

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 318
5560398

BETWEEN

GURINDERJIT SINGH
Applicant

AND

NZ TRADINGS LIMITED
TRADING AS MASALA
BROWNS BAY
Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
Joti Jain for Respondent

Investigation Meeting: 7 October 2015

Further Information
Received: 9 October 2015

Determination: 12 October 2015

DETERMINATION OF THE AUTHORITY

- A. Mr Singh did not raise a personal grievance for unjustified dismissal within 90 days and the Authority is unable to be of further assistance to him.**
- B. NZ Tradings Limited is ordered to pay to Mr Singh the amount of 4,572.50 gross pursuant to section 131 of the Employment Relations Act 2000 within seven days of the date of this determination.**
- C. NZ Tradings Limited is ordered to pay to Mr Singh the amount of \$1,018.03 gross pursuant to section 131 of the Employment Relations Act 2000 within seven days of the date of this**

determination.

- C. NZ Tradings Limited is ordered to reimburse to Mr Singh the filing fee of \$71.56 within seven days of the date of this determination.**

Employment relationship problem

[1] Mr Gurinderjit Singh claims he was unjustifiably dismissed from his job as Assistant Manager with NZ Tradings Limited trading as Masala Browns Bay (Masala Browns Bay) on 24 December 2014. Mr Singh also claims arrears of wages.

[2] Mr Singh lodged his statement of problem in the Authority on 4 June 2015. The statement of problem was served on Masala Browns Bay on 5 June 2015.

[3] Masala Browns Bay failed to lodge and serve a statement in reply and on 22 June 2015 by Minute I set out the process I intended to follow in investigating Mr Singh's claims. Included in my Minute was a direction to Masala Browns Bay that if it wished to respond or be heard on the matter it must lodge and serve any witness statements on or before 18 September 2015. Masala Browns Bay was also directed to ensure any correspondence be accompanied by an application for leave to respond to the matter.

[4] On 15 August 2015 Mr Rajwinder Singh Grewal signed a Consent and Certificate of Director naming him as the sole director of Masala Browns Bay, replacing Ms Joti Jain. The address for service of the company was also changed in September 2015. The Authority attempted to serve Mr Singh's statements which he lodged in the Authority on 9 September 2015 on the new address for service of Masala Browns Bay. The documents have been returned to the Authority unopened.

[5] On Monday, 5 October 2015 the Authority was advised by Counsel that he was instructed to act on behalf of Masala Browns Bay and requested a postponement of the hearing until a mutually agreeable date after mid-November. The reasons given for the application for adjournment was that Counsel was out of the country until mid-November and Mr Grewal had a sentencing hearing on 16 October 2015. The application for adjournment was not accompanied by an application for leave to respond to the matter.

[6] Mr Singh opposed the application for adjournment.

[7] The Authority has dealt with a number of matters involving Masala restaurants many of which have been subject to delays due to the unavailability at the last minute of directors of the various legal entities operating the Masala restaurants or the companies have gone into liquidation. Given that history, the last minute application for an adjournment and the lack of an application for leave to respond to the matter, the application was declined and the meeting proceeded on 7 October 2015. Ms Jain, Mr Grewal and Mr Rupinder Singh attended the meeting for Masala Browns Bay.

[8] Following discussions with Ms Jain about Masala Browns Bay's failure to engage in the Authority's process, leave was granted by the Authority to Masala Browns Bay pursuant to Regulation 8(3) of the Employment Relations Authority Regulations 2000 to respond to the application brought by Mr Singh.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Singh and Masala Browns Bay 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.

Credibility

[10] As will become clear throughout this determination the parties' respective accounts as to what occurred differ in many significant respects. It is therefore necessary for me to determine whose evidence I find to be more reliable on any given issue.

[11] The Authority's responsibility is to carefully evaluate all the evidence including considering whether there are any external indications which can assist in a determination as to what occurred. The evidence has to be evaluated in a common sense but fair way. I have placed importance on contemporary materials, objectively established facts and the apparent logic of events.¹

¹ *Adams trading as Untouchable Hair & Skin v Brown* [2015] NZEmpC 77 at [73] – [74].

Background

[12] Mr Singh was offered and accepted employment in March 2014. At that time the company employing Mr Singh was called Browns Bay 2013 Limited. The name changed to NZ Tradings Limited on 14 April 2014. The company operates the Masala restaurant in Browns Bay.

[13] Mr Singh signed a written employment agreement on 20 March 2014. The rate of pay is set out as follows (verbatim):

7.1 Remuneration

The Employee's salary shall be paid **\$18** per hour, which shall be paid **weekly** on **THURSDAY** into a bank account nominated by the Employee.

[14] Mr Singh used the signed employment agreement as part of his application for a work visa which was successful. Mr Singh was issued a work visa on or about 16 May 2014.

[15] There is a dispute about when Mr Singh commenced working for Masala Browns Bay. At first Mr Singh said he started on 16 May 2014 but revised that to 17 May 2014 being the day after he was issued his work visa. Masala Browns Bay says Mr Singh commenced work on 26 May 2014 because the work visa was not received by Masala Browns Bay until 19 May 2014.

[16] On the balance of probabilities it is more likely than not that Mr Singh commenced work on 17 May 2014. Ms Jain told the Authority that she paid Mr Singh his first weeks' wages on 20 June 2014 into his bank account and also paid him four weeks' wages in cash. Ms Jain told the Authority that she paid Mr Singh for his first weeks' wages so late because she was waiting for Mr Singh to provide bank account details. The receipt of four weeks' pay was acknowledged by Mr Singh by text on 18 June 2014.

[17] The payment of four weeks' wages plus the payment of Mr Singh's first weeks wages is equivalent to five weeks pay which, when counting back from 20 June 2014 makes it more likely that Mr Singh commenced his employment before 26 May 2014.

[18] There was a dispute as to whether Mr Singh had worked for the whole month of August which was included as part of his claim for unpaid wages. At the

investigation meeting Mr Singh acknowledged that he took two weeks leave August 2014 to travel to India for his brothers' engagement.

[19] In October 2014 Mr Singh worked at Masala Bucklands Beach which was owned and operated by Mr Grewal who was at that time the sole director and shareholder of Bucklands Beach Limited (in Liquidation).

[20] Mr Singh says he was told by Ms Jain, to talk to Mr Grewal about working at Masala Bucklands Beach. Mr Grewal gave evidence that Mr Singh approached him and asked him if he had a job for him. Mr Grewal told Mr Singh that if he was not working at that time then he would employ him at Bucklands Beach. Mr Grewal says Mr Singh signed a written employment agreement and started working at Bucklands Beach in early October 2014. Mr Singh denies he was offered and signed a written employment agreement in October.

[21] On the balance of probabilities I find it is more likely than not that Mr Singh worked at all times for NZ Tradings Limited. The employment agreement contemplated that Mr Singh could be required to work at any of the Masala restaurants in the following terms (verbatim):

5.1 Flexible Location

The parties agree that the Employee shall perform their duties at **MASALA BROWNS BAY**, and at any other Masala location Auckland Wide to which they may be directed from time to time by the Employer.

[22] Mr Grewal's account is not consistent with the fact that in October 2014 Mr Singh continued to be paid by and on the payroll of NZ Tradings Limited.

[23] Mr Singh says he left his employment with Masala Browns Bay on or about 24 or 20 December 2014. Masala Browns Bay says Mr Singh left its employment when he went to work for the Bucklands Beach restaurant. I have already found on the balance of probabilities that Mr Singh was at all times employed by NZ Tradings Limited.

[24] Following the end of the investigation meeting I requested Masala Browns Bay to provide to the Authority the copies of the wages and time records it said were with its lawyers. Those documents have now been provided and Mr Singh has had an opportunity to comment on them.

[25] One document which purports to be a pay slip calculating Mr Singh's holiday pay is dated the pay period ending 14 December 2014. The document is a NZ Tradings Limited document. I find it is more likely than not that Mr Singh left his employment on or about 14 December 2014.

Issues

[26] The issues for determination are whether:

- a) Mr Singh was unjustifiably dismissed from his employment; and
- b) Any wages remain outstanding.

Dismissal

[27] In his statement of problem Mr Singh claims he was dismissed from his employment with Masala Browns Bay but does not provide any information as to when the dismissal occurred or how he says he was dismissed.

[28] At the investigation meeting Mr Singh told the Authority that he was dismissed on 24 December 2014. That evidence changed during the course of the investigation meeting to 20 December 2014. I have found on the balance of probability that the employment relationship ended on or about 14 December 2014.

[29] Mr Singh has one major obstacle with his claim for unjustified dismissal. The Employment Relations Act 2000 (the Act) at section 114(1) requires an employee to raise a grievance with his employer within 90 days beginning with the date on which the action alleged to amount to a grievance occurred or came to the notice of the employee.

[30] Mr Singh has provided documents to the Authority dated from January to March 2015 which relate to his claim for non-payment of wages. There is no indication in any of the documents that he had or intended to raise a personal grievance. In an email to a Labour Inspector on 8 January 2015 Mr Singh states that he is "...*just wanting his wages back and that's all*".

[31] Mr Singh has failed to establish that he raised a personal grievance with Masala Browns Bay within 90 days as required by section 114 of the Act. I am unable to be of further assistance to him.

Arrears of wages

[32] Mr Singh bears the onus of proof to establish there was a default in payments due to him. In my Minute to the parties dated 22 June 2015 I directed Mr Singh to provide to the Authority full information relating to each of his claims. This was due to the unsatisfactory way Mr Singh had set out his claims in the statement of problem. At the investigation meeting I reiterated my request to Mr Singh for further particulars to support his claim for arrears of wages including the hours and days he says he worked.

[33] Mr Singh has provided copies of pay slips which he says remain outstanding. A review of the bank statements and pay slips produced by Mr Singh show he received payments for wages on the following dates:

- 20 June 2014 for pay period ending 1 June 2014
- 3 July 2014 for pay period ending 29 June 2014
- 19 September 2014 for pay period ending 14 September 2014
- 25 September 2014 for pay period ending 21 September 2014
- 2 October 2014 for pay period ending 28 September 2014

[34] Mr Singh is owed wages in addition to the amounts he received for the pay periods set out in paragraph [33] because the payments were calculated at an hourly rate which was less than the rate prescribed in the employment agreement. I have calculated the difference in what Mr Singh actually received and what he should have received to be \$369.50 gross.

[35] Ms Jain says Masala Browns Bay paid Mr Singh four weeks wages on or about 18 June 2014. On 18 June 2014 Mr Singh acknowledged via a text message to Ms Jain that he had received his wages “...for the last 4 weeks”. This payment appears to have been made in cash. Mr Singh then received wages equivalent to his first weeks’ wages in the amount specified on his pay slip on 20 June 2014 by direct credit to his bank account.

[36] It is not possible for the Authority to assess the amount of short paid wages for the four weeks' pay Mr Singh received on 18 June 2014. This is because Mr Singh denied receiving this payment (even though he sent Ms Jain a text acknowledging receipt). Neither party has provided the Authority with any details of the amounts paid Mr Singh.

July

[37] Masala Browns Bay has not established to my satisfaction that Mr Singh received any wages after 3 July and before 19 September 2014. A document provided by Ms Jain indicates that payment for the pay periods ending on 20 and 27 July 2014 were "pending". I have concluded from that, that Mr Singh was not paid for those two weeks.

[38] Based on the information available to the Authority I am satisfied Masala Browns Bay has failed to pay to Mr Singh wages for the pay periods ending 6, 13, 20 and 27 July. Ms Jain has provided the Authority with documents which purport to record the hours worked by Mr Singh during July.

[39] In the absence of any other evidence, including any evidence from Mr Singh about the hours and days he worked during this period I accept the timesheets provided by Masala Browns Bay record the hours and days worked by Mr Singh in July 2014. I have calculated the total arrears of wages for July 2014 as \$2,448.00 gross.

August

[40] There is a dispute as to whether Mr Singh worked during August. Mr Singh says he was entitled to full payment for the whole of August. This evidence fails to take into account that Mr Singh took at least two weeks leave to attend his brother's engagement in India from 11 to 24 August 2014. At the time of taking this holiday Mr Singh had not yet completed 12 months employment and was not entitled to any payment for the holiday time. Mr Singh was unable to tell the Authority what hours and days he worked during August. At the investigation meeting Ms Jain appeared to concede that Mr Singh was only away for two weeks.

[41] Further, Mr Singh suffered from a serious assault in early August which required him to take some time off work. As Mr Singh had not been employed for more than six months at the time of the assault he was not entitled to any pay for the time he was not able to work. Mr Singh says he took three days off work. A text message sent by Mr Singh indicates he was absent on 4 August 2014.

[42] The evidence from Mr Singh in support of his claim for arrears of wages for the two weeks in August is unsatisfactory. The Authority is not required to guess as to the hours and days worked.² In the absence of more information from Mr Singh as to the hours and days he says he worked in the first two weeks of August I am unable to progress his claim any further.

[43] The only information the Authority has been able to obtain is a record of hours Mr Singh worked in the week 25 – 31 August 2014. There is no record or other information to prove that Mr Singh was paid for that week. The total wages owed for that week, based on Mr Singh having worked 31.5 hours at \$18.00 per hour is \$567.00 gross.

September/October

[44] Mr Singh has also not received payment of wages for 7 September and 5 October 2014 although he has received pay slips for those two periods. The total payment due for these two pay periods based on Mr Singh having worked 32 and 34 hours respectively at \$18.00 per hour is \$1,188.00 gross.

October - December

[45] This leaves Mr Singh's claim that he did not receive any payments from Masala Browns Bay from 12 October to 14 December 2014. I am satisfied that for at least some of this time Mr Singh was working at the Bucklands Beach restaurant, but continued to be employed by Masala Browns Bay.

[46] Ms Jain has provided the Authority with a copy of a document she asserts establishes that Mr Singh was paid by cash for his work at the Bucklands Beach restaurant. The cash payments are recorded as being made on 19 and 26 October, 2, 9, 16, 23 and 30 November 2014. Mr Singh denies he received any cash payments.

² *Nelson/Westland Hotel etc IUW v Rapahoe Hotel* [1990] 2 NZILR 489.

[47] Mr Grewal's contentions that these payments in cash were made directly to Mr Singh is not evidence of Mr Singh receiving the payments. The amounts set out on the document, which is simply a list of dates and amounts, are less than Mr Singh was receiving for his work at the Browns Bay restaurant. The document does not record Mr Singh's name anywhere and there is no signature from Mr Singh evidencing his receipt of the amounts listed.

[48] There are no time records available for this period and Mr Singh was unable to tell me what hours and days he worked. Instead Mr Singh has invited me to calculate the pay due to him based on the hours set out in his employment agreement. I am unable to do that with any certainty as the employment agreement allows for "...between 30 and 40 hours per week...". The information currently before the Authority shows no consistent pattern of hours worked each week, instead the hours Mr Singh worked vary between 30 and 36.

[49] The evidence from Mr Singh is wholly unsatisfactory. To average his hours of work for the months of October, November and December would amount to speculative guesswork. Without more information from Mr Singh as to the hours and days he says he worked from 12 October to 14 December 2014 I am unable to progress his claim any further.

Holiday Pay

[50] Mr Singh claims holiday pay which remains outstanding. Based on the documents and the outstanding wages owed and which are set out in this determination Mr Singh is owed \$1,018.03 as holiday pay.

Orders

[51] NZ Tradings Limited is ordered to pay to Mr Singh the amount of 4,572.50 gross being arrears of wages pursuant to the Employment Relations Act 2000 section 131. Payment is to be made within seven (7) days of the date of this determination.

[52] NZ Tradings Limited is ordered to pay to Mr Singh the amount of \$1,018.03 gross being arrears of wages for unpaid holiday pursuant to the Employment Relations Act 2000 section 131. Payment is to be made within seven (7) days of the date of this determination.

Costs

[53] Mr Singh is entitled to reimbursement of his filing fee in this matter. NZ Tradings Limited is ordered to reimburse to Mr Singh the filing fee of \$71.56 within seven (7) days of the date of this determination.

Vicki Campbell

Member of the Employment Relations Authority