

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 621
3049753

BETWEEN

GUNJEET KAUR SIDHU
Applicant

AND

RYTHM HOSPITALITY
LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: The Applicant in person
Gagandeep Singh for the Respondent

Investigation Meeting: 29 July 2019

Submissions Received: From both parties at the investigation meeting

Date of Determination: 30 October 2019

DETERMINATION OF THE AUTHORITY

- A. Gunjeet Sidhu was subject to an unjustified action by Rythm Hospitality Limited to her disadvantage.**
- B. Ms Sidhu was unjustifiably dismissed by Rythm Hospitality Limited.**
- C. Within 28 days of the date of this determination Rythm Hospitality Limited is to pay Ms Sidhu the following as remedies for her personal grievances:**

- (i) **\$2,769.23 gross as lost wages;**
- (ii) **\$11,250.00 as compensation for humiliation, loss of dignity and injury to feelings; and**
- (iii) **\$720.00 as money lost as a result of the dismissal.**

D. Rythm Hospitality Ltd is order to pay Ms Sidhu the sum of \$71.56 for the Authority's filing fee, within 28 days of the date of this determination.

Employment relationship problem

[1] Gunjeet Kaur Sidhu worked for Rythm Hospitality Limited¹ (RHL or the company) as the operations manager at a bar in Auckland. She was on a work visa which relied on her RHL job.

[2] RHL is owned by Gagandeep Singh. He also operates another bar, where he spent most of his work time.

[3] Ms Sidhu claims that she was subject to an unjustified action by RHL to her disadvantage regarding health and safety and was unjustifiably dismissed by it. She claims lost wages and other money, as well as compensation for humiliation, loss of dignity and injury to feelings.

RHL's involvement in the proceeding

[4] The company was originally represented by an advocate and a statement was filed. Although that document is entitled statement of problem, I am satisfied that it is a statement in reply to Ms Sidhu's claim. The statement's entitling refers to the respondent as "Rhythm Hospitality Limited", although there is no registered company with that spelling. The email address provided for the company refers to Rythm.

[5] After RHL ceased being represented by the advocate, RHL's director Mr Singh had some involvement with the Authority. He confirmed that the document was filed for RHL. The Authority has the power to validate things done informally² and I am satisfied that the respondent is the registered company Rythm Hospitality Limited.

¹ Spelling as indicated

² Section 219 of the Employment Relations Act 2000

[6] RHL's statement denies that it dismissed Ms Sidhu, saying that she abandoned her employment. The company also denies breaching its obligations in regards to health and safety and says that Ms Sidhu does not have a valid personal grievance claim.

[7] No witness statements or further documents were filed by RHL as directed. However, Mr Singh attended the investigation meeting representing the company.

The Authority's investigation

[8] At the investigation meeting I heard evidence in person from Ms Sidhu and Mr Singh.

[9] A claim for holiday pay had been resolved by the time of the meeting.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received but has stated findings, expressed conclusions and specified orders made as a result.

Who was the employer?

[11] Ms Sidhu originally sought to lodge this claim against the director Mr Singh, however, a revised statement of problem naming RHL as the respondent was what was accepted as lodged. At the case management conference Ms Sidhu sought to have Mr Singh joined as a party to the proceeding. A Minute of 27 May 2019 called for any response from Mr Singh and RHL on that issue. Mr Singh replied that RHL should be the respondent.

[12] Ms Sidhu's employment agreement refers to RHL twice on the title page, as well as in the footer of each page. RHL is identified in clause 3 as the employer party. The signature provision had a space for the employer where Gagandeep Singh's name is handwritten along with his signature.

[13] At the investigation meeting Ms Sidhu said that she understood at the time she worked at the bar that RHL was her employer but that the focus of her concerns was Mr Singh's actions.

[14] There was no other documentary evidence of assistance. I conclude that RHL was the employer. In the context of a personal grievance claim I can see little

purpose at this stage in joining Mr Singh as a party and so did not join him to the proceeding.

What were the health and safety issues?

[15] Ms Sidhu's claim regarding health and safety appears to rely mainly on having to work excessive number of hours. She also felt physically unsafe at times due to fights and presence of gang members at the bar, sometimes with groups from opposing gangs being present.

Agreement provisions on hours of work

[16] Clauses in Ms Sidhu's employment agreement with RHL regarding hours of work are inconsistent. The agreement specified that the position was part time,³ which is defined as being flexible hours which were expected to be less than 32 hours per week.⁴ However, it also stated that the ordinary hours of work should not normally exceed 40 to 45 hours a week or 10 hours a day.⁵ Further, where the parties agreed, the ordinary hours may exceed 40 in any week, provided that no more than 50 hours may be worked "without agreement".⁶

[17] Perhaps surprisingly for an arrangement with such a range of possible hours of work, the agreement provides for an annual salary of \$48,000 gross. Ms Sidhu makes no claim for any unpaid hours worked.

Ms Sidhu's position

[18] Ms Sidhu says that she was supposed to be working 40 to 45 hours a week, which is consistent with one part of the employment agreement. However, she says that in practice she often worked considerably more hours due largely to the lack of other staff with duty manager's certificates, necessary to allow alcohol to be served. She had a duty manager's certificate.

[19] When Ms Sidhu started at the bar in June 2017 there were two duty managers. However, both those staff members took extended leave at different times and finished employment in the early months of 2018. Ms Sidhu was then the only

³ Clause 5.1

⁴ Clause 2.2

⁵ Clause 6.1

⁶ Clause 6.2

employee with a duty manager's certificate. As a result she was required to work extended hours as set out below.

[20] Ms Sidhu's view is that Mr Singh did not want to hire more staff so he could cut costs.

[21] At times Ms Sidhu felt unable to take time off sick or injured because the business was so short staffed. Once when Ms Sidhu was off on ACC having injured her back and supposed to be on bed rest, Mr Singh's wife came to pick her up from home and took her into the bar so she could count money and set up the tills.

[22] When she was the only staff member with a duty manager's certificate, she sometimes worked from 11am to 4 or 5 am the following morning. These shifts of up to 18 hours were on Friday and Saturday night. On Sunday and Tuesday to Thursday Ms Sidhu would work an 11 hour shift.

[23] This equates to a total of around 80 hours work a week. Neither party were able to be precise regarding how long this continued for but my sense is that it was at least a few months.

[24] A member of the kitchen staff later got their certificate and took over the day shifts. Ms Sidhu continued to cover the night shifts. A new duty manager was hired but, according to Ms Sidhu, was not offered the hours he was promised and left. Ms Sidhu thus continued to cover most of the night shifts

[25] Due to being the Operations Manager Ms Sidhu also had to undertake work even when she was not working at the bar. Her work from home included emails, dealing with staff queries and operating the business's Facebook account.

[26] Ms Sidhu who had been relatively recently married, started having problems at home because she was working every night. She describes it as having a huge impact on her personal life, marriage, and physical and mental health. She began having anxiety and panic attacks. She sought medical advice.

RHL's position

[27] RHL did not dispute the hours of work claimed by Ms Sidhu.

[28] However, the company suggested that as Ms Sidhu was involved in the hiring of staff, she could have advertised and appointed other duty managers. She denies this, saying that Mr Singh's wife advertised the bar's roles on Trade Me and Ms Sidhu did not have access to that account. Mr Singh's evidence indicated that Ms Sidhu had wide powers to hire staff. However, that was not consistent with Ms Sidhu's position description which referred only to training, supervising and managing staff, and not to hiring them.

[29] Both Mr Singh and Ms Sidhu agree that the business was not financially lucrative.

[30] Mr Singh says that Ms Sidhu was compensated for any extra hours worked by getting time off or she could use it for sick leave. There was no other evidence of this occurring nor of any system being in place to record such compensation. In addition there were inadequate staff with a duty manager's certificate to cover her taking sufficient periods of time off.

[31] Mr Singh also refers to occasionally giving Ms Sidhu \$100 as, being the Operations Manager, she was not entitled to the employee of the month award.

[32] Mr Singh stated that Ms Sidhu's problems at home were for reasons other than her work but he did not wish to say what they were, despite Ms Sidhu saying that she wanted to hear them. I was therefore unable to pursue this prospect further.

Timesheets

[33] Ms Sidhu says she filled out timesheets of her hours and gave them to the external payroll provider. Mr Singh did not cross examine Ms Sidhu on this, or any other, issue. RHL did not file any timesheets despite the Authority directing that all relevant documents be filed.

Raising the hours issue

[34] Ms Sidhu says that she mentioned a lot to Mr Singh and his wife that she was stressed and needed more time off.

[35] Mr Singh's wife, although not a shareholder or director of the company, had involvement with the business, including undertaking book-keeping. She and Ms

Sidhu were in frequent and friendly contact in hindsight thinking it was the other woman's friendliness which had kept her working for RHL despite the long hours.

[36] RHL filed extensive What's App messages between the two. These include supportive comments by Mr Singh's wife but also Ms Sidhu reporting:

(a) being badly affected by having to cover for the duty manager (March 2018);

(b) being left in tears because the remaining reliable staff were super demotivated and not wanting to work (April 2018). Mr Singh's wife acknowledges that the work load has been "quite a bit". Ms Sidhu refers to having no time to even go to the supermarket for groceries, being anaemic and tiring easily; and

(c) being understaffed in April and May 2018 and having untrained staff.

[37] In May 2018 Ms Sidhu sent a lengthy message including:

So my wellbeing doesn't matter. And I can't feel sick ,... even for one day?... It's the company's responsibility to find another manager. Not mine....The minute I wake up the phone starts ringing. The hours I write on my time sheet don't even matter because I'm working all the time except when I'm sleeping. No one can put 3 people's jobs on my shoulders and expect me to not break down. The job that 3 people were doing in this place is being covered by me alone for about half a year now and its not fair. ...My brain is about to explode but obviously no one cares because it has been running smoothly so far...I have a [life] outside of work.. and it is in a total mess right now partly because of this job which is a total mess itself...

[38] Mr Singh's wife replies that she knows Ms Sidhu is not well and she will try to arrange for Mr Singh to give Ms Sidhu a break. She arranges for Ms Sidhu not have to work that night, but proceeds to tell her to pull herself together and go in tomorrow morning to open the bar.

[39] Although there was some decrease in hours, Ms Sidhu remained having to cover many duty manager shifts as well as undertake the Operations Manager role.

Conclusion

[40] Ms Sidhu was required by RHL to work excessive hours. Even once she reported the negative effects, insufficient steps were taken to moderate her hours to a reasonable level. RHL did not act as a fair and reasonable employer could have done and was in a breach of its health and safety obligations to Ms Sidhu. RHL's actions were unjustified and were to Ms Sidhu's disadvantage. She became distressed and her health and personal life suffered.

[41] I have considered making a separate award of compensation for this grievance but find that it forms a significant backdrop to the dismissal claim and so will make a global award covering both grievances, as set out below.

What about fights?

[42] Ms Sidhu's impression was that an increasing number of fights were happening at the bar. Some were gang related and Ms Sidhu believed that Mr Singh encouraged gang patronage. On occasions the police would be called to intervene in the fights. Mr Singh did not consider that the situation was worse than that of any other bar in the area. He denied encouraging patronage by gang members.

[43] The long hours and the nature of the bar environment appear to have come to a head for Ms Sidhu. On the night of 23 November 2018 several fights were occurring in and outside the bar at one time. A pregnant woman was injured and reportedly later miscarried. Ms Sidhu says she needed a good number of security and bar staff to manage that night.

[44] Ms Sidhu filed a video from that evening which someone else had put up online.

What happened on Saturday 24 November 2018?

[45] The following evening RHL was sponsoring one of the bar's security guards who was participating in a boxing event. Mr Singh was at the fight.

[46] Ms Sidhu was working that night as duty manager. She had rostered two other front of house staff to be there but neither showed up nor were they responding to her calls or messages. Ms Sidhu rang Mr Singh's wife to ask her to try to find someone to work while Ms Sidhu also asked around. Ms Sidhu eventually arranged for another staff member, who was at the bar as a customer, to work as a favour.

[47] The security guards did not arrive as anticipated. Unexpectedly new security guards turned up who had not worked at the bar before and did not know the procedures. Ms Sidhu messaged Mr Singh who replied that he knew about the security situation as the experienced guards were at the boxing event. At 9.06pm Mr Singh messaged that he would be at the bar soon. However, he had not arrived by midnight. He maintains that he could not leave the fight as he was a sponsor. Mr Singh suggests he may have phoned within the next few hours but there is no record of that available. He did not message until after midnight.

[48] Additional guards should have arrived but did not. By 10pm Ms Sidhu was starting to “freak out”. She was conscious of her responsibility as duty manager for safety and making sure the bar was fully compliant with its licensing obligations. Ms Sidhu was unable to get hold of Mr Singh but again messaged his wife at 10.56pm that she did not know how they were going to survive “it’s so out of control”. Mr Singh’s wife was living out of Auckland and so could not assist in person.

[49] Ms Sidhu warned Mr Singh’s wife at 11.10pm that she was not staying at the bar to risk her licence if she did not hear from anyone regarding security in the next half hour or by 12, noting “this is just insane. I can’t work here with 3 security and one staff who is not even a bar staff member”.

[50] Ms Sidhu had messaged two different contacts regarding security just after 11pm but got no response. Generally Mr Singh had primary responsibility for dealing with security but Ms Sidhu could not get hold of him.

[51] Mr Singh says he could see CCTV footage of the bar through his phone and did not consider it a particularly busy evening.

[52] By midnight no other bar staff had turned up. Mr Singh had not replied to Ms Sidhu’s messages since just after 9pm. She messaged his wife and said she would not run a shift like that. She was about to close up when the usual security guards showed up but they were drunk. She describes one as not being able to stand up straight. Ms Sidhu was worried about her risk to her manager’s licence, being fined and/or the premises being shut down. Mr Singh acknowledged that some of the guards had been drinking at the fight event.

[53] Mr Singh messaged saying to tell the drunk guards to fuck off. However, Ms Sidhu was worried that that would leave the bar with only the three new guards.

[54] Mr Singh acknowledged that the busiest time in the bar on weekends was 1 to 3am. Ms Sidhu was very worried and wanted to leave. She had mentioned in messages about shutting down but says that she had not got permission to do that. She felt under so much pressure and stress that she broke down, crying. She went outside to leave.

[55] Two staff were present as customers (a security guards and a bar person). Ms Sidhu said she could not stay. The security guard as described by Mr Singh as having been stood down until she fixed some property which she had damaged. She told Ms Sidhu not to worry, she would look at after the place and close it down. Ms Sidhu handed over the keys and told her what to do including not to serve alcohol while there was no duty manager. Ms Sidhu then drove away.

[56] Mr Singh says he left a few minutes before boxing event finished and tried calling Ms Sidhu but she did not answer. He saw Ms Sidhu leaving in her car and followed but lost sight of her.

[57] During the drive Mr Singh was sending began messaging and calling Ms Sidhu. The messages included the following sequence, without replies from Ms Sidhu:

- Just wait there gunjeet dnt fuck me up
- I will fucking get angry wint be good for u
- Just fucking wait there when I come u can go
- Just stop there I'm behind u
- U are a big looser gunjeet just get lost dnt show me ur fucking face again
- Just fuck off dnt fucking cone to work again. U fucking looser. U are not capable of anything u piece of shit. If I see u again I will throw u out. U deserve shit gunjeet, Madarchod⁷ u have no respect for anyone

[58] Ms Sidhu was very disturbed by the messages. Due to Mr Singh's message that he was behind her, she feared that Mr Singh was following her in his car and was scared. She was correct that he was following her at one point. She decided not to go home immediately. Mr Singh says that he was concerned about Ms Sidhu and that

⁷ Translation – motherf**ker

was why he followed her and then went to her house. This is not in keeping with the messages above.

[59] Ms Sidhu was not home so Mr Singh returned to the bar, concerned about the obligation to have a licenced manager on the premises. No alcohol had been served in the absence of a duty manager. Mr Singh described being stressed by what was going on.

[60] Ms Sidhu did not work at the bar again.

Was Ms Sidhu dismissed?

[61] Mr Singh did not contact Ms Sidhu again, either by phone, message or email. However, his wife did. He says she was doing it on his behalf although that is not evident on the face of the messages. His wife asked Ms Sidhu, via text message if she was that angry that she was not coming into work at all. Ms Sidhu refused to come back due to the way she had been treated. She made reference to Mr Singh's swearing. Her evidence was that although Mr Singh used to swear at times, he had never sworn at her before. Ms Sidhu's text continues:

...he fired me on the spot asked me not to come back n if I do he will throw me out.

[62] After messaging that she does not want to discuss it any further, Mr Singh's wife messaged that that was fine. She then asks Ms Sidhu for her resignation letter, saying she cannot force her (to provide one). Ms Sidhu does not provide a resignation letter. Mr Singh's wife contacts Ms Sidhu a few days later, asking her to come back for a month to "give me some time to fix his ways". Ms Sidhu refuses, saying Mr Singh had messaged saying he would throw her out if he sees her face again and "I am not up for that".

[63] Although Mr Singh suggested at the investigation meeting that his wife apologised on his behalf there is no evidence of that in the text messages.

[64] RHL says that Ms Sidhu was not dismissed but rather that she left during her shift without authorisation and decided not to return despite repeated requests for a month.

[65] Ms Sidhu was told by text message never to come back to work. I do not consider that Mr Singh's wife suggesting that she come back was sufficient. Given

the nature of his messages and the fact he was the owner of the business, Mr Singh himself should have made contact and offered Ms Sidhu assurance that, despite what he had said, he wanted her back in the workplace. His texts and then inaction subsequently amount to sending Ms Sidhu away and thus dismissing her.

Was Ms Sidhu's dismissal unjustified?

[66] I assess whether, under s 103A of the Act, RHL acted as a fair and reasonable employer could have done in all the circumstances. Ms Sidhu left the bar during her shift. Under normal circumstances that would not be acceptable conduct and could warrant disciplinary action. However, I take into account the pressure Ms Sidhu had been under, being required to work seven nights most weeks for an extended period, despite complaining about the pressure she was under.

[67] There was a lack of process by RHL. The company did not inform Ms Sidhu of its concerns, investigate the situation at the bar that night, give Ms Sidhu a chance to comment on its concerns and listen to any response she had.

[68] When asked about Ms Sidhu thinking her certificate was at risk if she stayed, Mr Singh indicated that if she had been fined, her fine would have been smaller than what the business would have been fined and the risk to his investment, implying that she should have put up with it.

[69] RHL failed to act as a fair and reasonable employer could have done and unjustifiably dismissed Ms Sidhu.

What remedies should Ms Sidhu receive?

[70] Ms Sidhu claims a month's wages. I am satisfied that she began applying for jobs straight away and was fortunate to find one quickly. The first job she was offered was in Wellington, which she accepted. However, it took some weeks to arrange a new visa to reflect her new employer. Her claim of four week's wages (\$3,692.31 gross) is modest and I would award it, subject to a consideration of any contribution by her to the situation giving rise to her dismissal.⁸

[71] I assess the compensation for the health and safety work hours issue globally with the dismissal grievance. Ms Sidhu's life was quite seriously impacted by the

⁸ Section 124 of the Act.

hours she had to work. Her physical and mental health suffered, as did her relationship. As to her dismissal, she was fearful as a result of the chain of messages from Mr Singh. She was put under pressure financially as she was not able to work for some time. She worried about whether she would be able to stay in New Zealand because of her immigration status. Prior to any contribution deduction a figure of \$15,000 is appropriate.

[72] Ms Sidhu makes a claim for lost benefits being the flight costs of obtaining the position and moving to Wellington (totalling \$465.00) and an application fee to get her visa changed to her new employer (\$495.00). Neither of those amounts would have needed to be spent if Ms Sidhu had not been dismissed and Ms Sidhu should be compensated for them, subject to the contribution assessment. I make no award for the trip to attend mediation, as costs associated with mediation cannot usually be claimed.

[73] Ms Sidhu's decision to leave the bar open was unwise and exposed RHL to potential liability for operating without a duty manager present. In addition, it seemingly increased the risk of customer difficulties due to her departure reducing the staff numbers and the bar being unable to sell alcohol in her absence. However, I also take into account that Ms Sidhu's ability to cope with stressful situations was affected by her working of excessive hours for RHL. Ms Sidhu also made some arrangements for others to operate the premises in the meantime and instructed that no alcohol be sold. I assess Ms Sidhu's contribution to the situation giving rise to her dismissal as 25%.

[74] After making deductions for contribution, I order Rythm Hospitality Limited to pay Ms Sidhu the following sums within 28 days of the date of this determination:

- (i) \$2,769.23 gross as lost wages;
- (ii) \$11,250.00 as compensation for humiliation, loss of dignity and injury to feelings; and
- (iii) \$720.00 as money lost as a result of the grievance.

Costs

[75] Ms Sidhu represented herself, so no issue of costs arises.

[76] I order Rythm Hospitality Ltd to pay Ms Sidhu the sum of \$71.56 for the Authority's filing fee within 28 days of the date of this determination.

Nicola Craig

Member of the Employment Relations Authority