

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 15/10

5148946

5274798

BETWEEN

LABOUR INSPECTOR
Applicant

AND

AZZURRO VENTURES
LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Jo-Ann Duff (Labour Inspector), the Applicant in person
Shaun Browne & Kelly Donovan, Advocates for the
Respondent

Investigation Meeting: 27 January 2010 at Dunedin

Determination: 28 January 2010

DETERMINATION OF THE AUTHORITY

[1] Azzurro Ventures operates two pizza shops in Dunedin under franchise and it employs a number of staff. Shaun Browne is the company's sole shareholder and director and Kelly Donovan is his partner. Ms Donovan attends to administration relating to staff employment.

[2] The first application (5148946) related to Azzurro's non supply of time and wage records to the Labour Inspector, requested as part of her investigation into a complaint by a former employee of the company (James Cowan). I understand that material was eventually supplied so it is not necessary to deal with that application any further. The Labour Inspector then lodged a further statement of problem (5274798) seeking to recover arrears of holiday pay said to be owed to Mr Cowan and inviting the Authority to impose a penalty on the company for the associated alleged breach of s.75 of the Holidays Act 2003.

[3] The relevant facts do not take up much time. Mr Cowan obtained other employment. He resigned from Azzurro by giving two week's notice in writing but

failed to work all his rostered shifts during the notice period. Apparently he preferred to work for his new employer. Mr Browne was annoyed about that because it created staffing problems. He says that he (or his manager) attempted to adjust the roster as best they could to accommodate Mr Cowan. When Mr Cowan nonetheless failed to work for Azzurro, Mr Browne decided to apply a clause in the employment agreement permitting the employer to deduct pay in lieu of the employee working out their notice period. A sum to cover Mr Cowan's default was calculated and deducted from his final pay. As a result Mr Cowan was paid \$160.86 (gross) less holiday pay than his entitlement. He complained to the Labour Inspector who requested the relevant records and eventually calculated the sum just mentioned.

[4] Mr Browne and Ms Donovan say that Mr Cowan received, signed and returned his employment agreement which includes the right for the employer to make such a deduction in the present circumstances. However, they were not able to provide the signed agreement to the Labour Inspector, nor have they been able to produce it for the Authority. They say that it was retrieved from the filing system to check before the deduction was made, that it was returned to the filing system but that it cannot be located now. They have moved several times and some papers suffered water damage and were disposed of so that could explain the situation.

[5] I questioned Mr Browne and Ms Donovan about the circumstances of Mr Cowan's original employment. The franchisor supplies a read only document which is a template written employment agreement. Ms Donovan prints the template, personalises it by hand writing to the employee's circumstances (including the notice period) and gives it to the employee to review, sign and return. They say that Mr Cowan did exactly that and Mr Browne says that there was also a discussion about a particular clause.

[6] Mr Cowan did not attend the investigation meeting although he has apparently told the Labour Inspector that he never had a written employment agreement. Ms Duff's evidence about that is of course hearsay. The only other clue available is the copy of Mr Cowan's letter of resignation by which he gave two weeks' notice of resignation, the notice period the employer says that it includes in its written agreements.

[7] There is no basis for me to disbelieve Mr Browne and Ms Donovan. They answered my questions candidly. Employment agreements are provided routinely in

keeping with the franchise arrangements, which gives reason to think that the same was done for Mr Cowan. Mr Cowan's letter (which predates any dispute) indicates that he was aware of the notice period said to have been included in his agreement. A plausible reason has been given to explain the document's absence. I therefore find that there was a written employment agreement applicable to Mr Cowan's employment that entitled the employer to deduct pay in lieu of notice in the present circumstances.

Conclusion

[8] It follows that the Labour Inspector cannot succeed with the claim to recover any holiday pay or a penalty. All claims are dismissed.

[9] It appears that the company has not incurred any legal costs but I will reserve costs just in case.

Philip Cheyne
Member of the Employment Relations Authority