

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 109/08
5082953

BETWEEN

ENKE GOUW
Applicant

AND

WAKEFIELDS OF SUMNER
LIMITED
Respondent

Member of Authority: Paul Montgomery

Representatives: Enke Gouw in person
Tim Guthrie, Advocate for Respondent

Investigation Meeting: 15 April 2008

Determination: 28 July 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Gouw claims he was unjustifiably dismissed from his employment as head chef by the respondent. He says he was not provided with an employment agreement prior to starting work although he accepts he was later provided with a letter of appointment on 7 June 2006 which set out the proposed conditions of the appointment. He accepts that there was a four week trial period provided for, and that his hours of work and hourly rate were specified in that letter.

[2] Mr Gouw says that the respondent extended the trial period without his agreement, and that he was without cause, dismissed from his position.

[3] On behalf of the respondent, Mr Guthrie says the restaurant wanted to employ a suitably qualified Asian chef who could develop and present a quality menu to patrons, but in the context of the quiet winter season.

[4] The respondent says that Mr Gouw was unable to adhere to the hours stipulated in the letter of appointment and that the costs of employing all staff in the Sato restaurant, was consistently outstripping the income from the sale of meals.

What caused the problem

[5] Mr Gouw, whom the respondent acknowledges is an able Asian food chef, had previously worked for another restaurant in Sumner. Mr Gouw, having seen an advertisement for the head chef's position, duly applied and after an initial discussion the application was sent a letter of offer on 16 May 2006. He accepted the terms set out in that letter and began working for the respondent on 30 May 2006.

[6] The letter offered an hourly rate of \$18, minimum hours of 35 per week, a monthly bonus of \$200 per month for each month where gross turnover exceeded \$18,000, and pointed out that the applicant would have the normal chef's responsibilities in the kitchen but the management of the restaurant was in the hands of Ms Bridget Olsen. The letter also states *we offer a one month trial for both parties to decide whether the position is suitable and at the conclusion of that period a full contract will be offered.*

[7] As part of his role Mr Gouw was to assemble a new menu while overseeing the activities of the kitchen generally.

[8] Relatively soon after commencing work Mr Guthrie had reason to write to the applicant noting that his timesheet for the first week of employment showed 42.5 hours. The letter is not unduly critical but rather a reminder of the need to stay within the 35 hour guideline until the turnover increased. A week later he again wrote asking that the applicant confine his hours to 35 per week and on 21 June 2006 the tone changes somewhat when he wrote:

I am very concerned about you working on Queens Birthday Monday which costs the company time and a half and a day in lieu. Sato is not open on Mondays and staff have no authority to work on a public holiday without permission from management. ... As you know I am very concerned about the wages cost at Sato and this is a totally unnecessary cost and is completely unauthorised. ... Please note that under no time can you work on a public holiday without my authority.

[9] It is quite clear from a letter that the applicant wrote to Mr Guthrie on 4 July 2006 that he was aware that the restaurant had not been trading well. In that letter he

says *Before my start on 30 May 2006 we discussed what strategy to use in order to turn Sato Noodle House back into the black figures.* The letter goes on to explain the amount of time the applicant deployed in the development of the new menu and also for bringing the kitchen up to a standard that assisted more speedy service for customers. Further, the applicant points to the success of the new menu and an increase in customer bookings because of the developments.

[10] In his reply, Mr Guthrie says that he largely agreed with what Mr Gouw had said in his 4 July letter but says:

Unfortunately in doing such a good job the business has gone heavily into debt largely because the wage bill has been exceeding 90% of the turnover and the purchase cost of new products for your menu far exceeds those anticipated. ... My original letter of offer stated that the trial period was for both parties to decide whether the position is suitable and it is unfortunate that the current situation is not suitable for me. Sato is losing a substantial amount of money on a weekly basis and your income is greater than any other member of our business, a situation that for financial reasons alone, cannot continue. I therefore cannot offer you a full employment agreement and will arrange a time to meet with you to discuss these matters.

[11] A meeting took place on 7 July at the restaurant and following that Mr Gouw wrote to Mr Guthrie:

Due to your departure to England on 10 July 2006 there is no time for either of us to look for alternatives. We agreed to continue our work relationship as is until you return from your trip. I will continue to run the kitchen of Sato Noodle House the best I can.

However this does not mean that I agree to your terms and recommendations mentioned in your letters dated 28 June and 6 July 2006. I still strongly believe that I am entitled to a full time individual employment agreement and for now I consider you to be in breach with the terms and conditions of your original offer.....

We will continue to discuss these matters after your return to Christchurch.

[12] On 10 August 2006 Mr Guthrie wrote to the applicant:

It is with considerable regret that I have to inform you that I will not be offering you an employment contract with Sato.

The continuing losses suffered by the business mean that I have no alternative but to put it on the market as we continue to lose at a steady and unacceptable rate. ...

I am hugely disappointed that the business has failed to meet our expectations and the resulting financial losses are causing me considerable concern. We cannot continue to do so and I must terminate your employment at a time suitable to us both, in the near future.

I will be continuing to operate Sato until a sale is made but will have to find a less expensive wage bill and as there is no way I would ask you to work less hours or take a pay reduction I will await your notification of a finishing date.

[13] Having heard nothing from the applicant in response to this letter on 15 July Mr Guthrie wrote:

Further to my letter of 10 August 2006, I can advise that your employment with us will cease as of 22 August 2006.

I am disappointed in this decision and in your lack of response to that letter, but have no alternative given the dire financial situation of Sato.

I am aiming to appoint a part-time chef, on greatly reduced hours and pay, to enable the business to trade during the period of its sale.

... Once again I would like to thank you for your efforts and wish you well in your future endeavours.

Issues

[14] In order to determine this matter the Authority is required to make findings on the following issues:

- Was the employer entitled to extend the probationary period; and
- Was the dismissal justified in all the circumstances; and
- If not, what, if any, remedies are due to the applicant; and
- Did the applicant contribute to the circumstances given rise to his dismissal?

The investigation meeting

[15] Both the applicant and respondent represented themselves at the meeting. It proceeded with each party making its statement as to their view of the facts and then by way of questioning by the Authority and discussion between the parties on various

key points. Although there were underlying issues between the parties, both were helpful and conducted themselves appropriately.

[16] The respondent had brought Ms Olsen, the restaurant manager, to the investigation meeting and her presence assisted in establishing the operational difficulties faced by the business.

Analysis and discussion

[17] This is an arrangement, the Authority accepts on the evidence before it, which was entered into by parties who had their own genuine, common objectives, and both of whom wanted the arrangement to work to mutual benefit.

[18] The applicant was looking for more secure conditions than were provided by his former employer. The respondent was looking for a chef who could deliver results in a relatively short timeframe, including developing a more appealing menu, but within restricted hours and in the quiet winter season with an eye on the coming summer.

[19] The initial offer to the applicant was well defined although not in accordance with the Act. That said, it is not disputed that the employment was subject to a four week probationary period and the hours restricted to 35 per week.

[20] The problems were however, that the applicant needed more time and more resources than envisaged by the respondent to develop the upgraded menus, the respondent was impressed with the quality of the menus developed but objected to the costs and in the last analysis, costs outstripped the income and the business needed to be put on the market.

[21] The Act is quite clear about what is required of an employer engaging an employee on an individual employment agreement. The respondent, while falling short of the Act's requirements, put the situation fairly to the applicant. The letter of offer was clear in its terms and it was evident from the discussion before the Authority that both parties were aware of the risk they were taking in attempting to turn around the fortunes of the business.

[22] It is also clear from the evidence that Mr Gouw was aware of the need for close adherence to the 35 hours per week from the outset. Mr Guthrie wrote to the

applicant three times in June drawing his attention to this. Those letters also clearly state that the wage bill was greater than gross takings and that this could not continue. On 12 June 2006 Mr Guthrie firmly stated to the applicant, following a discussion on the previous day, that Mr Gouw's working hours were 35 per week. He gave the reason that the business could not at that time sustain hours in excess of those agreed.

[23] On 28 June, the respondent wrote to the applicant congratulating him on the new menu, pointing out that wages were running at more than 50% of gross takings which is a significant loss, and advising the wish to extend the trial period until a profit situation was achieved. Mr Guthrie advised he would be away from 10 July until 4 August 2006 attending his son's wedding in the UK and said, *[this] leaves me no time to make any major changes. It is therefore necessary for you to decide whether or not you wish to continue in a trial period as I will have to look at other options should this not be acceptable.*

[24] On 8 July 2006, Mr Gouw, after a meeting with Mr Guthrie the previous day, wrote the letter referred to in [11] above.

[25] It is clear from this letter that the applicant, with some reluctance, agreed to continue the status quo until Mr Guthrie's return but raises some areas of concern which he says they will discuss.

[26] That discussion did not eventuate. Mr Guthrie's letter of 10 August 2006 makes it clear he has reached a decision and is waiting for Mr Gouw to provide him with a finishing date. Having had no reply to that, Mr Guthrie issued his letter of 15 August advising that the employment will end on 22 August 2006.

[27] Mr Gouw's evidence was that he remained unemployed and without income for a period of three months during the early part of which he says he was subject to the disheartenment which the respondent's actions had caused him. He says *one symptom of this occurred at the end of being unemployed for three months when I attempted to change trades and ended up doing a training course as an insurance sales representative for Combined Insurance. In the event this career change only lasted six months.*

[28] I have considered this at some length and what I find somewhat unconvincing is the lack of evidence of the applicant attempting to find alternative employment within the hospitality industry. His decision not to seek employment within a trade

chronically short of qualified people was certainly his to make, but I find it cannot be laid at the respondent's door. As noted above, I am of the view that both parties to this employment relationship were aware that each was taking risks. While not contesting that Mr Gouw felt disillusioned at the failure of the relationship, I do not accept that he was incapable of finding alternative employment as a chef.

The determination

[29] Returning to the issues set out above in this determination I find:

- The dismissal was unjustified because the respondent made the decision to terminate without engaging the applicant on the issue of how the employment relationship was to end. Given the serious state of the business, it was virtually inevitable that sale or closure was close, certainly closer than three months. However, the respondent issued the notice of dismissal prior to discussion whether Mr Gouw would remain on reduced hours pending the sale or whether he preferred to leave, and under what terms.
- In the circumstances, the employer was entitled to extend the probationary period having put this as a proposal to the applicant. While his agreement was reluctant, it is clear that Mr Gouw accepted this proposal at least until Mr Guthrie's return from the United Kingdom.
- While the applicant contributed to the circumstances by not adhering to the agreed hours, including working on a public holiday without authorisation, I do not find this sufficiently serious to apply a reduction in remedies.
- The respondent failed to provide a written employment agreement and is in breach of s.65(2)(a)(vi) of the Act.

Remedies

[30] Given my finding in the particular financial circumstances of this case that the employment relationship would not have endured for three months, the respondent is

ordered to pay the applicant four weeks wages in the sum of \$2,520 gross under s.123(1)(b) of the Act.

[31] The respondent is to pay the applicant the compensatory sum of \$1,000 under s.123(1)(c)(i) of the Act.

[32] In failing to provide a written agreement the respondent is liable to a penalty. However, I have decided not to impose one as while the letter of appointment falls short of the Act's requirements, it does reflect an attempt to be clear about the basic terms of the employment relationship. The Authority recommends strongly that the respondent review its practice when hiring new staff.

Costs

[33] As Mr Gouw was representing himself he is not entitled to costs. He has however incurred the \$70 filing fee and the respondent is ordered to refund this to the applicant.

Paul Montgomery
Member of the Employment Relations Authority