

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 395

3041175

BETWEEN                      OM PRAKASH VERMA  
Applicant

AND                              INDIAN HEAVEN LIMITED  
Respondent

Member of Authority:        Helen Doyle

Representatives:             Anne-Marie McInally, counsel for the Applicant  
Sayed Noori and Najma Noori, advocates for the Respondent

Investigation Meeting:      16 April 2019

Submissions received:      On the day and further information 17 April 2019

Determination:                4 July 2019

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**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

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- A      Om Prakash Verma was unjustifiably dismissed from his employment with Indian Heaven Limited.**
- B      Indian Heaven Limited is ordered to pay to Om Prakash Verma:**
- (a) Reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000 (the Act) in the sum of \$1760 gross.**
  - (b) Compensation under s 123(1)(c)(i) of the Act in the sum of \$20,000 without deduction.**
  - (c) Costs in the sum of \$600 together with the reimbursement of the filing fee of \$71.56.**

## **Employment Relationship Problem**

[1] Mr Om Prakash Verma is a qualified Tandoori/Curry Chef. After concluding his training in New Delhi he worked for some months in Germany before coming to New Zealand in 2002 and working in restaurants in Auckland and elsewhere. Mr Verma shifted to Christchurch in 2016 in order to work at Indian Heaven Limited's restaurant (Indian Heaven). He commenced employment as a Chef at Indian Heaven in January 2016 and signed an employment agreement on 4 February 2016.

[2] Mr Verma says that his employment was terminated by his employer on or about 7 January 2017 following an altercation between himself and a shareholder and owner of Indian Heaven, Mr Sayed Noori. He says that his dismissal was not procedurally or substantively justified, and he seeks reimbursement of underpaid wages for notice, lost wages for one week and compensation in the sum of \$30,000.

[3] Indian Heaven says that it is only its director Mrs Najma Noori who has the authority to terminate Mr Verma's employment and that as she did not terminate his employment then there cannot be a complaint of unjustified dismissal. Indian Heaven says that Mr Verma left without notifying Mrs Noori and argued with Mr Noori about business related issues. Mrs Noori says that Mr Verma did not supply a medical report and would not reply to requests as to why he was not at work.

[4] The Authority needs to determine the following issues:

- (a) How did the employment relationship between Mr Verma and Indian Heaven end?
- (b) If the relationship is found to have ended by way of dismissal, then was that dismissal justified?
- (c) If the dismissal was unjustified then what remedies is Mr Verma entitled to, and is there issues of contribution and mitigation?
- (d) Should there be an award for costs and disbursements?

## **How did the employment relationship end?**

[5] Mr Verma says that concerns arose during his employment when he returned from India after a planned visit on 4 May 2016. As agreed his hours of work increased to 50 hours per week however Mr Verma said that he was only being paid for thirty hours per week. He began to ask Mr Noori for payment for all hours worked.

[6] There has been a determination of an employment relationship problem involving Indian Heaven and the Labour Inspector. This determination found breaches of employment standards. Mr Verma was amongst a group of employees of Indian Heaven who was found to be owed arrears of wages and holiday pay.<sup>1</sup>

[7] Mr Verma says that there were discussions with Mr Noori about providing him with a car rather than getting paid the wages. When no car was provided he said Mr Noori told him that he would be promoted with an increased salary and a car when Mr Noori opened a chain of restaurants. Mr Verma recalled this discussion took place in October 2016. He said that it was not until the second week of November 2016 that he was given what he described as a very old car that had failed a warrant of fitness. Mr Verma said that he handed the keys to the car back because the car was not what he had been promised and he did not accept it.

[8] At that point Mr Verma said that Mr Noori told him he was struggling financially and unable to fulfil his promise. He was told that his wages would be paid.

[9] Mr Verma continued to be paid for 30 hours per week and, although not happy, he felt he simply had to wait for the balance of his wages to be paid.

*6 January 2017*

[10] Mr Verma says that matters came to a head on 6 January 2017 when Mr Noori tried to give him some cash shortly before he finished his night shift. Mr Verma says that he refused to take cash. He said he did not know how much cash Mr Noori had but it did not look to him that it was enough to pay for the hours that he had worked in excess of thirty hours a week.

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<sup>1</sup> *A Labour Inspector v Indian Heaven Limited and Sayad Noori, Najima Noori and Fatima Noori* [2019] NZERA 227.

Mr Verma said that he asked Mr Noori to clear all his wages and for the amount to be paid into his bank account and not in cash.

[11] Mr Noori in his evidence said that it was Mr Verma who offered to pay money that he had been given in cash by Indian Heaven of \$5000 when he went to India. Mr Noori did not accept that Mr Verma went to work on 7 January 2017.

*7 January 2017*

[12] On 7 January Mr Verma says that after he started his shift around 10:40 am Mr Noori asked why he had refused to take cash from him the previous night. Mr Verma says that Mr Noori told him that he was Mr Verma's boss and he would decide how, when and how much he would pay to clear his dues. Mr Verma said that he did not accept that suggestion and Mr Noori became very angry and threw the cash that he had tried to give him the night before at him. Mr Verma says that Mr Noori started banging on the kitchen bench and shouting and was violent and abusive and "he could still hear his voice in his memory."

[13] Mr Verma said that Mr Noori shouted "I am a Khan and I am from Afghanistan. I will kill you and finish your family as well."

[14] As Mr Noori was shouting at him he stepped in close and, Mr Verma said, grabbed both of his arms very firmly. Mr Noori then tried to push him from the kitchen into the dining area. Mr Verma said that he became afraid because he was in an environment with knives. He said that he had seen Mr Noori shout and throw things at people but he had not seen him quite so angry before. Mr Verma said that he released himself from Mr Noori's grip and ran through the kitchen door.

[15] When he gave his evidence Mr Noori said that although he agreed he pulled Mr Verma by the arm it was to ask him to show him something. He said that this took place on 6 January 2017. Mr Noori did not accept that he had threatened Mr Verma. He said that he had come to New Zealand as a refugee and that he knew it was illegal to make threats.

*Conclusions about how the relationship ended*

[16] After Mr Verma left the restaurant he said that he was afraid to go back into the kitchen and called the police who confirmed that he should not return. Mr Verma was advised that as the police could not come immediately, to get a friend to come with him to the nearest police station to lodge a complaint. Mr Verma called a friend who is a taxi driver who took him to the police where his statement was made. There is some support from a police acknowledgement document that an incident involving threatening language, from the location out of which the restaurant operated, was reported by Mr Verma on 7 January 2017 at 11.35 am.

[17] Mr Verma said that he was so scared by what Mr Noori had shouted at him that he called his family and told them not to open the door. Mr Verma said that he felt very nervous and sick and asked his friend to take him to the hospital.

[18] Mr Verma spent several hours at the hospital before he was released at about 4:30 p.m. and was provided with a medical certificate to have complete rest for a few days. That medical certificate was not provided to the Authority. There was no dispute however that Mr Verma was at the hospital on 7 January 2017 because he was, as I shall set out shortly, seen there by Mrs Noori.

[19] A text message was sent from Mr Sayed Noori to Mr Verma at 12.16pm on 7 January 2017. It provided as follows:

Hello Om

This is last notice for you, if you want to leave the job you need to give me at least three weeks notice according to the agreement you have signed. To be nice to you I am happy if you work for two weeks and give notice for two weeks if not, you have to pay the consequences.

My restaurant is closed right now because of you!!! If I'm in a loss you have to pay for everything. This is the second time you have left my work without any reason. It's not professional and not nice at all. Hope to hear back from you.

Thank you.

[20] Shortly after receipt of that Mr Verma had his friend text Mr Noori at 1.48pm:

Ur employee is sick. He is in hospital.

[21] The following text was sent from Mr Noori to Mr Verma at 2:00 pm, and appears to support that Mr Verma had in fact attended work on the morning of 7 January. It provided as follows:

Hello

This is your second time that you've have left my restaurant, sorry i can't give anymore chance because you came to my restaurant today Morning you were working totally fine, I have a proof of this and you looked totally fine not SICK. It is not your choice that you leave my restaurant whenever you want to and make me close it down.

[22] At 4:46 pm Mr Verma sent a text Mr Noori to advise that he was on medical leave for three days from that day.

[23] At some stage during that day Mrs Noori said that she went to the hospital and "asked around" and saw Mr Verma at the hospital. She said that she saw him from a distance and he was "silly and talking" and that he was "just acting". Mrs Noori said that she went with her daughter Fatima to Mr Verma's house to attempt to get his restaurant key back the same day that they saw him in hospital, and again the following day.

[24] The next morning Mr and Mrs Noori's daughter Fatima came to Mr Verma's house and Mr Verma said that he was too afraid to let her in. A text message was then received from Mr Noori's phone at 11.05am:

I'm knocking at the door at your house. I saw your daughter opening the door but you said don't open the door I want my restaurants key now I want to go and open my restaurant.

I am in my car outside your house I want the key of my restaurant back and send me your email address.

[25] Within minutes a further text was sent from Mr Noori's phone at 11.07 that the key and Mr Verma's email address was required.

[26] There was then another text messages sent at 11.15 am as follows:

Om Prakash Verma

Please give me your email address I want to send you a resign later [sic] to leave my work, I will give you two weeks notice and pay you for that two week too, however don't even come near my restaurant, and if you don't send me your email address you face to face all the consequences. Plus right now I am giving you notice!!! DON'T COME TO MY RESTAURANT ANY MORE.

[27] Mr Verma sent a text Mr Noori later that afternoon to confirm that the key and chef uniform had been given to the other chef to return to restaurant and that Mr Noori replied thanks for the key and asked for the email address.

[28] The following day on 9 January 2017 Mr Noori sent a further text message:

Good Morning Om Prakash Verma I've requested a lot from you to send me your email-ID but I got no response back.

I Sayed Masoun Noori resign you from Indian Heaven Limited Restaurant and Takeaway to leave the job.

I'm giving you two weeks notice and in that two weeks notice that I have given to you Om Prakash, you don't need to come to work and you will be paid for that two weeks for free.

So please I request don't even come near my restaurant.

Thank you.

Kind regards

Sayed Masoun Noori.

[29] There is evidence to support that 7 January 2017 is the more likely date of the incident at the restaurant. There is the police acknowledgement form, the first text message sent by Mr Noori about Mr Verma leaving the work place on 7 January and this is followed by another text message at 2.00pm on 7 January that refers to Mr Verma's attendance at the restaurant that morning.

[30] The text message sent at 11.15am on 8 January 2017 by Mr Noori was in the nature of a dismissal because it was sending Mr Verma away from employment. Mr Verma was advised that he was to be given notice and not to come to the restaurant anymore. There was a further text message reinforcing this sent on 9 January 2017.

[31] Mrs Noori is the sole director of Indian Heaven. Her evidence is that Mr Noori had no authority to dismiss Mr Verma and Mr Verma should have contacted her about the dismissal or other concerns.

[32] The evidence supported that Mr Noori was in charge of the restaurant day to day along with Mrs Noori and their daughter Fatima. His text messages are further evidence of the authority that he had in the restaurant.

[33] I find Mr Noori was placed in a position by Indian Heaven and Mrs Noori where he would be objectively regarded as having the authority to make decisions about Mr Verma's employment, including a decision to terminate his employment. Objectively assessed it was reasonable for Mr Verma to believe that Mr Noori had the authority to dismiss him. That type of authority is known as apparent or ostensible authority.

[34] Mr Noori had apparent authority to dismiss Mr Verma. Accordingly it is not now open to Indian Heaven to say that Mr Noori's action of dismissing Mr Verma was invalid.

[35] Finally in considering how the relationship ended an argument is not available to Indian Heaven that Mr Verma abandoned his employment. Under clause 12.6 of the individual employment agreement he had with Indian Heaven an abandonment of employment would require Mr Verma to be absent from work for three consecutive days without notifying his employer. Mr Verma advised Mr Noori on 7 January that he was unwell and in hospital.

[36] The relationship between Indian Heaven and Mr Verma ended by way of dismissal on 8 January 2017.

### **Was the dismissal justified?**

[37] There is a test of justification in s 103A of the Employment Relations Act 2000 (the Act). The Authority is required to determine on an objective basis whether Indian Heaven's actions, and how it acted, were what a fair and reasonable employer could have done. A fair and reasonable employer could also be expected to comply with good faith obligations.

### *Procedural fairness*

[38] Section 103A(3) of the Act requires the Authority to consider certain procedural fairness factors, including the proper investigation and raising of concerns, and the giving of a reasonable opportunity for a response. None of these factors were satisfied in this case when Mr Verma was dismissed and the dismissal was procedurally unfair.

*Substantive fairness*

[39] I do not find any substantive basis from the evidence that would justify Mr Verma's dismissal.

[40] Mr Verma's evidence was that he was so scared by Mr Noori's anger and what Mr Noori threatened to do that he ran from the restaurant and called the police. He said that the matter arose because he wanted to be paid wages owed to him in full and into his bank account rather than by a cash amount that did not seem to be the full amount he was owed. He was then dismissed and no attempt was made to see if the relationship could be repaired.

[41] That was not what a fair and reasonable employer could have done in all the circumstances.

[42] Mr Noori denies that he offered Mr Verma cash and threatened him when he refused to take it. Whilst he agrees that he pulled Mr Verma by the arm he says it was for an innocent purpose and that he did not grab both arms and attempt to pull Mr Verma into the restaurant. There is some other reliable evidence that is consistent with aspects of Mr Verma's account. I refer to the earlier Authority determination that found Mr Verma was owed quite a large amount of unpaid wages.<sup>2</sup> I find in those circumstances it is less likely that it would be Mr Verma who would have offered to pay cash to Mr Noori. There is the report by Mr Verma to the police of threatening language on 7 January 2017 at 11.35am, the hospital visit and the refusal to open the door to Mr Noori's daughter. Those matters are consistent with Mr Verma being very scared of Mr Noori and I find it more likely than not that Mr Verma was threatened by Mr Noori. I prefer Mr Verma's account of what occurred at the restaurant on 6 and 7 January 2017.

[43] Mr Verma has made out his personal grievance that he was unjustifiably dismissed and he is entitled to consideration of remedies.

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<sup>2</sup> Above n1

## **Remedies**

### *Lost wages*

[44] It was four weeks from the date of dismissal before Mr Verma obtained a new role. Mr Verma said that he was too scared to go outside for the first week after his dismissal but then he realised he had to go out and look for another job. I find that there are no issues of mitigation. After the investigation meeting it was clarified that Mr Verma was paid three weeks' in lieu of notice rather than two weeks referred to in the text message from Mr Noori. I accept Mr Verma's evidence that he worked at least 50 hours per week and sometimes more. Mr Verma was only paid for 30 hours per week for the three weeks paid in lieu of notice. The evidence was that the case the Labour Inspector took only reimbursed Mr Verma for wages up to the date of dismissal.

[45] Mr Verma is entitled to be reimbursed for the 60 hours he was short paid for his notice period. His hourly rate was \$16 per hour. \$16 multiplied by 60 hours is \$960 gross.

[46] Mr Verma is also entitled to be reimbursed for an additional one week's lost wages on the basis of an average of 50 hours per week. That is \$16 multiplied by 50 hours which is \$800 gross.

[47] Subject to any issues of contribution Mr Verma is entitled to be paid the sum of \$1,760 gross for lost wages.

### *Compensation*

[48] Mr Verma seeks the sum of \$30,000 under this head. I accept that he was the subject of angry threats that left him afraid for himself and his family in New Zealand and in India. He felt unsafe to the extent that he was prescribed several days' rest. It was Mr Noori's level of anger during the exchange that impacted particularly on Mr Verma. He was then dismissed from his role for no good reason and on the basis that he was somehow at fault when he was not. There was also a suggestion that he had fabricated the reason for his visit to hospital. There was no attempt to see if the relationship could be repaired and/or the damage caused by the behaviour of Mr Noori reduced. Perhaps an apology would have made Mr Verma and his family feel more secure that the threats would not be carried out.

[49] I accept that Mr Verma was humiliated and suffered significant loss of dignity and injury to his feeling by the dismissal and the events that led to it. He said that he had never been dismissed before and I accept that impacted on him when he was dismissed for no good reason from Indian Heaven.

[50] I have weighed that Mr Verma was able to obtain another role within a fairly short period of time and that there was a payment in lieu of notice.

[51] I find an appropriate compensatory award subject to any issue of contribution is the sum of \$20,000.

#### *Contribution*

[52] I am required under s 124 of the Act in every case where I find a personal grievance to consider the extent, if any, to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If the actions require then the remedies that would otherwise have been awarded are to be reduced accordingly.

[53] There are no actions on the part of Mr Verma that could be said to have contributed to the situation giving rise to the personal grievance. He simply asked for his wages owing to be paid in full and into his bank account and not by way of cash. I accept that he did not supply a medical certificate but he was dismissed the day after he was in hospital. Mr Noori was aware why Mr Verma was not at work.

[54] The above awards are not reduced.

#### **Costs**

[55] In her submissions Ms McInally suggested that given the matter only took half a day there should be a contribution towards costs of \$600 which she assessed on the basis of return airfares from Auckland and accommodation. She also asked for reimbursement of the filing fee. There was an objection to paying for the airfare on the part of Indian Heaven.

[56] The Authority is empowered to award costs and expenses under clause 15 of schedule 2 of the Act. Mr Verma was successful and is entitled to a consideration as to whether there

should be an award of costs. Costs are often awarded in the Authority on the basis of a daily tariff which is currently \$4,500 for a full day. A half day award of costs at tariff would be the sum of \$2,250.

[57] The claim for costs based on expenses incurred I find, in the exercise of my discretion, is a fair one. A fair award for costs for this half day matter is \$600 together with reimbursement of the filing fee of \$71.56.

### **Orders made**

[58] I order Indian Heaven Limited to pay to Om Prakash Verma the sum of \$1760 gross being reimbursement of lost wages under s 123(1)(b) of the Act.

[59] I order Indian Heaven Limited to pay to Om Prakash Verma the sum of \$20,000 without deduction being compensation under s 123(1)(c)(i) of the Act.

[60] I order Indian Heaven Limited to pay to Om Prakash Verma the sum of \$600 costs and reimbursement of the filing fee in the sum of \$71.56.

Helen Doyle  
Member of the Employment Relations Authority