

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 125/08
5114959

BETWEEN MICHAEL FRANKS
 Applicant

AND DYNASTY METHVEN
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Paulette Petelo, Counsel for Applicant
 No appearance by Respondent

Investigation Meeting: 20 August 2008 at Ashburton

Determination: 22 August 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Franks) alleges that he was subject to unjustified actions by the respondent (Dynasty) causing him disadvantage, that Dynasty owes him wages, and that Dynasty breached the statutory duty of good faith towards him.

[2] No statement in reply was ever filed by Dynasty although it was initially active in defending the claim, at least to the extent of, through its employment law advocate, resisting the claims of Mr Franks and providing Mr Franks with some of the material he sought from his former employer such as payslips for the period of the employment.

[3] Accordingly, although Dynasty failed to file a statement in reply and failed to participate in the Authority's process in any proper way, I am satisfied that Dynasty knew that the claim had been made, knew its terms, and had every proper opportunity to defend the claim should it have seen fit to. In my opinion, its failure to participate

in the investigation meeting was not a function of any confusion about the nature of the claim or about the time and place of the investigation meeting.

[4] When the hearing was set to commence at Ashburton, I deferred the start time for a decent interval to ensure that, if Dynasty or its representatives were running late, they would not be disadvantaged, but in the result no appearance was recorded and I elected to proceed.

[5] Mr Franks was employed by Dynasty as an executive chef at Dynasty's Methven Resort Hotel. His duties commenced in that capacity on 27 June 2007 and the employment agreement the parties signed contemplated Mr Franks being effectively head of the department responsible for the kitchen with overall charge of matters such as the preparation of menus, management of kitchen staff, production and quality of food, the purchase and costing of base ingredients for meals and all other incidental matters to do with the running of the kitchen and the restaurant.

[6] Mr Franks told me in his evidence that when he returned to the district with his wife, he had taken his resumé to a number of businesses including the Methven Resort Hotel but that although there was interest shown by Dynasty at this early stage (February 2007), no job offer was forthcoming.

[7] Mr Franks understood that Dynasty had imported chefs from China to run and manage the kitchen and he obtained other employment. In June 2007, he was effectively headhunted from his then current cheffing role by Dynasty and asked to interview for the role of executive chef which he agreed to do. He undertook a long interview and practical test process of some four hours and was eventually offered the position. He understood that the Chinese executive chef who had filled the role previously was sent home to China.

[8] From a very early stage in the employment, Mr Franks argued that Dynasty was a dysfunctional employer. A senior manager of Dynasty, Thomas Wang, was in place at the Methven Resort Hotel but Mr Franks's observation was that he (Mr Wang) made little practical contribution to the running of the hotel and indeed, in many respects, was more of a hindrance than a help.

[9] Amongst other things, Mr Franks soon noted that the two junior Chinese chefs who worked under him in the kitchen were significantly less experienced than he had been led to believe and that they socialised with Mr Wang on a regular basis to the

extent that the two chefs would frequently attend at work later than their stipulated time, and hung over having been out drinking late with Mr Wang. Mr Wang allegedly tended to favour the Chinese chefs and give them time off which he would not give to Mr Franks.

[10] Because of the claimed dysfunctional nature of the employment Mr Franks' view that Mr Wang had "curious" management practices, staff turnover was high and Mr Franks became in effect the "go-to" person for virtually everything in the hotel. In what proved to be an employment relationship of short duration, Mr Franks became responsible for a raft of other duties which had nothing whatever to do with his job description. He told me and I accept that he made beds, that he fixed fire extinguishers, that he became responsible for dealing with the back up generator, that he attended to breakages of toilets, lamps, tiles and drawers, that he maintained the hotel's hot pools, collected supplies personally (and on occasion paid for supplies with his own money when Dynasty's credit failed as happened regularly), and that he even had to perform basic secretarial-type work notwithstanding that there were reception persons who could have been directed to do the work in question. In addition, Mr Franks was required to get his duty manager's certificate so that he could be used by Dynasty for liquor licensing purposes.

[11] Mr Franks' wife, Izumi, became employed by Dynasty as a housemaid during Mr Franks' short tenure there.

[12] The evidence discloses that Mr Wang developed an inappropriate interest in Izumi and I am satisfied on the evidence I heard that Mr Wang sexually harassed Izumi. This sexual harassment of Mr Franks' wife was, I hold, a significant factor in the demise of Mr Franks' employment relationship with Dynasty.

[13] Like Mr Franks, Izumi was required to get training to become a duty manager as well, despite Mr Franks' view given in evidence that it was inappropriate for his wife to be a duty manager in the hotel's bar when she did not wish to be a duty manager and as a housemaid, had little connection with the bar facility anyway.

[14] Mr Franks gave graphic evidence of the health consequences for his wife of the sexual harassment by Mr Wang. His wife, he indicated, had a breakdown and his relationship with his wife was put under very severe strain. Mr Franks was put in the unenviable position of feeling he had to choose between his job and his marriage. He

told me (and I accept) that Mr Wang had sought to take Izumi out and had in fact done so, but Izumi was frightened of Mr Wang and Mr Franks felt powerless to intervene because of the risk of such intervention threatening his livelihood.

[15] Mr Franks told me that Izumi was displeased with him for not standing up for her and eventually in the first week of August 2007, Mr Franks told Mr Wang that Mr Wang was not to sexually harass Izumi any more. Mr Wang did not deny the inappropriate touching but said that Mr Franks was *unprofessional* in raising it. Unable to cope with the poisoned work environment, Izumi resigned a week later.

[16] Mr Franks told me that he tried to continue on but, having had to confront the trauma of his wife being inappropriately touched in the workplace and subjected to other sexual harassment by Mr Wang and having had to deal with the domestic consequence of her illness brought about by that toxic workplace environment, the evidence I heard suggested that Mr Franks was probably at the end of his tether when, on or about 20 August 2007, he had what turned out to be his final conversation with Mr Wang.

[17] There was a large party from a travel firm coming into the hotel and, as was usual, Mr Franks felt he was in the position where he had to do everything himself. He had frequently told Mr Wang that there were insufficient permanent staff and that Dynasty ought to recruit people to replace the people who had left, but Mr Franks' evidence was that nothing ever seemed to be done about that.

[18] On the day that the employment relationship ended, Mr Franks was at home and intending to attend at the workplace in the afternoon to receive food that he had ordered for the upcoming large party with the intention that he would work through the afternoon and do the evening as well. Mr Wang called him at home in the morning and alleged that Mr Franks ought to be at work because Mr Franks would have to set up the tables for the large function. There was an argument about whose job that was and why Mr Franks had to do everything himself, and in the result Mr Wang said words to the effect: *you either work for me or you don't* and Mr Franks said in response *okay I don't*. That discussion marked the end of the employment relationship.

[19] During the exchanges between Dynasty's representative and Mr Franks's representative, various allegations were made by Dynasty that Mr Franks had behaved

badly by encouraging the District Licensing Authority to investigate the premises, got the Police to check on licensing issues, and got the Health Department to check the adequacy or otherwise of the hygiene in the kitchens. Mr Franks said while all of those agencies were involved, they were certainly not involved as a consequence of anything that he did and he denied that allegation.

[20] The other allegation made by Dynasty against Mr Franks was that he had left Dynasty in a mess because of his sudden departure. Mr Franks accepts that he left suddenly but he was at the end of his tether and he simply could not take any more.

Determination

[21] I am satisfied on the evidence I heard that Mr Franks has suffered disadvantage as a consequence of a series of unjustified actions of Dynasty in two particular respects. The first series of unjustified actions relates to the incremental increase in Mr Franks' role such that in the end, I am satisfied, it would not be true to say that he was the executive chef at all but was in effect doing part of virtually every job in the hotel and working extraordinary hours as a consequence, none of the extra hours ever being paid for.

[22] Second, I am satisfied that the very strong evidence that Izumi (Mr Franks' wife) was sexually harassed by Mr Wang put huge pressure on Mr Franks, not only at home and in his relationship with Izumi but also in terms of his own continued employment.

[23] I hold then that by a series of unjustified actions by Dynasty (the incremental increase in Mr Franks' job and the sexual harassment of Izumi), Dynasty committed unjustified actions against Mr Franks which caused the latter disadvantage.

[24] It follows that Mr Franks has a personal grievance and is entitled to remedies.

[25] Next, although not pleaded as such, my considered view is that Mr Franks has, through the same factual matrix, suffered a constructive dismissal from his employment and that the dismissal from his employment is thus unjustifiable and represents a further head of personal grievance. Again, Mr Franks is entitled to a consideration as to remedies.

[26] Before considering the issue of remedies, s.124 of the Employment Relations Act 2000 requires that I consider whether any behaviour of Mr Franks has contributed to the personal grievances that I have found. I am satisfied that Mr Franks has not contributed in any way by his behaviour to the events complained of.

[27] Mr Franks was not paid for the last two weeks of his employment by Dynasty and he is entitled to recovery of those two weeks' wages. The evidence of that default by Dynasty is clear and I will make those orders accordingly.

[28] I am also satisfied that Mr Franks has lost wages as a consequence of losing his employment with Dynasty and I am making an order in that regard as well.

[29] I note that I am satisfied on the evidence I heard that Dynasty breached its statutory duty of good faith to Mr Franks, but I make no separate award in that regard.

[30] Finally, I make an order for costs. I note that I am satisfied on the evidence I heard that Dynasty breached its statutory duty of good faith to Mr Franks, but I make no separate award in that regard.

[31] To remedy Mr Franks' personal grievances, I direct that Dynasty is to pay to Mr Franks the following sums:

- (a) \$7,000 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 being \$3,500 compensation under each head of personal grievance;
- (b) Unpaid wages during the employment of \$1,267.48 net;
- (c) A contribution to lost wages post-employment of \$5,000 gross;
- (d) Reimbursement of the filing fee in the Authority of \$70;
- (e) A contribution to the legal costs Mr Franks has incurred in the sum of \$1,750.

James Crichton
Member of the Employment Relations Authority