

ATTENTION IS DRAWN TO
THE ORDER PROHIBITING
PUBLICATION OF CERTAIN
INFORMATION REFERRED
TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 178
3024840
3029851

BETWEEN PAUL ALGAR
 Applicant

AND SOUTH ISLAND HOTELS
 LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Philippa Tucker, Counsel for Applicant
 Robert Thompson, Advocate for Respondent

Investigation Meeting: 14 and 15 August 2018 at Christchurch

Submissions Received: 15 August 2018 and 30 August 2018 for Applicant
 15 August 2018 and 30 August 2018 for Respondent

Date of Determination: 4 December 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] South Island Hotels Limited (“SI Hotels”) employed Paul Algar for a short period of time from October 2016 and the employment relationship did not work out. This is probably all that the two parties would agree on when looking back at their relationship. In short, Mr Algar and SI Hotels disagree on almost all of the matters relating to Mr Algar’s employment. This includes some key matters such as Mr Algar’s role, many of the terms of

his employment, particular arrangements relating to a smokehouse BBQ trailer (the Trailer) that Mr Algar had possession of and was to use in SI Hotels business and how and when Mr Algar's employment ended.

[2] Mr Algar says SI Hotels dismissed him on 22 November 2017 and he brings two distinct claims to the Authority making up his alleged employment relationship problem.

[3] First, he says SI Hotels unjustifiably dismissed him as Gary Lawson, the director of SI Hotels, told him there was no work for him and he should go back to Wellington (where he had relocated from in order to take up the employment with SI Hotels). Mr Algar seeks remedies for this unjustified dismissal.

[4] Second, Mr Algar says SI Hotels has failed to pay him the final payment due under an agreement to purchase the Trailer and he seeks damages for this breach of contract.

[5] Mr Algar had originally sought repossession of the Trailer based on the breach of contract, asserting that he was the rightful owner and SI Hotels was unlawfully retaining possession of the Trailer. This developed further when Mr Algar made an application for an interim order for possession of the Trailer when he became concerned that SI Hotels was attempting to sell the Trailer before the scheduled investigation meeting for this matter.

[6] The application for an interim order was resolved by SI Hotels giving appropriate undertakings and I did not need to make an interim determination.

[7] However, the claim relating to the Trailer changed again when SI Hotels stopped making the finance payments for a loan secured by the Trailer and Silver Chef, the third party financier repossessed the Trailer.

[8] In the end, Mr Algar discontinued his claim for an order for repossession of the Trailer during the investigation meeting, as he appeared to accept that the ownership of the Trailer had been transferred to Silver Chef and Silver Chef had possession of the Trailer because the payments for a loan secured by the Trailer had not been made.

[9] In response to all of this SI Hotels says it did not dismiss Mr Algar but rather, Mr Algar left for his own reasons. It also says I do not have jurisdiction to grant any remedies

arising out of the alleged breach of contract claim, as any deal relating to ownership and possession of the Trailer is not an employment relationship problem.

[10] In order to resolve this employment relationship problem I must address the following issues:

- (a) Do I have jurisdiction to deal with the alleged breach of contract? This involves an analysis of whether the claim relating to the Trailer is a matter related to a breach of Mr Algar's employment agreement or a matter arising from or related to the employment relationship¹.
- (b) If I do have jurisdiction in relation to the alleged breach of contract; has there been a breach as alleged? This involves an analysis of the contractual obligations and a factual determination of whether the actions complained of occurred and if so whether those actions are a breach of those obligations.
- (c) If there has been a breach of contract, what remedies is Mr Algar entitled to?
- (d) Was Mr Algar dismissed?
- (e) If Mr Algar was dismissed, was that dismissal justified?
- (f) If the dismissal was unjustified, what remedies is Mr Algar entitled to? This involves an analysis of Mr Algar's loss, including possible losses stemming from use of the Trailer in SI Hotels' business, mitigation and contribution.

[11] One other aspect of this employment relationship problem that I must also determine is an application for non-publication that Mr Algar has made. I will deal with the non-publication question first, then the jurisdiction and contractual claim issues and finish with the unjustified dismissal issues.

Extension of time

[12] This determination has been issued outside the statutory period of three months after receiving the last communication from one of the parties. When I advised the Chief of the Authority this would occur he decided, as he is permitted by s174D(3) of the Act to do, that

¹ Sections 161(b) and 161(r) of the Employment Relations Act 2000.

exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174D(2) of the Act.

Non-publication order

[13] Counsel for Mr Algar lodged and served a memorandum seeking an order prohibiting the publication of the names of both parties in this matter. This application is made pursuant to clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act).

[14] Counsel for Mr Algar submits that an order is appropriate because:

- (a) Mr Algar is involved in a relatively small industry, which relies on reputation and word of mouth for obtaining employment. Any decision I make may impact on Mr Algar's reputation and may affect his future employment prospects.
- (b) The evidence I heard in my investigation includes evidence of a sensitive nature about Mr Algar's background including an injury he suffered, medical information pertaining to that injury and information about the impact of that injury.

The sensitive nature of the information means it is likely that media sources will be interested in the case and are likely to publish articles about it online.

If this highly personal information is publicised, it will affect Mr Algar, his partner and his family.

[15] The advocate for SI Hotels responded to the application, advising that SI Hotels opposes the non-publication orders sought. The advocate for SI Hotels says:

- (a) The potential impact of publicity around this claim on Mr Algar's future employment prospects is not sufficiently adverse to meet the high threshold of adversity for a non-publication order to be made.
- (b) Any adverse consequences of Mr Algar's medical information being published can be prevented by limiting any reference to the medical information in my determination as most of it is not relevant to determining the issues.

Alternatively SI Hotels does not oppose an order for non-publication preventing publication of any of Mr Algar's medical information and the effects of it on him and others, if I consider that it is necessary to protect Mr Algar in this regard.

[16] My power to make an order for non-publication is set out in Clause 10 of schedule 2 of the Act:

10 Power to prohibit publication

- (1) The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[17] Whilst on the face of it this appears to be a wide discretionary power without any limitations, it is not unfettered. In *XYZ v ABC*² Judge Inglis (as she was then) observed that the power to prohibit publication is a discretionary power that must be exercised according to principle and consistently with the legislative scheme. Applications must be assessed having regard to their particular circumstances, and the approach must follow that set out by the Supreme Court in *Erceg v Erceg*³.

[18] In *Erceg* the Supreme Court said that open justice is fundamental to our common law system. This means that judicial proceedings should be held in open court with the public having access and the media should be free to provide reports of proceedings. The Supreme Court went on to say however, there are well established circumstances where the interests of justice override the general rule of open justice, but any departure from this general rule can only be to the extent necessary to serve the ends of justice⁴.

[19] The Supreme Court then stated at [13]:

... We accept that the courts are able to make orders to protect confidential information in civil proceedings in the exercise of their inherent powers. The need to protect trade secrets or commercially sensitive information, the value of which would be significantly reduced or lost if publicised, are obvious examples of situations where such orders may be justified. However, the courts have declined to make non-publication or confidentiality orders simply because the publicity associated with particular legal proceedings may, from

² [2017] NZEmpC 40

³ [2016] NZSC 135

⁴ At [2] and [3]

the perspective of one or other party may, be embarrassing (because, for example, it reveals that a person is under financial pressure) or unwelcome (because, for example, it involves the public airing of what are seen as private family matters). This has been put on the basis that the party seeking to justify a confidentiality order will have to show specific adverse consequences that are exceptional, and effects such as those mentioned do not meet this standard. We prefer to say that the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but agree the standard is a high one.

[20] So, Mr Algar will need to show specific adverse consequences arising out of the publication of his name, and/or details of his injury that are sufficient to justify an exception to the fundamental principle of open justice. And whether the specific adverse consequences are sufficient to justify this exception, is a high standard.

[21] The Supreme Court is clear that adverse consequences such as unwanted publication of private matters are not sufficient to justify an exception.

[22] In the same vein, it is my view that the potential impact on a party's reputation for merely bringing a claim in the Employment Relations Authority cannot justify an exception.

[23] Turning to Mr Algar's application for non-publication and the reasons he seeks the order:

- (a) That there might be a potential impact on Mr Algar's reputation and a subsequent impact on his future employment prospects is insufficient to justify a non-publication order.
- (b) I am satisfied that I should order non-publication to prevent further damage to Mr Algar and his family arising out of his medical information. But this can be achieved by limiting non-publication to that medical information and the impact of it on him and his family.
- (c) Neither limb advanced as a basis for non-publication of the parties' names meet the high threshold required to justify a non-publication order being made, of the parties' identities.

[24] I decline Mr Algar's application for non-publication orders but will make an order preventing any publication of his medical information.

[25] I will also grant interim non-publication orders in respect of the parties' names and information relating to their identities so that if Mr Algar wishes to challenge my decision on his application for non-publication orders and is successful in that challenge that is not rendered useless by publication of his name or identifying details now.

[26] As a consequence the Authority will not publish this determination or the substantive determination on the Authority's website until either the Employment Court has made orders or the interim order has lapsed in accordance with its terms.

Orders on non-publication

[27] Pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) I prohibit from publication any information given in evidence by Mr Algar about his medical condition and the effects of that condition on him and his family.

[28] I also grant an interim non-publication order prohibiting the publication of Mr Algar and SI Hotels' names and any matters that might identify them. The terms of the interim order are:

- (a) This interim order is to stay in place for 28 days commencing from the day after the date of this determination, to allow Mr Algar to file a challenge to this part of my determination if he wishes.
- (b) If Mr Algar files a challenge, this interim non-publication order will be extended to remain in place until the Employment Court makes any order that renders it unnecessary.
- (c) If Mr Algar does not file a challenge to this part of my determination then the interim order will lapse.

Breach of contract claim

Background

[29] Mr Algar lived in the USA for a number of years where, amongst other things, he worked as a cook with a particular focus on Texas style smoked and BBQ meats. When Mr Algar decided to return to New Zealand he planned to use his skills with smoked and

BBQ meat to create a business. To this end, he purchased the Trailer and had it shipped to New Zealand. He intended to use the Trailer in a business preparing and selling meals based around the smoked and BBQ meats he has expertise with.

[30] After returning to New Zealand, Mr Algar went about setting up his business by attending a course on running a small business, creating a business plan based around a menu and projected turnover and costs, looking for an appropriate site to locate the Trailer and operate the business from and obtaining some initial funding through Work and Income New Zealand.

[31] Mr Algar incurred significant costs in purchasing and importing the Trailer to New Zealand. Initially this cost was funded by a friend but as time progressed and Mr Algar had limited income whilst he went about setting up his business he decided to get finance to repay his friend and pay off some of the other costs he still had in relation to the Trailer.

[32] Mr Algar entered into a finance agreement with Silver Chef. Mr Algar described this in both his claim and evidence as just a loan secured by the Trailer indicating that he retained ownership and possession of the Trailer. This was inaccurate as in fact, the terms of the finance deal with Silver Chef were that Mr Algar transferred the ownership of the Trailer to Silver Chef for the loan amount he received and then entered into a rental agreement under which he made regular rental payments to pay off the loan and he had possession of the Trailer. It was essentially a rent to buy agreement where Mr Algar had possession and use of the Trailer and the option to purchase back the ownership of the Trailer at certain points depending on how much of the loan he had repaid through his rental payments.

[33] Whether Mr Algar knew of the details of this arrangement is not clear to me – he presented as someone who believed that he still had ownership and rights to possession of the Trailer and that there was a simple finance deal consisting of a loan he repaid to Silver Chef.

[34] It was with this finance in place and Mr Algar's planning and preparation well under way that Mr Lawson of SI Hotels entered into the picture. SI Hotels was looking to establish and operate a hotel business in Christchurch, which included a bar. The bar was to have a kitchen that would service the bar patrons and the hotel guests. To this end Mr Lawson was the key individual in SI Hotels who was planning and creating the hotel and bar.

[35] Mr Lawson became interested in Mr Algar and his Trailer for two reasons. SI Hotels needed a head chef, a role Mr Lawson thought Mr Algar could do; and Mr Lawson believed the Trailer could be used as an addition to the bar and kitchen, selling food at various events and advertising the bar, and that Mr Algar could do this work as part of any Head Chef role.

[36] Mr Algar and Mr Lawson met on 30 August 2017 in Wellington when Mr Lawson viewed the Trailer and discussed his plans for the hotel and bar in Christchurch and Mr Algar's potential involvement in that. In this first meeting, Mr Lawson expressed his interest in using the Trailer as part of SI Hotels' hotel and bar business and therefore SI Hotels might purchase the Trailer.

[37] Mr Algar then travelled to Christchurch the next day to view the bar, or at least the partly fitted out site, and negotiate the terms of his employment and any purchase of the Trailer.

[38] In the meeting on 31 August 2017, in Christchurch Mr Lawson, on behalf of SI Hotels, agreed to purchase the Trailer at a value of \$50,000.00. This value was to be accounted for by SI Hotels taking over any finance owing to Silver Chef, thought to be \$28,000.00 at that time, and then any balance, thought to be \$22,000.00, being paid to Mr Algar in two instalments.

[39] Mr Algar and Mr Lawson also agreed terms of Mr Algar's employment in the same meeting, terms that I will come back to when I consider the unjustified dismissal claim.

[40] In September 2017, SI Hotels paid Mr Algar \$11,000.00 as an initial payment of what it believed it owed under the purchase agreement for the Trailer. By this time, it had become apparent to SI Hotels that Mr Algar owed more than \$28,000.00 to Silver Chef under the finance agreement – SI Hotels says it was over \$34,000.00, which included some arrears owed by Mr Algar.

[41] On 6 October 2017, SI Hotels gave Mr Algar a draft employment agreement, but it was never signed by Mr Algar.

[42] On 12 October 2017, Mr Algar advised Silver Chef that he consented to the assignment of the rental agreement for the Trailer to SI Hotels – it is not entirely clear that in

consenting to the assignment, Mr Algar knew it was a rental agreement rather than a finance agreement.

[43] On 18 October 2017, SI Hotels paid the arrears owed on the rental agreement and Silver Chef completed the assignment of the rental agreement to it. The result at this point appears to be that Silver Chef still had ownership of the Trailer. SI Hotels had a rental agreement, being the rental agreement Mr Algar had originally entered into that had been assigned to it. So, effectively SI Hotels now had a rent to buy agreement with Silver Chef which meant it was obliged to make the required rental payments – the repayments of the loan secured by the trailer – and it had the residual right to purchase the Trailer for an agreed value at certain stages of the rental term.

[44] On 23 October 2017, Mr Algar commenced employment with SI Hotels.

[45] By the end of November 2017, there were problems in the employment relationship between Mr Algar and SI Hotels. I will address the detail of what occurred when I analyse the unjustified dismissal claim but by 1 December 2017, Mr Algar believed SI Hotels had dismissed him and raised a personal grievance for unjustified dismissal.

[46] SI Hotels denied any dismissal and attempted to meet with Mr Algar to discuss his continued employment, but this did not eventuate.

Jurisdiction

[47] In the statement of problem and the application for interim orders, Mr Algar's counsel claimed that the arrangements for the purchase of the Trailer between Mr Algar and SI Hotels were terms of his employment agreement and that transfer of ownership was not complete until those terms were performed. She asserts that by dismissing Mr Algar, SI Hotels cancelled the contract – the “employment contract” - and that SI Hotels had no right to continued possession of the Trailer.

[48] So the first possible basis for my jurisdiction to consider the claim arising out of the arrangements for purchase and possession of the Trailer is that this is a dispute about the interpretation, application or operation of an employment agreement and I have jurisdiction pursuant to s 160(1)(a) of the Act.

[49] The definition of an employment agreement, which applies to this claim is, a contract of service which includes the terms and conditions of employment in an individual employment agreement⁵.

[50] SI Hotels provided Mr Algar with a draft individual employment agreement. This draft did not contain any reference to the purchase of the Trailer. So my starting point is that it does not appear that the purchase of the Trailer was a term and condition of Mr Algar's employment agreement.

[51] Further, whilst the discussions around the purchase of the Trailer took place at the same time as the discussions about Mr Algar's employment I am not satisfied that the purchase was agreed as part of the terms of Mr Algar's employment.

[52] Certainly, it was anticipated that Mr Algar would use the Trailer as part of his employment but whether SI Hotels or Mr Algar owned the Trailer was not integral to that.

[53] The other persuasive aspect for me is that the steps for completion of the purchase of the Trailer were undertaken before Mr Algar commenced employment but after the draft individual employment agreement was provided. There are two aspects to this:

(a) First, if Mr Algar believed the purchase was a term of his employment he would have raised this in terms of the draft individual employment agreement and in terms of him being required to take steps to facilitate the completion of the transaction –agreeing to the assignment of the rental agreement with Silver Chef to SI Hotels.

(b) Second, based on the terms of the purchase of the Trailer as I understand them to be, it is possible that the purchase had in fact been completed. SI Hotels' case is, that after it had accounted for the debt owing under the finance/rental arrangement, based on its rental payments and the residual value, and accounted for the \$11,000.00 it had already paid to Mr Algar there was no further money owing to Mr Algar. And the assignment had been effected.

⁵ Section 5 of the Employment Relations Act 2000.

[54] So, I conclude that the agreement to purchase the Trailer was not a term and condition of Mr Algar's employment and this claim, as it relates to the purchase of the Trailer, is not a dispute about the interpretation, application or operation of an employment agreement.

[55] The second argument advanced by counsel for Mr Algar, as a basis for jurisdiction, was advanced in submissions. It is that this is an action arising from or related to the employment relationship and as a result I have jurisdiction under s 161(1)(r) of the Act.

[56] The extent and application of s 161(1)(r) of the Act was discussed in detail by the Court of Appeal in *J P Morgan Chase Bank NA v Lewis*⁶. The Court held that the Authority has jurisdiction under 161(1)(r) where the claim is one that directly and essentially concerns the employment relationship.

[57] In a discussion of *J P Morgan* at the 2016 Employment Law Conference⁷, Philip Bartlett analysed the Court's reasoning particularly its treatment of *The Hibernian Catholic Benefit Society v Hagai*⁸. I have found Mr Bartlett's analysis and conclusion to be instructive of my application of the Court of Appeal's view of how s 161(1)(r) of the Act operates. In essence I accept his view that based on *J P Morgan*, in order to have jurisdiction under s 161(1)(r), I must be satisfied that the employment relationship is an essential or necessary component of the claim.

[58] In this case, the employment relationship between Mr Algar and SI Hotels is not an essential or necessary component of Mr Algar's claim of breach of the terms of the purchase of the Trailer. There are a number of considerations in my conclusion on this point:

- (a) Mr Algar's claim, as it relates to the Trailer, was pleaded as a breach of a term of the employment agreement and that termination of the employment agreement amounted to a cancellation of the terms relating to the purchase of the Trailer. I have found that this cannot be the basis for the claim as the purchase was not a term of the employment agreement. So any analysis of the terms of employment and whether there was a termination of that employment is not necessary to resolve the claim.

⁶ [2015] NZCA 255

⁷ Philip Bartlett, "Jurisdictional Issues in the Employment Court and *JP Morgan Bank NA v Lewis*" 11th Employment Law Conference (NZLS CLE Ltd 2016) pp 299 - 309.

⁸ [2014] NZHC 24

- (b) The claim as it relates to purchase of the Trailer is really a breach of the obligation to pay the balance of the agreed value for the Trailer after deducting the amount attributable to the underlying finance with Silver Chef and the payment of \$11,000.00 to Mr Algar. This does not require any employment expertise.
- (c) The agreement for the purchase of the Trailer was not completely independent of the employment relationship as it was negotiated in the context of an offer to employ Mr Algar. Also, the Trailer was to be used by Mr Algar in his employment which included him using it to prepare food offered under the bar menu and using the Trailer at events. And, as part of this, Mr Algar was to get a bonus payment based on the profit generated from the Trailer. But none of these things impacted on the agreement to purchase the Trailer.
- (d) The parties completed the purchase of the Trailer before they had negotiated and agreed all of the terms of Mr Algar's employment and before Mr Algar commenced employment. In this sense, the agreement operated quite independently of the employment relationship.
- (e) No element of the agreement to purchase the Trailer was dependant on the employment relationship. For example, the payment to be made to Mr Algar as part of the purchase of the Trailer was not linked to commencing employment or ongoing satisfactory performance of his employment obligations.
- (f) There was a third party, Silver Chef, involved in the claim as it relates to the purchase of the Trailer, and understanding Silver Chef's involvement did not require any employment expertise, rather it required some analysis of contractual and financial obligations. And potentially this part of the claim could require an analysis of whether there had been valid assignments of property and financial obligations.

[59] All of these factors indicate that the employment relationship was not an essential or necessary component of this claim. It also follows, that an analysis of this claim does not require any employment law expertise, in fact the underlying legal expertise is based in

contract, finance and the assignment of ownership and possession of property rights – other tribunals and courts are better placed to deal with these issues than the employment institutions.

[60] I conclude that I do not have jurisdiction to determine Mr Algar's claim for breach of the agreement to purchase the Trailer.

Unjustified dismissal

[61] In the meeting on 31 August 2017, Mr Algar and Mr Lawson discussed basic terms of Mr Algar's employment. The terms of employment were never finalised and recorded in a signed IEA. The failure to finalise the terms of employment created problems in the employment relationship.

[62] Both Mr Algar and Mr Lawson agreed that Mr Algar was employed to work in Christchurch and he would be paid \$52,000.00 per annum.

[63] It seemed clear to me that Mr Algar believed he was employed as a cook primarily focussing on smoked and BBQ meats prepared using the Trailer, which would be sold through the bar and at events. It appears to me that he believed he was employed simply to work in the Trailer to supply food for the bar or sell food at events. He would be paid a salary for base hours of 40 per week and then an additional 20% of the profit generated by sales from the Trailer.

[64] Mr Lawson believed Mr Algar was employed as a Head Chef for the bar, which would operate as part of SI Hotels' hotel. This role would be 40 hours per week and he would be paid \$52,000.00 per annum. He would commence his employment before the opening date of the bar and hotel so he could assist with the design of the kitchen, supervise the fit-out and prepare a menu for the bar. The Trailer would be used to supplement the food produced in the bar's kitchen and it would be used independently at events. Mr Algar would receive 10% of net profit from the Trailer. Mr Algar would also be entitled to use a work vehicle to tow the Trailer when required and for other work purposes including travelling to and from work.

[65] Mr Algar moved to Christchurch and started working for SI Hotels on 23 October 2017. Mr Lawson said that from 23 October 2017 he expected Mr Algar to be working on the kitchen and bar in preparation for opening – in particular assisting to supervise the fit-out

and preparing a menu. Mr Algar said he worked from this time doing things for Mr Lawson such as meeting with suppliers.

[66] What is clear is that from 23 October 2017, Mr Algar and Mr Lawson had different expectations about what Mr Algar should be doing and when Mr Lawson did not see progress with the kitchen he became frustrated.

[67] Any confusion over Mr Algar's role and responsibilities during this time was not aided by the fact that Mr Algar intermittingly took time off during this period to travel back to Wellington to see his father who was not well. And during his absence Mr Lawson undertook steps to prepare SI Hotels' business for opening such as interviewing for staff to work in the kitchen.

[68] From 16 November 2017, Mr Algar worked solely in the Trailer preparing food for sale at Riccarton races on 18 November 2017. After the weekend of the Riccarton races Mr Algar and Mr Lawson had a meeting, on 20 November 2017, to discuss the Trailer. Mr Lawson was concerned about the amount of work and cost that had gone into preparing for and selling food at the Riccarton races in light of the sales. He told Mr Algar he needed to come up with a proposal of how he could make the Trailer profitable.

[69] Mr Algar says that meeting was about the revenue required to make the Trailer profitable but he was told this was not possible to achieve. He says that Mr Lawson told him the Trailer would need to be sold.

[70] Mr Lawson says they also discussed his concerns about Mr Algar's commitment to the Head Chef role. He says that Mr Algar told him that he did not want to be the Head Chef but rather he just wanted to work in the Trailer. Mr Lawson says he told Mr Algar he could not just work in the Trailer but there may be some alternative role.

[71] Mr Algar says he then spent the rest of the day cleaning the Trailer. During this time, he received a text message from Mr Lawson advising him to drop the Trailer at an address where it would be secure. He did this once he had finished cleaning.

[72] On the morning of 21 November 2017, Mr Algar sent a text message to Mr Lawson stating "[Mr Lawson] let's talk today. I need to make a decision on what I'm going to do."

[73] Mr Lawson replied to the text saying “Ready when you are I’m in the office”.

[74] Mr Algar says that after this text exchange he received a call from Mr Lawson telling him to go back to Wellington, as there was no job for him. As a result, Mr Algar believed he had been dismissed.

[75] Mr Lawson says he did call Mr Algar on 21 November 2017 to find out where he was – this is consistent with the further text messages between Mr Lawson and Mr Algar that morning. He denied dismissing Mr Algar by telling him to go to Wellington. In fact, the situation was that it was agreed that Mr Algar could go to Wellington to see his father; SI Hotels would give him leave for that trip, would pay for his flights and would arrange for Mr Algar to be dropped off at the airport so other employees could use the work vehicle whilst Mr Algar was in Wellington.

[76] Mr Lawson then sent an email on the evening of 21 November 2017 to another employee summarising the situation as follows:

Iv (sic) had a chat to [Mr Algar] and he’s heading back to Wellington to see his sick Dad.

He hasn’t signed his contract but we have agreed it needs re done as he doesn’t want the job as Head Chef.

He is going to email me how he thinks his job description should read and once we agree on that we will get another one drawn up.

He is going to book a flight for tomorrow and Iv (sic) said I will drop you off at his place so you can take him to the Airport and we can continue to use the Isuzu.

[77] On 23 November 2017, Mr Algar says he received a call from a business partner of Mr Lawson telling him to give him the work vehicle. Mr Algar says because he had been dismissed and because Mr Lawson had threatened to sell the Trailer, which he believed at that time he owned, and because he believed he was entitled to use the work vehicle to move the Trailer he decided to take the keys for the work vehicle with him to Wellington.

[78] On 24 November 2017, Mr Lawson discovered that Mr Algar had taken both sets of keys to the work vehicle with him to Wellington. Mr Lawson had to arrange for the work vehicle to be towed to a garage and have the keys replaced.

[79] Mr Lawson then took some advice and given Mr Algar’s failure to properly engage as the Head Chef and because he had deliberately taken the keys to the work vehicle to

Wellington he decided that SI Hotels would commence a disciplinary process with Mr Algar. A letter advising Mr Algar of SI Hotels' concerns and commencing the disciplinary process was sent to Mr Algar by email on 24 November 2017.

[80] In the evening of 24 November 2017, Mr Algar sent a text message to Mr Lawson, which was seen as "derogatory and disrespectful" of Mr Lawson. So, SI Hotels decided that in addition to the concerns raised in its letter of 24 November 2017, it would require Mr Algar to answer its concerns about the text.

[81] On 28 November 2017, SI Hotels' advocate sent a letter to Mr Algar by email advising him of the further concerns and inviting him to a re-scheduled meeting to discuss the new concerns and those set out in the earlier letter of 24 November 2017. The letter concluded by offering Mr Algar paid leave until the meeting on 5 December 2017.

[82] On 1 December 2017 Mr Algar's counsel sent a letter advising SI Hotels that Mr Algar had been dismissed in the telephone call of 21 November 2017 – although the letter incorrectly refers to a telephone call of 22 November 2017 – and raised a personal grievance for unjustified dismissal.

Dismissal

[83] So, based on the evidence outlined above the first issue for me to resolve on the unjustified dismissal claim is, was Mr Algar dismissed by SI Hotels.

[84] The evidence from both Mr Algar and Mr Lawson of what occurred from 20 November 2017 until 1 December 2017 was somewhat confused, so my first assessment has been to resolve any confusion in each witness's own evidence before considering the conflicts between their evidence. Mr Lawson's confusion appeared to be more in relation to remembering timing of discussions, losing the sequence of discussions rather than the content. Mr Algar was confused as to timing of events and what was said to him. My summary of his evidence outlined above is gleaned from his oral evidence and partly from his written evidence but in doing this, I had to resolve a number of inconsistencies within his own evidence.

[85] I then considered each witness's evidence, as I understood it to be (after resolving the inconsistencies), against the contemporaneous documents, including the text messages and

other correspondence as well as known facts. Mr Lawson's evidence was more consistent and plausible. In particular, I was persuaded by his account of the events of 20 November 2017 and 21 November 2017 tying in with the text messages and the email on those dates. Mr Algar's evidence was inconsistent with some of the contemporaneous documents and events such as his agreed travel to Wellington on 24 November 2017 and the text messages, particularly the messages after his return from Wellington where he said he was ready to work.

[86] Then standing back and considering the totality of each witness's evidence including how they presented their evidence, i.e. what they said and how they said it, Mr Lawson's evidence seemed more credible:

- (a) Mr Algar's evidence on all of the matters relating to his employment from negotiations through to the alleged termination lacked consistency, enough accuracy and credibility in terms of the overall picture or story to be reliable.
- (b) Mr Lawson's evidence overall, hung together, made more sense and was more plausible than Mr Algar's.

[87] After this analysis of the evidence, I conclude it seems more likely to me that Mr Algar was not dismissed on 21 November 2017.

[88] I conclude that SI Hotels did not dismiss Mr Algar so there can be no unjustified dismissal.

[89] There is one additional aspect to consider. It is clear from *New Zealand Cards Limited v Ramsay*⁹ that where an employer becomes aware that an employee misunderstood a communication to mean he/she was dismissed, contrary to the employer's intention, the employer cannot simply do nothing about this. In *Ramsay*, after referencing *Boobyer v Good Health Wanganui Limited*¹⁰ Judge Couch says:

[51] If the mistake is about dismissal rather than resignation, the analogous scenario is this. Where the communication is equivocal, the employer learns that the employee has misunderstood it as a dismissal contrary to the employer's intention but does nothing within a reasonable time to correct the employer's false impression. In such a case the employer must suffer the

⁹ [2012] NZEmpC 51.

¹⁰ WEC 3/94, 24 February 1994.

adverse consequences of passively standing by and letting the employee think that a dismissal has taken place.

[90] SI Hotels received the personal grievance letter on 1 December 2017, which indicated that Mr Algar believed he had been dismissed, contrary to any intention of Mr Lawson and SI Hotels. So it was then incumbent upon SI Hotels to clarify the mistaken belief and give Mr Algar an opportunity to continue his employment.

[91] SI Hotels did just this through its advocate writing to Mr Algar's counsel, advising that SI Hotels had not dismissed Mr Algar and as far as SI Hotels was concerned there was a disciplinary process that Mr Algar was expected to participate in. This position was reiterated in correspondence exchanged between the two representatives but in the end Mr Algar never attended the disciplinary meeting maintaining his view that he had been dismissed.

[92] So, overall I am satisfied that SI Hotels did not dismiss Mr Algar and it did enough to disabuse him of his belief that he was dismissed and Mr Algar's continued refusal to engage in the disciplinary process amounted to a resignation.

Conclusion

[93] I do not have jurisdiction to determine Mr Algar's claim against SI Hotels relating to the purchase of the Trailer.

[94] SI Hotels did not dismiss Mr Algar.

Costs

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

[96] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs by 25 January 2019. The other party will then have until 8 February 2019 to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority