

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 172
3021493

BETWEEN PUSHPINDER SANDHU
Applicant

A N D LOAF LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Ben Hinchcliff, for Applicant
Anmol Shankar, for Respondent

Investigation Meeting: 15 February 2018, at Auckland

Submissions Received: At the investigation meeting and 28 February 2018 from
Applicant
22 February 2018 from Respondent

Date of Determination: 29 May 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Pushpinder Sandhu was subject to an unjustified action to his disadvantage when he was suspended by Loaf Limited.**
- B. Mr Sandhu was unjustifiably dismissed by Loaf Ltd.**
- C. Within 28 days of the date of this determination Loaf Ltd is ordered to pay to Mr Sandhu:**
- (i) \$3,776.00 in lost wages, and \$113.28 (for the employer's Kiwisaver contribution) and \$302.08 (for holiday pay) on that sum, totalling \$4,191.36; and**

(ii) \$4,000.00 as compensation for humiliation, loss of dignity and injury to feelings.

D. Costs are reserved and a timetable set.

Employment relationship problem

[1] Pushpinder Sandhu worked as a baker for Loaf Limited (“Loaf or the company”). He started work in April 2017.

[2] During Mr Sandhu’s employment he received a verbal warning on 7 August 2017 regarding a food safety and hygiene concern and health and safety risk. He also received a written warning on the same day regarding punctuality and uniform issues.

[3] On 6 September 2017 Loaf’s human resources and customer services manager saw Mr Sandhu throwing a small dough ball at another baker inside the bakery area, where food is prepared. Mr Sandhu was suspended on the same afternoon. He was summarily dismissed on 8 September 2017 after he did not attend a disciplinary meeting arranged by Loaf and did not respond to messages left by Loaf managers.

[4] Mr Sandhu claims that he was unjustifiably dismissed by Loaf. The company maintains the dismissal was justified and a fair process was followed.

Investigation meeting

[5] At the investigation meeting I heard evidence from Mr Sandhu, a former colleague of his, Sean Armstrong (Loaf’s founder, director and owner) and Elliot Cheesmur (Loaf’s Bread Operations Manager).

[6] At the investigation meeting Mr Sandhu’s suspension was explored and the Authority informed the parties that they may wish to file submissions on the suspension issue. Under s 122 of the Employment Relations Act 2000 (the Act) I am able to find a personal grievance of a type other than that alleged.

[7] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[8] The issues for determination are whether Mr Sandhu was subject to an unjustified disadvantage regarding his suspension by Loaf and whether he was unjustifiably dismissed.

[9] Other issues were raised for Mr Sandhu. He originally questioned whether he had been paid his correct holiday pay. However, during the investigation meeting Mr Sandhu accepted that the amount he had been paid as holiday pay on the termination of his employment seemed about right. This issue was not investigated further.

[10] A claim was made on Mr Sandhu's behalf that he may not have been paid properly for a short period. Until the investigation meeting there was a lack of clarity regarding this claim, particularly which pay period it related to. Loaf then agreed to review Mr Sandhu's pay and discovered a few hours of underpayment. Payment was then made to him.

[11] Although it was suggested that a penalty should be imposed under the Wages Protection Act 1983, I do not consider this to be an appropriate situation to order a penalty. The evidence was that the small underpayment was inadvertent and that once the nature of it was clearly identified, payment was promptly made.

[12] It was also suggested that Mr Sandhu was not paid properly for his final week of work. However, having at the investigation meeting seen Mr Sandhu's roster, and examined his usual hours of work and the number of days of work and suspension, I am satisfied that he was paid for slightly more than the three days which he would have completed had he not been suspended. His suspension was thus on pay at his usual hours of work.

Mr Sandhu's work history

[13] Mr Sandhu had been spoken to informally on a few occasions about concerns which Loaf had, primarily about his performance. He was also issued with the two warnings on the same day in August 2017, including a verbal warning regarding a food safety and health and safety issue.

[14] Loaf considered Mr Sandhu's previous warnings when it made the decision to dismiss him. I accept Loaf's submission that Mr Sandhu had been put on notice

regarding the need to be careful about food safety and hygiene and health and safety issues. These did not relate to dough throwing.

The dough throwing

[15] The ball was a small amount of leftover dough, which he estimated to be about one and a half inches long, weighing 25 grams. Mr Sandhu threw it at a fellow employee who was operating a Rex machine at the time. This machine shapes dough for rolls. The ball hit the back of the employee and eventually fell to the ground. The baker at whom the dough was thrown did not say anything. Mr Sandhu's impression was that he had realised that he had been hit and possibly turned around a little bit but did not speak.

[16] Mr Sandhu says that in his time at Loaf he had seen other staff, including supervisors flicking dough at other people. This was particularly after 6 pm and at the end of the work day. He thought that he had seen this every day.

[17] Mr Sandhu says that there was no specific reason for his flicking dough on this occasion. It was more in the nature of what I will describe as a joke or playful behaviour. There was no suggestion by Loaf that this was an act which would have hurt the recipient.

[18] Mr Sandhu says that dough throwing or flicking was a common practice but Loaf disagrees. I will deal below, before discussing misconduct, with the issue of the prevalence of dough throwing and Loaf's concerns about Mr Sandhu's action.

Discussions with the human resources manager and Mr Cheesmur

[19] Having seen Mr Sandhu throwing the dough, the human resources manager who happened to be walking by, called him from the room. After a brief discussion she said that she was going to call Mr Cheesmur, the bread operations manager.

[20] Mr Cheesmur says when he arrived he told Mr Sandhu that he should not be throwing dough in the bakery. Mr Sandhu apologised for doing that and said that he had no specific reason for doing it. It was suggested on behalf of Mr Sandhu that Mr Cheesmur's actions amounted to the giving of a warning to Mr Sandhu, meaning that no further disciplinary action could legitimately be taken.

[21] I do not accept that. Mr Cheesmur was expressing his concern about what Mr Sandhu accepted that he had done. There was no warning given such as would extinguish any other possible disciplinary action.

[22] The human resources manager decided to get Mr Armstrong involved. Mr Sandhu went off on his break. During his break he was called to the meeting with Mr Armstrong.

Meeting with Mr Armstrong

[23] Mr Armstrong arrived and he, Mr Sandhu, Mr Cheesmur and the human resources manager had a discussion which lasted at least a few minutes.

[24] This discussion occurred in an area which contained a freezer and which the staff break room was off. There was a prospect of staff members coming across the group having a discussion, although this did not occur. The discussion occurred with the parties standing.

[25] Mr Armstrong asked Mr Sandhu whether he had thrown the dough. Mr Sandhu said that he had. Mr Armstrong then asked why he had done that. After not receiving a quick response he asked again and there was still no reply, so Mr Armstrong said you have five seconds to reply. Mr Sandhu then said he had no specific reason for throwing the dough.

[26] Mr Sandhu found Mr Armstrong's manner aggressive and says that swear words were used by Mr Armstrong, although he accepted that these were used in the sense of a description, as in "why are you throwing dough in my fucking bakery?" Mr Armstrong accepts that he spoke like that but denies that he was angry. He recognises that he was frustrated and very concerned.

[27] Mr Armstrong says that he had moved right into telling Mr Sandhu that he was suspended rather than discussing that possibility with him. He says that he told Mr Sandhu about how what he had done was serious misconduct and a gross breach of food, safety and health and safety requirements. He told Mr Sandhu that he had 30 seconds to go and get his stuff from his locker and go home and they would be in touch.

[28] Mr Armstrong was very concerned about the possibility of a disgruntled employee, namely Mr Sandhu, coming back the next day when there was a critical food control plan audit. Mr Sandhu was aware of the audit. He told Mr Sandhu that if he came back he risked being trespassed and that is when the police would be involved. Mr Sandhu says that he was completely shocked and scared.

Mr Sandhu's departure from the premises

[29] Mr Sandhu headed towards the lockers to collect his bag. After a short period, Mr Armstrong asked Mr Cheesmur to go and make sure that Mr Sandhu was doing what he was asked. However, when Mr Cheesmur began in that direction Mr Sandhu appeared.

[30] Mr Armstrong then walked him out through the door of the factory building. Mr Sandhu left the building into the carpark. Mr Armstrong called out of the door "keep going, keep going". Mr Armstrong was concerned that Mr Sandhu might not head towards the exit gate but rather go to the smoking area which was at the other side of the carpark. There was no evidence of any staff members overhearing these comments, although they occurred in a place where it is possible that staff could have been, or members of the public could have observed from the street.

[31] Mr Sandhu does not accept that the words suspension or suspended were used by Mr Armstrong. He thought that Mr Armstrong had fired him because he had been sent home. He did not expect to have further contact from Loaf. He said that at the meeting Mr Armstrong had said do not come back unless you give back your uniform.

Dismissal or suspension on 6 September 2017

[32] In the statement of problem Mr Sandhu alleged that he was summarily dismissed on 6 September 2017. This was on the basis that he had been told to go home. He says that he did not hear the words suspended or suspension. Equally he did not hear the words dismissal or dismissed on that day.

[33] Mr Armstrong and Mr Cheesmur both gave evidence that Mr Sandhu was told that he was suspended and that there was no mention of dismissal or the like.

[34] While I accept that Mr Sandhu may have taken the implication that he could have been dismissed when he was sent home and the possibility of trespass was

mentioned, I accept the evidence for Loaf that he was told that he was being suspended.

[35] That is consistent with much subsequent correspondence and other documents, including the letter of 7 September 2017, the scheduling of the meeting on 8 September 2017 and the reference to suspension in the dismissal letter. Mr Sandhu's letter of 12 September 2017 raising the grievance refers to being told to leave immediately and not return, but without reference to dismissal at that point. A document from Mr Sandhu's representative of 21 September 2017 refers to what was described as being trespassed amounting to an "effective termination", suggesting that there were no words of termination. A memorandum from Mr Sandhu's representative of 5 December 2017 states that Mr Sandhu's employment was terminated on 8 September 2017.

[36] I find that Mr Sandhu was not dismissed on 6 September 2017.

Conclusion on suspension

[37] I now consider whether the suspension was unjustified.

[38] Mr Sandhu's employment agreement provides for suspension where Loaf considers that an act of serious misconduct may have occurred.¹ The Loaf Company Policies & Procedures document also sets out the employer's discretion to temporarily suspend the employee prior to a full investigation of the allegations surrounding the circumstances involving the employee. Both documents provide for suspension to usually be on pay with some ability to suspend without pay.

[39] Loaf submits that, in addition to considering serious misconduct may have occurred, the suspension was justified in light of the importance of the food control plan audit scheduled for the day following the incident. Mr Armstrong gave evidence that without a successful audit there would be serious implications for the company's ability to operate. I accept that the audit was something which could be taken into account by Loaf.

[40] There are several aspects of the suspension meeting which I have concerns about. My impression was of a hurried event undertaken without the opportunity of a cooling down period. The meeting was not held in an office. Mr Sandhu was called

¹ Clause 20 of the individual employment agreement

out of the break room and the discussion as held about 10 metres from there. That was not ideal, as there was the prospect of someone walking past, although the evidence was that that did not occur. The meeting was conducted with the parties standing up. This provides a background against which misunderstandings, particularly with an employee who does not have English as their first language, are more likely.

[41] The prospect of suspension was not put to Mr Sandhu to allow him to comment. Mr Armstrong was frank about this. There was thus no opportunity to be heard about the issue of suspension before the decision was made to suspend.

[42] For Loaf it was suggested that employees have no absolute right to be heard on the suspension question prior to the employer deciding to suspend. However, in this case it would have increased the likelihood of Mr Sandhu understanding what was happening. He could also have commented on whether his continued presence in the workplace would cause difficulties. Mr Armstrong was concerned about a disgruntled employee disrupting the following day's audit, but he seems to have had no particular reason to think that Mr Sandhu would behave in that way and effectively denied Mr Sandhu the right to reassure Mr Armstrong that he would behave properly.

[43] There was limited information provided to Mr Sandhu. He was not told that he was suspended on pay, although he was in fact paid for the suspension. Again a more measured process could have provided that reassurance to Mr Sandhu.

[44] I find that although there was reason for Loaf to suspend, the process was carried out unfairly. The suspension occurred quickly in a pressured situation with Mr Sandhu being spoken to in an area which was available to other staff. There was no reason offered as to why the meeting had to occur there rather than in an office. Mr Armstrong was very concerned about the upcoming audit and seemed irritated by Mr Sandhu's actions and lack of a prompt explanation. He was also worried about the effect on other workers, although no particular reason was given for this.

[45] I do not consider these procedural defects to be minor under s 103(5) of the Act. I find that Mr Sandhu was subject to an unjustified action by Loaf to disadvantage when it suspended him on 6 September 2017.

[46] Mr Sandhu lost no wages as a result, as he was paid for his suspension. Loaf submitted that any unjustified disadvantage relating to the failure to consult about

suspension was very short-lived and thus no remedies should be awarded.² I will deal with the issue of compensation for non-pecuniary consequences with the dismissal grievance below.

Discussion with other staff

[47] Mr Armstrong was concerned about the effect on other staff of Mr Sandhu being sent home, particularly the day before an audit. After Mr Sandhu had been suspended, Mr Armstrong and Mr Cheesmur went to the bakery. They say that they told other staff that Mr Sandhu had been sent home and would not be returning to Loaf until disciplinary processes into his action had been completed.

[48] It was suggested by Mr Sandhu that a different message had been given at that meeting. However, I did not hear from any other witnesses who were at the meeting and accept Mr Armstrong's and Mr Cheesmur's version of events.

Dough throwing

[49] I now go on to consider the contrasting evidence given for the parties regarding whether dough throwing or flicking was a common practice in the bakery.

[50] Mr Sandhu says that he had been aware of dough flicking on a daily basis in the almost six months that he had been at Loaf. His impression was that it was especially done when staff were cleaning up at the end of the night. Mr Sandhu said that he had never been told by a supervisor, in his induction or anywhere else not to throw dough.

[51] Another baker, a former colleague of Mr Sandhu's at Loaf, also says that he saw almost every day small amounts of dough, he estimated being around the size of a highlighter pen cap, being flicked. He had also seen supervisors who he named undertaking the practice. He described it as something that was done for fun when people were free and was not done to harm people. He accepts that senior managers were not aware of dough throwing and if they were aware they would most likely have taken steps to prevent it from occurring, because it was wrong.

[52] By contrast, evidence given for Loaf was that this was not a common practice. Mr Armstrong has around 20 years' experience as a chef, although not primarily as a

² Relying on *Walker-Rogers v Quick Skips Ltd* [2016] ERNZ 587

baker until Loaf was established. Mr Armstrong was not aware of food throwing occurring in the Loaf bakery and no one had mentioned dough throwing to him. He was also not aware of food throwing being a practice which occurred in other environments which he had worked in. He regards food throwing as unacceptable even if it was a scrap.

[53] Mr Armstrong accepts that it was quite possible that Mr Sandhu was not told that it was unacceptable to throw dough. He says that in any work environment it is not possible to list all of the do's and don'ts.

[54] Mr Armstrong was surprised to hear about dough throwing. He says that under benches there were dough bins which bits of dough should be put in so that dough on the floor was minimal.

[55] Mr Cheesmur had done some short bakery jobs before coming to Loaf and had been at Loaf for around 12 or 13 years starting as a junior baker, and working his way up to a supervisor role. He then moved out of the bakery into a managerial role. He says that he had seen dough scraps thrown at the dough bins and missing, but not at other people or in the sense of an entertaining activity which Mr Sandhu described.

[56] He accepts that once Mr Sandhu had been told not to do things then he would not do them again. However, there was some evidence suggesting that that was not the case although that was not fully explored.

[57] It is plausible that both parties' evidence on dough throwing is accurate. It is possible that the practice had arisen in recent months or years, since Mr Cheesmur had taken a more senior role and was no longer in the bakery for the extended periods which he used to be. It seemed to be a practice which occurred more in the clean-up period at night, when more senior staff may not have been present. It was less likely to be observed or cause a concern when the food making was completed for the day.

Possible consequences of dough flicking

[58] Mr Armstrong emphasises the importance to the Loaf business of food safety requirements and describes the risk which he saw as possible as a result of dough flicking.

[59] The concerns about dough throwing which Mr Armstrong identifies included:

- (a) Contamination of products which the dough is thrown into, including if it included allergens, especially sesame seeds. This was a concern as the Rex machine, which the baker who the dough was thrown at was operating, had an open hatch at the top;
- (b) Bakery areas are supposed to be kept free from rubbish, debris and waste-products, for food safety reasons and for the health and safety of staff; and
- (c) The person at whom dough was thrown, or anyone else distracted by the throwing, could be injured by the machinery being operated. Some machinery in the bakery had blades and pressing parts. Mr Sandhu threw dough at a person operating such a machine.

[60] Under cross examination Mr Armstrong was questioned about whether dough flicking could really be seen as a safety risk to staff. He referred to a finger injury a few years previously to an experienced baker who got distracted while operating the Rex machine. It was accepted that Mr Sandhu would not have been aware of that accident as it was before his time.

Misconduct

[61] I now turn to look at whether Mr Sandhu's dismissal was substantively justified. This was a summary dismissal with no notice paid as Loaf considered that serious misconduct had occurred. The employment agreement allowed for dismissal without notice were the employee is guilty of serious misconduct which Loaf considers justifies instant dismissal.³

[62] What is usually required to justify summary dismissal is conduct which deeply impairs or is destructive of the basic trust and confidence that is essential in an employment relationship.⁴

[63] Serious misconduct is defined in the employment agreement to include non-compliance with food safety programme.⁵

[64] On Mr Sandhu's behalf the extent of his training on food safety and health and staff health and safety was questioned. However, I find that he was aware of the

³ Clause 20 of the employment agreement

⁴ *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 at 487 CA

⁵ Clause 20

importance of food safety and hygiene as well as health and safety requirements in the bakery. His induction included being instructed about the importance of preventing contamination. Loaf operated a detailed induction programme and Mr Sandhu had been through that training. He had also been given the verbal warning regarding another food safety issue.

[65] Ultimately Loaf's food safety concerns were largely not disputed by Mr Sandhu. Initially Mr Sandhu stated that there was no risk to health and safety because the dough ball was very small. However, under questioning he admitted that bakers needed to concentrate and could be harmed if they got distracted.

[66] Mr Armstrong took into account the fact that Mr Sandhu had been given a warning previously regarding a food safety issue. He was entitled to do that.

[67] However, the audit, understandably a pressure point for Loaf, seems to have influenced the level of response. Having given a verbal warning a month before for a food safety and hygiene concern, I do not think that it reasonable that a somewhat similar matter would be seen as so deeply impairing trust that it justified a summary dismissal.

[68] A fair and reasonable employer would have seen this incident as a misconduct issue rather than of serious misconduct.

Procedural fairness

[69] I now turn to look at aspects of the procedure used by Loaf. Under s 103A(3) of the Act I must consider whether:

- (a) Having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing him;
- (b) The employer raised the concerns it had with the employee before dismissing him;
- (c) The employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing him; and
- (d) Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations before dismissing him.

Investigation

[70] Submissions filed on Mr Sandhu's behalf criticised the investigation undertaken by Loaf.

[71] Loaf undertook a limited amount of investigation. However, the company was dealing with one incident which the human resources manager had witnessed. Mr Sandhu accepted to the human resources manager, Mr Cheesmur and Mr Armstrong that he had thrown a small dough ball, so that was not in dispute. There was no suggestion that the baker who had been hit by the ball had initiated the events, or had suffered any ill effects as a result, so no investigation in those regards seemed necessary.

[72] I am not satisfied that any further investigation was reasonably required, at least without knowledge of Mr Sandhu saying that dough throwing was common.

[73] Had Mr Sandhu raised the issue of seeing dough throwing frequently, Loaf should have investigated that as Mr Armstrong and Mr Cheesmur were not aware of any such practice. However, Mr Sandhu did not raise his experience of the practice at the time he was suspended and did not attend the disciplinary meeting or send information for that meeting, and so those running the process at Loaf did not have any reason to investigate further.

Loaf's concerns being raised with Mr Sandhu

[74] I turn back to the process leading up to Mr Sandhu's dismissal. The human resources manager at first, then the human resources manager and Mr Cheesmur, then those two and Mr Armstrong together met with Mr Sandhu on 6 September 2017. At each of those discussions Mr Sandhu was advised of Loaf's concerns about his dough throwing.

Letter inviting Mr Sandhu to a disciplinary meeting

[75] Loaf's concern was also set out in correspondence. The next day, 7 September 2017, the human resource manager sent via email a letter to Mr Sandhu which read:

On 6th September 2017 you were suspended from Loaf due to serious misconduct that resulted from you breaching our Food Safety regulations.

You are now requested to attend a meeting on Friday 8 September at 10.30 am where we will seek clarification and an explanation to the point raised above. ...

You are more than welcome to bring a representative or support person with you to this meeting. You must be aware that this could result in disciplinary action.

[76] I am satisfied that with the statements made orally on 6 September and the letter of 7 September 2017, Loaf's concerns were sufficiently identified to Mr Sandhu.

Lack of timely response to meeting invitation

[77] Mr Sandhu accepts that the email with the letter attached was sent in the afternoon of 7 September 2016 but says that he was busy getting advice and so did not see it until after 6 pm. He did see it that day however.

[78] Mr Sandhu did not send a reply to that email until about 24 hours later.

No attendance at disciplinary meeting

[79] On the morning of 8 September 2017 Mr Sandhu did not arrive to attend the 10.30am meeting. Mr Armstrong then asked both Mr Cheesmur and the human resources manager to try to call Mr Sandhu to ask where he was.

[80] Mr Sandhu accepts that he had missed calls on his cell-phone. He says that he was on the phone for some of this period trying to get advice. Phone records show that calls were made from both Mr Cheesmur and the human resources manager's cell phones to Mr Sandhu's cell phone shortly after 10.30 am.

[81] The human resources manager did not give evidence, however Mr Sandhu accepted that he had a message on his phone from her. He says that he was on the phone when someone called him. He says that the message from the human resources manager was that she was calling about the meeting today and she asked him to let her know when he had got the message. Mr Sandhu did not call her back.

[82] Mr Sandhu accepts that he had another voicemail message, which may have been from Mr Cheesmur. He says that he did not check that message and does not offer a reason for that. Mr Cheesmur says that he called Mr Sandhu but is unable to recall specifically whether he left a voicemail message. He believes that he would

have done. I accept that and find that both the human resources manager and Mr Cheesmur left messages for Mr Sandhu.

[83] Mr Sandhu offered several explanations as to why he did not attend the meeting or respond to the messages left for him by Loaf staff. He says that he thought he was trespassed from Loaf. However, given that the letter clearly invited him to a meeting, a sensible response would have been to make contact and see if he was trespassed or whether he could come in for the meeting. He did not do that.

[84] In addition, Mr Sandhu suggested that he was so busy trying to get advice that he could not contact Loaf. However, under questioning he accepted that he had not been on the phone for the entire four hours between say 11.00am and 3.00pm on 8 September 2017.

[85] Mr Sandhu accepts that he knew there was to be a meeting where Loaf were going to discuss issues which they thought were serious. He says that he could not think properly, that he got distracted and that is why he did not call anyone at Loaf to tell them that he was not coming to the meeting. While I accept that Mr Sandhu felt under pressure, I found his explanations unsatisfactory as to why he did not contact someone at Loaf to say that he was seeking advice and/or needed more time. He could have contacted the human resources manager or Mr Cheesmur.

[86] During the course of his evidence Mr Sandhu mentioned for the first time that he was advised by phone, from an organisation he was seeking legal assistance from, not to go to the meeting. He was unclear about whether this advice came from an administrative person or a lawyer.

Decision to dismiss

[87] Having received no response from Mr Sandhu by 3 pm on 8 September 2017, some four and a half hours after the meeting time, Loaf considered and decided to terminate his employment. A termination letter was sent by email. The letter refers to Mr Sandhu admitting that he had thrown dough inside the bakery and advising that his employment was terminated due to serious misconduct. Reference is also made to health and safety and food safety requirements.

[88] Mr Sandhu then emailed back saying:

Thanks for emails as I have just checked my emails and found that you have sent me an email two times. Due to looking for legal advice about myself being sent home unfairly and threatened me to call cops or trespass on me and telling me that I have 30 seconds to leave the building which then I left the building. I just wanted to let you know that I have seen my superiors ... [2 people named] throwing dough pieces and ...

I will be in touch on Monday after taking legal advice.

[89] On Tuesday 12 September 2017 Mr Sandhu emailed a letter to Loaf setting out his personal grievance claim. Loaf replied offering him the opportunity for a formal meeting. Mr Sandhu's representative later advised that the representative rather than Mr Sandhu would attend the meeting.

Opportunity to respond to concerns

[90] Mr Sandhu had opportunities on 6 September 2017 during the various discussions with the human resources manager, Mr Cheesmur and Mr Armstrong to provide an explanation. He did not on those occasions make the point about dough throwing being common practice.

[91] I accept that it was right to give him the opportunity at a more formal meeting, with support or representation, to provide an explanation. That was done by inviting him to meet on 8 September 2017.

[92] Mr Sandhu legitimately and reasonably sought advice. However, what he did not do was contact Loaf to tell them that he needed more time, was trying to get advice or wanted to meet with Loaf. His obligation of good faith required him to be communicative. Loaf followed up twice trying to contact Mr Sandhu and find out what was going on.

[93] No doubt an extension and different time should have been agreed to by Loaf if requested to do so by Mr Sandhu or his representative. However, Mr Sandhu did not contact Loaf to explain the difficulty or make the request to change the meeting time. He had both phone and email details but used neither.

[94] It is most unfortunate if Mr Sandhu received inadequate or inaccurate advice or information, however, Loaf was not aware that he was seeking advice or of the nature of what he was told. I need to look at the reasonableness of its actions in that light.

[95] There was only half a day between when the meeting was to be and when Loaf decided to dismiss. However, although by a narrow margin, I accept that Mr Sandhu was given the opportunity to respond to Loaf's concerns and having not shown that he wanted to take up that opportunity, Loaf was entitled to make a decision based on the information which it had.

Conclusion on dismissal

[96] I conclude that Loaf did meet its obligations to act in a procedurally fair manner. However, having found that, in the circumstances this was not a matter of serious misconduct, I find that Loaf unjustifiably dismissed Mr Sandhu.

Reimbursement of lost wages

[97] Turning to remedies, Mr Sandhu claims three months' lost wages and Kiwisaver and holiday pay on those wages, as well as payment of the notice period under his employment agreement. As I have found that Mr Sandhu should not have been dismissed I do not consider that it is appropriate to award him payment for the notice period.

[98] On Mr Sandhu's behalf a weekly rate of \$760.00 gross was claimed totalling \$9880.00 for 13 weeks, or three months.

[99] Loaf questioned whether Mr Sandhu had mitigated his loss. Mr Sandhu provided no written evidence of attempts to find other work. He says that he approached agencies and was able to find some casual employment which earned him up to about \$600. Loaf questions why he was not able to find more employment as it notes that bakers are on the occupational shortage list with the immigration service and Loaf struggles to find bakers to fill its roles. Mr Armstrong says that everyone he speaks to in the industry is looking for people.

[100] I accept that Mr Sandhu made some attempt to find work initially. However, his opportunity to find work was cut short. On the evening of the day that he was dismissed Mr Sandhu booked a ticket to return to India and from 30 October 2017, the day he departed, he was not looking for other work in New Zealand. While his desire to return to his family is understandable, it did have an effect on his ability to mitigate his loss.

[101] Mr Sandhu provided no evidence regarding mitigation of his loss whilst in India.

[102] Mr Sandhu was paid until 10 September 2017. I would not award him more than seven weeks' lost wages, being the time until he left New Zealand. Seven weeks' wages total \$5320.00 less the \$600 earned is \$4720. I consider the issue of contribution below.

Compensation for humiliation, loss of dignity and injury to feelings

[103] Mr Sandhu claims \$15,000 compensation under s 123(1)(c)(i) of the Act. I consider that compensation for the unjustified suspension should be considered as part of a global award of compensation.

[104] Mr Sandhu was shocked during the suspension meeting and confused about what was happening when he was sent home. There was only a modest amount of evidence regarding how the dismissal affected Mr Sandhu. He felt humiliated, worried about his future and how he was going to survive financially. Before considering contribution, \$5,000 is the appropriate compensation figure.

Contribution and remedies outcome

[105] I am required to take into account whether there has been contribution by Mr Sandhu.⁶ Loaf argues that Mr Sandhu was a significant contributor to the situation that gave rise to the personal grievance. Reliance is placed on Mr Sandhu's work history, his throwing of dough on 6 September 2017 and his awareness of the following day's food audit.

[106] If Mr Sandhu's actions are to be taken into account to reduce the remedies they must be both causative of the outcome and blameworthy⁷.

[107] Although the throwing or flicking of dough was something which Mr Sandhu witnessed, there was some recognition by him at the investigation meeting of the risks from equipment if employees were distracted and the possible contamination of products. His former colleague, although confirming the practice, says that it would

⁶ S 124 of the Act

⁷ *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178], *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 Full Court [175]

be reasonable for management to stop the practice if they became aware of it. The fact that others may not have behaved in the right way cannot entirely excuse Mr Sandhu from blame, particularly when he was aware of the audit the following day.

[108] I conclude that Mr Sandhu's actions were blameworthy and contributed to the situation giving rise to his dismissal. I make a reduction of 20% to the remedies outlined above.

[109] I order Loaf to pay Mr Sandhu the following sums within 28 days of the date of this determination:

- (a) \$3,776.00 in lost wages, \$113.28 (for Loaf's Kiwisaver contribution) and \$302.08 (for holiday pay) on that sum, totalling \$4,191.36; and
- (b) \$4,000.00 as compensation under s 123(1)(c)(i) of the Act.

Costs

[110] Costs are reserved and the parties are invited to attempt to resolve that issue between themselves. If the parties are unable to resolve this matter, Mr Sandhu shall have 28 days from the date of this determination in which to file and serve a memorandum on the costs issue. Loaf will have a further 14 days within which to file and serve a memorandum in reply.

[111] Any claim for costs are to include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[112] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Nicola Craig
Member of the Employment Relations Authority