

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 235/10
5284446

BETWEEN	RONGAN SITU Applicant
AND	TOPCHEER ENTERPRISES LIMITED TRADING AS DH SUPERMARKET MANUREWA Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
Jian Fu for Respondent

Investigation Meeting: 26 February 2010

Determination: 19 May 2010

DETERMINATION OF THE AUTHORITY

[1] Mr Rongan Situ commenced employment for Topcheer Enterprises Limited trading as DH Supermarket Manurewa (“Topcheer Enterprises”) on 9 February 2009. In contravention of the Employment Relations Act 2000 Mr Situ was not provided with a copy of his employment agreement.

[2] The relevant terms and conditions of Mr Situ’s employment were that he would work six days of the week Monday to Saturday inclusive. Mr Situ’s hours of work were 11 hours each day commencing at 7.30am and ending at 7.00pm. He was paid at the minimum rate of pay of \$12.00 increasing to \$12.50 per hour on 1 April 2009.

[3] The employment relationship encountered difficulties in October 2009 when Mr Situ says his hours of work were unilaterally reduced until eventually no work was provided to him. Mr Situ says the unilateral withholding of hours of work was in effect a dismissal. He claims the dismissal was unjustified and seeks remedies including lost wages and compensation. Mr Situ also claims arrears of wages for the

weeks he worked less hours than agreed and payment for work undertaken on a public holiday which was not paid correctly.

[4] Topcheer Enterprises has not lodged a statement in reply. Mr Jian Fu (“Mr Fu”) attended the investigation meeting assuming he was entitled to defend the application. Mr Fu was advised that he was not entitled to defend the application without the leave of the Authority. Mr Fu was provided with the opportunity to seek leave and did so. I considered Mr Fu’s application and granted leave to Topcheer Enterprises to defend the matter as I prefer to determine the matter on its merits with the respondent’s input instead of on a default basis.

Dismissal

[5] Mr Situ claims he was unjustifiably dismissed when Topcheer Enterprises no longer offered him work.

[6] I am required to examine Topcheer Enterprises’ actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[7] On 12 October 2009 Mr Fu instructed Mr Situ that he was only to work 2 days per week instead of 6. This change was effective immediately. The next week Mr Situ, was instructed that he was required to work only on 1 day and then the next week was told by Mr Fu that he would ring him when he had more work available. Mr Situ has received no further contact from Mr Fu, and has not worked for him since 19 October 2009.

[8] I find the action of Mr Fu in unilaterally reducing Mr Situ’s hours of work amounted to an unjustified disadvantage grievance. Further, the failure to offer Mr Situ work after 19 October was akin to a dismissal. Neither actions by Mr Fu have been established as being justified.

[9] A fair and reasonable employer in the circumstances of this case would have discussed issues about availability of hours and the viability of providing ongoing employment with Mr Situ and provided him with an opportunity to have input into

any decisions relating to whether or not a reduction in hours was necessary and whether the an ending of the employment relationship was appropriate.

[10] I find Mr Situ was unjustifiably disadvantaged in his employment and then unjustifiably dismissed.

Remedies for the personal grievances

[11] Mr Situ has not claimed any remedies for his personal grievances. The only remedies he seeks relate to his arrears of wages claims. Therefore Mr Fu is not on notice that remedies are being sought. In the absence of an application for remedies I decline to award any.

Arrears of wages

[12] Mr Situ says he was entitled to receive his full weeks pay for the days he was not required to work during October. He also claims he was not paid at the correct rate of pay for working on public holidays and seeks payment of his holiday pay which was not paid to him when his employment terminated.

[13] In claims for arrears of wages, the onus is on the employee to prove the monies owing to them.

Wages Claim

[14] Mr Situ seeks payment for the wages he was not paid in October 2009. I am satisfied Mr Situ has established to my satisfaction that the employment agreement between the parties provided Mr Situ with the promise of a minimum of 66 hours per week and that during the final week of his employment he lost 6 days pay. I find he is entitled to be reimbursed for the wages he lost being 6 days at 11 hours per day.

Topcheer Enterprises Limited trading as DH Supermarket Manurewa is ordered to pay Mr Situ the sum of \$825.00 gross pursuant to section 131 of the Employment Relations Act 2000 within 28 days of the date of this determination.

Payment for public holidays worked

[15] Mr Situ has established to my satisfaction that he worked on 1 June 2009 which was a public holiday. He was paid only at his ordinary rate for that day. Mr Situ is entitled to be paid at the rate of time and a half for each hour he worked on 1 June and is also entitled to receive payment for the day off in lieu to which he became entitled but never received.

Topcheer Enterprises Limited trading as DH Supermarket Manurewa is ordered to pay Mr Situ the sum of \$203.50 gross pursuant to section 131 of the Employment Relations Act 2000 within 28 days of the date of this determination.

Holiday Pay

[16] Mr Situ claims he has received no holiday pay. Mr Fu acknowledged at the investigation meeting that Mr Situ was not paid any holiday pay at the end of his employment.

[17] Based on the information provided by Mr Situ and which was confirmed as being correct by Mr Fu at the investigation meeting I have calculated Mr Situ's total gross earnings as being \$33,546.00 for the period of his employment. I have then calculated 8% of the total gross earnings to ascertain the amount of holiday pay outstanding.

Topcheer Enterprises Limited trading as DH Supermarket Manurewa is ordered to pay Mr Situ the sum of \$2,683.68 gross pursuant to section 131 of the Employment Relations Act 2000 within 28 days of the date of this determination.

Costs

[18] Mr Situ was unrepresented at the Investigation Meeting, however, he is entitled to be reimbursed for the filing fee on this application.

Topcheer Enterprises Limited trading as DH Supermarket Manurewa is ordered to pay Mr Situ the sum of \$70.00 gross within 28 days of the date of this determination.

Vicki Campbell
Member of Employment Relations Authority