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Salgado v Los Incas Limited [2011] NZERA 160; [2011] NZERA Auckland 116 (28 March 2011)

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Salgado v Los Incas Limited [2011] NZERA 160 (28 March 2011); [2011] NZERA Auckland 116

Last Updated: 3 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 116 5298029

BETWEEN GLORIA INES CALVO

SALGADO

AND LOS INCAS LIMITED

Respondent

Member of Authority:

Representatives:

Investigation Meeting:

Yvonne Oldfield

Ms Salgado in person Judith Moore for respondent

8 March 2011

Determination: 28 March 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] When this matter was first lodged the claim was described as relating to a personal grievance (sexual harassment) and unpaid wages. During the investigation meeting Ms Salgado (who was representing herself and whose first language is not English) clarified that the only remedy she was seeking was in fact lost wages. She explained that she had referred to the alleged sexual harassment by way of background which served to show why she had abruptly walked out on her job one evening at the end of her first week of work and had never returned.

[2] Ms Salgado told the Authority that she was hired to work six days a week, Monday to Sunday, with Tuesday off because the restaurant was shut. She says her agreed rate of pay was \$15.00 per hour. She says on her first day of work (a Monday) she worked from 4.00pm until the restaurant shut at approximately 10.30pm. She says that for the rest of that week she worked from 12.00 noon until approximately

10.30pm.

[3] Mr Alvarez told the Authority that she worked two days, not six, in the week beginning 18 January 2010, and was hired to work at the minimum wage (then \$12.25) and not at \$15.00 per hour. He told the Authority that Ms Salgado worked 22 and 23 January only. He said the restaurant was closed for business on two days per week, Monday as well as Tuesday, and if Ms Salgado was present in the restaurant at other times, it was as a guest. He said the total staff, including himself, numbered three during the week with one more at the weekends when things were busier.

[4] Mr Alvarez conceded that he had not provided Ms Salgado with a written employment agreement. No wages at all was paid to Ms Salgado until after the present proceedings were lodged, at which point she received a payment through Counsel of \$96.00. This cheque was drawn on an account bearing the name "Los Incas Limited t/a Los Incas Senators."

[5] Ms Salgado displayed some confusion as to which week she worked but was prepared to accept Mr Alvarez' assertion that it was the week beginning 18 January. She refuted any suggestion that she spent additional days at the restaurant as a customer or in any other capacity. The questions for determination are:

- i. which of the respondents employed Ms Salgado;
- ii. what hours and days Ms Salgado worked, and
- iii. what if any arrears of wages she is owed.

Determination

[6] The Authority obtained information from two sources besides Ms Salgado and Mr Alvarez. One was a staff member, Mr Cardona. Mr Cardona gave evidence which confirmed Mr Alvarez's recollection that Ms Salgado worked in the week beginning 18 January however he recalled that she worked all week.

[7] The Authority also received an affidavit from Ms Eve-Lyn Ashby in which Ms Ashby stated that she had been a director and part owner of Los Incas Restaurant with Mr Alvarez until October 2010. Ms Ashby stated that the records showed that Ms Salgado had worked and been paid for hours worked on 22 and 23 January 2010. Ms Ashby did not attest to any direct personal knowledge of the hours Ms Salgado worked but stated:

"Ms Salgado would not have worked on Monday evening as the restaurant was always quiet and we did not require additional staff."

[8] Ms Salgado presented as an honest witness. She was prepared to concede where it appeared her memory may have been at fault and told the Authority that she wanted only what she was owed. Although she continued to assert that she had been sexually harassed she said that she did not seek a remedy for this. To have been denied her wages was however a different

matter about which she felt strongly. I am satisfied on balance that Ms Salgado's evidence must be preferred to that of Mr Alvarez.

[9] It would appear, given what Ms Ashby stated in her affidavit and given the provenance of the \$96.00 paid to Ms Salgado that the restaurant in which she worked was operated by the first respondent, Los Incas Limited. I accept therefore that the first respondent employed Ms Salgado.

[10] The second respondent is removed from the proceedings.

[11] I accept that in total Ms Salgado worked 59 hours at an hourly rate of \$15.00. The total payable to her was therefore \$885.00 gross. She has received one payment of \$96.00 (which appears to be a gross amount.) She is therefore entitled to the balance, \$789.00 gross.

[12] The first respondent, Los Incas Restaurant Limited, is therefore ordered to pay to the applicant the sum of \$789.00 gross arrears of wages.

Yvonne Oldfield

Member of the Employment Relations Authority

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