

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 87  
3094733

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| BETWEEN | JITESH THAKORLAL<br>Applicant                    |
| AND     | THE ALBERT CAFÉ AND<br>BAR LIMITED<br>Respondent |

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| Member of Authority:   | Leon Robinson  |
| Representatives:       | Mark Nutsford, advocate for the Applicant<br>No appearance by the Respondent |
| Investigation Meeting: | 20 July 2021 at Auckland   |
| Submissions received:  | 3 August 2021 from Applicant   |
| Determination:         | 11 March 2022  |

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**DETERMINATION OF THE AUTHORITY**

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**The problem**

[1] Jitesh Thakorlal (Mr Thakorlal) claims he was unjustifiably dismissed from his employment as bartender with the Albert Café and Bar Limited on about 27 November 2019.

[2] The Albert Café and Bar Limited by its statement in reply denies that it employed Mr Thakorlal because he did not sign and return an individual employment agreement. It says that even if he had been employed, Mr Thakorlal would have been a casual employee. Additionally, it says that if he thought he was employed, his employment was terminated under a 90 day trial period clause contained in the agreement.

[3] The parties were unable to resolve the employment relationship problem by the use of mediation. Mr Thakorlal asks the Authority to resolve it by granting him formal orders for reimbursement and compensation.

### **The investigation**

[4] The Albert Café and Bar Limited did not attend the investigation meeting. Being satisfied that it had been served with notice of the investigation meeting and without good cause shown for its non-attendance, I proceeded to act as fully in the matter before me as if it had duly attended or been represented. I questioned Mr Thakorlal and his representative made submissions.

[5] This determination has been issued outside the timeframe set out at section 174C(3)(b) Employment Relations Act 2000 (the Act), where the Chief of the Authority considers exceptional circumstances exist. As permitted under section 174E of the Act, not all the evidence or information received has been recorded. Rather, this determination makes findings of fact and law and sets out conclusions on the issues necessary to dispose of the Applicant's claims.

### **The issues**

- [6] The issues requiring investigation and determination were:
- (a) was there an employment relationship between the parties? &
  - (b) was the Applicant dismissed, and if so, was that dismissal, and how that decision was made and carried out, what a fair and reasonable employer could have done in all the circumstances at the time? &
  - (c) if the Respondent's actions were not justified what remedies should be awarded, considering:
    - (i) lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
    - (ii) compensation under section 123(1)(c)(i) of the Act 2000;
  - (d) if any remedies are awarded, should they be reduced (under section 124 of the Act) for blameworthy conduct by the Applicant that contributed to the situation giving rise to the Applicant's grievance?
  - (e) Should either party contribute to the costs of representation of the other party?

## **The facts**

[7] In late October 2019 Mr Thakorlal responded to an advertisement for staff at The Albert Café and Bar in Mt Albert, Auckland (the bar). Both full-time and part-time roles were available. There was no mention of casual employment.

[8] On 4 or 5 November 2019 Mr Thakorlal received a call from one Mr Dinesh Patel (Mr Patel) a person in authority and an agent of the Respondent. Mr Thakorlal accepted an invitation from Mr Patel that they meet at the bar on Friday 8 November 2019 for an interview. Before the interview, Mr Thakorlal sent a text to Mr Patel enquiring about the pay rate. Mr Patel responded the rate was negotiable and would be discussed at interview.

[9] When they met at the bar on 8 November 2019 Mr Thakorlal told Mr Patel about his existing role as a bartender and said that he was very fast and capable working alone behind the bar. He also told Mr Patel he wished to settle in one job and make progress in his career, working his way up to a senior position.

[10] Mr Patel was apparently happy with Mr Thakorlal and what Mr Thakorlal told him. Mr Thakorlal accepted Mr Patel's offer of bartender on a starting hourly rate of \$20.00. Mr Thakorlal was pleased to accept because he perceived the bar to be a relaxed environment and because it was very close to his home.

[11] On 19 November 2019 Mr Patel sent a text message that Mr Thakorlal go into the bar the following day to sign his contract (employment agreement).

[12] At 12.00pm the following day Mr Patel took Mr Thakorlal through the employment agreement. Mr Thakorlal signed the agreement and initialled each page. Mr Patel asked Mr Thakorlal to be available for the bar's opening on 27 November 2019. Mr Thakorlal agreed and later resigned from his existing employment.

[13] At lunchtime on 26 November 2019 Mr Patel texted and requested Mr Thakorlal attend at the bar for a staff meeting and uniform handout at 3.30pm that afternoon. At that staff meeting and uniform handout the new employees were welcomed. Mr Thakorlal appeared in a photograph taken of the new bar staff group.

[14] On the morning of 27 November 2019 Mr Patel called Mr Thakorlal and asked for the details of his managers' licence. Mr Thakorlal informed him that he did not have one and Mr Patel was surprised and said "I thought you have one". Mr Patel said

he would speak to the owner and get back to Mr Thakorlal. Thereafter, Mr Thakorlal says Mr Patel “went to ground” and would not respond to texts.

[15] At 2pm that afternoon Mr Thakorlal texted Mr Patel asking if it was his (Mr Thakorlal) night off as he still had not heard back from him (Mr Patel).

[16] The following day on 28 November Mr Thakorlal texted Mr Patel again to find out what was happening about his employment. Mr Patel did not respond. Mr Thakorlal continued to text Mr Patel but Mr Patel did not respond.

[17] On Tuesday 17 December 2019 Mr Thakorlal texted Mr Patel and requested a meeting with him. Mr Patel did not respond.

[18] Mr Thakorlal went to the bar the following day on Wednesday 18 December 2019. Mr Patel told Mr Thakorlal that he had not been employed because he had not signed a contract and because he had falsely stated at interview that he had a managers’ certificate.

[19] Mr Patel told Mr Thakorlal he could not be hired as a bartender only, because the role of bartender is the acting manager on duty. Mr Thakorlal was also told that another person had been employed to take his place and because of that, he was asked if he would study the Xero business accounting software so he could take on some of the office duties on an unpaid basis while he worked towards his managers’ certificate.

[20] Mr Thakorlal was not happy. As he studied the Xero software package he decided he should be paid. He texted Mr Patel and asked when he could start work. Mr Patel did not respond.

[21] Mr Thakorlal did not hear from Mr Patel again and he was never invited to commence work at the bar.

### **Unjustifiable dismissal?**

[22] I accept Mr Thakorlal’s unchallenged evidence that he signed an employment agreement with the Respondent. I find that he was a person intending to work as defined in the Act. He was an employee.

[23] I find that Mr Thakorlal was not a casual employee because the advertisement did not make any reference to casual employment.

[24] I accept Mr Thakorlal's unchallenged evidence that he did not at any stage misrepresent to the Respondent that he had a manager's licence. I find that it follows then, that Mr Patel misrepresented that he (Mr Thakorlal) had done so. It must have been that Mr Patel assumed Mr Thakorlal had a managers' licence and when he learned his assumption was incorrect, he decided Mr Thakorlal was not needed.

[25] I find that when Mr Patel asked Mr Thakorlal to study up Xero business software so he could take on some of the office duties unpaid while he worked towards his managers' certificate as well as telling him that he had been replaced, was a 'sending away' that was tantamount to dismissal.

[26] I find the Respondent had no legitimate basis to prevent Mr Thakorlal from commencing the employment the parties had agreed he would. in the employment agreement I find he signed. Mr Patel's incorrect assumption was no justification for ending Mr Thakorlal's employment.

### **The result**

[27] The 'sending away' and how that decision was made and carried out, was not what a fair and reasonable employer could have done in all the circumstances at the time. I find that Mr Thakorlal has a personal grievance for unjustifiable dismissal.

### **The resolution**

[28] Mr Thakorlal is entitled to formal orders to resolve the personal grievance I have found.

[29] I must first consider whether there was any blameworthy conduct on Mr Thakorlal's part which contributed to the situation that led to the unjustifiable dismissal. I repeat again that I find Mr Thakorlal did not misrepresent that he had a managers' licence. I find that there was no such blameworthy conduct on Mr Thakorlal's part and there is no basis to reduce either the nature or the extent of any remedies to be provided to him.

### *Reimbursement*

[30] I accept Mr Thakorlal's evidence of the steps he took to mitigate his loss. I also accept that as a condition of the receipt by him of the job seekers benefit, he was actively seeking work. I consider that when he commenced full time study in August 2020, the

chain of causation was broken and the Respondent was no longer accountable for his loss.

[31] I accept that Mr Thakorlal has lost remuneration as a result of his personal grievance for unjustifiable dismissal. I order The Albert Café and Bar Limited to pay to Jitesh Thakorlal the gross sum of \$27,200.00 (Twenty-seven thousand two hundred dollars) as reimbursement (34weeks x \$800(40 hours x \$20)).

[32] I order The Albert Café and Bar Limited to pay to Jitesh Thakorlal the gross sum of \$1,632.00 (One thousand six hundred and thirty-two dollars) being holiday pay due on the order of reimbursement sum.

[33] I order The Albert Café and Bar Limited to pay to Jitesh Thakorlal the Kiwisaver contributions amount on the order of reimbursement sum.

#### *Compensation*

[34] Mr Thakorlal describes having difficulty attending courses in February 2020 due to depression and helplessness. He experienced considerable disruption too when he resigned from an existing job and an ongoing income stream only to go on to have no job and no income.

[35] I accept Mr Thakorlal has suffered hurt and humiliation, embarrassment to his feelings and loss of dignity. Having regard to the circumstances of the personal grievance and his evidence, I order The Albert Café and Bar Limited to pay to Jitesh Thakorlal the sum of \$8,000.00 (Eight thousand dollars) as compensation.

#### **Costs**

[36] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[37] If they are not able to do so and a determination on costs is needed Mr Nutsford may lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum the Respondent would then have 14 days to lodge any reply memorandum.

Leon Robinson  
Member of the Employment Relations Authority