled migrant. It is alleged that the First Employment Agreement had therefore been drafted by an Immigration Consultant engaged by Mr Malawaliya to comply with this requirement.

[13] During January 2016 Mr Malawaliya took extended leave to return to India, and did not return to work at the restaurant until early March 2016.

[14] During June 2016 Mr Malawaliya was promoted to Restaurant Manager and was issued with an individual employment agreement (the Second Employment Agreement) which included the following clauses:

1.1 Position

*The Employee is being employed as **Restaurant Manager**.*

2.1 Individual Agreement of Ongoing and Indefinite Duration

... This agreement is ongoing for you only if you have valid work visa the entire time or residence visa.

5.1 Full Time Hours of Work

The Employee's hours of work will be 40 hours peer week on Mondays to Saturday.

5.2 Lunch Breaks

The Employee shall be entitled to a lunch break on each working day of employment, of 30 minutes, to be taken at 12.00pm or such other time as the parties agree from time to time.

5.3 Tea Breaks

The parties agree that the Employee shall be entitled to a tea break of 10 minutes at 1pm and 4pm.

6.1 Wage Packet

The employee shall be paid gross annual salary of \$40,040 equivalent to 19.25 per hour.

12.1 General Termination

The employer may terminate this agreement for cause, by providing three weeks' notice in writing to the Employee. Likewise the Employee is required to give three weeks' notice of resignation.

[15] Both Mr Kumar and Mr Malawaliya signed the Employment Agreement on 13 June 2016. Mr Malawaliya had signed beneath the statement:

I, Ankit, declare that I have read and understand the condition of employment detailed above and accept them fully. I have been advised of the right to seek independent advice in relation to this agreement, and have been allowed reasonable time to do so.

[16] Mr Malawaliya said his promotion to Restaurant Manager was because Mr Kumar was recruiting a chef, and he was going to be away from the restaurant regularly, therefore he (Mr Malawaliya) was to take responsibility for the restaurant.

[17] Mr Kumar said that Mr Malawaliya had asked to be made a Restaurant Manager as he intended to apply for permanent residency in New Zealand and the job title of Assistant Manager would not meet the Immigration requirements.

[18] During July 2016 a distant relative of Mr Kumar's, Janardhan, joined the restaurant and began working as the chef. Mr Kumar said he had employed Janardhan as he had been working 7 days a week and wanted to spend time with his family.

Working Hours

[19] Despite the First Employment Agreement stating that he worked 32 hours per week, Mr Malawaliya said he commenced work at 8.00 a.m. each day, working 6-7 days a week during which time he performed various duties in order to make ready the restaurant for business, these duties included cutting and preparing chicken. Mr Malawaliya claimed that he was not remunerated for these additional hours worked.

[20] He also claimed that he was required to work through his contractual break times without remuneration.

[21] This situation did not change after his working hours increased to 40 per week upon his promotion to Restaurant Manager.

[22] Mr Malawaliya, who was paid by direct bank transfer to his bank account, had not been provided with payslips recording the hours worked. He did not complete timesheets and had kept no record of the hours he worked each day.

[23] Mr Kumar said he had offered to provide Mr Malawaliya with payslips, however he had said that he did not want one providing that his payment went into his bank account.

[24] Mr Kumar said that the busy times in the restaurant were from 11 a.m. to 2.30 p.m. He agreed that Mr Malawaliya would arrive at the restaurant before his expected commencement time of 10.30 a.m. each day, but said that he was not required to do so, and that he did so in order to cook himself breakfast, the food being provided by the restaurant. Frequently Mr Kumar would cook breakfast for them both as he arrived at 9.00 a.m. to prepare the restaurant food.

[25] He said that Mr Malawaliya was not required to prepare chicken as that was the work of the chef, which he himself did when he arrived in the morning. There was no requirement to undertake any work earlier than this since the restaurant did not become busy before 11 a.m.

[26] Ms Sarita Bardoni, wife of Mr Kumar, worked from 11.00 a.m. to 3.00 p.m. each day, working alongside Mr Malawaliya serving customers during the restaurant busy times. She said that she had never been requested to start work early as there was no work for her to do as the restaurant did not get busy until after 11.00 a.m. with only 1 or 2 customers prior to that time.

[27] Ms Bardoni said that Mr Malawaliya was not required to, and did not, prepare food as he was not a chef.

[28] Although Mr Kumar subsequently provided wage and time records to establish that Mr Malawaliya had worked only the contractual hours of 32 per week prior to June 2016 and 40 hours per week thereafter, he had not kept contemporaneous time and wage records, relying upon his memory to advise his accountant of the hours Mr Malawaliya worked each week.

[29] There were three witnesses who provided evidence in support of Mr Malawaliya's claim that he worked in excess of his contractual hours.

Mr Amandeep Singh

[30] Mr Amandeep Singh worked in a kebab restaurant in the same food court as Mr Malawaliya. He said he worked either 3 or 4 days a week commencing at 9.00 a.m. When he arrived he saw Mr Malawaliya in the restaurant, sometimes he was in the kitchen area, but he could not see into the kitchen to see if he was alone.

[31] He and Mr Malawaliya ate lunch together on the days he worked.

Mr Gobind Singh

[32] Mr Gobind Singh worked as a cleaner in the shopping mall during the time of Mr Malawaliya's employment at the restaurant. He worked 7 days a week. He started work at 9.00 a.m. on a Monday, but worked in the afternoon or evening on other days, unless he was asked to work during a special event at the shopping mall.

[33] Mr Singh said he saw Mr Malawaliya working when he arrived at 9.00 a.m., on the counter or in the back area of the restaurant. He sometimes joined Mr Malawaliya when he took a break.

Mr Ben Cartmell

[34] Mr Ben Cartmell worked as a sales assistant at a shop in the shopping mall during the time of Mr Malawaliya's employment at the restaurant. He confirmed that he was a good friend of Mr Malawaliya and that as it was relatively quiet in their work place; he and Mr Malawaliya often chatted together and travelled by the same bus at the end of each working day.

[35] Mr Cartmell commenced work at 9.00 a.m. Monday to Friday, but arrived before that time to attend the gym which was located in the shopping mall. At that time he said he saw Mr Malawaliya preparing food at the restaurant. During that time he saw only Mr Malawaliya at the restaurant.

Raising of concern

[36] Mr Malawaliya said he had raised his concern about working long hours without being paid for the additional hours, but Mr Kumar had always reassured him that he would: "*look after him*".

[37] Mr Kumar denied that Mr Malawaliya had raised any issues concerning his hours of work or pay prior to August 2016.

Loan/Advances

[38] Mr Kumar said he had provided Mr Malawaliya with an amount of \$1,500.00 during October 2015 to assist him financially because he intended to apply for a Visa credit card account. However Mr Kumar also stated that in October 2015 he paid Mr Malawaliya an amount in respect of holiday pay. An amount of \$1500.00 in cash was in fact paid to Mr Malawaliya, who agreed that he had received the loan of \$1,500.00 which he stated he understood to be in respect of his holiday entitlement pay..

[39] Mr Kumar said he made other loans to Mr Malawaliya including one of \$500.00 on 18 January 2016 and one of \$200.00 on 8 August 2016. There was no agreement as to repayment terms and no documentation in connection with any of these loans.

Events in August 2016

[40] On or about early August 2016 Mr Kumar said he had asked Mr Malawaliya when he intended to make repayment of the loans/advances he had made to him.

[41] Mr Malawaliya confirmed at the investigation Meeting that there had been an argument about repayment of the loan monies on or during July or August 2016.

[42] As he had received no response to his request regarding repayment of the loans/advances, Mr Kumar made no wages payment to Mr Malawaliya on 3 August 2016 which is contrary to s 4 of the Wages Protection Act 1983. Mr Malawaliya had complained so Mr Kumar made him the loan of \$200.00 on 8 August 2016 in order that he could pay his rent. Mr Malawaliya's wages due on 11 August 2016 were paid as usual.

[43] On or about this time Mr Malawaliya made contact with Mr Lee-Lo who began acting as his representative in his dealings with Anjani.

[44] On or about 10 August 2016 Mr Kumar said Mr Malawaliya had called him and asked to meet with him to talk about his salary. During that meeting Mr Malawaliya had secretly recorded the conversation during which he said there was a reference to Mr Malawaliya making Mr Kumar a payment of \$20,000.00 in return for helping him achieve permanent residency. The translated transcript of the recording (translated by an interpreter at the Investigation Meeting) stated:

... When you apply for visa I told you to give me an advance. As when we hire a house we first pay rent and then move in, similarly here it also works like that. So I told you to pay in advance as I knew from day one that your financial situation is not good. I calculated all and told you there and then.

But I said that I can't give money as I don't have it.

Even then I want in advance.

This means I am committed to you

Yes if you want PR. OK I pay your full taxes then you will pay me 20000 (Twenty thousand)

Why should I pay 20000. I am working here 24/7 for you.

[45] Mr Kumar said the reference to 'PR' and a \$20,000.00 payment was a reference to a matter involving another person, and said that there would have been no point in him demanding a \$20,000.00 payment from Mr Malawaliya who was unable to repay him the much smaller sums of money he had lent him.

[46] The following day, 11 August 2016, Mr Malawaliya, accompanied by Mr Lee-Lo who was acting as his representative, met Mr Kumar at the restaurant to discuss Mr Malawaliya's work issues.

[47] Mr Kumar said that he had been presented with a claim for \$35,000.00 on behalf of Mr Malawaliya who threatened that the restaurant would be closed if he did not pay the amount claimed.

[48] Mr Malawaliya said Mr Lee-Lo had asked Mr Kumar why he had asked for \$20,000 from Mr Malawaliya who had responded that that had been related to another person. The meeting had become heated and ended with an expectation that Mr Kumar would respond to the issues discussed within a few days.

[49] There was no response received from Mr Kumar and on 16 August 2016 Mr Lee-Lo wrote to Mr Kumar noting the failure to respond and advising him that Mr Malawaliya would be filing a personal grievance with the Authority.

Meeting on 18 August 2016

[50] The next meeting took place on 18 August 2016. Mr Kumar claimed that Mr Malawaliya had been absent for some days during the intervening period, Mr Malawaliya said he had been absent on his usual days off and an additional one day of sick leave.

[51] During the morning of 18 August 2016 Mr Malawaliya said he had been working as normal when Mr Kumar told him he was not feeling comfortable with him and told him to go away. When Mr Malawaliya asked why he should leave, Mr Kumar had told him to go as otherwise he would be: "*thrown away*".

[52] Mr Kumar said Mr Malawaliya had reported as usual for work on the morning of 18 August 2016 but his attitude had been poor and resulted in customer complaints. As a result he had spoken to Mr Malawaliya about the customer service and also asked if he had a plan to return the loan amounts.

[53] Mr Malawaliya had argued with him in front of customers, so he told him to go and: “cool down”.

[54] Ms Bardoni said she had been working in the restaurant at the time the altercation took place. She said Mr Malawaliya had been angry because Mr Kumar had asked him to return the borrowed money, and she heard Mr Kumar telling him to go and: “cool down”.

[55] Janardhan said Mr Malawaliya had been in a bad mood when he arrived at work on the morning of 18 August 2016. He saw him having an argument with Mr Kumar and heard Mr Kumar telling him to go and return when his mood was better. Mr Malawaliya had then run to the kebab shop where Mr Amandeep Singh worked and made a call on his mobile telephone.

[56] A little later Mr Malawaliya had returned to Anjani’s premises in the shopping mall accompanied by Mr Lee-Lo who asked Mr Kumar why Mr Malawaliya had been dismissed.

[57] Mr Kumar said he had been serving a customer when Mr Malawaliya and Mr Lee-Lo arrived at the restaurant. He had told Mr Lee-Lo that the restaurant was busy and asked him to leave his business card and they would talk when he was free. However they had followed him to the kitchen door and the exchange had become extremely heated.

[58] Ms Bardoni said she had become scared during the altercation.

[59] It had ended by Mr Kumar calling the Mall security to advise them what was occurring and security personnel subsequently escorting Mr Malawaliya and Mr Lee-Lo from the shopping mall.

[60] As Mr Malawaliya did not return to work after 18 August 2016, Mr Kumar said he made two attempts to contact him by telephone and ascertain the reason for his absence, but there was no reply. He did not leave a message and there was no reply call.

Determination

Was Mr Malawaliya unjustifiably dismissed by Anjani or did he abandon his employment?

[61] Mr Malawaliya claims that he was dismissed by Mr Kumar. Mr Kumar claims Mr Malawaliya abandoned his employment. I find that the incident on 18 August 2016 which is the pivotal point for this issue was the culmination of events that came to a head at that date.

[62] There is no documentary evidence prior to the termination of Mr Malawaliya's employment that is of assistance, and therefore I take into consideration the evidence provided by the participants.

[63] I find that there were inconsistencies in Mr Malawaliya's evidence. His original statement on the first day of the Investigation Meeting was that he was not provided with an employment agreement. However one was subsequently provided as part of my request for Mr Malawaliya's work visa application documentation.

[64] Whilst Mr Malawaliya later clarified that he had meant that he did not have an employment agreement until after he had been employed for a few weeks, I find his initial evidence on that issue to have been unreliable.

[65] I also note Mr Malawaliya's evidence that he believed that after Janardhan was appointed as chef, he was no longer required. I find this does not accord with his evidence that his promotion to Restaurant Manager in June 2016 was because a chef had been appointed and Mr Kumar was intending to be away from the restaurant on a regular basis as a result of which he was required to manage it.

[66] The evidence is that the working relationship between Mr Malawaliya and Mr Kumar was good prior to August 2016. There were no issues concerning wage payments, Mr Malawaliya's salary was being paid into his bank account regularly until August 2016, and there was no problem with Mr Malawaliya taking a period of extended holiday leave from the restaurant between January and March 2016.

[67] The event that appeared to give rise to the change in the relationship between Mr Malawaliya and Mr Kumar was the request by Mr Kumar that Mr Malawaliya should make a proposal for the repayment of the monies he had borrowed.

[68] This request was followed by the meeting between Mr Malawaliya and Mr Kumar on 10 August which was recorded by Mr Malawaliya unknown to Mr Kumar. In this meeting there is clear reference to the loan made in October 2015 which was to assist Mr Malawaliya with a visa credit card application and repayment.

[69] I find the reference to: "PR" and to: "*pay me 20000*" to be unclear. Mr Malawaliya's evidence was that Mr Kumar was asking him for \$20,000.00 in return for assisting him obtain permanent residency, Mr Kumar's evidence was that it would not have made sense for him to make such a demand given Mr Malawaliya's inability to repay the amounts he owed him.

[70] I find no clear evidence that a demand for an employment premium was being made by Mr Kumar on 10 August 2016.

[71] By 18 August 2016 I observe that emotions would have been high between the parties. That morning the evidence is that Mr Kumar made a further request for a plan from Mr Malawaliya to repay the loan amounts which resulted in the initial confrontation in the restaurant vicinity. During this confrontation Mr Malawaliya left the restaurant.

[72] The evidence of Mr Kumar, Ms Bardoni and Mr Janardhan was that Mr Malawaliya had been advised to 'go and cool down'. Mr Malawaliya said that he had been told to go away. He had left and informed Mr Lee-Lo that he had been dismissed and returned with Mr Lee-Lo who confronted Mr Kumar and asked why Mr Malawaliya had been dismissed.

[73] Following the confrontation on 18 August 2016 Mr Malawaliya did not return to Anjani's premises, nor did he contact Mr Kumar, although Mr Lee-Lo did so on his behalf.

[74] Mr Kumar's claim is that Mr Malawaliya abandoned his employment on 18 August 2016.

[75] Mr Kumar did not communicate in writing with Mr Malawaliya after 18 August 2016, although he claimed that he had tried unsuccessfully to contact him by telephone, but without making contact or leaving a message.

[76] In order to substantiate Mr Kumar's evidence relating to the telephone calls he allegedly made to Mr Malawaliya, I required that the relevant telephone logs were to be produced. The Vodafone telephone logs covering the period 1/08/16 to 31/8/16 were duly submitted into evidence on 5 May 2017.

[77] No explanation or identification of any telephone calls made to Mr Malawaliya or his representative was provided by Mr Kumar or his counsel, indeed Mr Lee-Lo assisted the Authority by identifying Mr Malawaliya's telephone number.

[78] According to the information provided by the telephone logs, Mr Kumar did not make any telephone call to either Mr Malawaliya or Mr Lee-Lo during the period 18 to 31 August 2016.

[79] The Court of Appeal in *E N Ramsbottom Ltd v Chambers*¹ accepted a submission that an employer must be cautious in drawing the inference that an employee has abandoned their

¹ [2000] 2 ERNZ 97

employment and that it faces a high threshold if contending that the employment ended at the employee's initiative.

[80] Mr Malawaliya was in the situation on 18 August 2016 in which, because his work visa allowed him only to work for Anjani, he had no immediate alternative employment in prospect, he was clearly financially challenged in his personal circumstances.

[81] In these circumstances whilst I accept that there may have been a misunderstanding as to whether or not the sending away was temporary or permanent as Mr Malawaliya understood it to be. If, as Mr Kumar stated, he believed that Mr Malawaliya had abandoned his employment, the onus was on Anjani to ascertain the reason why Mr Malawaliya did not subsequently attend for work by making a determined effort to contact him. There is no evidence that it did so. Nor did it write to him confirming the final payment details.

[82] I consider that Anjani's actions were not consistent with those of an employer holding the belief that the employee had abandoned their employment, and that Anjani terminated Mr Malawaliya's employment.

[83] I find that Mr Malawaliya was unjustifiably dismissed by Anjani.

[84] Mr Malawaliya has been unjustifiably dismissed and he is entitled to remedies.

Remedies

Lost Wages

[85] Mr Malawaliya was unemployed from 18 August 2016 until he obtained alternative employment on 23 December 2016.

[86] According to the copy work visas supplied to the Authority Mr Malawaliya had, when he commenced working for Anjani, a valid work visa covering the period 20/8/2014 to 20/8/2015, which allowed him to work for any employer in New Zealand. A replacement work visa was issued on 22/6/2015 valid until 20/6/2017, which allowed him to work only as an Assistant Manager for Anjani Limited. This visa was replaced by a further work visa issued on 20/6/2016 valid until 22/7/2017 which allowed him to work only as a Restaurant Manager for Anjani.

[87] Mr Malawaliya was dismissed on 18 August 2016, and because his work visa was based on his employment with the Anjani, the loss of his job meant he no longer met the necessary criteria to enable him to work or in fact remain in New Zealand. This required Mr Malawaliya to apply for a visitor visa to enable him to lawfully remain in New Zealand

pending the issuing of a further work visa. A visitor's visa was issued to Mr Malawaliya on 15 November 2016 valid until 15 February 2017; however that did not allow him to undertake employment in New Zealand.

[88] Mr Malawaliya claims that it took five months from the date of his dismissal until he obtained a further valid work visa however there is no evidence supplied that he endeavoured to obtain an interim work visa covering that period.

[89] Employees are under a duty to mitigate their loss following the unjustifiable termination of their employment. Mr Malawaliya has provided evidence that he actively applied for some positions following the termination of his employment. However, the failure to obtain alternative work was due to the fact that he was not legally entitled to work in New Zealand, which I find was caused by his unjustified dismissal.

[90] Mr Malawaliya has previously had three New Zealand work visas, and therefore during the immediate two or three days following his sending away he would have been aware that without a valid work visa he would be unable to undertake legal employment, or in fact remain in New Zealand, but no evidence has been supplied that he approached, made contact with Mr Kumar to establish his employment status, or attempted to return to his employment rather than just pursuing legal remedies.

[91] Having fully considered this issue and all the circumstances, I order that Anjani pay Mr Malawaliya the sum of \$10,010.00 gross for lost earnings for a period of 13 weeks pursuant to s 128(2) of the Act.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[92] Mr Malawaliya said that he felt humiliated by what had occurred at Anjani and resulted in the termination of his employment. He had been depressed following the termination of his employment and concerned for his family.

[93] I order Anjani to pay Mr Malawaliya the sum of \$8,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[94] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[95] Mr Kumar and Mr Malawaliya were involved in a heated altercation prior to the sending away of Mr Malawaliya. Both parties were agitated and I consider that what occurred was as a result of a situation in which both felt aggrieved, and which was provoked by the conversations concerning repayment of the alleged loans. I find that as a result of this situation Mr Malawaliya contributed to the situation which resulted in the termination of his employment.

[96] I reduce the amount ordered as compensation pursuant to s.123(1)(c)(i) of the Act to be reduced by 40%.

Is Mr Malawaliya owed unpaid wages by Anjani?

1 Unpaid wages in respect of additional hours worked

[97] Mr Malawaliya is claiming that he is owed unpaid wages in respect of 59.5 hours he worked beyond his contractual hours and for which he received no remuneration.

[98] The standard of proof is on the balance of probabilities. There is a contradiction in the evidence of Mr Malawaliya, who claims he was working in the restaurant in excess of the hours for which he received payment, and that of Mr Kumar, who claims Mr Malawaliya was not required to arrive before his contractual start time, and that he was able to take his breaks as contractually agreed.

[99] I therefore must decide which version of events is the more likely to be true, examining all the evidence as presented.

Record of hours worked

[100] Anjani denies that Mr Malawaliya worked any hours in addition to those stated in the First and Second Employment Agreements, and has provided wage and timesheets in support of this. However at the Investigation Meeting Mr Kumar confirmed that these timesheets were of recent compilation and that at the relevant time he had supplied the hours worked information to the accountant to pay Mr Malawaliya from his memory.

[101] Whilst I accept that Mr Malawaliya was the sole employee for the majority period of his employment and he was paid on a weekly basis, a memory exercise would not have been a major exercise, the timesheets as provided are not contemporaneous documents, and therefore they are inconclusive as evidence.

[102] Mr Malawaliya did not complete timesheets and he kept no record of his worked hours. Nor was he able to provide to me a contemporaneous weekly breakdown of the times and days on which the claimed hours were worked

[103] I find there to be no compelling evidence of the hours claimed to have been worked and I find this evidence to be inconclusive.

Witness Evidence

[104] I have already observed in paragraphs [63] and [64] that there were inconsistencies in Mr Malawaliya's evidence which gives rise to some doubt on the veracity of his evidence in this area.

[105] I find the evidence of Mr Amandeep Singh, Mr Gobind Singh and Mr Cartmell to be inconclusive on the basis that:

- Mr Amandeep Singh only worked 3 or 4 days a week. On those days, whilst he said he saw Mr Malawaliya in the restaurant and kitchen, there is no evidence that Mr Malawaliya was not preparing breakfast for himself as claimed by Mr Kumar. Additionally his evidence supports that of Mr Kumar, namely that Mr Malawaliya did take breaks.
- Mr Gobind Singh only worked 1 morning a week, unless it was a special occasion such as Christmas. During those special occasion times I would expect him to have been very busy and not necessarily aware of Mr Malawaliya's activities.
- Mr Cartmell only saw Mr Malawaliya in the restaurant when he arrived at the shopping mall, despite Mr Kumar stating that he was present from 9.00 a.m. When he saw Mr Malawaliya in the restaurant, he was preparing food which I find to be inconclusive on the same basis as set out above.

[106] Mr Kumar and Ms Bardoni's evidence was that the restaurant was busiest between 11.00 a.m. and 2.30 p.m. and any food preparation was done by Mr Kumar as chef between 9.00 a.m. and 11.00 a.m.

[107] I observe that the restaurant was in the nature of a fast food outlet in the food court of a shopping mall, operating in accordance with the shopping mall operating hours. On that basis I find credible Mr Kumar and Ms Bardoni's evidence that customer demand prior to 11.00 a.m. was low. On that basis I find it less than probable that Mr Malawaliya was required to carry out tasks prior to 10.30 a.m. each day.

Documentation

[108] The witness and timesheet evidence I have found to be inconclusive. Proceeding therefore to examine the documentary evidence I note that the First and Second Employment

Agreements were entered into and signed by the parties, these set down the agreed contractual hours between the parties.

[109] The agreed salary payments were made directly into Mr Malawaliya's bank account and the IRD payments made by Anjani on his behalf accord with the contractual terms regarding remuneration.

[110] Mr Malawaliya stated that he had raised the issue of his wages payment with Mr Kumar on a number of occasions, and that Mr Kumar assured him that he would resolve this issue. Despite the situation apparently remaining unresolved, Mr Malawaliya had signed the Second Employment Agreement on 13 June 2016 beneath the statement:

I, Ankit, declare that I have read and understand the condition of employment detailed above and accept them fully. I have been advised of the right to seek independent advice in relation to this agreement, and have been allowed reasonable time to do so.

[111] I do not find that this supports his claim that he was dissatisfied with his situation.

[112] I have also taken into consideration the fact that the payments made into Mr Malawaliya's bank account and the IRD payments made by Anjani on his behalf accord with the contractual terms regarding remuneration.

[113] I have considered whether or not there had been duress on the basis of Mr Malawaliya's application for a work visa to make Mr Malawaliya sign the First and Second Employment Agreements. I find that the behaviour of the parties during the period of employment does not support a finding of duress. In particular when taken in balance with the facts:

- of the alleged loans made to Mr Malawaliya by Mr Kumar;
- that there was no objection to Mr Malawaliya taking a protracted period of leave from January to March 2016; and
- of Mr Malawaliya not disputing at the Investigation Meeting that the relationship between him and Mr Kumar had been good until August 2016.

[114] I find that on the balance of probability that Mr Malawaliya was paid in respect of the hours he worked for Anjani and his claim for payment in respect of additional hours worked but not remunerated is not established.

[115] I determine that Mr Malawaliya is not owed unpaid wages by Anjani in respect of additional hours worked.

2. Unpaid wages regarding non-payment of due wages

[116] Anjani in evidence and the Statement in Reply agreed that it owes Mr Malawaliya two weeks wages.

[117] Mr Malawaliya was not paid his weekly wages due on the 3 August 2016; however a payment of \$200.00, described by Anjani in the statement in reply as “an advance” was received by him on 10 August 2016. Mr Malawaliya’s net wage due was \$642.00.

[118] Mr Malawaliya, who I have held to have been unjustifiably dismissed on Thursday 18 August 2016, did not receive payment for his net wage of \$642.00 due on that date.

[119] I find that Anjani acted unlawfully in withholding Mr Malawaliya’s wages, and he is entitled to the outstanding wages due on 3 and 18 August 2016.

[120] I order that Anjani is to pay to Mr Malawaliya the amount of \$1,084.00 net as unpaid wages (calculated as twice \$642 less \$200 paid as an advance on 10 August 2016), and that Anjani is to account for the relevant tax and ACC due to the IRD.

Is Mr Malawaliya owed holiday pay by Anjani?

[121] At the Investigation Meeting Mr Kumar confirmed that he owed Mr Malawaliya holiday pay.

[122] Mr Malawaliya is entitled to annual holiday entitlement in respect of the period he worked for Anjani to 18 August 2016.

[123] Anjani is ordered to pay Mr Malawaliya any outstanding unpaid holiday pay for that period to be calculated in accordance with the Holidays act 2003.

[124] I note:

- 1) that Mr Malawaliya was not paid for the period of his extended leave from January to March 2016 and therefore that period is relevant and to be taken into consideration when calculating the amount due to be paid to him.
- 2) Mr Kumar's evidence is that he paid Mr Malawaliya: "*his first holiday pay when he asked me to take time off to travel to India*". I accept both Mr Malawaliya's and Mr Kumar's evidence on this matter; therefore the sum of \$1,500.00 is to be deducted from the gross holiday pay entitlement calculated to be to Mr Malawaliya.

[125] I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority.

Remedies

Summary of Orders

[126] The summary of orders made is as follows:

Unjustifiable Dismissal

- **I order that Anjani pay Mr Malawaliya the sum of \$10,010.00 gross for lost earnings for a period of 13 weeks pursuant to s 128(2) of the Act.**
- **I order Anjani to pay Mr Malawaliya the sum of \$8,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.**
- **I reduce the amount ordered as compensation pursuant to s.123(c)(i) of the Act to be reduced by 40%.**

Unpaid wages: non-payment of due wages

- **I order that Anjani is to pay to Mr Malawaliya the amount of \$1,084.00 net as unpaid wages (calculated as twice \$642 less \$200 paid as an advance on 10 August 2016), and that Anjani is to account for the relevant tax and ACC due to the IRD.**

Holiday pay

- **Anjani is ordered to pay Mr Malawaliya any outstanding unpaid holiday pay for that period to be calculated in accordance with the Holidays act 2003.**

Costs

[127] Costs are reserved. Given the extent to which both parties have been successful, I consider that this is an appropriate case for letting costs lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve the matter between them.

[128] If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[129] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority