

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 57
5559047

BETWEEN DEVENDER SINGH
 Applicant

AND SK BROTHERS LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Satchie Govender, Counsel for Applicant
 Sarjeevan Kumar for Respondent

Investigation Meeting: 24 and 25 May 2016 at Napier

Determination: 25 May 2016

ORAL DETERMINATION OF THE AUTHORITY

[1] The applicant, Devender Singh, claims he was unjustifiably dismissed by the Respondent, SK Brothers Limited (SK). He also seeks to recover unpaid wages and the return of money he lent the company. There was also an issue concerning PAYE deductions but this is no longer being pursued.

[2] SK claims Mr Singh was not dismissed but simply absconded. It denies it owes any money to Mr Singh.

Citation of the Respondent

[3] The claim, as initially lodged, cited the respondent as *Sarjeevan Kumar trading as SK Brothers Limited*. Mr Kumar is the sole director and shareholder of SK Brothers Limited.

[4] This was raised during a telephone conference held on 15 January 2016. Mr Govender advised he understood the company to be the employer. Mr Kumar agreed and the citation was changed by agreement.

Background

[5] Mr Singh was employed by SK as the manager of a dairy and takeaway it operated in Napier. It was one of three or four such businesses operated by SK. Mr Singh commenced in July 2012 and was employed in accordance with a work visa which was conditional on employment with SK.

[6] On 27 July 2013 he was injured while at work with hot oil splashing in his eye. As he was the only worker at the premises he concluded he had no option but to close the shop while he sought medical treatment.

[7] About a month earlier Mr Singh received a notice from the local council advising its hygiene inspectors were dissatisfied with the premises. He advised Mr Kumar who arranged remedial repairs. Mr Kumar says he arrived to commence the required work but found the shop closed. This gives rise to one of many factual disputes between the parties.

[8] Mr Kumar, who did not reside in Napier, says when he arrived to meet those he engaged to perform the repairs he was told the shop had been closed for a few days. He tried to call Mr Singh, initially got no response but when he did was fobbed off and told Mr Singh would turn up about 10.00pm, which he did.

[9] Mr Singh says that is incorrect. He says he immediately advised Mr Kumar of his absence and responded when called to the shop the day he incurred the injury. He says he arrived much earlier than Mr Kumar claims. He says Mr Kumar was angry, accused him of lying about the injury and tore up the medical certificate he offered.

[10] Mr Kumar denies destroying the medical certificate and while he accepts Mr Singh had one eye bandaged makes the contradictory claim Mr Singh could not have been hurt as he was observed on surveillance cameras shopping with no visible injury immediately after the injury was allegedly incurred. The footage was not produced and no advice was given as to where it was recorded.

[11] Mr Singh says Mr Kumar then advised that if he was unwilling to return immediately he need not bother returning at all and he, Kumar, would advise Immigration New Zealand Mr Singh was no longer employed. Mr Singh, concluding he was incapable of working, advised Mr Kumar accordingly, and left.

[12] Mr Singh says Mr Kumar telephoned the next day, apologised and asked Mr Singh return to work. Mr Singh says he advised he was unable to do so as he was incapable of driving to work. He says he invited Mr Kumar to come to his home and see for himself but Mr Kumar responded by terminating the call. Mr Singh says there was no further contact between the two.

[13] Mr Kumar denies this call occurred but claims he made a number of calls during which he left messages asking Mr Singh return to work immediately. He says they all went unanswered and accepts the two had no further direct contact.

[14] Mr Singh says Mr Kumar then advised Immigration New Zealand he was no longer employed. He says he only became aware of this when his immigration lawyer advised him of his visa's cancellation on the grounds he had been dismissed. He challenged that decision and obtained a further visa allowing time to source new employment. His search was successful but took some three months and required a relocate to Taranaki.

[15] Mr Kumar denies talking to Immigration New Zealand. He says Mr Singh failed to return his numerous calls made after the evening on which the two had met in the shop¹ and never returned. Mr Singh was therefore deemed to have abandoned his employment.

[16] Mr Singh also claims SK frequently failed to pay him correctly. He claims deficiencies regarding wages including overtime, annual leave, public holidays and sick leave.

[17] On 29 August 2013 he reported his pay concerns to the Ministry of Business, Innovation and Employment (MBIE) and these were investigated by one of its Labour Inspectors, Rick Brown. Mr Brown interviewed both Mr Singh and Mr Kumar and examined available documentary evidence including bank statements and pay records (where available). Mr Brown concluded there were various deficiencies totalling \$20,752.78.

[18] There are also issues about loans Mr Singh says he made to various creditors on SK's behalf or arranged to have paid by a friend to whom he still owes the money he asked that party pay. He says this was done in response to requests for assistance

¹ Paragraphs [8] to [11] above

from Mr Kumar and he complied in order to ensure his continuing employment. He says he was told failure to pay would mean the business would fold and he would be out of work. The terms of his visa would then mean he was no longer capable of staying in New Zealand which would see the destruction of his dream to do so. The amounts involved total \$17,239.43. Mr Singh says repayment has not occurred despite promises it would.

[19] Mr Kumar says he never asked Mr Singh pay SK's debts. While his utterances in this respect were varied he is effectively alleging Mr Singh was stealing from SK and trying to launder his ill-gotten gains by lending them back to the company.

Determination

[20] There are three issues to be determined. They are whether or not Mr Singh was unjustifiably dismissed; whether or not there are outstanding wages and whether or not SK has loans to repay.

[21] Mr Singh claims he was dismissed. Mr Kumar says no – Mr Singh abandoned.

[22] On this, and most other aspects of the claim, the two versions are diametrically opposed. When it comes to a preference for one's evidence over the other I clearly prefer Mr Singh's. It was consistent and delivered with apparent honesty and integrity.

[23] Mr Kumar's evidence was, as Mr Govender submitted, vague, inconsistent and contradictory. For example, when asked about the arrears claim, he initially said Mr Singh, as manager, was responsible for paying himself and if there were deficiencies it was his problem. He then contradicted that by almost immediately saying Mr Singh had been paid and he (Kumar) had ensured that had occurred.

[24] I would go so far as to say some assertions simply defy belief. An example is Mr Kumar's claim Mr Singh simply abandoned and he never told Immigration New Zealand the later had been dismissed. The contemporaneous documentary evidence clearly says otherwise. It was that correspondence which led Mr Singh to contact the labour inspectorate. There are other examples, none of which portray Mr Kumar as a credible witness.

[25] Having considered the evidence I conclude Mr Singh was dismissed.

[26] Once the fact of dismissal has been established it falls to the respondent to justify its action. There is, in this case, no such attempt. SK concedes there was no inquiry as Mr Singh had absconded and failed to answer its calls. As already said my preference for Mr Singh's evidence means I reject the proposition this is what occurred but the defence confirms there was no inquiry. That means, given the content of s103A of the Act, no viable justification.

[27] Here I also note Mr Singh has produced an original ACC certificate. It confirms a second period of absence of one week which commenced four days after he incurred the injury but records an earlier consultation on the alleged date of injury. It was during this period covered by this second certificate that Mr Kumar advised Immigration New Zealand of the termination. The certificate appears to confirm there was an earlier certificate – the one Mr Singh says was destroyed by Mr Kumar but which the later says he never saw.

[28] There can be no justification for dismissing a worker for refusing to work on medical advice and due to injuries incurred in the workplace, at least in such a short time and in the absence of any real inquiry about the injuries and a rehabilitation prognosis. Ms Singh's dismissal is unjustified.

[29] The conclusion the dismissal is unjustified leads to a consideration of remedies. Mr Singh seeks lost wages and compensation for hurt and humiliation.

[30] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis.

[31] Mr Singh's evidence is his attempts at mitigation were facilitated by Immigration New Zealand granting a visa which allowed him to pursue the search. This he did with success coming exactly three months after he was last paid by SK.

[32] Mr Singh seeks 13 weeks wages assuming 40 hours a week at his hourly rate. There is no doubt he was a fulltime worker (ie: 40 hours a week). While the evidence suggests he regularly worked additional hours he does not seek recompense for this. 40 hours a week for 13 weeks at Mr Singh's hourly rate means a loss of \$9,620. Section 128(2) states this is payable.

[33] Turning to compensation. Mr Singh did not quantify his claim in this regard but provided significant evidence as to why a payment was justified. This included reference to the angst caused by his immigration status and SK's attempts to undermine his wish to stay in New Zealand. He spoke of the stress his situation imposed, the uncertainty and fear generated by that and texts from Mr Kumar's wife which included threats. Having considered the evidence I conclude the significant award of \$10,000 appropriate.

[34] The conclusion remedies accrue means I must, in accordance with s 124 of the Act, address whether or not Mr Singh contributed to his dismissal in a significant way. There is no credible evidence he did.

[35] The next issue to be considered is the claim for monies owing. As already said SK offered contradictory responses. It says (a) Mr Singh was the manager and could pay himself as he wished. If there is a shortfall it was therefore his fault. That said SK also asserts, (b), he was actually paid. The first answer is an abrogation of SK's responsibilities and that of its directors. It is totally unacceptable.

[36] The second fails to stand scrutiny. A company is required to keep time and wage records. If, as suggested, the failure to produce one was attributable to Mr Singh's failure there is no evidence SK attempted to rectify the deficiency but in any event, and given my comments about credibility, I do not accept the claim. Given that and the content of s 132 of the Act I consider it open for me to accept Mr Singh's claim without inquiry.

[37] That said I also note evidence of Mr Brown's investigation and the schedule he prepared which quantifies the claim. There are also e-mails between Mr Brown and Mr Kumar's then lawyer prior to Mr Singh deciding to pursue his claim via Mr Govender. They record Mr Kumar conceding the debt in full and seeking to repay it via instalments – albeit at an extremely low, arguably insulting, rate.

[38] Given the Act and the evidence I conclude Ms Singh is due the amount claimed.

[39] Finally there is the issue of repaying the loans Mr Singh says he advanced to SK. SK claims the monies were never advanced and Mr Singh is a liar. It says he was actually stealing from it and trying to launder the proceeds via the alleged loans.

[40] The fact monies were advanced, though not all those claimed, is confirmed by SK's financial statements which record the credit of a large loan from Mr Singh.

[41] Turning to the allegation this was a laundering exercise. This allegation is effectively one of theft and when questioned Mr Kumar accepted that to be the case. He also accepts he did nothing about it but was totally incapable of explaining why. I consider it preposterous to claim someone has stolen significant sums of money, that the victim was aware of that but chose to do nothing and can offer absolutely no explanation as to why.

[42] I then add the fact Mr Singh's claims were accompanied by supporting documentation and the evidence he paid these monies in fear a failure to do so would lead to a cessation of employment and with that his attempts to remain in New Zealand. This leads me to conclude this is a debt attributable to the employment relationship and that I am capable of ordering its repayment. The evidence also leads me to conclude these payments have all the hallmarks of a premium obtained in contravention of section 12A of the Wages Protection Act 1983.

Costs

[43] Mr Govender also asks I determine the issue of costs. Mr Singh's claim was heard immediately prior to another against SK in which Mr Govender represented the applicant.²

[44] It is accepted that in the normal course of events costs follow the event and normally the Authority will use a daily tariff approach when addressing such a claim.³ The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances. Mr Govender simply asks I apply this approach and award a total of \$3,500 given a total hearing time for the two cases of approximately a day, albeit spread over two calendar days.

[45] The claim is, in my view and in the absence of a contrary argument, reasonable especially as SK's less than helpful approach added to the cost incurred by Mr Govender's clients. He had to second guess what might be alleged in defence given the absence of either a statement in defence or witness briefs from SK and its'

² *Pal v SK Brothers Limited* [2016] NZERA Wellington 58

³ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808

uncooperative approach saw further costs such as a requirement there be personal service of documents.

[46] In the circumstances I consider the costs application more than reasonable. It should be granted in full with Mr Singh being entitled to half of the amount sought given the concurrent investigations.

Conclusion and orders

[47] For the above reasons I conclude Mr Singh has a personal grievance in that he was unjustifiably dismissed. He has also established he is owed unpaid wages and entitled to the return of monies he loaned SK.

[48] As a result I order the respondent, SK Brothers Limited, make the following payments to the applicant, Drevender Singh:

- i. \$9,620.00 (nine thousand, six hundred and twenty six dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further conclusion \$10,000.00 (ten thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- iii. A further \$20,752.78 (twenty thousand, seven hundred and fifty two dollars and seventy eight cents) being payment of unpaid wages; and
- iv. A further \$17,239.43 (seventeen thousand, two hundred and thirty nine dollars and forty three cents) being repayment of monies the applicant loaned the respondent; and
- v. A further \$1,750 (one thousand, seven hundred and fifty dollars) as a contribution toward the costs Mr Singh incurred in pursuing his claim.

[49] Despite suggestions SK was impecunious and incapable of paying the amounts ordered there was no supporting evidence and no application I apply s 131(1A) and order instalment payments. Payment is therefore to be made no later than 4.00pm Wednesday 22 June 2016.

M B Loftus
Member of the Employment Relations Authority