

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 36  
5381884

BETWEEN                      GARETH ANSEL HOMAN  
   Applicant  
  
A N D                              THE PERSIAN PRINCESS  
   LIMITED t/a THE FIG  
   Respondent

Member of Authority:        K J Anderson  
  
Representatives:              S Franklin, Counsel for Applicant  
   L Eshkehsou, Advocate for Respondent  
  
Investigation Meeting:        27 September 2012 at Whakatane  
  
Further Information :        4 October 2012 from Respondent  
  
Date of Determination:       31 January 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1]     The applicant, Mr Gareth Homan, claims that he was unjustifiably dismissed on or about 14 June 2011. Mr Homan asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of lost wages for 10½ weeks and compensation of \$15,000.

[2]     The respondent, The Persian Princess Limited (PPL), denies that the dismissal of Mr Homan was unjustified and several counterclaims have been presented relating to the alleged actions of Mr Homan prior to his dismissal. In summary, these counterclaims relate to allegations of breaches of good faith by Mr Homan and a penalty of \$10,000 is sought.

## Background

[3] The managing director of PPL is Ms Lili Eshkehsou; she owns and operates a small café and licensed restaurant (the Restaurant) in Whakatane, trading as The Fig. The business employs between five and nine staff with three or four people being on duty at most times.

[4] From early January 2011, Mr Homan was employed on a part time basis as a café assistant and barista.

[5] The evidence of Ms Eshkehsou is that Mr Homan had only been employed for a short time when she began to have problems with him, mainly related to Mr Homan's attitude towards other staff and customers. Ms Eshkehsou says that Mr Homan was often abrupt and "almost hostile" and she received frequent complaints about his attitude. Ms Eshkehsou says that she spoke to Mr Homan about his behaviour as customer service is very important to her; and she had worked hard to bring in customers; and to see them being lost due to the behaviour of Mr Homan was "breaking my heart."

[6] Ms Eshkehsou also related to Mr Homan's unacceptable behaviour in the kitchen: throwing pots, banging and breaking dishes and "throwing things around". Ms Eshkehsou told the Authority that Mr Homan used to get "really angry" towards her and other staff and she received complaints from customers that Mr Homan was "really grumpy and angry" and would not go to the counter to serve them. When asked by the Authority how often she spoke to Mr Homan about his behaviour, Ms Eshkehsou replied that she spoke to Mr Homan "too many times" and that she was "losing" her business. The evidence of Ms Eshkehsou is that:

*I can recall that I discussed his poor performance with Gareth many times & warned him often that I would dismiss him if this behaviour continued.*

[7] The further evidence of Ms Eshkehsou is that her kitchen manager, Ms Gloria Tahere, also spoke to Mr Homan about his behaviour. Ms Eshkehsou also attested to being told "several times" by customers that Mr Homan had closed the restaurant early; informing customers that the kitchen was closed. Also Ms Tahere had informed Ms Eshkehsou that she had discovered Mr Homan smoking cannabis in the restaurant's outside courtyard during working hours. Ms Eshkehsou says that she raised this matter with Mr Homan and he told her that if he did not smoke cannabis he

would become moody and angry. Ms Eshkehsou says that she told Mr Homan that smoking cannabis during working hours must stop.

[8] The evidence of Ms Eshkehsou is corroborated by evidence from Ms Tahere and Ms Sharday Cable, an assistant waitress at the restaurant. Ms Tahere appears to have assumed the management of the restaurant while Ms Eshkehsou was on maternity leave. The evidence of Ms Tahere is that shortly after Mr Homan was employed, he became “erratic and unprofessional” in regard to his behaviour towards customers and other employees. Ms Tahere says that she spoke to Mr Homan on numerous occasions regarding his behaviour and lack of a professional approach towards customers. Ms Tahere says that she also spoke to Mr Homan about his blatant disregard for the restaurant’s equipment, for example: punching walls, kicking doors and slamming the dishwasher and coffee maker. The evidence of Ms Tahere is that Mr Homan had “personal issues” which he would “unleash” at work by being aggressive towards customers, staff and equipment. Ms Tahere says that when she spoke to Mr Homan about his behaviour, he assured her it would not happen again but his behaviour “just escalated”.

[9] Ms Tahere confirmed that there was a problem with Mr Homan smoking cannabis during working hours along with another staff member. Nonetheless, it seems that Ms Tahere may have tacitly accepted the smoking of cannabis at times, due to the key roles that the two men played within the Restaurant.

[10] Ms Tahere also referred to Mr Homan showing another person (the owner of another café in Whakatane) how to use the coffee machine. However, given the overall evidence, in particular, that of the other café owner mentioned, it appears that Ms Tahere may have been mistaken in her general perception regarding this matter.

[11] The evidence of Ms Cable is that during her time working with Mr Homan at the Restaurant she witnessed a number of events relating to his behaviour that she believes had major effects on the business and its reputation. Ms Cable referred to Mr Homan’s behaviour in that he would “curse and get agitated” when customers came in and they could see and hear his displeasure. Ms Cable also referred to Mr Homan throwing dishes down, making a loud noise that customers were aware of and made comment about. Ms Cable says that Mr Homan’s behaviour did not improve even after being given verbal warnings and she continuously apologised to

customers for his poor service. Ms Cable says that she watched the client base drop dramatically due to how unhappy customers were after dealing with Mr Homan.

[12] Ms Eshkehsou presented written statements from two other people that refer to inappropriate behaviour by Mr Homan in regard to his behaviour when he was working as an employee at another Whakatane café, and observations from a customer of The Fig respectively. However, as these people did not appear at the investigation meeting, I cannot give any weight to these statements albeit the alleged behaviour of Mr Homan that they refer to is consistent with the other evidence before the Authority.

### **The dismissal**

[13] The evidence in regard to what eventually led to the dismissal of Mr Homan is not entirely clear. But it appears that on Sunday, 11 June 2011, Mr Homan was sent home from the Restaurant by Ms Tahere because he had broken some dishes. Mr Homan accepts that he was sent home by Ms Tahere but he says this was “a couple of weeks” before his dismissal. However, I conclude that it is more probable that it was Sunday, 11 June 2011 that he was sent home by Ms Tahere, because of his behaviour.

[14] It appears that upon becoming informed by Ms Tahere of the incident on 11 June 2011, Ms Eshkehsou sent a text to Mr Homan later on the afternoon of 14 June 2011; as follows<sup>1</sup>:

Hi Gareth just letn u knw dat you wont be required to wort tomrow.  
Final pay an ur letter will be ready for u to pik up on Thursday.  
Thanks

[15] The evidence of Ms Eshkehsou is that she “just had enough” and decided that Mr Homan had to go because of the detrimental effect he was having on her business. Ms Eshkehsou attested to the loss of income to the business while she was on maternity leave and this is supported, to some extent, by information from the accountant for the business. Nonetheless, the evidence as to the financial affect on the business, relative to Mr Homan’s behaviour, is inconclusive.

[16] Mr Homan came into the restaurant on 16 June 2011 to receive his final pay. Ms Eshkehsou also gave Mr Homan a letter dated 12 June 2011. It informed:

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<sup>1</sup> With spelling as sent.

Dear Gareth,

Even though you have been spoken to on a number of occasions regarding your attitude in front of the customers you have continued to behave in an unsatisfactory manner therefore your services are no longer required at these premises, as from the 12th of June 2011.

The letter was over the name of Lila Henareh, Managing Director<sup>2</sup>.

[17] The evidence of Ms Eshkehsou is that when she gave Mr Homan the letter and his final pay, she informed him that the reason for the dismissal was because of his “attitude and other issues”. Ms Eshkehsou says that Mr Homan appeared to understand and accept this. However, the evidence of Mr Homan is that no discussion took place about the reasons for his dismissal, but there was some discussion about his holiday pay, which was subsequently paid in two instalments, apparently due to the financial position of the business.

[18] Mr Homan challenges his dismissal on the grounds it was substantively and procedurally unjustifiable. Mr Homan denies that his behaviour and actions were as attested to by the witnesses for the respondent. However, I did not find Mr Homan to be very credible in regard to most of his evidence. However, I allow Mr Homan the benefit of the doubt as to some of the evidence regarding his general behaviour, as Ms Eshkehsou and Ms Tahere failed to record various events in writing. Nonetheless, I found both women (and Ms Cable) to be essentially credible and I find that the actions of Mr Homan are fundamentally proven to have been of a substantial detriment to the operation of this small business, which was still in its early development.

### **Analysis and conclusions**

[19] In determining whether a dismissal is unjustifiable, the test that the Authority must apply is: Whether the employer’s actions and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred<sup>3</sup>. In applying this test, the Authority must consider<sup>4</sup>:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the

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<sup>2</sup> While the full name of Ms Eshkehsou is Lila Henareh Eshkehsou, it appears that for business purposes, she uses the surname Henareh. The evidence is that the letter was actually written by Ms Tahere and given to Ms Eshkehsou for her to deliver to Mr Homan.

<sup>3</sup> Section 103A(2) of the Employment Relations Act 2000

<sup>4</sup> Section 103A(3) of the Employment Relations Act 2000

allegations against the employee before dismissing or taking action against the employee; and

- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[20] Unfortunately, the undisputed evidence is that Ms Eshkehsou failed to observe any of the above legal requirements and hence I am bound to find that the dismissal of Mr Homan was unjustifiable. This is because the clear breach of the above provisions of the Employment Relations Act 2000 (the Act) is not what a fair and reasonable employer could do. Mr Homan has a personal grievance.

### **Remedies**

[21] Having found that Mr Homan has a personal grievance, pursuant to s.123(1) of the Act:

Where the Authority or the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide for one or more of the following remedies ...

[22] Included in the remedies available is reimbursement of wages and compensation for humiliation, loss of dignity and injury to feelings.

### ***Reimbursement of lost wages***

[23] Mr Homan claims reimbursement of wages for 10½ weeks. He says that he was “actively looking for jobs” but has not provided any evidence about his attempts to obtain alternative employment; and he only made a brief reference to approaching other “coffee places”. There is an onus on Mr Homan to mitigate his losses and establish this in evidence. The obligations of a dismissed employee, in relation to a

loss of earnings, was explained by Chief Judge Colgan in *Allen v. Trans Pacific Industries Group Ltd (t/a "Medismart Ltd")*<sup>5</sup> as follows:

[78] ... dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.

[24] The *Allen* judgment was referred to by Judge Ford in *Radius Residential Care v. McLeay*<sup>6</sup>: He stated that:

It is up to the employee in an unjustified dismissal case to produce the evidence to prove any loss of income.

The same applies in relation to the obligation to mitigate loss. The Court [Authority] should not be left to speculate or guess. The paucity of evidence produced by the defendant on these topics has not persuaded me that she did take adequate steps to mitigate her loss. She has failed to produce any of the evidence identified by Chief Judge Colgan required to substantiate a loss of earnings claim.

[25] And so it is with the circumstances pertaining to Mr Homan. Unfortunately, there has been no evidence produced by him that would satisfy the requirements of *Allen*; hence I am left to decline to make any award of reimbursement under this head.

### ***Compensation***

[26] Mr Homan seeks an award of compensation in the sum of \$15,000 but he has provided little evidence as to why such a relatively high sum would be appropriate. Mr Homan attests to being upset and humiliated in regard to being dismissed via a text message. He also refers to the subsequent financial effects of the loss of income, including the humiliation associated with having to borrow money from his mother. However, having observed Mr Homan and taking into account the evidence of his attitude and behaviour towards his employer, I conclude that he is largely impervious to the notion of humiliation and that only a minimal award is appropriate: being the sum of \$2,000.

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<sup>5</sup> [2009] 6 NZELR 530 (EmpC)

<sup>6</sup> [2010] NZEmpC 149 at para.[51]

***Contribution***

[27] Pursuant to s.124 of the Act, I am obliged to consider the extent to which the actions of Mr Homan contributed towards the situation that gave rise to the personal grievance. Given the overall evidence of Ms Eshkehsou, Ms Tahere and Ms Cable, I considered reducing the compensation awarded by 100% to reflect the contribution made by Mr Homan towards the situation that gave rise to the personal grievance. However, upon consideration of some of the evidence elicited by Mr Franklin's cross-examination of the three witnesses, I allow that some doubt has been cast upon the degree of some of the actions attributed to Mr Homan. Nonetheless, I accept that the generally disruptive behaviour and irresponsible attitude of Mr Homan during his employment, was such that his contribution to the circumstances that brought about his dismissal is substantial, hence I reduce the award of \$2,000 by 75% to the sum of \$500.

**Determination**

[28] For the reasons set out above, I find that the dismissal of Mr Homan was unjustified. The Persian Princess Limited is ordered to pay to Mr Homan the sum of \$500 without deduction.

[29] In regard to the counterclaims advanced by the respondent, I conclude that while some of the actions of Mr Homan were not those of an employee acting in good faith towards his employer, the counterclaims specifically relate to Mr Homan's alleged actions in closing the restaurant early and creating a loss of income; and to training a competitor (and subsequent employer of Mr Homan) to operate a coffee machine. But these allegations are not sufficiently proven and hence the respondent's claims are not upheld.

**Costs**

[30] Given the outcome of this matter, it is appropriate that costs should lie where they fall. It is so ordered.

**K J Anderson**  
**Member of the Employment Relations Authority**