

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 2
5378488

BETWEEN	SANJEEV KUMAR Applicant
AND	USHA FOOD LIMITED t/a GARAM MASALA INDIAN RESTAURANT Respondent

Member of Authority:	Michele Ryan
Representatives:	No appearance by or on behalf of the Applicant Ross Jamieson, for the Respondent
Investigation Meeting:	27 November 2012
Determination:	14 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 29 June 2012 Mr Sanjeev Kumar lodged a statement of problem with the Employment Relations Authority. Mr Kumar claimed he was unjustifiably dismissed by his employer Usher Food Limited t/a Garam Marsala Indian Restaurant, (Garam Marsala). He also claimed that he was owed statutory holiday pay.

[2] On 13 August 2012 the Authority conducted a telephone conference with authorised representatives for each of the parties and an investigation meeting was arranged for 27 November 2012 with agreement for timetabling of the exchange and filing of written evidence.

[3] On 5 October 2012 Mr Kumar's counsel notified the Authority that he was having difficulty contacting Mr Kumar and was unable to provide the Authority or Garam Marsala with written statements scheduled for filing that day. On October

12 October 2012 Mr Kumar's counsel advised the Authority that he had made numerous attempts to contact Mr Kumar by telephone and in writing but Mr Kumar had not responded. Mr Kumar's counsel said he had not received instructions and in these circumstances was unable to advance Mr Kumar's application.

[4] At the commencement of the investigation into Mr Kumar's application, the Authority sought to contact Mr Kumar via his counsel to ascertain whether Mr Kumar had recently been in contact with his representative and wished to attend the investigation meeting. Mr Kumar's counsel was unable to verify Mr Kumar whereabouts.

[5] In the absence of any communication by Mr Kumar with the Authority or with his representative I consider that that no good cause has been shown by him for his failure to attend the Authority's investigation or be represented. I proceeded with an investigation into the claims set out in Mr Kumar's statement of problem.

[6] Mr Ruchir Gaur, the director of Usha Food Limited, attended the investigation meeting with his representative. He disputes that Mr Kumar was unjustifiably dismissed by Garam Marsala.

Events leading to dismissal

Mr Kumar's position

[7] Mr Kumar's statement of problem states that he commenced full time employment with Garam Marsala on 22 August 2011, pursuant to a written fixed term employment agreement. The term of employment expired on 11 December 2011 however on 12 December 2011 Mr Kumar signed another fixed term employment agreement. The second employment agreement provided that the term of employment would end on 30 June 2012 and specified that Mr Kumar's the hours of work were between 20-25 per week.

[8] Mr Kumar says that on 13 March 2012 his wife had a miscarriage and he arranged to take leave with the consent of Mr Gaur.

[9] The statement of problem records that on 19 March 2012 Mr Kumar sent a text to Mr Gaur indicating that he planned to return to work on 21 March. The following day he received a response by text from Mr Gaur stating that he would call but says Mr Gaur did not contact him that day.

[10] Mr Kumar sent a further text on 21 March 2012 which resulted in a telephone discussion between them. He says Mr Gaur asked to meet him at the restaurant in the afternoon. Mr Kumur says that when he met with Mr Gaur he was told business “*was down*” and to go home as his employment had ended but that he would be paid any holiday pay owing. He says he was not paid holiday pay until 27 March 2012.

[11] Mr Kumar’s statement of problem states he has not been in paid employment since his dismissal.

Garam Marsala’s position

[12] Mr Gaur agrees that Mr Kumar was employed as described in his statement of problem. He says the reason for the fixed term nature of employment was because the specialist chef who had previously performed the position was in India visiting his family and Garam Marsala was holding the position for him on his return.

[13] Mr Gaur denies that Mr Kumur was dismissed and says Mr Kumur resigned from his position. He says that in late January 2012, Mr Kumar approached him on several occasions and requested additional hours of work. Mr Gaur says that the restaurant was in difficulties and running at a loss. He says he told Mr Kumar that was unable to provide additional hours and Mr Kumar said he would seek alternative work.

[14] Mr Gaur says that on 10 February 2012 Mr Kumar told him that he had found work in Karori and tendered his resignation orally. Mr Kumar worked until 12 February 2012. Mr Gaur produced a copy of a letter which had been given to Mr Kumar in response to his resignation.

[15] Mr Gaur says that in or around late February 2012, Mr Kumar approached him and asked if there was any work available. Mr Gaur told the Authority that he believed Mr Kumar had not been able to find alternative work. Mr Gaur says he was unable to offer Mr Kumar an employment position but they reached an agreement whereby Mr Kumar agreed to work as a contractor and would, when able, attend the restaurant and work within the kitchen making foods that could be frozen or used at a later date. Mr Gaur says this arrangement lasted for “*around three weeks*”. He says in mid-March Mr Kumar stopped coming to the workplace and when Mr Gaur contacted him he learnt that Mr Kumar’s wife had miscarried.

[16] Mr Gaur says that Mr Kumar contacted him again on or about 21 March 2012 seeking payment for work undertaken pursuant to his contract for services. He says they met at an ATM machine in Johnsonville and Mr Gaur paid Mr Kumar for his work as a contractor and promised he would pay Mr Kumar's outstanding holiday pay associated with his previous fixed term employment agreement in the near future. This entitlement was transferred to Mr Kumar's account on 27 March 2012.

[17] Mr Gaur says he did not have any further contact with Mr Kumar until he received notice of a personal grievance on 13 April 2012.

Was Mr Kumar was unjustifiably dismissed?

[18] In the absence of Mr Kumar's attendance at the Authority and/or any sworn evidence to support his claim of an unjustified dismissal I am unable to find on the balance of probabilities that he was dismissed from his employment with Garam Marsala. I have accepted the evidence of Mr Gaur as it relates to the claim of unjustified dismissal. In this respect I decline to award the remedies Mr Kumar has requested with this aspect of his claim.

Is Mr Kumar owed holiday pay?

[19] Mr Kumar's statement of problem claims that he worked full time despite his employment agreement stating his hours of work were between 20-25 hours per week.

[20] Mr Kumar says he had not been paid his full holiday pay entitlement. He says he worked Labour Day 2011, Boxing Day 2011, Wellington Anniversary Day 2012 and Waitangi Day 2012 but was not paid time and a half nor was he provided with a day in lieu. He further says he did not receive pay for Christmas Day 2011 despite this being a normal working day for him.

[21] I do not accept that Mr Kumur was required to work full time hours during his second fixed term period of employment. Mr Gaur provided fulsome Excel spreadsheets to the Authority which recorded Mr Kumar's hours of work between 22 August – 11 December 2011 and 12 December 2011– 12 February 2012 – 11. I have no reason not to consider these documents as correct. These documents record that Mr Kumar worked either 4 or 5 hours per day during his second fixed term employment agreement.

[22] On a review of the spreadsheets it was apparent that although Mr Kumar had not worked on Christmas Day or Boxing Day in 2011, these being days that he would have normally worked, he had not received payment pursuant to s49 Holidays Act 2003 for each of those public holidays.

[23] It is also clear that Mr Kumar worked for three hours on 23 January 2012, Wellington Anniversary Day. He was paid at his usual rate but not at the rate prescribed by s50(1)(a) of the Holidays Act (time and a half) nor was he provided with an alternative holiday pursuant to s56.

[24] On the evidence provided Mr Kumar was appropriately paid for Waitangi Day 2012 and enjoyed a paid day in lieu.

[25] During the Authority's investigation Mr Gaur accepted that Mr Kumar is owed payment for public holidays on Christmas Day and Boxing Day 2011 and a further payment of half time and a day in lieu for Wellington Anniversary 2012. Mr Gaur agreed that Mr Kumar is owed 14.5 hours at the rate of \$13.00 per hour. In total this sum is \$188.50 (gross).

Order

[26] I order Usha Food Limited to pay to Mr Kumar \$188.50. minus PAYE.

Costs

[27] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority