

was satisfied that Nandos knew about the claim and knew about the details of the investigation meeting, I determined to proceed with the investigation meeting notwithstanding the absence of Nandos which I took to be a deliberate decision on their part rather than an error of omission. I concluded that Nandos were apprised of the claim and its nature because a Director had participated in the Authority's telephone conference to set up the investigation meeting and the same Director had attended at the mediation meeting.

[3] Mr Aitken was employed on general kitchen duties at Nandos working 4-5 split shifts per week, each usually comprising 5 to 6 hours. Although the employment relationship was governed by a written employment agreement, Mr Aitken notes that that agreement prescribes the commencement of the employment relationship as 7 May 2009 when in fact he commenced working in March 2009.

[4] There were no difficulties at the beginning of the employment relationship but in July 2009, the working Director, Amanda Newson prepared eight weeks of rostering arrangements because she was going overseas. During this eight week period, Mr Aitken was to work 5-6 shifts a week. Mr Aitken's evidence is that he relied on that forward commitment of hours of work in relation to his own financial obligations. However, he suffered an accident before he was able to commence any of that shift cycle and he immediately reported to the employer with his ACC paperwork once his injury had been assessed and given initial treatment.

[5] Mr Aitken was summoned to a meeting with Ms Newson on 31 July 2009 at which he was dismissed from his employment allegedly on the basis that his position had become redundant. The final pay which followed this advice was less than Mr Aitken expected, was never documented by a pay slip and he was never paid his holiday pay. He raised a personal grievance promptly.

Issues

[6] The Authority needs to investigate the following questions:

- (a) Was Mr Aitken's dismissal justified? and
- (b) Is Mr Aitken owed wages?

Was Mr Aitken's dismissal justified?

[7] I am satisfied Mr Aitken's dismissal was unjustified. Mr Aitken was purportedly dismissed for reasons of redundancy but if that were the basis for the dismissal, the required rules for a redundancy dismissal were wholly absent. There was no process whatever in the dismissal, no attempt to alert Mr Aitken (or other staff for that matter) about the need for a restructure, no evidence Nandos proposed a provisional solution and sought responses from staff and no opportunity whatever for staff to comment one way or the other.

[8] In fact, on the facts before the Authority, it seems to me much more likely that Nandos have dismissed Mr Aitken because his unavailability by reason of injury was an inconvenience rather than because his position had become redundant. There is not sufficient evidence before the Authority to enable me to conclude whether there is any prospect that the redundancy could be genuine; it is conceivable that Nandos decided that it could dispense with the particular position that Mr Aitken occupied. However, it is clear that Nandos continued recruiting after Mr Aitken was dismissed and that seems an unusual state of affairs if the redundancy was indeed genuine.

[9] However, even if the redundancy were genuine (and I doubt that) the process was so unfair as to make the dismissal unjustifiable.

Is Mr Aitken owed wages?

[10] Mr Aitken complains that his final pay did not include holiday pay and was paid net of the deduction for an advance on wages which had previously been made by Nandos. As to the failure to pay holiday pay, clearly Mr Aitken is entitled to his holiday pay and that will be ordered.

[11] In respect to the unauthorised deduction, Mr Aitken told me in evidence that he had informally agreed to the earlier advance being recovered from subsequent wages payments and at the time of his dismissal, an amount of \$150 was still outstanding. While his evidence is clear that there was no formal agreement that Nandos could retain those monies, the practical reality is that Mr Aitken agreed he owed Nandos that money and while the deduction from his final pay is not supported by an appropriate written agreement, I do not propose to take that issue further.

Determination

[12] I am satisfied that Mr Aitken has a personal grievance by reason of having been unjustifiably dismissed from his employment by Nandos and accordingly he is entitled to remedies. I have considered the question of contribution as is required by the Employment Relations Act 2000. I am satisfied that Mr Aitken has made no contribution whatever to the circumstances giving rise to his personal grievance.

[13] As I have already indicated, I am also satisfied that Mr Aitken is owed holiday pay but that in all other respects, his final pay is accurate. Because Mr Aitken has lost his position and has been unable to obtain alternative employment since dismissal he has suffered a loss in respect to wages which he would otherwise have earned and he is entitled to a contribution to that loss as well.

[14] Finally, Mr Aitken ought to recover the filing fee payable in respect of his application to the Authority.

[15] Nandos is to pay to Mr Aitken the following sums to remedy his personal grievance:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$2,000.00;
- (b) A contribution to lost wages in the sum of \$2,707.16 gross;
- (c) Unpaid holiday pay in the sum of \$720.00 gross;
- (d) Filing fee of \$70.00

Costs

[16] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority