

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 132/09  
5126754

BETWEEN                      MICHAEL HILL  
   Applicant  
  
AND                              THE BAY CAFÉ LIMITED  
   Respondent

Member of Authority:      Paul Montgomery

Representatives:           Applicant in person  
   Leslie Scott, Advocate for Respondent

Investigation      Meeting  
and Submissions:      2 June 2009 at Dunedin

Determination:              19 August 2009

---

**DETERMINATION OF THE AUTHORITY**

---

[1]      The applicant alleges he was unjustifiably dismissed from his position as head chef at The Bay Café (the café) which was owned and operated by the respondent at the relevant time. Further, Mr Hill claims the respondent failed to pay him the notice as set out in the employment agreement between the parties. The dismissal was on the ground of redundancy. Mr Hill seeks wages lost as a result of the alleged unjustified dismissal, compensation for hurt and humiliation and penalties against Mr Scott personally for aiding and abetting breaches to the employment agreement and costs.

[2]      Mr Scott, who is the sole director of the respondent company, resists the applicant's claim. He says the respondent company ceased trading when the café was closed on 5 March 2008. He says that while he has since opened another business trading as The Bay Café, that entity is owned by another company; Macbay Café Limited of which he is sole director and shareholder. Finally, Mr Scott says the

respondent is now a shelf company with significant debts to ACC and the Inland Revenue Department remaining outstanding.

### **The essential facts**

[3] The applicant began work as head chef at the café on 16 February 2006 and an individual agreement was signed by the parties on 11 May that year.

[4] On 2 May 2007 Mr Scott advised Mr Hill the café was closing due to *insufficient funds*, effective immediately. Mr Hill says he was not given any details of the financial difficulties facing the respondent nor did he have any indication the business was at risk of closure and his job in jeopardy. He says he was not consulted on the matter and was not paid the four weeks notice set out in the agreement when redundancy was in issue.

[5] Some two weeks later the applicant telephoned Mr Scott to inquire if Mr Scott would lease the premises to him. He was advised the café was to reopen and Mr Scott offered him the head chef role. The café continued under the ownership of the respondent company and Mr Hill recommenced work on 23 May 2007.

[6] On 16 February 2008 Mr Hill asked Mr Scott for a raise as 16 February *marked my second anniversary as The Bay Café*. Mr Hill received a raise of \$1 per hour. He says Mr Scott did not raise the prospect of the business closing a second time in the course of these discussions.

[7] On 5 March 2008, Mr Scott approached the applicant and told him the café was closing that day. Again, Mr Hill says there was no consultation on the matter, no notice was given nor paid as set out in the agreement. He was paid out his wages and his accrued holiday pay. Mr Hill telephoned Mr Scott on 14 March 2008 to ask him to pay out the four weeks notice only to be told Mr Scott was *broke* and had *only \$300 to my name*.

[8] The applicant sought other work and started a new job on 27 March 2008 but at an hourly rate \$2 lower than that paid to him at the café.

[9] On 9 June 2008 the Authority received Mr Hill's statement of problem. This statement was dated 24 May 2008. It was forwarded to the registered office of the respondent on 10 June 2008. Mr Scott says he was advised of its arrival and received

a copy of it *a day or two later*. Mr Scott complains that the claims set out in the statement of problem were not put to him as representative of the respondent within the 90 day period. Indeed, it was not received at the registered office within the 90 day period.

[10] Further, he maintains the employment agreement signed by the parties ceased to have force following the first closure of the café and hence the claim of four weeks notice relating to the second closure is without merit.

### **The issues**

[11] To resolve this matter the Authority needs to make findings on the following issues:

- What is the correct identity of the employer; and
- The 90 day issue and the admissibility of the applicant's claim; and
- The relevance of the individual employment agreement; and
- Was the dismissal, based on the redundancy, justified under s.103A; and
- In the event it was not, did the applicant contribute to the circumstances giving rise to the dismissal; and
- What, if any, remedies are due to the applicant.

### **The investigation meeting**

[12] The investigation meeting proceeded without any difficulties. Evidence for the applicant was given by Mr Hill and his wife Erica. Mr Scott presented evidence on behalf of the respondent. All answered the Authority's questions openly and Mrs Hill presented submissions on her husband's behalf at the close of the meeting. I found all three to be reliable and genuine witnesses.

### **The test**

[13] The test for justification in matters of dismissal are set out in s.103A of the Employment Relations Act 2000 and its amendments. It requires the Authority to determine whether a dismissal was justifiable must be determined, on an objective

basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

### **The 90 day issue**

[14] Section 114 of the Act requires an applicant alleging a personal grievance to bring the grievance to the employer's attention within 90 days of the date on which the action which is said to amount to a grievance arose or the date on which the claimant first became aware of the action in question.

[15] Sections 130(2) and 224(4) of the Act, in respect of a claim on arrears to be recovered, restricts the period to six years from the date on which the claimed arrears were due to the claimant.

[16] Mr Scott, with some merit, pointed out that the statement of problem was received at the registered office of the respondent on 11 June 2008 and that this was eight days outside the 90 day period which commenced on the day of dismissal, namely 5 March 2008. Unfortunately, this matter was not raised by Mr Scott during the teleconference with the Authority on 17 February 2009 and neither did the applicant know or his advisers alert Mr Hill to the need to apply for leave to submit a personal grievance out of time. Had Mr Hill despatched his statement of problem on 25 May 2007 and copied it to Mr Scott, it would have likely slipped inside the 90 day limit.

[17] With no application for leave to lodge a personal grievance out of time, the Authority has no discretion to waive the statutory requirements.

[18] As the 90 day rule does not apply to the recovery of arrears of wages, the applicant's claim in respect of this issue is admissible and thus falls for the Authority's consideration on its merits.

### **The identity of the employer**

[19] The respondent's position is that the agreement between the parties signed on 11 May 2006 was voided at the first closure of the café and cannot impose obligations on either party in relation to the second closure. On this basis Mr Scott says that

document's provision of four weeks notice in the event of redundancy is irrelevant in the context of the second closing of the café.

[20] It was accepted by both Mr Scott and Mr Hill at the investigation meeting they had an agreeable working relationship during both periods of employment. When Mr Hill called Mr Scott to inquire whether Mr Scott might be agreeable to his leasing the café premises, that call resulted in an offer to the applicant to resume his role as head chef. Given the applicant's acceptance that the first closure was caused by lack of profitability in the venture and Mr Hill's decision at that time, not to pursue the issue of the four weeks pay in lieu of notice, I find, on the balance of probabilities, that both men simply got on with rekindling the business and neither turned their minds to the issue of a new agreement.

[21] The café had closed on 2 May 2007 and reopened on 23 May 2007. The non-trading period was therefore three weeks. I think it highly probable the two men simply carried on, on the same basis as before, until the lift in the applicant's hourly rate in February 2008.

[22] I find the initial agreement continued to govern the employment relationship up to and including the dismissal on 5 May 2008. The parties were identical.

### **Dismissal justified?**

[23] Both situations in which Mr Hill was sent away from his employment were occasioned by genuine financial reasons. They were both substantively justified. Where the employer failed, on both occasions, was to engage the applicant in a consultation process as required in the light of the Court of Appeal decision in *Coutts Cars Limited v. Baguley* [2002] 2 NZLR 535 (CA).

[24] Those failures to consult inevitably give rise to a finding of unjustified dismissal in a redundancy setting. That said, the applicant's success is academic due to his failure to lodge his later grievance within the statutory 90 day period.

[25] The obligations on the respondent in respect to the notice provisions of the employment agreement however, remain.

[26] For the sake of fullness I find that on the evidence before the Authority, the applicant did not contribute to the circumstances which gave rise to his loss of employment.

### **The determination**

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

- During both periods of employment Mr Hill was employed by the respondent company.
- The admissibility of the applicant's grievance related claims are voided by the 90 day rule.
- The employment agreement originally signed by the parties continued to govern the relationship between the parties. The dismissal, based as it was on redundancy, would have been justified under s.103A but for the failure of Mr Scott to consult with the applicant.
- I find Mr Hill did not contribute to the circumstances giving rise to the dismissal.
- Mr Hill is entitled to be paid for four weeks in lieu of notice as set out in the employment agreement.

### **Remedies**

[28] In the particular circumstances of this case the remedies are necessarily restricted to the recovery of wages due under the redundancy notice provisions of the agreement.

[29] In respect of the first redundancy, on balance of probability, I find that at the time, the applicant chose not to pursue his entitlement to four weeks notice as he saw alternative benefits to himself and his family in remaining employment in their own local community.

[30] In respect of the second redundancy the respondent is ordered to pay the applicant the sum of \$2,960.00 gross being four weeks at his then hourly rate of \$18.50 gross for 40 hours per week.

**Penalties**

[31] The threshold for establishing an allegation of aiding and abetting a breach of an employment agreement is particularly high, and in this case I find it has not been established. Accordingly, I decline the applicant's claim under this head.

**Costs**

[32] The applicant, while representing himself, did engage professional assistance in preparation of evidence statements and of legal submissions.

[33] Invoices from Anderson Lloyd indicate a total cost for legal assistance of \$762.00.

[34] As the investigation meeting involved under half a day for which I would usually award \$1,000 - \$1,500 in legal cost contributions, I think it just in all the circumstances to award Mr Hill the sum of \$500 as a contribution to what I find are reasonably incurred costs.

Paul Montgomery  
Member of the Employment Relations Authority