

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

<b>BETWEEN</b>	Devender Sagar (applicant)
<b>AND</b>	Bakhtier Hussain t/a Curry Village Indian Restaurant, Porirua (respondent)
<b>REPRESENTATIVES</b>	Graeme Ogilvie for the applicant The respondent represented himself
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>INVESTIGATION</b>	Wellington, 12 April 2005
<b>DATE OF DETERMINATION</b>	13 April 2005

**DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. Devender Sagar's claim has three parts: he says that Bakhtier Hussain owes him unpaid wages and holiday pay, and that he was unjustifiably dismissed by Mr Hussain. He seeks to recover the unpaid monies, lost wages and compensation for humiliation, etc of \$10,000 as well as costs. Mr Sagar accepts he owes Mr Hussain \$1,500 and that it should be deducted from any monies awarded him

2. Mr Hussain agrees Mr Sagar is owed some wages and holiday pay but denies that he unjustifiably dismissed the applicant. Mr Hussain says he is owed two amounts of \$1,500 by Mr Sagar but accepts, in the absence of any recorded agreement, he is unlikely to recover the second sum.
3. The parties underwent mediation but their employment relationship problem remained unresolved. They subsequently agreed to a one-day investigation in Wellington on 12 April 2005.

### **Dismissal**

4. Mr Sagar started working as a chef for Mr Hussain at the latter's Curry Village Indian Restaurant, Porirua in July 2002. The two men signed off a written employment agreement.
5. Mr Hussain dismissed Mr Sagar on 23 August 2004 with initially three weeks' notice which, Mr Hussain says, he later increased to four weeks consistent with his belated appreciation of the requirement of clause 7 of the applicant's employment agreement.
6. Mr Hussain set out the reason for terminating the applicant's employment in a letter dated 23 August. It was for:

*... misbehaviour and misconduct ... towards your co-worker. In spite of several warnings we did not see any change in your behaviour, so we had to take action against your employment.*

7. Mr Hussain says that, on Saturday 21 August 2004, Mr Sagar started a fight with a co-worker in front of customers. While not a witness to the original incident, Mr Hussain said he was satisfied from his investigation on 23 August that there were grounds to dismiss Mr Sagar. Mr Hussain's evidence to the Authority was that the dismissal resulted from the applicant's attitude and because "*... he seemed ready to resume the fight*" (par 1, witness statement). Mr Hussain said the applicant had an anger problem and that he had previously been warned about fights and arguments with co-workers.

8. Further complications arose following Mr Sagar's dismissal on 23 August. Mr Hussain claims that, first, the applicant was late to work on the morning of 31 August (and that he was then sent home because another chef had to be called in to replace him). Second, he says that the applicant abandoned his job sometime during the following day, 1 September 2004.

### **Applicant's Position**

9. Mr Sagar disagrees with most of his ex-employer's claims. He does not accept he has an anger problem nor that he had previously been warned for fights and arguments.
10. Mr Sagar does admit to a disagreement with another employee on the night of 21 August, but says it did not develop into a fight as other staff made them stop their disagreement. He also says that he was only ever given three weeks' notice whereas his employment agreement requires four weeks' notice.
11. Mr Sagar's version of what happened after his dismissal is entirely in conflict with his ex-employer's: he says he was told by other staff on 31 August that Mr Hussain had instructed them to tell the applicant he was not to work that day. He later agreed to meet with Mr Hussain, on the following day. When he did so, on 1 September, he says Mr Hussain told him he was dismissed and that he was to leave the restaurant. Mr Sagar says he was dismissed as a result of seeking mediation assistance for his employment problems.
12. Mr Sagar's says the circumstances of his dismissal were distressing not least because he was exercising his rights, but also because he was sworn at and abused by Mr Hussain and had to find new accommodation for himself, his five year old son and his pregnant wife, at short notice, after Mr Hussain ordered them to leave the property in which they had been staying, that same day. The property is owned by Mr Hussain.

## Discussion and Findings

### Unpaid Wages and Holiday Pay Claim

13. Much of Mr Sagar's claim for wages and holiday pay can be readily disposed: first, Mr Hussain agrees the applicant is owed wages for 24, 25, 26, 27, 28 & 29 August 2004. He agrees that Mr Sagar worked those days and has never been paid for them. Mr Hussain attempted to say the non-payment was caused by Mr Sagar's sudden departure, not knowing what exactly was claimed by the applicant and not having an address to forward the money to. That is not a convincing explanation. Mr Hussain has known from the letter of 2 September 2004, forwarded by the applicant's representative, Mr Graeme Ogilvie, that the applicant was seeking his unpaid wages and holiday pay, as well as wage and time records. Mr Sagar calculates the amount of unpaid wages for that period as \$300 nett: Mr Hussain is to pay that amount to the applicant as well as its PAYE requirement.
14. Second, Mr Hussain accepts the applicant is owed holiday pay. His explanation for failing to pay those monies is also unacceptable. That is because Mr Hussain has attempted to set-off monies owed by the applicant to him by the amount of the holiday pay he owes Mr Sagar. There is no agreement between the two men that would legally permit such a set-off. Mr Sagar calculates his unpaid holiday pay as totalling \$1,800 nett. Mr Hussain does not dispute that calculation. Properly, Mr Sagar concedes that he owes Mr Hussain \$1,500 by way of a personal debt and that it should be deducted from his unpaid holiday pay. Mr Hussain is therefore to pay \$300 nett to the applicant as well as the PAYE requirement.
15. Mr Sagar says he is owed wages for the weeks ending 22 and 29 July 2003. He says he returned from a trip to India on 14 July 2003 and resumed work the following day. Mr Hussain says the applicant did not work during that period: he says his wages record properly shows Mr Sagar's earnings resuming on 5 August, consistent with his return to work in the week preceding that date. I am not satisfied that Mr Sagar has made out his claim, particularly as he has not pursued the matter until after his dismissal over a year later. I therefore decline to make any award in favour of Mr Sagar.

## Unjustified Dismissal Claim

16. A credibility finding is required in order to determine which of the two men's competing claims is to be preferred. I favour Mr Sagar's claims, on a balance of probability basis, for the following reasons: Mr Hussain is not arguing that the applicant was summarily dismissed, for serious misconduct. He relies instead on that part of clause 7 of the employment agreement with Mr Sagar whereby the contract may be terminated by either party giving four weeks notice. Mr Hussain says that the applicant's dismissal was justified as it was preceded by several warnings in respect of the same unacceptable behaviour. However, Mr Sagar conceded there was no written evidence of Mr Sagar being earlier warned, for fighting and arguing with co-workers. There is therefore no recorded evidence to support the implied claim that the applicant was on a final warning for this type of behaviour, consistent with the grounds given for his termination – that of *"misbehaviour and misconduct towards (his co-worker"*.
17. I find support for the conclusion that there were no earlier warnings in the near contemporaneous notes made by Mr Sagar on his copy of Mr Hussain's termination letter of 23 August 2004. They protest the claim that he had been given several warnings. Mr Sagar records his view that he has *"not received any such thing in the past"*. Mr Hussain did not challenge the applicant's assertion, at that time.
18. The evidence disclosed by Mr Hussain's investigation supports Mr Sagar's claim that the incident between himself and the other co-worker on 21 August was a disagreement, i.e. a difference of views possibly involving raised voices, but not a physical assault. That is because the letter of termination refers only to *"misbehaviour and misconduct"* and not to, as Mr Hussain asserted to the Authority, Mr Sagar starting *"a fight with a co-worker in front of customers"*. That amounts to a new justification for Mr Sagar's dismissal. It has all the appearance of a retrospective attempt to bolster the respondent's decision. Its late appearance makes it less credible.
19. The respondent's investigation did not disclose any evidence of the disagreement putting the co-worker, or Mr Hussain's business at risk, such as to warrant Mr Sagar's dismissal.

20. Mr Hussain's casual approach to his obligations to Mr Sagar is apparent in a number of areas: first, it can be seen in his failure to pay wages and holiday pay legally owed to the applicant. It can be seen also in Mr Hussain's initial failure to give Mr Sagar four weeks' notice as stipulated by the contract, rather than the three provided in the letter of termination. Third, Mr Hussain failed to address repeated requests by Mr Sagar's representative, Mr Graeme Ogilvie, for copies of wage and time records; these were only provided on the day of the Authority's investigation. Mr Hussain's casual approach to his obligations to his former employee is, I find, a final reason to prefer Mr Sagar's version of events in respect of his dismissal.

### **Remedies**

21. As is made clear above, I find that Mr Sagar is entitled to wages for 24, 25, 26, 27, 28 & 29 August 2004 totalling \$300 nett: Mr Hussain is to pay that amount to the applicant and the resulting PAYE requirement.
22. Mr Sagar is also entitled to recover holiday pay, less his debt to Mr Hussain, i.e. a total of \$300 nett. Mr Hussain is to pay that amount to the applicant and the PAYE requirement.
23. Mr Sagar is also entitled to wages lost to him from the time of his summary dismissal, on 1 September 2004, until the date he found – consistent with his positive efforts – fresh employment on 27 October. I calculate the amount owed Mr Sagar as 8 weeks X \$300, less a payment he received during that period of \$120 = \$2,280 nett. Mr Hussain is to pay that sum to Mr Sagar as well as the PAYE component.
24. Mr Sagar seeks compensation for humiliation, etc of \$10,000. He gave compelling evidence of the shock and surprise he experienced in respect of his unjustified dismissal, first by way of three week's notice then compounded as it was by his employer action in effectively summarily dismissing him on 1 September 2004. That injury was made worse by Mr Sagar's personal circumstances, particularly his wife's pregnancy. Those circumstances must have been known to Mr Hussain. The injury was further magnified by Mr Hussain's requirement that the applicant and his family immediately vacate their accommodation, owned as it was by the respondent. I am

satisfied that the amount claimed, \$10,000, is entirely appropriate in these circumstances.

### **Contributing Behaviour**

25. I do not accept Mr Sagar's evidence of a disagreement between himself and another co-worker on 21 August 2004 as contributing in any way to the situation that gave rise to his personal grievance. I reach that conclusion because of the absence of any evidence to support Mr Hussain's position, that the termination was the culmination of several warnings.

### **Determination**

26. For the reasons set out above I find in favour of Devender Sagar's claims against Bakhtier Hussain trading as Curry Village Indian Restaurant, Porirua. Mr Hussain is directed to pay Mr Sagar the following amounts:

- a. Unpaid salary totalling \$2,580.00 nett (two thousand, five hundred and eighty dollars);
- b. Unpaid holiday pay totalling \$300.00 nett (three hundred dollars); and
- c. Compensation for humiliation, etc of \$10,000 (ten thousand dollars).

27. I record here Mr Ogilvie's claim of costs of \$1,500 plus the filing fee of \$70, on behalf of his client. I reiterate my observation made during the investigation to Mr Hussain that, subject to his submission, the claim is likely to be seen by the Authority as both fair and realistic. The parties are to attempt to reach agreement on the matter of costs failing which leave is reserved for the matter to be put to the Authority.

**Denis Asher**

**Member of Employment Relations Authority**