

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 542  
5354865

BETWEEN CHAMINDA DILRUK de  
SILVA  
Applicant

A N D SHWETA INVESTMENTS  
LIMITED t/a BAKER'S  
DELIGHT, EDEN QUARTER  
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person  
A Jain, Representative for Respondent

Investigation Meeting: By telephone on 25 November 2013

Date of Oral  
Determination: 25 November 2013

Date of Written  
Determination: 26 November 2013

---

**DETERMINATION OF THE AUTHORITY**

---

- A. Shweta Investments Limited shall pay Chaminda de Silva the total sum of \$8,647.20 being wage arrears for annual leave and alternative holidays.**
- B. Chaminda de Silva was unjustifiably dismissed by Shweta Investments Limited.**
- C. The Authority cannot be certain to the required standard of proof that Chaminda de Silva has lost remuneration under s.128. In the**

**circumstances, the Authority declines to make any orders under s.123(1)(b) as a consequence.**

**D. Shweta Investments Limited shall pay Chaminda de Silva the sum of \$5,000 for hurt and humiliation (s.123(1)(c)(i) of the Employment Relations Act 2000). Payment shall occur within 28 days.**

**E. No order for costs shall be made.**

### **Employment relationship problem**

[1] Chaminda de Silva was employed as a full time baker by Shweta Investments Limited on or about August 2008. His employment ended following receipt of a letter from Shweta Investments Limited requiring he move to casual employment with one month's notice. Mr de Silva submits he was unjustifiably dismissed. He also seeks the recovery of unpaid annual leave and statutory leave payments.

[2] Shweta Investments Limited accepts there are wage arrears in the form of the annual leave and statutory holiday payments as set out in the schedule of holiday payments and statutory payments for the years 2008/2011 attached to Mr de Silva's statement of problem. It denies he was unjustifiably dismissed stating it had genuine reasons for moving employees from full time to casual work.

[3] At a teleconference on 25 November 2013, the parties agreed that this matter could be dealt with that day with an oral determination delivered at the end. Both parties gave an affirmation and oral evidence by telephone before the Authority.

### **Issues**

[4] Both parties accept the wages set out in the statement of problem in the holiday payments and statutory holiday payments for the years 2008/2011 schedule attached is correct. Accordingly, the Authority need only determine the amounts payable at each paragraph.

[5] Therefore the following issues arise:

(a) What amount of holiday and statutory holiday pay is due and owing?

- (b) Was Mr de Silva unjustifiably dismissed by the requirement he move from full time employment to casual employment on one month's notice?
- (c) What remedies (if any) should be awarded?

**What amount of holiday and statutory holiday pay is due and owing?**

[6] The parties agreed that the holiday payments and statutory holiday payments for the years 2008/2011 schedule attached to the statement of problem correctly recorded the wage arrears owed.

[7] The parties further agreed that Mr de Silva had received a one-off payment of \$500 towards those arrears.

[8] The holiday annual leave owed is for the period 2008 to 2011. Mr de Silva would be eligible to receive 8% of his gross annual pay as annual leave. The Authority determines there is \$7,071.20 annual leave pay owed by Shweta Investments Limited to Mr de Silva as set out in the annual leave table below:

<b>Date</b>	<b>Gross annual earnings</b>	<b>8%</b>
2008/2009	\$ 31,200.00 <sup>1</sup>	\$ 2,496.00
2009/2010	31,200.00	2,496.00
2010/2011	32,240.00 <sup>2</sup>	2,579.20
		\$ 7,571.20
less agreed deductions		500.00
<b>Total annual leave due</b>		<b>\$ 7,071.20</b>

[9] The parties agreed Mr de Silva worked 13 statutory holiday days from 2008 to 2013, was correctly paid for those days, but did not receive alternative holiday days.

[10] Section 56 of the Holidays Act 2003 provides where an employee works a statutory holiday day, they are *“entitled to another day's holiday (an alternative*

<sup>1</sup> Based upon \$15 per hour at 40 hours per week (\$600) multiplied by 52 weeks. This pay rate continued for 2008 to 2010.

<sup>2</sup> Calculated on \$15.50 per hour at 40 hours per week (\$620) multiplied by 52 weeks. This pay rate continued from 2010 onwards.

*holiday) instead of a public holiday if the public holiday falls on a day that would otherwise be a working day for an employee ...”* This is in addition to pay received for working that day.

[11] It was agreed Mr de Silva worked nine statutory holidays during 2009 to 2010<sup>3</sup>. The average daily pay for this period was \$85.00.<sup>4</sup> There is \$1,080<sup>5</sup> statutory holiday pay owed for the period 2009 to 2010.

[12] In 2011, four days statutory holiday pay is sought. During this period, Mr de Silva’s average daily pay was \$124.<sup>6</sup> There is \$496<sup>7</sup> statutory holiday pay owed.

[13] The Authority determines Shweta Investments Limited shall pay Chaminda de Silva the total sum of \$8,647.20 being wage arrears for annual leave and alternative holidays.

**Was Mr de Silva unjustifiably dismissed by the requirement he move from full time employment to casual employment on one month’s notice?**

[14] The parties agreed Shweta Investments Limited (SIL) sent a letter to Mr de Silva advising he was moving to casual employment with one month’s notice. SIL states the business could no longer sustain full time employees. There were genuine reasons for moving Mr de Silva to casual employment.

[15] Mr de Silva’s full time employment as a baker was terminated by the requirement he move to casual employment on one month’s notice. The onus now falls upon Shweta Investments Limited to justify whether its actions “*were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*”<sup>8</sup>. In applying this test, the Authority must consider the matters set out in s.103A.

---

<sup>3</sup> Holiday pay and statutory payments for year 2008/2011 schedule in the statement of problem shows he worked in 2009 Anzac Day, Queen’s Birthday and Labour Day; in 2010 New Year’s Day, Waitangi Day, Anzac Day, Queen’s Birthday, Labour Day and Boxing Day.

<sup>4</sup> Annual gross wage \$31,200 divided by 260 working days (5 days per week multiplied by 52 weeks per year) equates to average daily pay of \$120.

<sup>5</sup> Average daily pay \$120 multiplied by 9 alternative holiday days owed for 2009 to 2010.

<sup>6</sup> Annual gross wage \$32,240 divided by 260 working days (5 days per week multiplied by 52 weeks per year) equates to average daily pay of \$124.

<sup>7</sup> Average daily pay \$124 multiplied by 4 alternative holiday days owed for 2010 to 2011.

<sup>8</sup> Section 103A(2) of the Act

[16] The Authority must not determine the dismissal unjustified if the procedural defects were minor or did not result in the employee being treated unfairly<sup>9</sup>. A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified<sup>10</sup>.

[17] While there may have been genuine reasons for moving fulltime staff to casual work, none of the matters referred to in s.103A(3) appear to have been considered by SIL prior to taking the action it did. The procedural defects were not minor and did result in unfairness. The Authority determines Chaminda de Silva was unjustifiably dismissed by Shweta Investments Limited.

### **What remedies (if any) should be awarded?**

[18] Mr de Silva seeks payment of lost wages for a period of three months and hurt and humiliation compensation in a sum to be determined by the Authority.

[19] Mr de Silva gave evidence he declined work offered by Shweta Investments Limited for him to continue working for one month. Instead, he attempted to find a full time job through Work & Income New Zealand and went on the benefit. He applied for two or three jobs as a baker but was unsuccessful. In December 2011 he took out a loan to start his own cleaning business which he continues to do today.

[20] An award under s.123(1)(b) is for lost remuneration. This is capped at “... *the lesser of a sum equal to that lost remuneration or to three months’ ordinary time remuneration*” (s.128(2)). Mr de Silva must act reasonably to mitigate his lost wages. Otherwise he has not lost remuneration as a result of the grievance under s.123(1)(b) of the Act. If the remuneration has been lost because of a failure to mitigate, there is no statutory requirement to order reimbursement<sup>11</sup>.

[21] Mr de Silva refused work offered by SIL in favour of a WINZ benefit. Although he deposed to applying for a couple of jobs as a baker only, he did not apply for any other jobs he may have been qualified to fill. The Authority cannot be certain to the required standard of proof that Chaminda de Silva has lost remuneration under s.128. In the circumstances, the Authority declines to make any orders under s.123(1)(b) as a consequence.

---

<sup>9</sup> Section 103A(5)

<sup>10</sup> *Angus v. Ports of Auckland Ltd* [2011] NZEmpC 160 at [26]

<sup>11</sup> *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

[22] Mr de Silva seeks compensation for hurt and humiliation under s.123(1)(c)(i). An award of \$5,000 is appropriate. The parties agree he did not contribute to the situation. In the circumstances, the Authority determines Shweta Investments Limited shall pay to Chaminda de Silva the sum of \$5,000 as compensation for hurt and humiliation pursuant to s.123(1)(c)(i).

[23] Payment has been agreed to occur within 28 days. Mr de Silva shall provide his bank account details to SIL for payment as soon as possible.

[24] Both parties appeared in person. The matter was dealt with expeditiously and the Authority was greatly assisted by both parties. There were no legal costs incurred as a consequence. Accordingly no order for costs shall be made.

T G Tetitaha  
Member of the Employment Relations Authority