

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 179
5554545

BETWEEN JOHN EDWARD MAXWELL
(LABOUR INSPECTOR)
Applicant

AND TASTE OF EGYPT LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Catherine Milnes, Counsel for Applicant
Tony Stallard, Counsel for Respondent

Investigation Meeting: 19 October 2015 at Nelson

Submissions Received: At the investigation meeting, along with further
information up to and including 28 October 2015

Determination: 19 November 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a claim for an order the respondent, Taste of Egypt Limited, pay unpaid wages to two ex-employees (Rohit Sharma and Gurpreet Singh). There is also a claim for interest on these amounts.

[2] There are further claims for penalties against Taste of Egypt for failing to pay minimum wages, failing to pay statutory holidays appropriately, failing to pay alternate holiday pay, failing to provide annual leave, failing to maintain individual wage and time records and failing to maintain leave records.

[3] Taste of Egypt denies the claims are valid, at least in respect of the quantum sought. In its Statement in Reply it says:

Certain money is due, and has been analysed insofar as documentation is available, and the figures, amounts and evidential basis upon which the claim is based is wrong.

[4] Taste of Egypt also relies on an allegation the Labour Inspector's investigation was inadequate and its conclusions not in accordance with the facts. In this respect, reliance is placed on the respondent's *evidence* and statements signed by both Mr Sharma and Mr Singh.

Conduct of the investigation

[5] Taste of Egypt did not approach this investigation in good faith.

[6] While Taste of Egypt provided a statement in reply it failed to provide statements of evidence apparently on the ground it did not wish to incur the cost thereof. It engaged in various initiatives designed to undermine the investigations of both the Labour Inspector and the Authority. It then added various accusations, mainly unsubstantiated, of misconduct against both its' two ex-employees and the Labour Inspector.

[7] Its actions included procuring statements from Mr Sharma and Mr Singh (referred to in [4] above) which I conclude, and as discussed later, were obtained by improper means. There were also various attempts to have my investigation adjourned, which included reference to an ordered mediation which, according to the mediator concerned, were misleading.

[8] On the day of the investigation, Mr Stallard attended. He did so in order to:

- (a) Deliver an affidavit of one *Diane MacFarlane*, a director and shareholder of Taste of Egypt along with a data stick containing footage taken by surveillance cameras positioned in its premises;
- (b) Demand I suppress any information that might identify Taste of Egypt; and
- (c) If not of a view to order permanent suppression do so for an interim period of five weeks so as to allow a challenge in respect of that decision.

[9] Mr Stallard advised he had no further instructions and was not to participate further. He followed that with an allegation Mr Sharma's credibility was questionable as he was working illegally and contrary to his immigration status.

[10] Mr Stallard then walked out.

[11] I consider Taste of Egypt's approach to be most unhelpful and, as already said, conclude it does not comply with the duty of good faith.

Background

[12] As already said this is a claim for arrears of wages and penalties for various failures in respect to statutory obligations regarding the maintenance of employment records.

[13] In respect of Mr Sharma the Labour Inspector claims a total of \$41,918.57 (being alleged arrears applying the minimum wage to hours worked along with unpaid annual leave, public holidays and days in lieu of working on public holidays minus cash payments Mr Sharma acknowledges he received). The claim in respect of Mr Singh totals \$22,640.55. Both figures have been revived down since the claim was originally filed.

[14] The claim has its genesis in an approach to the Labour Inspector by a member of the public on 30 April 2014. He advised he worked in an establishment close to Taste of Egypt and was concerned by the conditions under which Messrs Sharma and Singh appeared to be working. He said he raised his concerns with them and learned they were working in excess of 70 hours a week but were only being paid for 30.

[15] The Labour Inspector (two have handled this file over time) decided to investigate these claims. After interviewing Messrs Sharma and Singh, along with their employer, it was concluded there were various breaches in respect of statutory obligations regarding payment and recordkeeping. These deficiencies are the subject of this claim.

[16] Taste of Egypt is in the food retail business and at the time Messrs Sharma and Singh were employed operated shops in both Nelson and Christchurch. The Nelson shop, at which Messrs Sharma and Singh were employed, has now been sold for some \$70,000 though the Christchurch operation continues.

[17] As already said Taste of Egypt concedes some moneys are due but disputes the amount. In doing so, it asserts:

The relevant factual matters are set out in the statement of the respective employees dated the 12th of May 2015.¹

[18] The statements in question are each handwritten and approximately one and a half pages in length. They were clearly written by the same individual who was, according to both Mr Singh and Mr Sharma, Ms MacFarlane. Their flow is identical though there are some minor differences in the exact content. In essence they say the employee concerned was confused when approached by the Labour Inspector as English was not his prime language. They go onto say (in Mr Singh's case):

I have now since learned that what I said to the Labour Inspector was incorrect.

[19] Mr Sharma's version does not contain the words *now* or *to the Labour Inspector*.

[20] Each then asserts the employee worked a number of hours significantly less than alleged by the Labour Inspector before saying notwithstanding that a longer period was spent in the shop. This was due to the employee having no other contacts or interests in Nelson and waiting to either get a lift home from, or provide a lift to, the other.

[21] There is then an assertion both employees were offered their holiday pay but asked that the employer retain it until it was needed for extended visits to their homeland. Mr Sharma denies this is true and says he asked for, but was denied, leave.

[22] Both statements conclude with an assertion the employee concerned was *happy with everything* and each is signed by the applicable employee.

[23] Mr Sharma and Mr Singh both acknowledge they signed the document but claim to have done so under duress. Both say they were told failure to sign would see the company liquidated and their employment terminated. That would, in turn, have consequences for their attempts to remain in New Zealand.

[24] These claims are supported by the Labour Inspector who says Mr Sharma advised him Ms MacFarlane had recently given him the document, that its content

¹ Statement in Reply at [2(b)]

was untrue but he was concerned about a threat to his employment if he did not sign. He says Mr Sharma was concerned about how the possible loss of employment might affect his immigration status and was seeking advice as to whether or not he should sign the letter.

[25] After queries to the Immigration Service, to which the Labour Inspector was a party, Mr Sharma was advised it was his choice whether or not he signed. If he did the Labour Inspector would conclude he did so under duress and the document would have little probative value.

[26] The Labour Inspector then approached Mr Singh who was by then aware of Mr Sharma's letter but had not received one himself. He also had concerns about his future should one be proffered and he not sign. The Labour Inspector says he gave Mr Singh similar advice to that he had given Mr Sharma and said he would be satisfied the signature was obtained under duress. It transpires Mr Singh was given his version on 27 May and he then signed.

[27] Shortly after one of the Labour Inspectors involved interviewed the employers a new roster was introduced. As a result, and on or about 29 June 2014, the hours required of both employees reduced significantly as did their pay but not by the same amount. This change saw a significant reduction in the level of underpayment for Mr Singh and its end in respect to Mr Sharma.

[28] On 12 August Mr Sharma telephoned the Labour Inspector to advise Taste of Egypt had paid \$18,556 into his account. A smaller amount (\$3,013.34) was paid to Mr Singh.

[29] The employment ultimately ended on 10 September 2015 following Taste of Egypt's sale of its Nelson operation.

[30] The next point to be commented on is the existence of the surveillance cameras (refer [8(a)] above). It is claimed Taste of Egypt enforced the excessive hours being worked by Messrs Sharma and Singh via these cameras as they could be monitored remotely from the home of Ms MacFarlane and her co-owner and husband, Saeed Awad.

[31] It is alleged that if Mr Awad observed either employee allegedly underperforming or not doing anything productive he would telephone and

remonstrate with the employee concerned. That the cameras exist is confirmed by the recording delivered by Mr Stallard and allegations Mr Awad continued to monitor the shop after sale and use the recordings to try and coerce the Labour Inspector's clients into settling their claims behind the Inspectorate's back. I make no findings about these as I have not investigated them.

[32] There have also been allegations, since the investigation, of further impropriety by Mr Singh and Mr Sharma including a claim they are involved in an attempt to extort money from Taste of Egypt.² About this I make two observations. First the claims are unsubstantiated and of little probative value in my investigation. Second, and if valid, they have criminal overtones and should be directed to the Police.

Determination

[33] The biggest problem Taste of Egypt faces is its non-attendance at the investigation. Its *evidence* is nothing more than an untested affidavit and even its authenticity is questionable – the spelling of Ms MacFarlane's christian name in the affidavit differs from that recorded in the Companies Register. The failure to attend and allow its claims to be tested means the affidavit has little probative value and can be given little weight.

[34] There is then Taste of Egypt's ongoing predilection for casting claims of wrongdoing against the Labour Inspectorate and its clients. This creates a poor image when it is considered the claims are largely unsubstantiated and Taste of Egypt is unwilling to participate in the investigation and have its assertions put to the test of cross examination.

[35] Against that is the evidence of Mr Sharma, Mr Singh and the two Labour Inspectors who were involved in investigating these matters. They all attended. They were willing to have their evidence tested and be challenged about various statements made by Taste of Egypt. All passed the test.

[36] There is then the investigation undertaken by the Labour Inspectors and their supporting notes, the lack of time and wage records as required by the Employment

² E-mail Stallard to Milnes timed at 11.03am on 28 October 2015

Relations Act 2000 (there are no records that comply with the provisions of s.130(1)) and the provisions of s.132.

[37] When all of the above is considered I have no qualms in accepting the evidence of the applicants as being vastly superior to that of Taste of Egypt. It follows I accept the claims and order payment of the sums sought.

[38] Interest on the underpayments is also sought. Interest is to reimburse someone for use, by others, of money that is theirs. There can be no doubt Taste of Egypt has, by failing to make payments properly due, continued to have use of money rightfully belonging to Messrs Sharma and Singh. This is, I conclude, a circumstance in which interest should be payable, especially in the absence of a contrary argument.

[39] The rate to be applied is prescribed in the Judicature (Prescribed Rate of Interest) Order 2011 (2011/177). It is currently 5%.

[40] Various portions of the outstanding amount owe from differing dates. As the calculations are significant, I choose to take a more simplistic approach. The following is based on an assumption the bulk of the minimum wage arrears should have been payable no later than the date the hours changed (29 June 2014) and, in Mr Sharma's case, his wage was then enough to discharge Taste of Egypt's obligations under the Minimum Wage Act. I have calculated interest from that date on the balance owing at that time. With respect to the balance of minimum wage arrears owing to Mr Singh I have used the date of termination and the same date has been used for the leave arrears as unpaid leave can continue to accrue till termination. For the purpose of these calculations I have deducted the amounts paid by Taste of Egypt from the second amount as the payment (on or about 12 August 2015) was reasonably contemporaneous with the date upon which the leave payment, which forms bulk of the second amount, became due (10 September 2015).

[41] Using the above approach I conclude that as of the date of this determination Mr Sharma is owed an additional \$2,768.35 as interest and Mr Singh \$1,022.68. These amounts will continue to increase until payment is made by \$5.74 per day in Mr Sharma's case and \$3.10 per day for Mr Singh. The applicants should also note that I am willing to reopen this issue and reconsider this part of the award should they feel inclined to attempt a more accurate calculation.

[42] Turning to the penalty claims. The time and wage records maintained by Taste of Egypt are clearly deficient and do not comply with the requirements of the Act. Add to that my acceptance of the applicant's claims it follows I accept the alleged failures to comply with statutory requirements in respect to both payment and record keeping occurred.

[43] In support of the argument penalties be imposed Ms Milnes refers to the principles enunciated in *Tan v Yang & Zhang*.³ She proffers various arguments as to why application of those principles suggests significant penalties should be imposed in this instance.

[44] I agree with the submission Taste of Egypt's behaviour is of the egregious type which warrants condemnation via the imposition of a penalty. I also agree with the various arguments proffered by Ms Milnes as to why they are serious and warrant a significant penalty. There has been a serious denial in respect to statutory entitlements which continued for some time and, while to a lesser extent, continued after Taste of Egypt had been made aware of the problems. There has clearly been an impact on the affected employees which has included an inability to use funds they should have had access to, an inability to take leave and the stressful burden of worrying about their immigration status.

[45] The most compelling argument though is the need for deterrence and this is especially true where the employer aggravates the situation by trying to undermine the Labour Inspector's investigation with false *evidence* obtained by duress and then decides to resort to the use of unsubstantiated threats in an attempt to intimidate the applicants witnesses (refer the allegations of wrongdoing in respect to Mr Sharma's immigration status aired by Mr Stallard ([9] above) which, I would add, he answered more than adequately).

[46] Having considered the evidence (or lack thereof from Taste of Egypt) I consider a strong statement of condemnation for multiple infractions is justified.

[47] There are two employees involved and I consider the failures in respect to each should be recognised. While penalties are sought for each breach, Ms Milnes recognises a global approach is an acceptable alternate in respect to each employee

³ [2014] NZEmpC 65

and I note the examples she cites regarding quantum are all ones in which a global approach was applied.

[48] Accordingly, and having considered the evidence, I order the payment of a penalty of \$10,000 in respect to the breaches as they apply to each of the affected employees. The total therefore is \$20,000.

[49] Finally there is the application for the suppression of information which may identify Taste of Egypt.

[50] First I note that on its surface this is nothing more than a standard arrears and breach application brought by a Labour Inspector. There is nothing unusual about such claims that might warrant suppression, especially in the absence of either tested and probative evidence as to why suppression might be appropriate or a supporting submission. The answer is therefore no.

[51] Turning to the request I then temporarily suppress Taste of Egypt's identity. The only rationale tendered in support was a claim this would be required to allow an appeal. I am surprised this argument has come from a respondent who is incapable of funding a defence to a substantive claim but then asserts it can find money to argue an ancillary issue like this. In any event there is once again no probative evidence or submission as to why such a measure might be warranted. The answer is again no.

Costs

[52] The Labour Inspector seeks a contribution toward costs.

[53] Normally the Authority will use a daily tariff approach when addressing a costs claim⁴. The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances. This is the principle the applicant asks I apply and no adjustment is sought.

[54] The investigation took less than half a day which would, in the normal course of events, mean a contribution of less than \$1,750. That said the investigation was initially scheduled for two days on the basis it would be defended and a number of witnesses would be called. It had to be prepared for accordingly.

⁴ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808

[55] Having considered what occurred and the fact unnecessary preparation was occasioned by the respondent's intimated, but unconfirmed, failure to appear I consider an increase on the tariff is warranted. I conclude a full day appropriate and to that I add the filing fee - it's a given.

[56] Taste of Egypt will therefore be required to pay an additional \$3,571.56 as a contribution toward costs. Payment is to be made to MBIE.

Conclusion and Orders

[57] For the above reasons I order Taste of Egypt Limited make the following payments no later than 4.00pm Thursday 3 December 2015:

- a. \$64,559.12 (sixty four thousand, five hundred and nine dollars and twelve cents) gross being arrears of wages and holiday pay. Payment is to be made to the Ministry of Business, Innovation and Employment for disbursement to Messrs Sharma and Singh; and
- b. An additional \$3,791.03 (three thousand, seven hundred and ninety one dollars and three cents) being interest owing as of the date of this determination. This will increase by \$8.84 (eight dollars and eighty four cents) with each calendar day that passes between 3 December 2015 and the date of payment; and
- c. A further \$20,000.00 (twenty thousand dollars), being penalties pursuant to the Employment Relations Act 2000. Payment is to be made to the Crown via the Employment Relations Authority; and
- d. A further \$3,571.56 (three thousand, five hundred and seventy one dollars and fifty six cents) as a contribution towards MBIE's costs. Payment is to be made to the Ministry of Business, Innovation and Employment.

M B Loftus
Member of the Employment Relations Authority