

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA110/09
5149314

BETWEEN

TARUN SHARMA
Applicant

AND

GOLDEN INDIAN
ENTERPRISES LIMITED
Respondent

Member of Authority: Yvonne Oldfield

Representatives: Applicant in person
Gaurav Saraswat (director) for Respondent

Investigation Meeting: 26 February 2009

Determination: 07 April 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Sharma claims that the respondent unjustifiably dismissed him from his position as Restaurant Manager in November 2008. He also claims arrears of wages and holiday pay.

[2] The respondent disputes both claims and says that it did not treat the employment as being at an end until after the applicant had been absent without leave for twelve days. The respondent counterclaims against the applicant in respect of food and accommodation which the respondent says it provided to the applicant.

[3] In his statement of problem, Mr Sharma (who has not had legal representation at any stage) sought interim injunctive relief. However the Authority proceeded to an early hearing of the substantive employment relationship problem and was able to complete the investigation of all the claims and counterclaims on 26 February. This determination therefore disposes of all issues tabled by both parties.

Issues

[4] The issues for determination are:

- i. whether Mr Sharma was dismissed and if so, whether this was unjustified;
- ii. whether the respondent owes the applicant arrears of wages or holiday pay, and
- iii. whether the applicant owes the respondent for food and accommodation.

Was Mr Sharma unjustifiably dismissed?

[5] Mr Sharma came to New Zealand to complete a degree at Massey University. After he finished his university studies he worked in the security and hospitality industries on temporary work permits. At the time of these events he had a permit which ran until September 2009.

[6] Mr Sharma started work in the respondent's Te Puke restaurant on or about 15 September 2008. Mr Saraswat (who was not permanently resident in Te Puke) would visit each week and assist in the restaurant. After some equivocation about the date, Mr Sharma told me that on or about 15 November 2008 Mr Saraswat arrived for his weekly visit and told Mr Sharma that he was closing the restaurant for one month for renovations and would pay Mr Sharma for 15 days of that time. Mr Sharma says that he got a lift back to Auckland with Mr Saraswat later that day. He said he left without seeing or speaking to Mr Singh, his flatmate and chef at the restaurant, because he had got up before Mr Sharma and gone over to Papamoa for the day. I asked Mr Sharma whether he was aware of Mr Saraswat leaving any message for Mr Singh about what was happening but he said he did not know, and did not think to ask.

[7] Mr Sharma told me that he returned to live in his old flat in Auckland, which he had kept on during his time in Te Puke. He said the payment Mr Saraswat had promised did not materialise. Mr Sharma told me he tried to contact Mr Saraswat by

phone but was unsuccessful. After a couple of weeks had passed, he rang the restaurant in Te Puke. He said Mr Singh answered the phone and told him the restaurant had never closed.

[8] Mr Saraswat says there was never any suggestion that the restaurant would close and vehemently denies everything Mr Sharma has said. He says that Mr Sharma simply disappeared without leaving any messages, on 28 October (the day after Labour Day.) Prior to this Mr Saraswat had received advice from his accountant that there were discrepancies in the accounts of the restaurant. When Mr Sharma disappeared and did not return Mr Saraswat concluded that he must have been stealing from him. Mr Saraswat said at first he spent time in Te Puke to fill the restaurant manager's role himself then, from 12 November, his brother stepped in to help him.

[9] Mr Sharma's final wages payment went in to his bank account on 28 October, which was a Tuesday, and the normal pay day. He did not receive holiday pay.

[10] Sometime after the applicant's employment ended, but before Christmas 2008, Mr Saraswat sacked Mr Singh. He told me he did so because the discrepancy in the accounts persisted after Mr Sharma left, leading Mr Saraswat to suspect the chef had also been stealing from him. Mr Singh has remained in contact with Mr Sharma and attended the Authority's investigation meeting to support him. He told me that he knew nothing about the circumstances of Mr Sharma's leaving Te Puke at the time but confirmed that Mr Sharma rang him a few weeks later. The effect of Mr Sharma's version of events was the same, for Mr Singh, as that of Mr Saraswat: either way, Mr Sharma simply failed to show up for work one day without telling him anything about it.

[11] In order to prove that he did not leave Te Puke until 15 November (and with the aim of demonstrating that his account of events was more credible than that of Mr Saraswat) Mr Sharma provided me with his bank statements. These show transactions in Rotorua on 7 November (a Friday) and in Te Puke as late as 11 November.

[12] On or about the same date as this final transaction in Te Puke Mr Saraswat says he informed the Immigration Service that Mr Sharma had left his employ. This resulted in the cancellation (on 15 January 2009) of Mr Sharma's work permit and

notice to him that he must leave the country. Although it gives no precise date, the notice of revocation confirms that it was in November that Mr Saraswat advised Immigration of Mr Sharma's departure.

[13] Mr Sharma told me he was unable to find work after his employment with the respondent ended, and has been living off money sent to him from India by his parents.

[14] On 20 January 2009 he lodged this matter in the Employment Relations Authority, citing the revocation of his permit as the reason for doing so. So far he has not been able to persuade the Immigration Service to reverse its decision to revoke his permit.

Determination

[15] I have been presented with two very different versions of events and little in the way of independent evidence to assist in resolving the differences between them. In a claim of unjustified dismissal the onus is on the applicant to begin by proving the very fact of dismissal. If the evidence is equally balanced on the question of whether the employment did indeed end at the employer's initiative, then that onus will not have been discharged and the applicant's assertion that he was dismissed will not have been made out.

[16] Mr Sharma told me he would not have risked jeopardising his work permit (and ability to remain in New Zealand) by disappearing in the way Mr Saraswat describes. He also says that his presence in Te Puke on 11 November shows that he had not abandoned his job at that stage. However, the fact that Mr Sharma was in the Bay of Plenty area up until 11 November does not establish conclusively that he was still in his job then. I have also noted that whilst in Te Puke he had continued to pay rent at his old flat in Auckland, indicating that he contemplated the possibility of returning there at short notice, and that the trigger for bringing this matter to the Authority was not the alleged dismissal but the revocation of his permit. Finally Mr Sharma was less consistent in his evidence that Mr Saraswat and made changes to his account of events, which undermined his credibility.

[17] Overall, I find it is no more likely that Mr Saraswat ended the employment relationship than it is that Mr Sharma did so. There is insufficient evidence, on balance, to persuade me that Mr Saraswat dismissed Mr Sharma. Mr Sharma's claim of unjustified dismissal fails.

Arrears of wages/ counterclaim

[18] Mr Sharma and Mr Saraswat (on the respondent's behalf) executed a written employment agreement which set an annual salary of \$35,000.00 and provided that:

"The Employee's hours of work shall be between 40 and 45 hours per week on Tuesday through to Sunday, between the hours of 11.00am and 9.00pm."

[19] Mr Sharma initially told me he worked approximately 3.30pm to 10.30pm seven days a week. Later he acknowledged that he had at least some Mondays off. He also told me at first that he worked public holidays for no extra pay however he later agreed that he did not work on the one public holiday during his employment which was a Monday (Labour Day.) Mr Sharma told me that his salary was often paid late and that he was underpaid.

[20] The pay records provided by Mr Saraswat show that the "base payment" was \$557.69 gross. From this was deducted \$101.88 tax, leaving a net weekly payment of \$455.81. The respondent's bank statements were produced and show that from the week ending 23 September Mr Sharma received four weekly payments of \$455.00 net. No payment was made in the fifth week. Then, at the end of the sixth week (on 28 October) Mr Saraswat received \$630.00. Mr Saraswat explained that Mr Sharma had been sick for part of the fifth week and the final payment was for the balance of that week plus full pay for the sixth week.

[21] After comparing this information to his own bank statements (which were also produced in evidence) Mr Sharma agreed that these payments were made.

[22] Mr Sharma and Mr Singh lived in a local house which was owned by another company in which Mr Saraswat had an interest. Mr Sharma ate at the restaurant and at the end of the evening was free to take leftover food home for the next day. Mr

Saraswat told me that Mr Sharma never paid for his accommodation and food. The respondent counterclaims a total of \$1,380.00 (\$230.00 per week) for this.

[23] Mr Sharma told me he expected to get food and accommodation provided free of charge as part of his terms of employment. There is no mention of this in his employment agreement. Nor, however, is there any tenancy agreement relating to the occupancy of the house.

[24] Mr Sharma did provide me with a deposit slip showing that he had deposited \$302.00 into Mr Saraswat's personal account. He said he also made other cash payments to Mr Saraswat. However he said that this was not rent, but rather related to immigration matters. Mr Saraswat could not recall what the payment related to.

Determination

[25] The claim for arrears of rent is dismissed for want of evidence of any tenancy agreement. As for food, I accept Mr Sharma's assertion that it is common in the hospitality industry for staff to get at least one meal provided. For this reason the claim for payment for food also fails.

[26] Turning to the claim for arrears of wages, I note that neither Mr Saraswat nor Mr Sharma was very clear about the hours actually worked. In the absence of better evidence I conclude that the total number of hours was probably close to the number contracted for, and usually worked over six days rather than seven.

[27] As we have seen, the agreement sets a salary of \$35,000.00, or \$673.08 gross per week, not the \$557.69 gross per week the applicant actually received. It was not explained to me why Mr Sharma was not getting the full amount set out in his contract. It does not seem to have been a rent or food payment, since that was counterclaimed.

[28] Having accepted that his total hours of work came up to the level set in the contract, I accept that he is entitled to his full wages. The arrears can be calculated as follows. Allowing for sick leave (for which he was not entitled to payment) Mr Sharma was entitled to be paid at a rate of \$35,000 per annum for five weeks and two

days. Gross salary payable for that period is therefore \$3,634.61 gross. Payments to him totalled \$3,000.37 gross according to pay records supplied by the respondent. The respondent is therefore liable for the shortfall of \$634.25 gross.

[29] The applicant is also entitled to holiday pay of 8% on the total gross earnings of \$3,634.61, namely a further \$290.77 gross.

Costs

[30] Neither party was represented and the issue of legal costs does not arise. However the applicant is entitled to recover the Authority filing fee of \$70.00

Summary of orders

[31] **The respondent is ordered to pay to the applicant the following sums:**

- i. \$634.25 gross arrears of wages;**
- ii. \$290.77 gross holiday pay, and**
- iii. \$70.00 reimbursement of filing fee.**

Yvonne Oldfield

Member of the Employment Relations Authority