

**Attention is drawn to the order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 126
5452657

BETWEEN JOHN BOWER
 Applicant

A N D GRAHAM HOUSTON AND
 JILLIAN HOUSTON
 Respondents

Member of Authority: David Appleton

Representatives: Robert Thompson, Advocate for the Applicant and
 Michael McDonald, Counsel for the Applicant
 Graham Houston, advocate for himself and Mrs Houston

Investigation Meeting: 13 August 2015 at Ashburton

Submissions and further 13 August and 3 September 2015 from the Applicant
information received: 24 and 26 August 2015 from the Respondent

Date of Determination: 8 September 2015

DETERMINATION OF THE AUTHORITY

- A. Mr Bower’s employer at all material times was The Lodge Restaurant & Bar Limited (struck off). This entity no longer exists, and so I can make no further findings.**
- B. I make no order as to costs.**

Prohibition from publication order

[1] The evidence heard by the Authority includes the names of a male and a female who, when they were minors, were allegedly assaulted by Mr Bower. These two individuals were not present or represented at the Authority’s investigation

meeting. Whilst no adverse allegations were made against either individual by either party, given their youth and the nature of the allegations, it is not appropriate for them to be identified in this determination.

[2] Accordingly, I prohibit from publication any information that could be used to identify these two individuals, save as already set out in this determination. The female shall be referred to in this determination as the *pizza cook* and the male as the *kitchen hand*.

Employment relationship problem

[3] Mr Bower claims that he was unjustifiably dismissed on or around 17 November 2013 from his position as a chef at The Lodge Restaurant and Bar in Methven (The Lodge). He also claims that he was unjustifiably disadvantaged by being stood down without pay on the same date. He claims he was employed by Mr and Mrs Houston personally.

[4] Mr and Mrs Houston deny that they personally employed Mr Bower, asserting that the correct employer was a company called The Lodge Restaurant & Bar Limited. This company was struck off the Companies Office Register on 18 November 2014. Whilst Mr and Mrs Houston have not expressly denied that Mr Bower was unjustifiably dismissed, it is my understanding from Mr Houston's evidence and from a letter written by Hospitality New Zealand on 13 February 2014 that they argue that Mr Bower's dismissal was substantially justified as several staff refused to work with him after he had been accused of inappropriately touching the pizza cook.

Brief account of the events leading to the dismissal

[5] It was Mr Houston's evidence that The Lodge Restaurant & Bar used to be operated by his son, and was owned by a company of which his son was the director. Sometime in 2012 or early 2013 Mr and Mrs Houston decided to take over the business of The Lodge and The Lodge Restaurant & Bar Limited was incorporated on 8 January 2013. Mr and Mrs Houston are shown on the Companies Office Register as having been the two directors and shareholders of this company.

[6] Mr Houston had been operating another business comprising motel accommodation. The premises comprising this accommodation and The Lodge were owned by another company called The Lodge on Chertsey Limited. This company

had been incorporated in 2005. This company went into brief receivership between 9 January and 9 July 2013, apparently due to a dispute with the family of one of its directors who had died.

[7] Mr Bower used to use The Lodge as his local. It is common ground that, after Mr and Mrs Houston had taken over the running of The Lodge, it was not doing particularly well and Mr Bower had offered some advice to them. It is Mr Bower's evidence that Mr and Mrs Houston offered him a job as head chef and bar manager and that, although he had not been actively seeking work, as he had a part-time job, he agreed to take up the offer.

[8] It is common ground that Mr Bower did not have a current manager's licence so that he could not immediately take up the role of bar manager. There was some disagreement as to whether or not Mr Bower made this clear to Mr and Mrs Houston at the time he was offered the position, although I do not consider that that is a matter that needs to be determined.

[9] However, when asked why Mr Bower had not been issued with an employment agreement, Mr Houston explained that it was because he and his wife did not know what position to state in the employment agreement because, at that time, Mr Bower did not have a current bar manager's licence, and so could not be employed as a bar manager. I accept this evidence.

[10] Notwithstanding this uncertainty, it was agreed that, during the first week, Mr Bower would carry out some stock taking duties to be paid, in cash, at \$15 per hour. He was also to act as chef during the same week between around 4pm and 9pm. Mr Houston said that the business had never employed a chef before, having previously only ever utilised the services of a cook. However, he said that the food that the restaurant was offering was not intended to be any different; it was just that Mr Bower was a trained chef and that was how they described him.

[11] The Authority saw copies of time sheets completed by Mr Bower which show that he carried out stock taking duties on Monday 11 November and between Wednesday and Saturday, 13 – 16 November. He also carried out cheffing duties on Tuesday 12 November and between Thursday 14 and Saturday 16 November 2013.

[12] Whilst Mr Bower was acting as a chef on Saturday 16 November, an incident occurred involving the pizza cook (who was under 16 years old at that point), the

details of which are not entirely clear. It is Mr Bower's evidence that the kitchen was very busy on that evening and it was getting behind in the orders. He said he was trying to keep morale up and be social with the staff by stating that after work they should sit down and have a drink together.

[13] Mr Bower also said that he remembered needing to get around the pizza chef and so put his hands on her hips and moved her sideways. He said that this type of movement was common in the kitchens he had worked in previously. He said that it seemed far more appropriate than him brushing up against her as he went past her. Mr Bower said that he kept working through the remainder of the night and did not notice any reaction from the pizza cook. Once the kitchen had finished its work, Mr Bower was told to go home, which he did, and grabbed a bottle of drink on the way out.

[14] The pizza cook did not give evidence to the Authority and the Authority has not seen any written statement by her to the Police. Mr Houston was also not present in the kitchen when the incident happened and so cannot give any first hand testimony about what occurred.

[15] The Authority did see a copy of an email that had been sent by one of the waitresses on duty that day, but which was sent on 8 May 2014, presumably in preparation for the Authority's proceedings. It is clear from this email that this waitress had also not witnessed what had happened between Mr Bower and the pizza cook although it is worth replicating part of this email as follows:

- *Whilst in the kitchen scrapping [sic] plates, John made the statement to [the pizza cook] 'after this we can sit outside and both have a drink'.*
- *By [the pizza cook's] reaction to this was misintercepted [sic] she is only in her teens, johns meaning was more as a team de stress after work.*
- *I left the kitchen.*
- *5 mins later [the kitchen hand] came to get me as [the pizza cook] was crying that John had touched her.*
- *[The pizza cook] was outside the kitchen on her phone, I asked her if she was okay, if I go [sic] anything she said that she was okay and I couldn't really help.*

[16] As Mr Bower's evidence is the only first-hand evidence that the Authority heard about what happened with respect to the pizza cook, and that evidence does not lack in credibility, I accept Mr Bower's account.

[17] I note, however, that the letter written by Mr Higgins of Hospitality New Zealand in response to Mr Bower's personal grievance, stated that Mr Bower had

picked up [the pizza cook] and threw her back to her station and on the way back threw [the kitchen hand] against the wall.

[18] Mr Houston was unable to explain where Mr Higgins had received this account of what had happened. Mr Bower has denied picking up the pizza cook and throwing her back to her station and said that he did not recall touching the kitchen hand in any way.

[19] The following day Mr Bower turned up at work at around 11am and was immediately told by Mr Houston that he would be *stood down* due to an allegation that he had inappropriately touched the pizza cook. Mr Houston said that he had learnt of this when the pizza cook had turned up earlier with her parents and the Police shortly beforehand. Mr Houston also said that he had been aware that something was up the previous evening because he had been at an event with the parents of the pizza cook but had not taken any notice of it. It was Mr Houston's evidence that he had stood Mr Bower down on 17 November 2013 as the pizza cook's parents had made it clear that they did not wish Mr Bower to work on the same shifts as their daughter.

[20] Later the same day Mr Bower emailed the respondent saying that he should be paid seven hours for being stood down that day. The following Tuesday 19 November 2013 Mr Bower received \$450.45 into his bank account, although it is understood that this did not include payment for Sunday 17 November.

[21] Mr Bower says that he contacted the respondent on Monday 25 November 2013, having heard nothing from them to date, and he was advised on 26 November that a Police investigation was going on. Mr Bower then made contact with the Police and was interviewed by them on 27 November when he was advised that it had been alleged that he had *manhandled* two minors and that the Police were investigating how serious it was.

[22] Mr Bower says that he was eventually told by the Police that there would be no charges laid against him but that he would receive a formal warning which would be administered advising him of the law in relation to assault on a child. The Authority saw a copy of this warning, dated 29 November 2013, in which it was stated that no conviction would be made against his name although a copy of the formal written warning would be retained on the Police file. On the same day, Mr Bower emailed the respondent to say that he had been cleared of all charges. He says that he received no reply to this.

[23] The Authority saw further emails from Mr Bower to the respondents on 1 December and 7 December. In the email of 7 December Mr Bower asked to be advised *of his status*.

[24] It was agreed during the Authority's investigation meeting between Mr Bower and Mr Houston that Mr Houston had visited Mr Bower at his home on three occasions while he was stood down, although it was not clear on what dates these visits took place.

[25] It was the evidence of Mr Bower that on or around Saturday 14 December 2013, Mr Houston came to his house and offered him some casual work for two days per week to start with, increasing to four days over Christmas. Mr Bower said that he told Mr Houston that it sounded good and that he would get back to him in two or three days. Mr Bower said that he wanted to discuss the offer with his advocate before accepting it.

[26] Mr Houston does not deny that he made this offer to Mr Bower and said that it had taken him so long to get back to Mr Bower, partly because he was waiting for the Police investigation to be completed and then because he was trying to work out a way that Mr Bower could attend work on different days to the pizza cook, whose parents were still insisting that they should not work together. Mr Houston suggested that this was also the reason why Mr Bower had only been offered two days a week. Mr Houston also said that there had never been an intention to offer Mr Bower fixed hours of work when they had first employed him.

[27] Two days later Mr and Mrs Houston received a letter from I R Thompson Associates Limited raising a personal grievance and seeking remedies on behalf of Mr Bower. It is Mr Bower's evidence that, once Mr Houston received this letter, he

came back to Mr Bower's house, very angry and effectively withdrawing the offer of work. Mr Houston did not deny this and accepted that his reason for withdrawing the offer was because he had received the letter from I R Thompson & Associates Limited.

The issues

[28] The following issues fall to be determined:

- (i) The identity of Mr Bower's employer;
- (ii) Whether Mr Bower was unjustifiably dismissed;
- (iii) Whether Mr Bower was unjustifiably disadvantaged in his employment.

What is the identity of Mr Bower's employer?

[29] Mr Thompson referred me to the recent Employment Court case of *Vince Roberts Electrical Limited v. Scott Phillip Carroll and Vincent Forsman Roberts (trading as Vince Roberts Electrical)*¹. In his judgment His Honour Judge Perkins reviewed the legal principles to be applied in determining the identity of an employee's employer. These principles can be summarised as follows:

- (i) Section 6 of the Employment Relations Act 2000 (the Act) provides some assistance in determining the identity of an employer;
- (ii) The Authority has jurisdiction under s.6 to determine the identity of the employer;
- (iii) The onus is on the employee to prove the identity of the employer and this assessment is generally to be made by reference to the outset of the employment relationship;
- (iv) It is for the Court (or in this case the Authority) to make an objective assessment of the evidence in determining the identity of the employer;
- (v) The standard of proof is on the balance of probabilities;

¹ [2015] NZEmpC 112

- (vi) if there has been a change of employer during the course of the employment, there must be evidence of mutual agreement to that change;
- (vii) it is possible to have joint employers;
- (viii) A useful starting point is the documentation evidencing any written agreement between the parties, which is generally a good indicator of the parties' intention.

[30] Sub-sections 6(2) and (3) of the Act provide as follows:

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

*(3) For the purposes of subsection (2), the court or the Authority—
(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

[31] Mr Bower's evidence was that he had no idea about the existence of The Lodge Restaurant & Bar Limited, and that there had been no discussion between him and Mr and Mrs Houston as to who the employer would be. It was his assumption that he was being employed by Mr and Mrs Houston directly. It is certainly the case that Mrs Houston was the bar manager in charge of the bar and it is understood that, therefore, she would have given direction to Mr Bower and the other staff. This fact, in itself, however, does not make the Houstons Mr Bower's direct employer as they employed no management staff and had no-one else to give those directions.

[32] It was the evidence of Mr Houston, which I have no reason to doubt, that all the other staff had employment agreements issued to them in the name of The Lodge Restaurant & Bar Limited. I also accept Mr Houston's evidence that, if Mr Bower had had a current bar manager's licence, Mr Bower would have been issued with an employment agreement.

[33] I therefore conclude that it was certainly the intention of Mr and Mrs Houston that The Lodge Restaurant & Bar Limited was going to be Mr Bower's employer, but that this was not Mr Bower's understanding. Therefore, there was no common

intention between the parties at the onset of employment as to who the employer would be.

[34] This does not mean that there was no employment relationship, however, as the reality of the situation that prevailed in November 2013 shows that Mr Bower did work in return for remuneration. I must make an objective assessment of which entity is the most likely to have been the employer.

[35] As in the *Vince Roberts Electrical Ltd* case, there was no written agreement between the parties in the current proceedings which can assist the Authority. There is, however, some documentary evidence, although it is not particularly conclusive.

[36] First, the Authority saw a copy of Mr Bower's bank statement which showed a payment to him by direct credit of \$450.45 with the narrative *Houston, Graham*. Mr Houston in turn showed the Authority a copy of a bank statement for The Lodge Restaurant & Bar Limited which showed a corresponding debit from that account of \$450.45 with the reference *John Bower*. No one was able to explain why the payment from the bank account of The Lodge Restaurant & Bar Limited showed up on Mr Bower's bank statement with the reference *Houston, Graham*. Mr Thompson surmised that this must have been entered by Mrs Houston, who carried out the payroll duties, as it is not possible for the recipient of a direct credit to manipulate the reference that appears on their bank statement. I accept Mr Thompson's submission that this is likely to be true. Unfortunately, Mrs Houston was not present at the Authority's investigation meeting and so unable to give any direct evidence on that point.

[37] In addition, the letter written by Mr Higgins of Hospitality New Zealand in response to the personal grievance letter from I R Thompson & Associates Limited stated that Hospitality New Zealand was authorised to represent The Lodge on Chertsey Limited. Mr Houston was unable to explain why Mr Higgins believed that he had been instructed by that company and not, for example, The Lodge Restaurant & Bar Limited or the Houstons personally. Mr Higgins was not present to give evidence and so one can only surmise as to the reason for this. One possibility is that it was The Lodge on Chertsey Limited which was the fee paying member of Hospitality New Zealand at that time.

[38] One last piece of documentary evidence that was provided was the email from the waitress dated 8 May 2014 which, at the bottom, showed what appeared to be a pay slip for that waitress in respect of the pay period ending 4 May 2014. This states *The Lodge Restaurant & Bar Limited* at the top.

[39] The bank statement for The Lodge Restaurant & Bar Limited which showed the payment to Mr Bower on 19 November also showed a number of other wage payments for other staff, as well as other payments which one would expect to see in respect of the operation of a restaurant and bar, such as payments to a liquor company, a laundry company and the Ashburton Licensing Trust. The Houstons produced further documents after the investigation meeting which showed invoices addressed to The Lodge Restaurant & Bar (as well as to The Lodge Bar & Restaurant) and a management report for The Lodge Restaurant & Bar Limited which showed wages payments.

[40] On the basis of this information, I am satisfied that The Lodge Restaurant & Bar Limited was the company used by Mr and Mrs Houston to operate The Lodge. The question is, however, whether one can extrapolate from this conclusion to a finding that this company was Mr Bower's employer.

[41] In the *Vince Roberts Electrical Limited* case, His Honour Judge Perkins refers to how Mr Roberts, the second defendant, marketed his business using his personality and long family history in the retail home appliance trade. Judge Perkins then goes on to say that it was only on rare occasions that Mr Roberts administered the business and employed staff via a limited liability company. He also referred to entries as to wages appearing in Mr Carroll's bank account showing non corporate entities as the payer. Judge Perkins also referred to the following factors:

- (i) Mr Roberts personally contacted Mr Carroll when he had been initially employed;
- (ii) Mr Roberts holding himself out to be the employer, with no mention of any limited liability company;
- (iii) Periodic pay records provided to Mr Carroll confirming to him that no entity other than Mr Roberts or Mr Roberts' trading with franchised entities was paying his wages;

- (iv) Mr Carroll taking directions from Mr Roberts personally during the employment;
- (v) The business being marketed and advertised in the name of Mr Roberts personally;
- (vi) Staff completed their business records, invoices and other documents required as part of their duties in the name of Mr Roberts personally;
- (vii) Sales invoices contained Romalpa clauses in the name of Mr Roberts or the unincorporated franchise trading names, (which Judge Perkins saw as a strong indicator that Mr Roberts traded in his own name) and
- (viii) Livery on the façade of the shop premises, business cards and advertising paraphernalia was under Mr Roberts' name personally.

[42] These factors helped to lead Judge Perkins to conclude that Mr Roberts was Mr Carroll's employer personally. Unfortunately, there are far fewer clear indicia which can assist the Authority in coming to a conclusion in this case. For example, Mr Bower was only employed for one week and therefore only received one payment.

[43] Whilst Mr Bower was not given an employment agreement, this was because of the uncertainty about what position he would hold, given that his bar licence had expired. Whilst Mr Bower was certainly interviewed personally by either Mr or Mrs Houston, they were the only directors of The Lodge Restaurant & Bar Limited and so there was, in reality, no one else who could have done that.

[44] Mr Bower referred to the trading name of The Lodge, which was The Lodge Restaurant & Bar. This, in itself, does not lead one to conclude either that Mr and Mrs Houston themselves or that The Lodge Restaurant & Bar Limited was the employer.

[45] When I weigh up the factors that are presented in these current proceedings, I must keep in mind that the assessment is to be an objective one, and not what Mr Bower subjectively believed. At the onset of the employment of Mr Bower, all

the other staff members were employed by The Lodge Restaurant & Bar Limited and that was the entity that paid Mr Bower's wages on 19 November 2013. That was also the entity by which The Lodge was operated. It was also the entity that Mr and Mrs Houston intended would employ Mr Bower.

[46] On the balance of probabilities, I find that an objective third party viewing the employment relationship and the surrounding circumstances would conclude that Mr Bower's employer was the limited liability company, The Lodge Restaurant & Bar Limited.

[47] I therefore strike out the claim against Mr Graham Houston and Mrs Jillian Houston and substitute The Lodge Restaurant & Bar Limited (struck off) as the respondent. However, as this entity has been struck off the Companies Office Register, it no longer exists and so no further action can be taken against it.

[48] Accordingly, these proceedings must now come to an end.

[49] This is most unfortunate for Mr Bower, who had a strong claim for unjustified disadvantage and unjustified dismissal on the evidence that was before the Authority. However, I am satisfied that there is no evidence that The Lodge Restaurant & Bar Limited was struck off the Companies Office Register in order to frustrate Mr Bower's claim, as that event occurred several months before Mr Bower's statement of problem was lodged with the Authority.

Conclusion

[50] I conclude that, on the balance of probabilities, Mr Bower's employer was The Lodge Restaurant & Bar Limited (struck off) and that no further proceedings may continue as that company no longer exists.

Costs

[51] Mr and Mrs Houston did not engage any legal representation in defending the proceedings against them. I therefore make no order as to costs.