

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 162
5588572

BETWEEN KLEBER FUKUBARA
Applicant

A N D BLUE STONE ROOM
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Kate Dillon, Counsel for Applicant
Roland Doyle, Director of Respondent

Investigation Meeting: 24 May 2016 at Auckland

Oral Determination: 24 May 2016

Written Record Issued: 25 May 2016

**ORAL DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Mr Kleber Fukubara was employed by the respondent, Blue Stone Room Limited (Bluestone), from 18 May 2014 until his resignation on 14 September 2015. Mr Fukubara was employed initially as a sous chef and subsequently as head chef. Bluestone says Mr Fukubara resigned and that he failed to return to work out his period of notice.

[2] Mr Roland Doyle, a director of Bluestone says Bluestone assisted Mr Fukubara by loaning him money at various times during his employment for bonds on apartments and allowed him to pay moneys back in instalments which gave him tax

advantages. Mr Doyle says that he did this for Mr Fukubara only, because he was likeable and he wished to help Mr Fukubara while he was at Bluestone.

[3] Bluestone says that following his marriage in July 2015, Mr Fukubara's attitude and performance altered dramatically. He did not work the hours agreed which caused problems for Bluestone.

[4] In early September 2015, Bluestone says that Mr Fukubara took six days off, supposedly for illness. Mr Doyle did not believe the illness to be genuine and declined to pay Mr Fukubara sick leave. This was after seeking a specialist medical certificate.

[5] At this point, Mr Fukubara resigned and says he was not paid holiday pay and sick pay owed to him and he seeks compensation for hurt and humiliation he suffered as a result of this resignation which he says was forced by Bluestone.

[6] Mr Fukubara also points to what he says was a change in his employment terms and conditions without his consent as being a reason for his resignation. Mr Fukubara found a new role within two weeks of his resignation.

[7] The parties attempted to resolve the issues between themselves by way of mediation but this was not successful.

[8] The parties were given another opportunity this morning to resolve the issues between themselves but were unable to do so.

Investigation Meeting

[9] The investigation of this matter took most of one day. Mr Fukubara and his wife, Ms Rebecca Elias, provided witness statements as did Mr Doyle. Mr Doyle also produced two letters from employees concerning Mr Fukubara which he says affected Mr Fukubara's credibility before the Authority. Each of the witnesses confirmed under oath that their evidence was true and correct.

[10] As allowed under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all of the evidence; relevant facts and legal issues are set out along with the Authority's conclusions.

Issues

[11] The key issues for the Authority to determine are:

- (a) whether Mr Fukubara's resignation was a constructive dismissal;
- (b) if so, was it justified or unjustified;
- (c) does Bluestone owe Mr Fukubara wages, holiday pay and sick leave;
- (d) in the event that the Authority finds that Mr Fukubara was unjustifiably constructively dismissed and that he is owed wages, holiday pay and sick leave, what amounts is he entitled to?

Relevant facts

[12] On 18 May 2014 Mr Fukubara was employed by Bluestone, initially as a sous chef, on \$20 per hour. On 16 June 2014 Mr Doyle offered Mr Fukubara full-time employment as a head chef at Bluestone. The offer of employment stated:

We wish to offer you the position of head chef at our establishment ... this position is a full-time waged position. Hours of work will be flexible as decided by the Employer and set hours of work cannot be guaranteed. The hourly rate for this position is \$23.

[13] An individual employment agreement was provided and signed by both parties. The individual employment agreement contained the usual provisions regarding annual leave of four weeks after 12 months.

[14] Clause 9.5 provides for sick leave of five days after six months employment; and clause 9.5.2 stipulates that sick leave is for cases of genuine sickness or injury or "when the employee's spouse or a dependent person (such as a child or parent) is sick or injured". Clause 9.5.8 provides that where a medical certificate is not provided, without a reasonable excuse, payment of sick leave will be withheld until an adequate medical certificate is provided.

[15] Mr Doyle says Mr Fukubara was a heavy drinker and this started from the first day of his employment. Mr Doyle says Mr Fukubara would badger staff, but no warnings were issued in relation to this conduct. Mr Doyle says there were lots of arguments between Mr Fukubara and the accounts clerk, Judy, about amounts deducted from his salary each for food and drink. Because of this a system was

introduced whereby Mr Fukubara had to sign dockets when purchasing drinks and food and this resolved the issue.

[16] In my view, this evidence was inconsistent with Mr Doyle's evidence that he was happy to loan money to Mr Fukubara on many occasions because he was so likeable. This was something he did not do for others.

[17] Bluestone closed over the Christmas period of December 2014 and January 2015 and Mr Fukubara took 30 hours annual leave. Annual leave was taken by Mr Fukubara in January, February and March 2015; a total of 85 hours for these three months.

[18] In early 2015, Bluestone loaned Mr Fukubara the sum of \$1,850 to put towards the bond on a new apartment. Bluestone was repaid out of deductions from Mr Fukubara's wages during February and March 2015. Mr Doyle says \$1,687.50 was deducted over this time leaving a balance of \$162.50 still owing to the company. Mr Doyle also says there is \$500 owing to him, which was loaned personally to Mr Fukubara. Other loans were made to Mr Fukubara of about \$1,000 each on approximately three occasions. No details of these loans were documented.

New terms of employment- 25 May 2015

[19] On 25 May 2015, Mr Fukubara and Mr Doyle signed a letter detailing changes to Mr Fukubara's remuneration. The letter states:

It is agreed you will complete a minimum of 46.15 hours per week with this package [\$60,000 per annum] and you are required to use our time clock system weekly as that records your times working at the Bluestone Room.

We require you to record your breaks and times during the day when you may have split shifts or periods when you need to leave the premises that are not work related.

If and when you work in excess of these hours or below these hours they will be monitored and you will be required to alter your schedule to balance out your hours either way.

At all times you are to manage to your kitchen so that your 46.15 hours per week is not detrimental to your workload and that your quality and service of food are not compromised.

This review is effective from 25th May 2015 so you will receive your first pay for this review on 3rd June 2015.

[20] In July 2015, Mr Fukubara was married and took three days leave.

[21] Mr Doyle says from this time Mr Fukubara's performance and attitude declined significantly. Mr Doyle says Mr Fukubara was not working the minimum hours required to achieve his salary of \$60,000.

Variation of Mr Fukubara's terms of employment- August 2015

[22] On 14 August 2015, Mr Fukubara met with Bluestone's other director, Mr Ross Vickers, and Mr Fukubara's hours were discussed. Mr Fukubara says there was no agreement to any alteration to his remuneration at the meeting. However, on 23 August 2015, Mr Fukubara's payslip showed that his salary was different.

[23] Mr Fukubara sent an email to Mr Doyle and Mr Vickers on 30 August 2015, disputing the change in his remuneration. In this email Mr Fukubara also informed Mr Doyle and Mr Vickers that there had been some personal issues involving childcare arrangements and his wife's illness that had affected his hours of work.

[24] Mr Fukubara attached an admission form from Auckland Hospital confirming that his wife had been in hospital on 20 August 2015. Mr Fukubara's email ends:

I hope this makes sense of life for me lately. I want to enjoy work and continue to create good food for the customers at the Bluestone Room. I just need you to understand these things right now.

I look forward to hearing from you.

[25] Mr Doyle responded to the email approximately one hour later accusing Mr Fukubara of disloyalty by looking elsewhere for employment. The email states:

Further that your performance over the period from when you got married has been very poor and the management of our position as head chef has been badly affected and subsequently so has the cost of the kitchen wages and food costs. You have put very little effort into the Bluestone.

If you take time off you will not be paid and neither will holiday entitlement be added to your wage. Currently you are in our debt by about 70 hours. This has come about by you not completing the minimum hours each week or increased your hours to cover the deficit.

Your contract required you to work a minimum of 46.15 hours and as explained to you at our last meeting, you have been working as little as 30 hours a week. Hence what has driven Ross to put you back on hours as you have altered your work conditions and without notice to your employer.

[26] On 31 August 2015, Mr Vickers wrote to Mr Fukubara stating:

Re: Hours of work

As per our meeting of Friday the 14th of August 2015, I confirm that we have resumed calculating your remuneration based on hours actually worked.

The terms and conditions of a salaried position as offered to you on the 25th of May 2015, but as yet not formally accepted by you, are to work a minimum of 46.15 hours per week. At the time of our meeting you had not worked a 46.15 hour week for some 8 weeks and you were unable to confirm your ability to do so in the meeting. At no stage had we agreed to such a reduction in your hours and you had not sought approval for it either, failing to discuss the matter with us.

It is very unclear to us what the status of your employment is and we would like this resolved as soon as possible.

[27] From the evidence available to me, the letter of 25 May 2015 which was signed and agreed to by both parties, set a remuneration for Mr Fukubara of \$60,000 per annum. The agreement was that he complete a minimum of 46.15 hours, but in the event that he did not then he would be required to alter his schedule in order to balance out the hours. In other words, if he worked less than 46.15 hours one week, he was to work more hours in the following weeks to balance this up. However, the letter does not have any details as to what the timeframe was for such hours to be worked and to be balanced up or down, as the case may be. There was no agreement to any deductions of salary in the event that the minimum of 46.15 hours was not worked each week.

Mr Fukubara's sick leave

[28] On Monday 7 September 2015, Mr Fukubara worked in the morning but went home sick at lunchtime. Mr Fukubara and his wife say Mr Fukubara was suffering from stress. Mr Fukubara attended the White Cross Clinic and was issued with a medical certificate that he had reported being unfit to work from 7 September to 12 September 2015.

[29] Mr Doyle challenged the medical certificate and Mr Fukubara produced another medical certificate that stated:

Kleber was reviewed at White Cross on 7 September 2015 and 8 September 2015 with ongoing symptoms of chest pain and shortness

of breath. He requires further investigation as to the cause and we have recommended that he is unable to work on the above dates.

[30] The dates referred to were from 7 September to 12 September 2015.

[31] Following receipt of the medical certificate and while Mr Fukubara was on sick leave, Mr Doyle emailed Mr Fukubara requesting a medical specialist certificate as he was concerned at the development of the illness. Mr Doyle asked that this be attended to on urgent basis.

[32] On 13 September 2015, Mr Fukubara returned to work.

[33] The evidence from Mr Fukubara is that he was never assisted by Bluestone to obtain a medical specialist certificate. There is an email from Mr Doyle referring to the fact that Bluestone may consider payment of a specialist medical certificate. However, there was never any organisation by Bluestone of a specialist or organisation of an appointment for Mr Fukubara to see a specialist at Bluestone's cost.

[34] In the circumstances, I do not consider a fair and reasonable employer would have challenged the medical certificates provided by Mr Fukubara. If there was to be further evidence regarding his medical condition then Bluestone should have taken steps to facilitate this. It did not do so.

Resignation

[35] On 14 September 2015, Mr Fukubara decided to resign. This, he says, was as a result of the change to his remuneration in August without his consent and the refusal by Bluestone to pay him sick leave.

Constructive dismissal

[36] The unilateral variation of Mr Fukubara's terms of employment and the refusal to pay him sick leave, when he had produced two medical certificates, amounted, in my view, to a breach of contract and indicated an intention by Mr Doyle and Bluestone not to be bound by the employment agreement with Mr Fukubara.

[37] Mr Fukubara was entitled to resign or abandon his employment and to treat it as a constructive dismissal and Mr Fukubara was justified in law in doing so.

[38] Mr Fukubara did not accept the unilateral variation to his terms of employment and expected to be paid sick leave. His resignation was a foreseeable consequence.

Was the constructive dismissal justified?

[39] The question now is whether or not the constructive dismissal was justified and that requires the application of the statutory tests under s.103A of the Act.

[40] The question is whether what Bluestone did and how it did it were what a fair and reasonable employer in all the circumstances could have done.

[41] I conclude that a fair and reasonable employer in Bluestone's circumstances could not have dismissed Mr Fukubara for seeking to adhere to his contractually agreed remuneration and seeking paid sick leave.

Remedies

[42] Turning now to remedies. Mr Fukubara gave evidence of the stress that he suffered as a result of the actions taken which led to his resignation and to his feelings once he had resigned. Mr Fukubara was recently married, had significant concerns about his financial situation and his family's financial situation and bills were mounting.

[43] I consider, in the circumstances, that compensation in the sum of \$5,000 pursuant to s.123 of the Act to be justified in respect of the unjustified constructive dismissal.

[44] Mr Fukubara was not required to give notice, as he was unjustifiably constructively dismissed.

[45] Mr Fukubara obtained another job within two weeks and so he mitigated any losses as a result of being out of work from Bluestone.

[46] In those circumstances, Bluestone is to pay Mr Fukubara the equivalent of two weeks' wages based on his annual salary of \$60,000.

Holiday pay and sick leave

[47] As mentioned, there is a claim for holiday pay which Mr Doyle accepted had not been paid because of what he claimed to be actions by Mr Fukubara which meant he did not need to do so.

[48] I order Bluestone to pay Mr Fukubara unpaid holiday pay of \$2,718.78 which includes holiday pay on 3 June 2015 and on the unpaid sick leave.

[49] I order Bluestone to pay Mr Fukubara unpaid salary of \$184.50.

[50] I order Bluestone to pay Mr Fukubara unpaid salary for the public holiday on 3 June 2015, of \$197.50.

[51] I order Bluestone to pay Mr Fukubara unpaid sick leave of \$1,153.85.

Penalties

[52] No penalties were sought by Mr Fukubara. However, I would like to make it clear that in instances of failure to pay employees their statutory entitlements, if penalties are sought they more than likely than not, ordered. This is because such breaches of statutory requirements is seen by the Authority as a grave breach of an employee's terms and conditions of employment.

Costs

[53] With reference to costs, I invite the parties to try and resolve the issue of costs between themselves. However, if they are unable to do so Mr Fukubara has 14 days within which to file a memorandum as to costs and Bluestone has 14 days from receipt in which to respond.

Anna Fitzgibbon
Member of the Employment Relations Authority