

Background Facts and Evidence

[2] It is commonly accepted that Mr Carabetta established a pizza restaurant trading as Piccola Italia (“the restaurant”) and that the restaurant operated from premises operated by Le Grand which in turn, is operated by Mr Michael Blagojevic. The records of the Companies Office show that a company, Piccola Italia Limited, was incorporated on 10th December 2007 and that Mr Carabetta is the sole shareholder and director.

[3] In establishing the business, Mr Carabetta entered into a Deed of Lease (“the lease”) for a term of two years from 3rd September 2007. The annual rent was \$24,000 (\$2,000 each month). The lease is signed by Mr Carabetta and Rosemarie Ubeda, as the General Manager for Le Grand.¹ The signatures of Ms Ubeda on the lease document were subsequently substituted by those of Aleksandra Blagojevich, but nothing rest on this for the purposes of the matter that has to be determined. It is enough to conclude that a lease was entered into by Mr Carabetta as part of establishing his business. However, the legal status of the lease appears to be disputed as subsequent to its signing, Mr Carabetta’s lawyer asserted that it was a monthly lease.²

[4] While Mr Carabetta had access to the business premises from on or about 15th October 2007, he was very slow to complete the fit-out of the restaurant. The evidence of Mr Blagojevich and Mr Mark Flyger, Consulting Accountant to Le Grand, is that Mr Carabetta was short of operating capital. Mr Blagojevich says that as it was in his business interests to have a viable tenant, he supplied tables and chairs and other items from the Le Grand Hotel, so that Mr Carabetta could commence trading as soon as possible.

[5] It appears that the restaurant was ready for trading on, or about 16th April 2008, in time for the annual V8 car races in Hamilton. A crisis arose for Mr Carabetta before then. His evidence (which is not contested) is that when he arrived at the restaurant on 3rd April 2008, the locks on the premises had been changed without notice and hence Mr Carabetta was prevented from entering the premises. It transpired

¹ Mr Blagojevich denies that Ms Ubeda was the General Manager but on the overall evidence, including an authority signed by Mr Blagojevich, I find that Ms Ubeda clearly was the General Manager as she attests, and that she did have authority to act on behalf of Le Grand.

² This appears to be accepted by Le Grand. See its lawyer’s letter dated 24th April 2008 Sub-clause (b).

that the reason for this was that Mr Carabetta had defaulted in paying his rent and Le Grand had “re-entered” the premises under the terms of the lease (clause 29.1). Mr Carabetta disputes that he had defaulted in the payment of rent to a degree that warranted Le Grand taking such action but the Authority is not required to determine this. What is relevant, is what happened between the parties from this point onwards, pertaining to the nature of the relationship between Mr Carabetta and Le Grand.

[6] The reality of the situation appears to be that before the restaurant started trading, Mr Carabetta was in some financial difficulty. A statement from Le Grand dated 9th April 2008, shows that the rent arrears, insurance and rates owed, totalled \$4,161.23. The evidence of Mr Carabetta is that upon finding that he was locked out of the premises and having to immediately find \$1,800 for his rent, he consulted his lawyer and decided to offer to sell the business to Mr Blagojevich. In a letter to the lawyer for Le Grand dated 14th April 2008, Mr Carabetta’s lawyer informed that Mr Carabetta had incurred set up costs for the restaurant totalling in excess of \$60,000 and had further liabilities of nearly \$58,000. Mr Carabetta’s lawyer wrote:

Despite incurring these sums, the pizzeria is still yet to open and there is still no written Deed of Lease in place. Our client is now in a situation where he is under incredible financial pressure and can no longer afford to wait for you to come to terms with him in regard to the lease.

A “Settlement proposal” was offered. In return for Le Grand taking over all of the liabilities incurred by Mr Carabetta, reimbursing him for all of the sums already expended by him for the chattels, and ending the monthly tenancy, Mr Carabetta would sign over all rights to the business to Le Grand, including ownership of the chattels. Furthermore, Mr Carabetta;

“... will not pursue the lease issues and will work for your client in the Pizzeria for a period to be confirmed between our clients.”

[7] The lawyer for Le Grand relied via a letter dated 24th April 2008, confirming that Le Grand was interested in Mr Carabetta’s proposal but required further details, being; a list of all the liabilities that Le Grand “... is expected to take over together with a schedule of payments eg. hire purchase.” And; “The exact list of assets that our client is buying.”

The letter continues:

Subject to the above our client would be prepared to enter into an agreement on the basis that:

- (a) *Our client would take over the ownership and management of the business and also the ownership of the assets/chattels*
- (b) *The monthly tenancy would be terminated and any arrears of rent would be waived.*
- (c) *Our client would take over the repayment of liabilities on the basis that Michelle [sic] Carabetta enter into an employment agreement with our client until all liabilities are paid off. Our client would pay Carabetta a wage to be agreed upon.*
- (d) *If Carabetta leaves our client's employment, our client will stop paying the liabilities and Carabetta will continue to be liable for the balance of the liabilities/debt and our client is entitled to keep the assets sold to him.*

[8] A counter-offer dated 14th May 2008, from Mr Carabetta (via his lawyer), followed. This included a proposal that Le Grand should take over the ownership and management of the business and the ownership of the assets and chattels “*from the date of settlement.*” It was further proposed that Le Grand would take over all of the liabilities incurred by the business and their repayment. A copy of the assets and liabilities of the business was provided. There were a number of other conditions proposed, including:

Our client agrees to work on a fixed term employment agreement for a period of 1 year with capacity for that agreement to be extended for 2 further terms of one year with a wage and conditions to be fixed.

The letter concluded:

This seems fair given your client will retain ownership of all the assets and has been running the business and taking the profit from the business since it opened last month and will continue to do so.

There is no evidence that the counter-offer was ever responded to albeit there was some minimal contact between the lawyers, the last of which appears to have been on or about 11th July 2008.

[9] There is uncertainty in regard to the evidence of what was happening to Mr Carabetta while attempts were being made to transfer the business and its chattels and liabilities to Le Grand. I found the evidence of Mr Carabetta and Mr Blagojevich to be at best, confusing, and at worst, unreliable. The evidence of Mr Carabetta is that as from 3rd April 2008, when he was “locked out,” he was being paid a wage by Le Grand. I do not accept that this is so at all. This is because it is obvious from the above exchange of letters between the lawyers for the parties, that Mr Carabetta was attempting to be rid of the business and its liabilities and he wished to become an employee of Le Grand, but as of 11th June 2008 (at least), no agreement had been reached. In an email of this date, Mr Carabetta’s lawyer informed him, that the lawyer

for Le Grand had conveyed that she was having difficulty in obtaining instructions from Mr Blagojevich, but was hopeful to be able to “come back” next week as to whether the counter-offer made by Mr Carabetta was acceptable. Therefore, I conclude that as of 11th June 2008, Mr Carabetta was clearly not employed by Le Grand and more probably than not, remained in business on his own account. There is also an email dated 13th July 2008 from Mr Carabetta’s lawyer informing him about his legal options if Mr Blagojevich should attempt to sell the business (Piccola Italia). Apparently, a “Business For Sale” notice had been placed in the window of the restaurant by Mr Blagojevich, but it is unclear when this occurred.

[10] It seems from the overall evidence that no formal agreement was ever entered into in regard to Mr Carabetta disposing of his business to Le Grand. Rather, what seems more likely is that an informal arrangement was arrived at. This included Le Grand acting as a guarantor, for at least some of Mr Carabetta’s liabilities, and also providing him with assistance, such as management and systems input, to get the business into a viable trading condition. It was also agreed that Mr Carabetta would be paid \$1,000 each week as personal drawings from the business. However, after only three payments of \$1000, this was reduced to \$500 each week from 16th May 2008, apparently due to the business not bringing in sufficient income.³ I found the evidence of Mr Flyger to be the most coherent and consistent in this regard (and overall). Mr Flyger acted as an accounting consultant to Le Grand and he says he was involved in discussions surrounding an “*informal partnership agreement*” between Mr Carabetta and Le Grand whereby Le Grand would take over the day-to-day administration of Piccola Italia and provide staff and general assistance; “... *so that the business could establish itself and survive.*” Mr Flyger also gave evidence about Mr Blagojevich’s de facto partner working in the business and the parties reaching an agreement about Mr Carabetta receiving drawings from the business of “... *a relatively modest amount.*” Mr Flyger also says that it was intended that all other expenses would be reduced to ensure the survival of the business. Mr Flyger attests that he was involved with reviewing the viability of the business and the payment of accounts pertaining to it.

[11] The further evidence of Mr Flyger is that following the agreement relating to Mr Carabetta receiving personal drawings from the business, he observed Mr Carabetta to be despondent and that each time he spoke to him Mr Carabetta would

³ The payments were made by cash cheque.

raise the matter of revisiting the arrangement with Le Grand in order to obtain higher drawings from Piccola Italia. Mr Flyger says that he spoke to Mr Blagojevich about this but the latter's view was that it was in Mr Carabetta's "... *own hands to develop the business and thereby improve his personal earnings.*" Mr Flyger further attested to the relationship between Mr Carabetta and Mr Blagojevich becoming strained; then on 13th and 14th October 2008, Mr Carabetta failed to arrive and the business remained closed those two days.

[12] The evidence of Mr Carabetta is that when he arrived at Piccola Italia on 15th October the locks on the premises had been changed and there was a trespass notice attached to the door. The notice informed Mr Carabetta that he was without authority to enter the property and that to do so would constitute an offence under the Trespass Act 1980. Mr Carabetta says he was shocked as he had received no notice of such action being imposed.

[13] The evidence of Mr Flyger is that Mr Blagojevich believed it was not acceptable for Mr Carabetta to not turn up to work at the business for the two days in question and have the business closed at a time when it was trying to establish a market. It seems that because Mr Carabetta had not paid the rent for the business premises, Mr Blagojevich re-entered the premises pursuant to the lease agreement.

[14] Apart from Mr Carabetta demanding to be paid for the time he had worked that week, it seems that this was the end of the relationship between the parties.

Analysis and Conclusions

[15] The question for the determination of the Authority is: Was there, at any time, an employment relationship in existence between Mr Carabetta and Le Grand?

[16] In deciding this matter I am required firstly, to apply s.6 of the Employment Relations Act 2000 ("the Act"). In particular, the following subsections:

- (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.

[17] In summary, as applied to the circumstances of this case, I am required to determine “the real nature of the relationship” between Mr Carabetta and Le Grand and “consider all relevant matters” including any matters that “indicate the intention” of Mr Carabetta and Le Grand, but I cannot treat as a “determining matter” any statement by Mr Carabetta or Le Grand, which they believe describes the nature of their relationship.

The Relevant Matters and Intentions

[18] It is not disputed that Mr Carabetta intended to, and did, establish an independent company and a business trading as Piccola Italia. The intention of Le Grand was to lease part of its premises to Mr Carabetta which it duly did. From there, Mr Carabetta claims that following being locked out of the premises on 3rd April 2008, he entered into an employment relationship. But this is not so, as it is transparently clear from the correspondence between the respective lawyers for the parties referred to earlier. As of at least 11th June 2008, Mr Carabetta owned and was operating his own business, albeit his intentions were to dispose of the business and its assets and liabilities to Le Grand, and then become an employee on a contract for one year with subsequent yearly renewals of the contract. But none of this was agreed to by Le Grand.

[19] I have considered the evidence of Mr Smith and Ms Ubeda in regard to the payments that were received by Mr Carabetta. Regrettably, both of these witnesses left the employment of Le Grand on what appears to be less than amicable terms and I consider that their evidence reflects this to some extent as I did not find their evidence to be reliable overall. I also note that Ms Ubeda says that she was dismissed from her employment with Le Grand on 28th April 2008, slightly more than three weeks after Mr Carabetta says he became an employee of Le Grand (3rd April 2008). Given that I have found that Mr Carabetta was clearly still running his own business up until at least 11th June 2008, whilst proposing to become an employee, it is not possible that he was being paid wages as Ms Ubeda testifies, albeit I accept that Mr Carabetta probably told her he was being paid wages. I conclude that it is more probable than not that the payments received by Mr Carabetta came from the income of Piccola

Italia⁴ and that those payments were personal drawings against the business as attested to, credibly in my assessment, by Mr Flyger.

[20] It may be that Mr Carabetta perceived that because he was being paid some monies via Le Grand, that the monies received were wages, but I even have some doubts about that, as he must have known that, at least up until 11th June 2008 (and probably beyond), that he still owned the business, and he was at that time, only proposing to become an employee and his proposals were never accepted by Le Grand. Furthermore, there is no evidence, such as PAYE records, that the monies received by Mr Carabetta were wages.

Determination

[21] While the evidence presented by both parties was (with the exception of that of Mr Flyer), confusing, disjointed and unreliable at times, I find that the true nature of the relationship between Mr Carabetta and Le Grand was at all times, a commercial business arrangement and that at no time did Mr Carabetta become an employee of Le Grand. It follows that because Mr Carabetta was not in an employment relationship, he is unable to pursue a personal grievance in the Employment Relations Authority.

[22] In conclusion, I cannot help but make the observation that while Mr Carabetta appears to be a hard worker with some particular skills in preparing Italian food, unfortunately he was seriously lacking in business acumen and it is regrettable that matters have taken the course they have. It would appear that everything he put into the business has been seized upon by Le Grand, possibly in lieu of his debts, but in what seems to be a rather hard-nosed and tactless manner. However, this is not a matter that the Authority has jurisdiction over and as I understand it, these matters are currently being litigated in another forum.

K J Anderson
Member of the Employment Relations Authority

⁴ It appears that the income from Piccola Italia was paid into a separate bank account for the business and that Mr Carabetta was not paid from a Le Grand bank account.