

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 169/07
5040647

BETWEEN Steven Flynn
 Applicant

AND The Bacon Barn Limited
 Respondent

Member of Authority: Dzintra King

Representatives: Clive Bennett, Counsel for Applicant
 Parvez Akbar, Counsel for Respondent

Investigation Meeting: 7 March 2007

Submissions received: 14 May 2007 from Applicant
 31 May 2007 from Respondent

Determination: 8 June 2007

DETERMINATION OF THE AUTHORITY

[1] The applicant, Mr Steven Flynn, says he has been unjustifiably dismissed by the respondent, The Bacon Barn Limited. Although Classic Cuts Limited was originally named as the respondent the parties agreed that The Bacon Barn Limited was the employer.

[2] The respondent claims damages for removal and use of intellectual property and damage to equipment.

Employment History

[3] Mr Flynn was initially employed by Mr Grant Turnbull, a director of the respondent, on a part time basis. On 6 October 2004 he commenced full time employment.

[4] Mr Flynn says that during the meeting where he became a full time employee Mr Turnbull offered to sell him a 50% share in the business in a year's time.

[5] Mr Turnbull denies that any agreement regarding Mr Flynn buying part of the business was entered into.

[6] Mr Flynn made small goods for the respondent and created the recipes for their manufacture.

[7] Mr Flynn approached Mr Turnbull in September 2005 and sought to buy a share in the business. Mr Turnbull would not sell.

[8] Mr Turnbull asked Mr Flynn on a number of occasions to supply the recipes for the small goods. Mr Flynn refused to do so.

[9] On 6 December 2006 Mr Flynn handed in his resignation. There was a subsequent meeting at which Mr Turnbull endeavoured unsuccessfully to obtain the small goods recipes.

[10] Mr Flynn says he was dismissed during the notice period.

Agreement to Buy a Share in the Business

[11] While I accept that Mr Flynn believed there had been an agreement whereby he would be able to buy a share of the business the evidence does not support that perception. There was discussion about a possible purchase in a year's time. Mr Flynn had said he wanted to buy into the shop to secure his children's future. Mr Turnbull said he had only recently purchased the business and it needed work and development.

[12] The sale price that Mr Flynn said was agreed was less than half of the cost of the business and did not take into account any profit or loss that the business might make in the future.

[13] Mrs Turnbull, also a director of the company, was not present when the discussions took place and said that any such agreement would have required her consent. She said any agreement would have been done through the company's solicitors and she and Mr Turnbull had recently been through an acrimonious business break-up which had resulted in litigation. Furthermore, the first she knew about any purported agreement was at a meeting in September 2005.

[14] Mrs Turnbull said she was surprised but asked Mr Flynn for details of his proposal, which was that she and Mr Turnbull would continue with the day to day

running of the business with no contribution from Mr Flynn; and that he would continue working on his existing terms and conditions, have a 50% shareholding and draw wages. Mr and Mrs Turnbull did not draw wages.

[15] She suggested that if he was concerned about securing his children's future he should buy a house and that she could speak to the company's bank manager about a home loan for Mr Flynn.

Small Goods Recipes

[16] Mr and Mrs Turnbull had made a number of requests for the ingredients and recipes which Mr Flynn had refused to supply. Mrs Turnbull said that this information was legally required and that the company had to be able to answer customer queries about ingredients.

[17] In October 2005 Mr Flynn was away for a week and had not left sufficient small goods to meet demand. As the company did not have the recipes they were unable to manufacture additional products in Mr Flynn's absence.

[18] At a meeting on 5 December Mr Flynn refused to disclose the ingredients and the recipes until Mr Turnbull agreed to sell him a share in the business. Mr Flynn went home, discussed the matter with his partner and decided to resign as he felt betrayed by Mr Turnbull's failure to honour the agreement.

[19] Mr Flynn accepted that there never been any agreement that he would hand over the recipes in exchange for a share in the business.

Termination of Employment

[20] Mr Flynn left a written resignation giving a week's notice with Mrs Turnbull on 6 December.

[21] A meeting was arranged for 8am the following morning to discuss the resignation. Mr and Mrs Turnbull also wanted to obtain the recipes. Mr Flynn did not bring the recipes to the meeting and refused to provide them.

[22] Mr and Mrs Turnbull then said they would adjourn the meeting to enable Mr Flynn to obtain representation. However, Mr Flynn insisted on continuing with the meeting. He was told that the company needed the information to comply with their legal obligations, which Mr Flynn acknowledged.

[23] The Turnbells were insistent that he obtain representation and adjourned the meeting until 1pm. Mr Flynn asked whether he had been sacked. The Turnbells told him he was not and that they were adjourning in order for him to have representation. Mr Flynn said Mr Turnbull said he had been sacked.

[24] Mr Turnbull said Mr Flynn demanded that his final pay be organised and collected his personal belongings and left.

[25] Mrs Turnbull sent a number of text messages to Mr Flynn who agreed to reschedule the meeting and indicated that he would advise her of a suitable time. Despite this and several subsequent attempts by Mrs Turnbull to contact Mr Flynn and his partner, including the sending of a courier letter which Mr Flynn refused to accept, they heard nothing further from him until he raised a personal grievance in February 2006. He did not work out his notice period.

Was Mr Flynn Unjustifiably Dismissed?

[26] Mr Flynn was not constructively dismissed. He tendered his resignation. There was no breach by the employer which would have entitled Mr Flynn to consider his employment at an end.

[27] Mr Flynn was understandably disappointed that the Turnbells would not honour what he considered to be an agreement to sell him 50% of the business.

[28] His continuing refusal to hand over the recipes and ingredients was a breach of a lawful and reasonable instruction and would have entitled the employer to dismiss him. I prefer the Turnbull's version of what occurred at the final meeting to Mr Flynn's. There was no actual dismissal

[29] Mr Flynn does not have a personal grievance.

Damages

[30] The respondent says that Mr Flynn has taken its intellectual property and seeks damages for its unlawful removal and use. It also says that Mr Flynn damaged a bowl cutter which required resurfacing costing \$2,000 and that his negligent use of the sausage making machine caused \$2,294.38 damage.

[31] There was insufficient evidence regarding any damage caused by the removal of the recipes.

[32] With regard to the damage to the equipment, while there was evidence of equipment repairs having been needed, there was insufficient evidence that Mr Flynn's use of that equipment was improper and that the damage had been caused by other than normal wear and tear.

Costs

[33] The parties should try to resolve the issue of costs. If they are unable to do so leave is reserved for the respondent to file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum

Dzintra King

Member of the Employment Relations Authority