

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Abdul Jalil Patel (Applicant)
AND Skylounge New Zealand Limited (Respondent)
REPRESENTATIVES A J Patel In person
Sandeep Gupta, Advocate for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 14 February 2006
DATE OF DETERMINATION 8 May 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Skylounge New Zealand Limited (“Skylounge”) employed Abdul Patel as a chef in its inner city tapas bar. Mr Patel says Skylounge’s director and shareholder, Sandeep Gupta, dismissed him unjustifiably, while Mr Gupta says Mr Patel resigned.

The termination of Mr Patel’s employment

[2] It was common ground that Mr Patel’s employment began on or about 20 June 2005, and ended on 8 July 2005. It was also common ground that Mr Gupta had just purchased the business and Mr Patel’s first week was spent on activities like cleaning and preparing the kitchen, and developing a menu. Mr Patel’s rate of pay was \$14 per hour.

[3] Other than that, the parties’ accounts had little in common. Mr Patel said he was employed for full time work, on Monday to Friday from 11 am – 3 pm and 4 pm – 10 pm, and Saturdays from 4 pm to 10 pm. Mr Gupta said Mr Patel was employed for part time work, on Tuesday to Friday from 4 pm to 10 pm and Saturday from 7 pm to 10 pm. He says the bar was closed on Mondays, and that it never offered lunches. Mr Patel disagreed.

[4] In his statement in reply Mr Gupta sought to characterise Mr Patel’s employment as casual. He said at the investigation meeting that he did so on the basis that he allowed Mr Patel to go home early sometimes. I did not understand him to be pursuing an argument that the employment was casual.

[5] Skylounge did not keep a reliable written record of the hours Mr Patel worked. Its record took the form of monthly reports of employee earnings forwarded to the Inland Revenue Department. I was shown two of these, but it is not clear exactly which periods they covered as far as Mr Patel’s employment is concerned. In addition Mr Patel kept his own record, which differed.

[6] There was no written employment agreement. When I asked Mr Gupta why not, he said he was going to get one, but first wanted to take two or three weeks to see how everything worked out. He said that was discussed at his pre-employment meeting with Mr Patel, but Mr Patel denied having such a discussion.

[7] As for the lead-up to the termination of Mr Patel's employment Mr Patel said that, by the start of his second week, everything was ready to begin opening the kitchen for lunch and dinner. The kitchen opened accordingly. There was no custom during the first four days, but the fifth (a Friday) was busy. On the Saturday Mr Gupta told Mr Patel there would be no more opening for lunches, and the bar would be open only in the evenings.

[8] Mr Gupta denied that account.

[9] Mr Patel said further that, at the end of the third week, Mr Gupta told him he could not run the kitchen at all because it was not making any money. Mr Gupta told Mr Patel he should find another job. Mr Patel protested, saying at least he should receive one week's notice, but was told he was not entitled to notice because of the short period of his employment. A heated discussion followed. Mr Patel received his final pay, and wrote a letter dated 8 July 2005 saying:

"I have nothing against you owing money at all.

Thank you very much for giving me a chance for work for you."

[10] Mr Patel said he wrote the letter because he was forced to, and it was merely an acknowledgement that Mr Gupta had paid him his wages and nothing more was owed. Mr Gupta did not deny asking for a letter confirming no money was owed, but sought to characterise the resulting letter as a letter of resignation. I do not accept it can be read that way. It is no more than the acknowledgement sought and provided.

[11] Mr Gupta agreed there was a conversation at the end of the third week, but said it was about his concern that Mr Patel had been looking for another job. The barman had reported to Mr Gupta that Mr Patel had frequent, and loud, telephone conversations in the kitchen from which it was clear he was seeking alternative employment. The barman believed Mr Patel had found another job. The barman did not give evidence and, although this determination has been significantly delayed in order to give him the opportunity to do so, Mr Gupta did not provide contact details the Authority requested in order to follow up on the matter.

[12] Because of the barman's information, on Friday 8 July 2005 Mr Gupta asked Mr Patel what was happening. Mr Patel said he had been for a job interview, asked for his money, and said he was leaving that day. Mr Gupta's evidence was that he believed things were going well and did not want to lose Mr Patel, but agreed to pay him his final pay. In the statement in reply, Mr Gupta recorded: 'no notice period was asked from him as the company and him was only 2 ½ weeks old'.

[13] Mr Patel denied this account of the Friday conversation, and also denied seeking alternative employment prior to the end of his employment by Skylounge. There was some common ground to the effect that there was a discussion about whether notice should be given. Beyond that Mr Patel said he was denied payment in lieu of notice because of the brevity of his employment, while Mr Gupta said he did not require Mr Patel to give notice because of the brevity of his employment.

Determination

[14] The question here was one of whose account to accept. On Mr Patel's account, there was an unjustified dismissal. On Mr Gupta's, there was a resignation. The evidence amounted to one

person's word against another's, with no supporting witnesses for either, and minimal supporting documentation.

[15] Mr Gupta urged me vociferously to conclude that Mr Patel was lying. However Mr Patel's evidence was materially consistent, the account he gave was credible, and there were no jarring notes. If he lied, he did so very well.

[16] There was a jarring note in Mr Gupta's evidence. It began with his statement that no written employment agreement was provided because Mr Gupta wanted to take two or three weeks to see how 'things worked out'. That was a wrong approach in terms of his obligations as an employer in any circumstances, and in addition the effect of Mr Patel's account was that at the end of three weeks Mr Gupta had indeed concluded things were not 'working out' for economic reasons. In addition the comment in the statement in reply concerning the giving of notice struck me as granting an unusually easy release to someone whose services were still required.

[17] I doubt that either man gave me a full or accurate account of their conversation on 8 July. However by a small margin, and for the reasons just set out, I find Mr Patel's account to be the more credible. I therefore conclude that Mr Patel was dismissed. The dismissal was unjustified because it did not meet the minimum requirements of a fair procedure. Mr Patel has a personal grievance.

Remedies

[18] Mr Patel started new employment on 1 August 2005. He lost three weeks' wages. From the record it appears Mr Patel worked for Skylounge for a total of a little under 120 hours. If he averaged a 40-hour working week, his lost earnings are $3 \times [40 \times \$14] = \$1,680$. Skylounge is to reimburse him in the gross equivalent of that amount.

[19] There was no evidence of injury to Mr Patel's feelings resulting from the dismissal, and I make no order in that respect.

Costs

[20] Costs are reserved. If the parties wish to be heard on whether either of them should contribute to the costs incurred in respect of this matter, they should put their views in writing and file them in the Authority within 28 days of the date of this determination.

R A Monaghan
Member, Employment Relations Authority