New Zealand Employment Relations Authority Decisions

Horan v Golden Fork Limited (Auckland) [2018] NZERA 370; [2018] NZERA Auckland 370 (26 November 2018)

Last Updated: 4 December 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND		
		[2018] NZERA Auckland 370
		3028751
	BETWEEN	DAVID HORAN Applicant
	AND	GOLDEN FORK LIMITED First Respondent
	AND	RAVNEET BRAR Second Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Danny Gelb, Advocate for Applicant	
Ravneet Brar, Representing the First and Second Respondent		
Investigation Meeting:	13 November 2018 at Auckland	
Submissions received:	13 November from Applicant & Respondent 16 November Further information from Applicant & Respondent	
Determination:	26 November 2018	
DETERMINATION OF THE AUTHORITY		

Employment Relationship Problem

[1] The Applicant, Mr David Horan, claims that he was unjustifiably dismissed by the Respondent, Golden Fork Limited (GFL).

[2] Mr Horan also claims that he is owed contractual and statutory entitlements, specifically unpaid wages and holiday pay entitlement.

[3] GFL denies that Mr Horan was unjustifiably dismissed and claims that he was justifiably dismissed within the probationary period for not holding a liquor licence.

Issues

[4] The issues for determination are whether or not Mr Horan:

    - was unjustifiably dismissed by GFL

- is owed unpaid wages or holiday pay by GFL
    - A penalty should be imposed upon the First Respondent for failing to pay holiday pay
    - A penalty should be imposed upon the Second Respondent for aiding and abetting the failure to pay holiday pay

Background

[5] GFL is a restaurant and bar employing approximately ten employees at the time Mr Horan was employed. There are two directors, Mr Ravneet Brar and Mr Rahul Verma.

[6] Mr Horan said he had applied for a Bartenders job which he had seen advertised on the Seek website, and was invited to attend for an interview which took place on 26 January 2018. . He said he had been met by a person, A, who had told him he was the manager and who had told Mr Horan to commence employment the following Friday.

[7] After he had commenced employment Mr Horan said he had requested and subsequently received an individual employment agreement (the First Employment Agreement). Mr Horan had entered the position as Bartender on page 15, and he and A had both signed it on page 16 on which the hours were stated as being 35 per week at an hourly rate of $19.00.

[8] The First Employment Agreement also contained a three month probationary period at clause 12.5.

Meeting 5 March 2018

[9] Mr Horan said that he had attended a meeting with new owners, Mr Brar and Mr Verma, on 5 March 2018. During the meeting he was told that providing he obtained a liquor licence he would be appointed as Bar Manager and would receive a salary increase.

[10] The Second Employment Agreement has been signed by both parties. It also contained a probationary period at clause 12.5. Entered in handwriting in the appropriate spaces in clause 5.1 is the information that the position is bar manager and in clause 5.2 that it was to commence on 5 March 2018 at a remuneration of $19.00.

[11] On the page headed: “Summary of Terms and Conditions of Employment” it states in handwriting:

25 hours as per roster for a 7 day site.

* Review to $20 p/hr once DM is attained 4-6 week review

[12] Mr Verma said Mr Horan had told him and Mr Brar that he had a liquor licence and it was on that basis that he had been appointed as Bar Manager.

[13] Mr Horan denied that he had informed GFL management that he had a liquor licence; however he had said that he had previously held one which had expired.

[14] A text message sent by Mr Horan to Mr Verma dated 21 March 2018 states: “*The council got back to me and its expired. It only lasts for a year. I’ll have to renew it.*”

[15] Mr Horan said he had applied for a Liquor Controlling Qualification Licence (LCQ) on 28 March 2018, paying the fee himself. LCQ is the prescribed qualification for persons applying for, or renewing, a manager’s certificate in order to demonstrate recent and relevant training in accordance with the requirements of the Sale and Supply of Alcohol Act 2012.

Events 3 April 2018

[16] Mr Horan said he had been standing behind the bar at GFL on 3 April 2018 when Mr Verma spoke to him and told him he was dismissed for poor performance and for not having a manager’s licence.

[17] Mr Horan said he had been shocked by the news which had been delivered in front of another employee and customers.

[18] Mr Verma denied that the decision to dismiss had been communicated in a public area and said that Mr Horan and Mr Verma had gone outside the GFL Bar to discuss matters.

[19] This was confirmed by Ms Helen Taylor, who had been employed at that time by GFL, who said that Mr Horan and Mr Verma had left the Bar, and when Mr Horan returned he informed her that he had been dismissed for not holding a liquor licence.

[20] Ms Taylor said she had never heard Mr Horan telling Mr Verma or Mr Brar that he had a LCQ, but she had assumed he had one when he had told her he was being promoted to be Bar Manager. Ms Taylor also said that Mr Horan told her had had previously had a liquor licence, but it had expired and would need to be renewed.

[21] Mr Verma confirmed the decision to dismiss Mr Horan in writing by letter dated 3 April 2018 which stated:

At our meeting on 3/04/2017, we discussed your unavailability to provide a managers certificate and poor performance.

I have taken your feedback into account but have reached the view that it is appropriate to terminate your employment on notice on this basis.

This letter is notice that your employment will be terminated from 7th April 2018 as per clause 12.1 in the contract.

Your final pay will be made on 11th April 2018 and will include any outstanding holiday entitlements owed to you.

[22] Mr Horan completed his weeks' notice period, leaving his employment at GFL on 7 April 2018.

[23] Mr Horan obtained the LCQ on 12 April 2018.

Was Mr Horan unjustifiably dismissed?

[24] Mr Horan claims that he was unjustifiably dismissed by GFL. The test of justification in s 103A of the Act states:

103A Test of justification

(a) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(b) The test 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.

[25] The test of justification requires that the employer acted in a manner that was substantively and procedurally fair. GFL must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Probationary Clause

[26] The First and Second Employment Agreements contained a three month probationary clause at clause 12.3.

[27] The Act makes provision for periods of probation at s 67:

S 67 Probationary arrangements

(1) Where the parties to an employment agreement agree as part of the agreement that an employee will serve a period of probation after the commencement of employment –

(a) The fact of the probation period must be specified in writing in the employment agreement; and

(b) Neither the fact that the probation period is specified or what is specified in respect of it, affects the application of the law relating to unjustifiable dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probation period.

[28] In *Nelson Air Ltd v New Zealand Airline Pilots Association* the Court of Appeal said in relation to probationary periods :

The requirements of that obligation will vary from case to case. Every probationer may be taken to realise that being on trial he or she will be under close and critical assessment and that permanent employment will be assured only if the employer's standards are met. The employer for its part may not be simply a critical observer, but must be ready to point out

shortcomings to advise about any necessary improvement and to warn of the likely consequences if its expectations are not met. Because the objective is always that the trial will be a success, not a failure, both parties must contribute to its attainment. If it becomes apparent to the employer, judging

fairly and reasonably, that the trial is not a success, the employee is entitled to fair warning before the end of the probationary period that the employment will then be coming to an end. 1

[29] GFL's evidence was that Mr Horan had been given verbal warnings for drinking on duty. Mr Horan denied this and said that the only occasion when he had a drink whilst on duty was on the occasion of Mr Verma's birthday when he (Mr Verma) had been in the bar celebrating with the employees.

[30] GFL also claimed that Mr Horan had been admonished in regard to smoking behind the bar. Mr Horan said that this issue had been addressed only in a group meeting for all the employees.

[31] I find no evidence in support of Mr Horan being made aware or warned during his employment of any shortcomings in his performance, or that his employment was in jeopardy in order that he could make the necessary improvements prior to dismissal.

[32] I do not find that the dismissal of Mr Horan is excluded by virtue of the probationary clause. Therefore I proceed to examine that dismissal in accordance with the requirements of s 103A of the Act.

Substantive Justification

[33] Mr Horan was initially employed as a Bartender. As a result of the discussion with Mr Verma and Mr Brar on 5 March 2018 he had been offered the position of Bar Manager and understood that the position would become effective after he had obtained a LCQ which entitled him to hold a liquor licence.

1 [1994] 2 ERNZ 665 at page 669

[34] This understanding was reinforced by the statement on page 12 of the Second Employment Agreement: **Review to $20 p/h once DM is obtained. * 4-6 week review."*

[35] I find the statement in the Second Employment Agreement to support Mr Horan's understanding from the discussion held with Mr Verma and Mr Brar on 5 March 2018 that the position of Bar Manager was dependent on his obtaining a LCQ which was expected to take between 4 to 6 weeks, at which time his salary would be increased to $20.00 per hour..

[36] I also find it significant that the salary in both the First and the Second Employment Agreement detail the position held by Mr Horan as bar tender at a salary of $19.00 per hour, there is no increase despite the purported change in position from Bartender to Bar Manager on 5 March 2018.

[37] Prior to the end of the period, Mr Verma informed Mr Horan that his employment was being terminated on the two grounds as set out in the letter dated 3 March 2018 and signed by Mr Verma.

[38] The first ground was Mr Horan's inability to provide a manager's certificate.

[39] I accept that the requirement that Mr Horan obtain a manager's certificate or LCQ was to occur without a period of 4 to 6 weeks. That would make the due expiry date of the period for obtaining it to be 16 March 2018, which date had not occurred either when Mr Horan successfully obtained a LCQ qualification, or by 3 April 2018 when he was notified that his employment was terminated..

[40] The second ground was Mr Horan's poor performance. There is no evidence of any formal disciplinary procedure being undertaken in respect of Mr Horan's performance, or that Mr Horan received any written warnings as a result of such a process.

[41] I find that GFL had no substantive justification for dismissing Mr Horan.

Procedural Justification

[42] In accordance with s 103A (3) of the Act, GFL was required to carry out a fair investigation and follow a fair procedure. The Authority must also consider whether:

(a) ... the employer sufficiently investigated the allegations against the employee ...
(b) ... the employer raised the concerns that the employer had with the employee ...
(c) ...the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...

(d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

[43] I consider that that there were major rather than minor flaws in the procedure adopted in terminating Mr Horan's employment namely:

- Mr Horan was not provided with details of any allegations against him;
- There is no evidence that GFL undertook any investigation into the allegations against Mr Horan;
- The performance concerns were not raised with Mr Horan prior to 3 April 2018;
- Mr Horan was not provided with a reasonable opportunity to respond to the allegations; and
- There is no evidence that GFL genuinely considered any explanation given to the allegations by Mr Horan.

[44] In addition there was no meeting with Mr Horan prior to the announcement of his dismissal by Mr Verma to discuss the allegations, nor was he informed that he would be entitled to be accompanied by a support person or representative at such a meeting.

[45] I find that the dismissal of Mr Horan fell short of the requirements of procedural fairness and the concept of natural justice.

[46] I determine that Mr Horan was unjustifiably dismissed by GFL.

Is Mr Horan owed unpaid wages or holiday pay by GFL?

(i) Unpaid wages
[47] The First Employment Agreement issued to Mr Horan specified at page 16 that he would be paid $19.00 per hour, and his weekly hours of work were 35.

[48] The Second Employment Agreement also specified at page 12 that he would be paid

$19.00 per hour, and his weekly hours of work were 35.

[49] Mr Horan was employed for a period of 9 weeks during which he should have been received a total of $5,985.00 gross (calculated as $19.00 x 35 hours x $665.00 per week x 9).

[50] During that 9 week period the hours worked per week by Mr Horan fluctuated and resulted in a gross payment to Mr Horan of $6,257.36 as set out in the wage records provided by GFL to the Authority.

[51] The wage records also set out a calculation of the net payment due to Mr Horan following the deduction of PAYE. The payments as calculated and set out in wage records correlate with the amounts paid to Mr Horan in the GFL bank statements and verified as received in Mr Horan's bank statements.

[52] I determine that Mr Horan is not owed unpaid wages by GFL.

(ii) Holiday Pay

[53] Mr Horan had not completed 12 months continuous service at the termination of his employment on 7 April 2018. Employees who have not completed 12 months continuous employment are covered by s 23 of the HA which mandates that the employer must pay the employees holiday pay at the rate of 8% of the employee's gross earnings.

[54] During the period of his employment Mr Horan's gross earnings were $6,257.36. 8% of that amount is $500.59 which Mr Horan should have received at the termination of his employment, however Mr Horan has been paid $424.88 in respect of holiday pay, resulting in a shortfall of $75.71 in payment.

[55] I determine that Mr Horan is owed $75.71 as holiday pay.

Remedies

Reimbursement of Lost Wages

> [56] Mr Horan obtained alternative employment on 23 April 2018. He was unemployed for two weeks from 7 April 2018.
>
> [57] Employees are under a duty to mitigate their loss following the unjustifiable termination of their employment. Mr Horan has provided evidence that he actively applied for some positions, however this process was made more difficult by the fact that he disclosed when questioned by prospective employers that he had been terminated from his previous position.
>
> [58] I order that GFL is to pay Mr Horan the sum of $1,330.00 gross as lost wages (calculated as $19.00 per hour x 35 hours per week x 2 weeks) pursuant to s 28 (2) of the Employment Relations Act 2000 (the Act).
>
> [59] Mr Horan did not receive his full entitlement to holiday pay upon the termination of his employment.
>
> [60] I order that GFL pay to Mr Horan the sum of $75.71 gross as unpaid holiday pay pursuant to s 23(2) of the Holidays Act 2003.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

> [61] Mr Horan is also entitled to compensation for humiliation and distress. I accept that he experienced significant upset and distress at the loss of his job, and financial embarrassment at having to become financially dependent for a short period of time on family and his girlfriend.
>
> [62] However I accept GFL's evidence that the news of Mr Horan's dismissal did not take place within hearing of customers or employee.
>
> [63] I order GFL to pay Mr Horan the sum of $3,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123(1) (c) (i) of the Act.

Contribution

> [64] I have considered the matter of contribution as I am required to do under s124 of the Act. Mr Horan did not contribute to the situation which resulted in his dismissal and there is to be no reduction in the remedies awarded.

Penalties

> [65] Mr Horan is seeking penalties in respect to the non-payment of his full entitlement to holiday pay. A penalty is appropriate in this case because GFL breached a basic statutory requirement. There is a public interest in not only punishing GFL but deterring other employers from similar behaviour.
>
> [66] In *Ford v Nicolson* Chief Judge Inglis identified the mandatory considerations which must apply when assessing penalties having their basis in the statutory considerations of s 133A of the Act and *Preet*2 . This gives rise to a four step process as set out in the judgment:

Step 1 – the number and nature of the breaches. I read *Preet* Step 1 as involving four sub-steps:

1. identify the number of breaches;

2 *Boorsham v Preet PVT Ltd [2016] NZEmpC 143*

2. identify the nature of each breach (for example, a breach under the Holidays Act; Minimum Wages Act etc);
3. identify the maximum penalty for each of the identified breaches; and
4. consider whether "global" penalties should apply ("globalisation" might be considered at this stage and "at all or at some stages of this stepped

approach").

Step 2 – establish a provisional starting point by assessing the severity of the breach in each case. Consider both aggravating and mitigating factors.

Step 3 – consider the means and ability of the person in breach to pay the provisional penalty arrived at in step 2.

Step 4 – apply the proportionality or totality test to ensure that the amount of each final penalty is just in all of the circumstances. This, the Court said, required standing back and assessing whether the final penalty was proportionate to the original amount in issue and whether the final penalty was likely to be paid, if ordered, against the employer.3

Step 1

> [67] Step 1 involves assessing the number and nature of the breaches in order to establish a starting point.
>
> [68] I find that there was one breach under s 23 of the Holidays Act 2003. The maximum penalty for the breach is $20,000.00. There is only one breach so it is not necessary to consider globalisation.

Step2

> [69] Step 2 involves assessing the severity of the breach.
>
> [70] GFL operates a successful business and can be deemed to fully understand its responsibilities towards ensuring its employees are properly remunerated. Mr Horan did not receive his full entitlement to holiday pay upon termination which caused him financial embarrassment.
>
> [71] However I note that GFL, which engaged an accountant to ensure that its contractual payments to its employees, including Mr Horan, were met, had ensured Mr Horan was paid his holiday entitlement upon termination of his employment, albeit less a 15% shortfall. I find that this indicates that the shortfall was inadvertent rather than deliberately calculated to deprive Mr Horan of his full entitlement to holiday pay..
>
> [72] I consider that the starting point for the breach to be $2,000.00.

3 *Nicholson v Ford* [2018] NZEmpC 132 at [19]

Step 3

> [73] Step 2 involves considering the means of GFL to pay the penalty.
>
> [74] There is no evidence before the Authority of GFL's ability to pay these provisional penalties. There is no information available outlining GFL's financial position, and it is not clear what, if any, cash or assets GFL may have.
>
> [75] In the absence of evidence about GFL's ability to pay the penalties, there is no adjustment made to the provisional penalties at this stage of the process.

Step 4

> [76] Step 4 involves the application of a proportionality test. In *Preet* the Court said that the penalties imposed should be proportionate to the amount of money unlawfully withheld. Additionally that the final penalties set should not be at such a level that the liable employer either has an incentive for not paying or cannot pay them. 4
>
> [77] The overall amount of penalties assessed at step 2 is $2,000.00. The total amount owed to Mr Horan as holiday pay is $75, 71 gross.
>
> [78] I consider that a penalty of $2,000.00 is disproportionate to the amount owed.
>
> [79] Balancing the need to avoid setting the level of penalty at such a level that there would be a significant risk of non-payment by GFL against the public interest to impose a penalty which acts a deterrent to others who may contemplate engaging in such behaviour.5, I consider in all the circumstances that applying a penalty of 50% of total breach is appropriate.
>
> [80] It is Mr Horan who alerted the Authority to the statutory breach in order that it should be addressed. Having regard to the fact that Mr Horan has already been compensated in part for the financial embarrassment he suffered as a result of the dismissal, I consider it appropriate that the major part of the penalty be paid to the Crown.
>
> [81] Accordingly GFL is ordered to a penalty of $1,000.00 for its breach of s 23 of the Holidays Act 2003, of which 20% is to be paid to Mr Horan and 80% to the MBIE Trust Account.

Penalty against Mr Brar and Mr Verma for aiding and abetting

4 Preet at [190] and [191]

5 *Tan v Yang and Zhang* [2014] NZEmpC 65

> [82] Mr Horan is also seeking a penalty against Mr Brar and Mr Verma personally for aiding and abetting the breach of s 23 of the Holidays Act 2003.
>
> [83] In accordance with s 134A of the Act a person who: "*incites, instigates, aids or abets any breach of an employment agreement*" is liable to a penalty.
>
> [84] As observed GFL engaged an accountancy firm to ensure that its contractual payments to its employees, including Mr Horan, were met. I have already found that the breach of a 23 of the Holidays Act was inadvertent rather than deliberate, and I find no evidence that Mr Brar and/or Mr Verma aided or abetted a deliberate breach of the contractual and statutory requirement to pay holiday pay to Mr Horan.
>
> [85] Accordingly I make no order for a penalty payment against Mr Brar and Mr Verma pursuant to s 134 of the Act.

Costs

> [86] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.
>
> [87] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence, including payment..

Eleanor Robinson

Member of the Employment Relations Authority
