

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 38  
5402091

BETWEEN SEAN AITKENHEAD  
Applicant  
AND BRUSCHETTERIA LIMITED  
Respondent

Member of Authority: James Crichton  
Representatives: Applicant in person  
Francesco Arini for Respondent  
Investigation Meeting: 31 January 2013 at Auckland  
Date of Determination: 1 February 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Mr Aitkenhead, alleges that he was unjustifiably dismissed and has unpaid holiday pay outstanding. The respondent ( Bruschetteria ) failed to file a Statement in Reply and to otherwise participate in the Authority's process, until the investigation meeting..

[2] Mr Aitkenhead began employment at Bruschetteria in September 2009 as manager. There was never a written employment agreement provided. At the end of July 2012, he was advised by Bruschetteria that the employer could no longer continue the employment because of financial difficulty and his last day of employment would be 31 August 2012. Subsequently, part of the justification for the termination of the employment became an allegation that Bruschetteria no longer trusted Mr Aitkenhead although he never had any warnings and is uncertain about exactly what the lack of integrity relates to.

[3] Since the employment terminated, there has been part-payment of the holiday pay owing but arrears of \$1,635.86 remains owing.

[4] Bruschetta has played no part in the Authority's proceedings up to the investigation meeting. However, Bruschetta was represented at the investigation meeting by its director, Mr Arini....

### **Issues**

[5] The three issues for determination are as follows:

- (a) Was Mr Aitkenhead dismissed for redundancy;
- (b) What part did the allegations of dishonesty play;
- (c) Is Mr Aitkenhead due unpaid holiday pay?

### **Was Mr Aitkenhead dismissed for redundancy?**

[6] The evidence before the Authority suggests that Mr Aitkenhead was told in the middle of July 2012 that his position would cease to be part of the employer's enterprise with effect from the end of August 2012, some six weeks later.

[7] At the investigation meeting, Mr Arini, a director of Bruschetta, told the Authority that Mr Aitkenhead's position had been disestablished because of the financial pressure that the business was under during the current recession. Mr Aitkenhead accepted in his evidence at the investigation meeting that there was real difficulty in the restaurant trade and he accepted that that general weakness could readily apply to Bruschetta.

[8] Furthermore, Mr Aitkenhead accepted a proposition from the Authority that he might well have simply accepted the dismissal at face value without challenge, if there had not been allegations made by Bruschetta about his honesty.

[9] The Authority is satisfied that Bruschetta was and continues to be in financial difficulty and in consequence, the Authority thinks it more likely than not that the redundancy was a genuine one.

[10] The evidence before the Authority on this point is first the sworn testimony of Mr Arini himself and second the obvious struggle that the business has had in

completing the payment of holiday pay arrears to Mr Aitkenhead. This difficulty has been apparent since Mr Aitkenhead's dismissal and continues down to the date of hearing.

[11] The Authority's conclusion then is that the redundancy was a genuine one. However, the next question is whether the process used by Bruschetteria meets the requirements of the law. First, while the nature of the process adopted by Bruschetteria was by no means perfect, it did give Mr Aitkenhead a reasonably lengthy period of paid notice of the forthcoming redundancy. Conversely, there was no prior warning of the decision, no provision of information about the financial predicament of the business and no opportunity for Mr Aitkenhead to be involved in suggesting alternatives to the loss of his job.

[12] The reality is that in a small business of this sort, this rather informal process is not uncommon. The Authority is satisfied that the resources of the employer were not extensive and that in all probability, a more elaborate process would not have achieved any different result. The obvious position to do away with in a business of this sort is that of manager and the Authority is satisfied that there is probably little that Mr Aitkenhead could have offered by way of alternative to the disestablishing of his position.

[13] In all the circumstances, the Authority thinks that the process adopted by Bruschetteria was so truncated as to really not give Mr Aitkenhead any opportunity to be involved in creating a different outcome and on that basis, the Authority thinks that a small amount of compensation may be due to Mr Aitkenhead to compensate him for the process failures of the employer. However, the failures were not so great as to materially affect the outcome but were just sufficient to justify some modest compensation.

#### **What role did the dishonesty allegations play?**

[14] The evidence the Authority heard indicated that after the notification by the employer that the position occupied by Mr Aitkenhead was to be disestablished, Mr Arini and other representatives of Bruschetteria raised issues about Mr Aitkenhead's integrity.

[15] The Authority is absolutely satisfied that these were not raised properly. Mr Aitkenhead was given no opportunity to deal with these allegations fair and

square. The allegations were of the sort often heard by the Authority in disputes of this kind where it was alleged that friends were being entertained in the business at no cost or reduced cost and that product was being removed from the business at the end of a shift. For the record, Mr Aitkenhead denied on oath any impropriety, and denied having had any opportunity to respond to all but one of these allegations. The Authority is satisfied that the evidence available does not suggest any impropriety at all.

[16] Indeed, while there were some specific examples given by Mr Arini in his evidence, with the exception of one episode where the till was out by \$80, it seems that Mr Aitkenhead was never given an opportunity to respond to any of these allegations. In relation to the \$80 episode, Mr Aitkenhead gave evidence that he had immediately taken responsibility for what was an error, but he denied absolutely pocketing the \$80.

[17] It emerged during the course of the investigation meeting that Bruschetta was rather using the alleged dishonesty allegations against Mr Aitkenhead as a shield to his continued push to be reimbursed the holiday pay arrears that were owed to him. One allegation, apparently made almost baldly, was that if he persevered with the holiday pay claim, the employer would take the dishonesty allegations to Police.

[18] Given the fact that these allegations are both unproven and have never been put to him in a proper way so that he can respond to them, that threat is, as the Authority Member remarked during the investigation meeting, grossly improper. As the Authority remarked during the investigation meeting, if there were matters going to the honesty of Mr Aitkenhead, then both parties had an absolute duty to engage with each other so that the matter could be discussed. If necessary, matters could be taken further, but certainly never before Mr Aitkenhead had had an opportunity to respond to what were very serious allegations made against him.

[19] The Authority emphasises that there is no evidence before it that Mr Aitkenhead has done anything wrong and the employer's enthusiasm for raising matters such as this once it has brought the employment to an end for other reasons, is completely improper.

[20] The Authority is satisfied that by behaving in the way it did, Bruschetta is responsible for an unjustified action or series of actions against Mr Aitkenhead

causing him disadvantage and he is entitled to modest compensation for those post-dismissal allegations.

### **Is Mr Aitkenhead owed arrears of wages?**

[21] The Authority is satisfied that Mr Aitkenhead is owed arrears of holiday pay and the Authority indicated that to the parties during the investigation meeting.

[22] Mr Aitkenhead took care to consult with the Inland Revenue Department about his entitlement to holiday pay and with its assistance he calculated the amount of holiday pay that he was entitled to. Using that process, the total amount owed amounted to \$3,185.32. From that sum, Mr Aitkenhead has deducted the various amounts already paid to him by Bruschetteria and from that process has derived the figure still outstanding of \$1,635.86.

[23] It is that amount which Bruschetteria owes Mr Aitkenhead as arrears of holiday pay. The Authority has already indicated to the parties at the investigation meeting that that is the position.

### **Determination**

[24] The Authority is satisfied that Mr Aitkenhead was genuinely redundant from his position as manager of Bruschetteria but the redundancy process was sufficiently deficient as to justify the Authority's finding that Mr Aitkenhead had suffered a disadvantage as a consequence of the unjustified action of Bruschetteria in the process by which it made his position redundant, bereft as it was of any information about the detail of the firm's financial predicament and bereft also of any consultation in relation to the forthcoming redundancy.

[25] Bruschetteria is to pay to Mr Aitkenhead the sum of \$750 as compensation for the wrong done.

[26] Moreover, the Authority is satisfied that the grossly improper process by which dishonesty allegations were levelled at Mr Aitkenhead after he was made redundant has caused him disadvantage and those allegations, again bereft of any proper process and any opportunity for Mr Aitkenhead to respond appropriately, are unjustified actions.

[27] Bruschetta is to pay to Mr Aitkenhead the sum of \$750 as compensation for this unjustified action.

[28] There are unpaid wages for arrears of holiday pay due in the sum of \$1,635.86 and that sum is also to be paid by Bruschetta to Mr Aitkenhead.

[29] Because of Bruschetta's financial position, the Authority is satisfied that time should be allowed for the payment of the sums awarded. Bruschetta is to make the payments required by the Authority to Mr Aitkenhead over the following four months, the first such payment to be made within four weeks of the date of this determination and the fourth and final payment within four months of the date of this determination.

[30] In the event that those payments are not made within the time specified by the Authority, a penalty will be payable by Bruschetta to Mr Aitkenhead for the failure to supply him with a written employment agreement in accordance with s.65(1) of the Employment Relations Act 2000, such penalty to be in the sum of \$1,000. For the avoidance of doubt, that penalty is not payable if Bruschetta meets the other payments required by this determination within the timeframe stipulated by the Authority. If the additional payment of \$1,000 as a penalty does become payable, then that payment is to be made to Mr Aitkenhead one month after the final payment from the other orders made by the Authority are required to be paid.

### **Costs**

[31] Costs are reserved. The parties are urged to agree costs between them. If that proves impossible, either party may have recourse to the Authority again and costs will be fixed.

James Crichton  
Member of the Employment Relations Authority