

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 442  
3049012

BETWEEN            ATUL RAI  
                                 Applicant

AND                    WNZ SYLVIA PARK LIMITED  
                                 (IN REC) TRADING AS  
                                 WAGAMAMA  
                                 Respondent

Member of Authority:    Nicola Craig

Representatives:        Annie Talakai, counsel for the Applicant  
                                 No appearance for the Respondent

Investigation Meeting:    25 July 2019

Oral Determination:     25 July 2019

Written Record Issued:    25 July 2019

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**ORAL DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Atul Rai was employed by WNZ Sylvia Park Limited (subsequently put into receivership) (WNZ or the company), trading as Wagamama at Sylvia Park, as assistant general manager. Wagamama is an Asian inspired restaurant. As set out below, on 23 July 2019 the company went into receivership.<sup>1</sup>

[2] Mr Rai started work at the restaurant on 21 May 2018. On 10 August 2018 Mr Rai was told by the store manager that, due to the close down of the Newmarket branch of Wagamama, there would be no work available for him at the Sylvia Park branch.

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<sup>1</sup> Below at [11]

[3] On 23 August 2018 Mr Rai was given a letter by the manager stating that his services were no longer required at WNZ and his last day of work would be 2 September 2018.

[4] Mr Rai claims that he was unjustifiably dismissed and also that he is owed for unpaid wages and other money.

### **WNZ's involvement and the Authority's investigation**

[5] Prior to the receivership WNZ had some involvement in the Authority's process. Mark Keddell, the sole director and shareholder of WNZ, telephoned the Authority and spoke to an Authority officer about Mr Rai's case. He also emailed apologising for his late reply to a previous email on the basis that he did not see the email chain in his inbox due to email overload and lack of organisation.

[6] Mr Keddell sought leave to lodge a statement in reply out of time and also to attend mediation. Leave was granted for a statement in reply to be filed out of time. However, none was received. Mr Keddell subsequently advised that he had just finished most of his letter but could not find Mr Rai's letter (presumably statement of problem) to respond to. The statement of problem was subsequently re-sent to him. A short extension was granted to allow consideration of that document and filing of the statement of reply but no statement of reply was received. The parties were directed to mediation. However, the Mediation Service advised the Authority that it was unable to make contact with Mr Keddell by telephone or email and so mediation did not proceed.

[7] An investigation meeting was set for 8 July 2019. Neither Mr Keddell nor anyone else on behalf of WNZ attended the Authority on that day. However, as the Authority had not at that point received sworn proof of service of the Notice of Investigation Meeting, I adjourned the meeting.

[8] On 9 July 2019 Mr Keddell emailed the Authority office saying that he had in his diary that his statements were due the following day. In fact WNZ's witness statements were due on 3 July 2019. Mr Keddell went on to say that he had nearly completed the statements but had just re-read the emails and noted the statements were due last week and the hearing was today. Mr Keddell said that he was stuck in the South Island and wondered if he can urgently change the date to next Wednesday (presumably the 17<sup>th</sup>).

[9] The Authority officer replied that the investigation meeting had been rescheduled to 25 July 2019, attaching the notice of the investigation meeting.

[10] A notice of an investigation meeting on 25 July 2019 was subsequently served on WNZ's registered office and sworn proof of service obtained. I am satisfied that WNZ was properly served with the statement of problem and the notice of today's investigation meeting.

[11] A routine search of the Companies Office register prior to the investigation meeting revealed that WNZ was placed in receivership on 23 July 2019. Mr Rai's claims relates to a period well before the receivership. On the basis of the Employment Court's decision in *Hutton v Provencocadmus Ltd (in rec)*<sup>2</sup> I am satisfied that I can go ahead and consider Mr Rai's claims.

[12] Neither Mr Keddell nor anyone else on behalf of WNZ attended today's investigation meeting. An attempt to contact Mr Keddell was unsuccessful. I proceeded to investigate the matter in the absence of WNZ. Evidence was heard from Mr Rai in person. I was assisted by an interpreter of the Hindi language.

### **Issues**

[13] The issues for investigation are:

- (a) Was Mr Rai unjustifiably dismissed by WNZ?
- (b) If so, what remedies, if any, should he receive?
- (c) Is Mr Rai owed any arrears of wages or other money and, if so, how much?

### **Dismissal**

[14] Mr Rai's employment agreement contained a 90 day trial period provision which specified that one week's notice must be given before the end of the trial period. I have calculated that the trial period finished on 18 August 2018.

[15] Although the 10 August 2018 discussion occurred before then I am not satisfied that Mr Rai was given notice of termination on that date. He was told that there would be no

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<sup>2</sup> *Hutton v Provencocadmus Ltd (in rec)*[2010] NZEmpC 94

work available but he was not given a fixed finish date and thus one week's notice was not given to him.

[16] The letter of 23 August 2018, which falls after the expiry of the trial period, refers to three weeks' notice being given as requested from 13 August 2018. However, having heard Mr Rai's evidence I am not satisfied that there was any agreement on 10 August to that effect. Therefore Mr Rai was only given notice of termination on 23 August 2019, after the expiry of the trial period. He is therefore able to pursue an unjustified dismissal personal grievance claim.

[17] Mr Rai appears to have been dismissed on the grounds of redundancy. The reason given to him verbally and in the letter of 23 August was that the Newmarket branch of Wagamama had closed, staff from there had to be accommodated at the Sylvia Park branch and so there would be no work available for him at Sylvia Park. It appears that the Newmarket staff were seen as a priority over Mr Rai.

[18] I have little evidence regarding the number of staff at Newmarket or at Sylvia Park and the hours of work available. I am unable to conclude on the basis of the limited evidence contained in the letter of dismissal and at the investigation meeting that Mr Rai's dismissal was genuinely for redundancy.

[19] Even if it was, there was an absence of proper process in terms of the provision of information and consultation with Mr Rai regarding the prospect of redundancy as required by s 4(1A)(c) of the Employment Relations Act 2000 (the Act). After Mr Rai received the 23 August 2018 letter he initiated some discussion with the store manager, operations manager and Mr Keddell but I do not consider this to be sufficient to amount to consultation. WNZ did not act how a fair and reasonable employer could have done in the circumstances.<sup>3</sup>

[20] Mr Rai was unjustifiably dismissed by WNZ.

### **Remedies**

[21] Mr Rai seeks lost wages and compensation for humiliation, loss of dignity and injury to feelings under s 123 (1)(c)(i) of the Act.

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<sup>3</sup> S 103A(2) of the Act

[22] Mr Rai seeks lost wages. He has provided evidence of a number of attempts to gain other employment. He could not obtain another job until 17 December 2018. Under s 128 of the Act I am required to order payment of three months' lost wages. Mr Rai was entitled under his agreement to a minimum of 35 hours work per week, which at \$18.00 per hour is \$630.00 gross per week. I order WNZ Sylvia Park Ltd (in rec) to pay Mr Rai the sum of \$8,190.00 gross, being 13 weeks' lost wages, within 28 days of the date of this determination. I have considered whether to make an award beyond the three months (13 weeks) period, but have decided not to on the basis of the uncertainty regarding Mr Rai's continued employment.

[23] Mr Rai also seeks compensation for the distress he suffered from his dismissal. He describes the dismissal as a disaster for him. He faced the embarrassment of having to borrow money from friends in New Zealand as well as approaching his family in India. He felt bad and guilty when they called him. He described it as a really horrible experience for him. I order WNZ Sylvia Park Ltd (in rec) to pay Mr Rai the sum of \$8,000.00 as compensation under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

[24] I have considered whether Mr Rai contributed to the situation giving rise to his dismissal and found that he did not.

### **Arrears of Wages**

[25] Mr Rai claims a number of payments which should have been made to him by WNZ but were not.

[26] Mr Rai claims for time which he should have been provided with work and pay in accordance with his employment agreement but these hours were not always provided. Appendix A of Mr Rai's employment agreement sets out that he was employed on a full-time basis, which is defined as a minimum of 35 hours per week. However, having looked carefully at the payslips provided to Mr Rai, I find that he was only offered less than 35 hours work in one week, and in that week he worked 34.75 hours.<sup>4</sup> He is thus owed for 15 minutes of work. I order WNZ Sylvia Park Ltd (in rec) to pay Mr Rai the sum of \$4.50 gross within 28 days of the date of this determination.

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<sup>4</sup> Pay period ending 27 July 2018

[27] Mr Rai was also not paid his full holiday pay on the termination of his employment. His final payslip shows that he was paid for 30 hours of holiday pay on the termination of his employment but there is still a holiday balance of 19.23 hours. He is owed for those hours. I order WNZ Sylvia Park Ltd (in rec) to pay Mr Rai the sum of \$346.14 gross as holiday pay within 28 days of the date of this determination.

[28] Mr Rai worked on Queen's Birthday<sup>5</sup>. Although he was paid time and a half for that public holiday, he did not receive an alternative day's holiday nor is it evident that he was paid for an alternative holiday on his termination. On the basis of a day of six hours I order WNZ Sylvia Park Ltd (in rec) to pay Mr Rai the sum of \$108.00 gross within 28 days of the date of this determination.

### **Certificate of determination**

[29] I order that a certificate of determination be issued along with written record of the oral determination.

### **Costs**

[30] Mr Rai seeks a contribution to the costs of bringing this proceeding. The investigation meeting took about a third of day. At the notional daily tariff rate of \$4,500 for the first day of an investigation meeting, Mr Rai is entitled to a contribution of \$1,500.00.

[31] I order WNZ Sylvia Park Ltd (in rec) to pay Mr Rai the following sums within twenty-eight days of the date of this determination:

(a) \$1,500.00 as a contribution to his costs; and

(b) \$71.56 for the Authority's filing fee.

**Nicola Craig**  
**Member of the Employment Relations Authority**

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<sup>5</sup> 4 June 2018