

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 58
5559048

BETWEEN RAMVIR PAL
 Applicant

AND SK BROTHERS LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Satchie Govender, Counsel for Applicant
 Sarjeevan Kumar for Respondent

Investigation Meeting: 24 and 25 May 2016 at Napier

Determination: 25 May 2016

ORAL DETERMINATION OF THE AUTHORITY

[1] The applicant, Ramvir Pal, claims he was unjustifiably dismissed by the Respondent, SK Brothers Limited (SK). He also seeks to recover unpaid wages and the return of money he says he lent the company. There was also an issue concerning PAYE deductions but this is no longer being pursued.

[2] SK denies the claims have validity and labels Mr Pal a liar.

Citation of the Parties

[3] The claim, as initially lodged, cited the applicant as Ramvir Ramivr and the respondent as *Sarjeevan Kumar trading as SK Brothers Limited*. Mr Kumar is the sole director and shareholder of SK Brothers Limited.

[4] The respondent's identity was discussed during a telephone conference held on 15 January 2016. Mr Govender advised he understood the employer to be the company. Mr Kumar agreed and the citation was changed by agreement.

[5] Ramvir Ramvir was the name by which the applicant was known at the time the application was lodged. That has since changed and the citation was changed by agreement at the commencement of the investigation meeting.

Background

[6] Mr Pal was employed by SK as the manager of a dairy and takeaway it operated in Waipukurau. It was one of three or four such businesses SK operated.

[7] Mr Pal commenced in December 2011. He is of Indian origin and initially came to New Zealand as a student. At the time of these events he held a work visa which was reliant on his being employed by SK.

[8] On 28 July 2013 Mr Pal returned after a months' leave. He says he was greeted by Mr Kumar who advised his employment was terminated due to the dairy's sale. Mr Pal says there was no prior discussion or consultation. He was simply told the business had been sold and his employment would come to an end unless he paid \$5,000 to Mr Kumar. The payment would facilitate a request Mr Pal's employment be transferred to the new owner. Mr Pal says he rejected the request and his employment was therefore terminated.

[9] Mr Kumar has a contrary view. He says Mr Pal was advised of the pending sale a month prior and offered a transfer to another of SK's business in Waipukurau. He says there was no response until he advised the sale had occurred on 28 July. He says Mr Pal then said he would only transfer if Mr Kumar paid him \$5,000. Mr Kumar says he said no which meant Mr Pal was no longer employed as he had rejected a reasonable offer of redeployment.

[10] Mr Pal also claims SK frequently failed to pay him correctly. He claims deficiencies regarding wages including overtime, annual leave, public holidays and sick leave.

[11] He reported his concerns to the Ministry of Business, Innovation and Employment (MBIE) on 4 September 2013. At the same time he advised Immigration New Zealand of his changed status and the fact he was no longer entitled to work in New Zealand.

[12] His wage concerns were investigated by one of MBIE's Labour Inspectors, Rick Brown. Mr Brown concluded there were various deficiencies totalling \$46,755.33 (though \$2,382.48 of this was money payable to Mr Pal's wife which Mr Pal concedes he cannot claim).

[13] There is then the loans Mr Pal says Mr Kumar asked he make to SK. He says he complied as he was told failure to pay would mean the business would fold and he would be out of work. The terms of his visa would then mean he was no longer capable of staying in New Zealand which would see the destruction of his dream to do so. The amounts involved total \$20,240.00. Mr Pal says repayment has not occurred despite promises it would.

[14] SK's response is Mr Pal is a liar. No money was loaned and nothing is owing.

Determination

[15] There are three issues to be determined. They are whether or not Mr Pal was unjustifiably dismissed; whether or not there are outstanding wages and whether or not SK has loans to repay.

[16] Mr Pal's application was heard immediately after that of another employee of SK's, Mr Singh.¹ In that determination I aired negative views about Mr Kumar's credibility and the same reservations exist here. I do not have the same impression of Mr Pal. He came across as a sincere and credible witness with his evidence being far more preferable than Mr Kumar's.

[17] Mr Pal says he was dismissed. SK denies that occurred. It says Mr Pal chose to *opt out* by not accepting a reasonable offer of redeployment. Putting aside my already expressed preference for Mr Pal's evidence over that of Mr Kumar I conclude SK's claim is simply not credible. The evidence is Mr Pal was desperate to advance his application for New Zealand residency. The parties agree his endeavours, which were at an advanced stage, were at the time dependant on his retaining employment with SK. It defies logic to assert he would put that at risk by refusing redeployment unless SK paid him \$5,000 but is far more credible to conclude SK would take advantage of the situation by making a similar demand of Mr Pal.

¹ *Singh v SK Brothers Limited* [2016] NZERA Wellington 57

[18] There is then the evidence of both Mr Pal and Mr Brown that it was Mr Pal who went to Immigration New Zealand and advised he was no longer fulfilling his Visa requirements and it was due to dismissal. Given the potential negative effect on his attempts to gain residency why would he do so if it were not true.

[19] Having considered the evidence I conclude Mr Pal was dismissed.

[20] Once the fact of dismissal has been established it falls to the respondent to justify its action. Talk of the dairy's sale means there is one obvious justification – redundancy (though Mr Kumar does not use that description – as already said, he contends Mr Pal opted out).

[21] It is well established when reviewing redundancy decisions the Authority or Court will look at two factors; the genuineness of the redundancy and the procedure by which it was implemented. The inquiry into each is carried out separately.²

[22] It is difficult to fathom the substantive justification. On one hand SK is saying the sale was brought about by the dairy's poor financial performance which it attributes to Mr Pal's incompetence as a Manager. On the other, and when addressing Mr Pal's arrears claim, it says he ceased working at the dairy in October 2012. From that point the dairy was managed by Mr Kumar's wife and its performance improved markedly so that by the time of sale it was profitable. There is no supporting documentation such as financial records. The contradiction is obvious and totally undermines SK's attempts to provide a substantive justification.

[23] Turning to procedure. Section 103A of the Employment Relations Act 2000 (the Act) requires an employer must, before dismissing an employee, raise its concerns, allow the employee an opportunity to respond and consider the response with an open mind.³ That these requirements, in the form of a consultation process, remain in the redundancy setting is expressly confirmed by s 4(1a)(c) of the Act and the relationship between the two sections was confirmed by the Court in *Jinkinson v. Oceanagold (NZ) Ltd.*⁴

² *Coutts Cars Ltd v. Bageley* [2001] ERNZ 660 (CA)

³ Sections 103A(3)(b) to (d) of the Act

⁴ [2010] NZEmpC 102

[24] My acceptance of Mr Pal's evidence leads me to conclude there was no consultation and/or examination of alternates. He was simply presented with an extortionate threat of pay or go which he reasonably rejected.

[25] If the defence really is an assertion Mr Pal chose to walk it is not one I accept for the reasons outlined in [17] above. The dismissal is unjustified.

[26] The conclusion the dismissal is unjustified leads to a consideration of remedies. Mr Pal seeks lost wages and \$15,000 as compensation for hurt and humiliation.

[27] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration.

[28] Mr Pal's evidence is his attempts at mitigation were facilitated by Immigration New Zealand granting a visa which allowed him to pursue the search. This he did with success coming on 7 October 2013 which is 10 weeks after his dismissal.

[29] There is no argument Mr Pal was anything other than a fulltime worker (ie: 40 hours a week). Indeed the evidence suggests he regularly worked additional hours but he does not seek recompense for this. 40 hours a week for 10 weeks at Mr Pal's hourly rate means a loss of \$7,000. Section 128(2) states this is payable.

[30] Turning to compensation. Mr Pal supported his claim with significant evidence about the hurt he incurred. He spoke of the uncertainty and angst caused by his immigration status and the effect the dismissal might have on his ability to remain in New Zealand, the separation from his wife who was then in India on holiday but would not commit to the cost of returning given uncertainty about her husband's future here and other hardships he endured as a result of the dismissal.

[31] Having considered the evidence I conclude an award of \$10,000 appropriate.

[32] The conclusion remedies accrue means I must, in accordance with s124 of the Act, address whether or not Mr Pal contributed to his dismissal in a significant way. Redundancy implies no fault and other than the claim he tried to demand money from SK to facilitate his transfer (which I reject) there is no evidence he did.

[33] The next issue to be considered is the claim for monies owing. There are no time and wage records before the Authority. Mr Kumar says this is because the records are in Mr Brown's possession. Mr Brown says the documents he has would not satisfy the requirements of s 130 of the Act. Given making such assessments is his area of expertise I accept that assertion.

[34] Section 132 would then be sufficient to allow me to accept Mr Pal's claim of \$44,372.85 but I also note Mr Brown's evidence, his investigation and the schedule he prepared which quantifies the claim. Further note is made of e-mails which passed between Mr Brown and Mr Kumar's then lawyer prior which record Mr Kumar as conceding money was owing but not the amount claimed.

[35] SK considered it owes \$19,715.04 and offered to repay this amount via instalments – albeit at an extremely low rate. SK bases its position on an assertion Mr Pal ceased working in October as a result of illness. In support of that claim it produced three scrappy statements provided by various suppliers stating Mr Pal was not present in the shop. The authors were not present.

[36] The same three documents were also given to Mr Brown during his investigation but he says they were overwhelmed by those supporting Mr Pal from various sources such as clients and neighbours. He adds a view the documents proffered by SK appear orchestrated – I agree. To that I add the fact SK accepts its pay records show Mr Pal worked during the period in question. It then tries to argue it deliberately falsified the records so as to support Mr Pal's residency application. Apart from the fact this contradicts an earlier suggestion SK played no part in preparing those records (though they were then unable to explain why they would pay him if he were sick as claimed and documents patently false) it is yet another example of possible dishonesty on SK's part.

[37] Given the lack of time and wage records, s 132 and the evidence (especially SK's contradictory assertions) I conclude Mr Pal is owed the amount he claims.

[38] Finally there is the issue of repaying the money Mr Pal says he loaned to SK. SK defence is simple - Mr Pal is a liar.

[39] Mr Pal originally sought \$20,240 but that includes \$8,000 which was paid into the account of a third party to assist that third party purchase a business. While he says he only did this at Mr Kumar's request, Mr Pal accepts it is difficult to claim Mr

Kumar is responsible for the return of money which went to another person for that other persons use. The claim is reduced accordingly. Mr Pal supported his claim with bank statements and other documentary evidence including evidence of the source of the money he was using. Given that, a total lack of any support for SK's assertions and my findings about credibility I accept the claim has validity.

[40] I then note Mr Pal's evidence he acceded to these requests due to Mr Kumar's implied threat a failure to do so could jeopardise his employment and with it his immigration aspirations. That leads me to conclude this is a debt attributable to the employment relationship and that I am capable of ordering its repayment. The evidence also leads me to conclude these payments have all the hallmarks of a premium obtained in contravention of s 12A of the Wages Protection Act 1983.

Costs

[41] Mr Govender also asks I determine the issue of costs. Mr Pal's claim was heard immediately after another against SK in which Mr Govender represented the applicant.⁵

[42] It is accepted that in the normal course of events costs follow the event and normally the Authority will use a daily tariff approach when addressing such a claim.⁶ The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances. Mr Govender simply asks I apply this approach and award a total of \$3,500 given a total hearing time for the two cases of approximately a day, albeit spread over two calendar days.

[43] The claim is, in my view and in the absence of a contrary argument, reasonable especially as SK's less than helpful approach added to the cost incurred by Mr Govender's clients. He had to second guess what might be alleged in defence given the absence of either a statement in defence or witness briefs from SK and it's uncooperative approach saw further costs such as a requirement there be personal service of documents.

[44] In the circumstances I consider the costs application more than reasonable. It should be granted in full with Mr Pal being entitled to half of the amount sought given the concurrent investigations.

⁵ *Singh v SK Brothers Limited* [2016] NZERA Wellington 57

⁶ refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808

Conclusion and orders

[45] For the above reasons I conclude Mr Pal has a personal grievance in that he was unjustifiably dismissed. He has also established he is owed unpaid wages and entitled to the return of monies he loaned to SK.

[46] As a result I order the respondent, SK Brothers Limited, make the following payments to the applicant, Ramvir Pal:

- i. \$7000.00 (seven thousand dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$10,000.00 (ten thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- iii. A further \$44,372.85 (forty four thousand, three hundred and seventy two dollars and eighty five cents) being payment of unpaid wages; and
- iv. A further \$12,240.00 (twelve thousand, two hundred and forty dollars) being repayment of monies the applicant loaned the respondent; and
- v. A further \$1,750 (one thousand, seven hundred and fifty dollars) as a contribution toward the costs Mr Pal incurred in pursuing his claim.

[47] Despite suggestions SK was impecunious and incapable of paying the amounts ordered there was no supporting evidence and no application I apply s 131(1A) and order instalment payments. Payment is therefore to be made no later than 4.00pm Wednesday 22 June 2016.

M B Loftus
Member of the Employment Relations Authority