New Zealand Employment Relations Authority Decisions

Iles v Dry Run Holdings Ltd WA 147/06 (Wellington) [2006] NZERA 832 (27 October 2006)

Last Updated: 6 December 2021

Determination Number: WA 147/06
File Number: 5028633

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON OFFICE

BETWEEN Michael Iles (Applicant)

AND Dry Run Holdings Limited (Respondent)

REPRESENTATIVES Bill Bevan for Applicant

No appearance by or for Respondent

MEMBER OF AUTHORITY G J Wood

INVESTIGATION MEETING

19 October 2006

DATE OF DETERMINATION

27 October 2006

DETERMINATION OF THE AUTHORITY

Background

1. Mr Iles was employed in a Pizza Haven Dial a Pizza store. From a legal perspective it has been very difficult for Mr Iles, his advisers, and the Authority, to ascertain who in fact Mr Iles' employer was, because his signed individual employment agreement was between him and an entity simply called "Pizza Haven". Clearly, Pizza Haven is not a legal entity and hence the difficulties for all concerned in ascertaining who Mr Iles' employer was.
2. With the assistance of the Porirua Community Law Centre, Mr Iles has been able to show that his employer at the time of his termination of his employment was Haven Developments Limited, which has since changed its name (back) to Dry Run Holdings Limited. While a New Zealand registered company, this company is run in Australia by the Christou family, who apparently also run the Pizza Haven business in Australia.

3. As a matter of law, employers are required, subject to penalty, to provide employees with a copy of any intended agreement, advise employees that they are entitled to seek independent advice and give them an opportunity to do so.

Furthermore, the terms of an employment agreement must be in writing. Where an employer fails to describe the actual name of the employer but instead relies, for instance, on a trading name, that is clearly a breach of good faith, as it is likely to be misleading. Employers who indulge in such lax behaviour may therefore leave themselves open under both of these provisions to a penalty.

The Facts

4. The facts are reasonably clear on the basis of my investigation. Michael Iles worked under the Pizza Haven banner from November 1999. Mr Iles became aware from September 2004 that the previous owner/operator had sold out to the Pizza Haven franchisor, and that his wages were now being paid by the company Haven Developments Limited, now known as Dry Run Holdings Limited.
5. Mr Iles subsequently found out, in late January 2005, via the grapevine, that the Pizza Haven franchise in New Zealand was being sold to another pizza franchise operation, Domino's.
6. In February Mr Iles approached his Pizza Haven manager and was told he would need to apply for work with Domino's and that he would be recommended by her for such work.
7. On 4 March representatives of Domino's arrived at the Pizza Haven store Mr Iles worked at and told the staff that the store would close in two days time and that staff could apply for jobs with it on the following Monday.
8. Despite the requirement in the employment agreement for two weeks' notice of termination of employment, management of Pizza Haven had made no contact with the staff at all to explain what would be happening to them or to give them any notice.
9. In actual fact, Mr Iles' employment was terminated on 6 March. He was not paid the sum of $79 gross owing for his last week's work, nor any pay in lieu of notice.

Employer's Defence

10. Mr Christou, the Director/Secretary of Dry Run Holdings Limited, was unable to attend the meeting and indicated that he would accept the decision of the Authority. He wrote to the Authority explaining, consistent with Dry Run Holdings' statement in reply, that it was a condition of the sale and purchase agreement between it and "Domino Pizzas NZ" that it would take over responsibility for all of Dry Run Holdings' employees on the sale of the business and that it had to keep the sale confidential.
11. Unfortunately, no evidence was provided of the sale and purchase agreement to substantiate this claim. Furthermore, it is trite law that an employer can not transfer employees into the employment of a new employer without the workers' specific approval, which was not sought or gained in this case, perhaps because Domino's intended to close down the store at which Mr Iles worked.
12. Because of the nature of Dry Run Holdings' defence and the fact that the Directors were based in Australia, together with the time taken to ascertain the real employer of Mr Iles, I determined that it would not have been productive to direct mediation. Therefore an investigation and determination of the Authority was necessary.

Determination

13. Clearly, Dry Run Holdings Limited dismissed Mr Iles. That was the effect of the sale of the business of Dry Run Holdings, namely the Pizza Haven franchise that Mr Iles worked in, to Domino's. Furthermore, given that Dominos were closing the store, I accept that Mr Iles acted reasonably in declining to apply for other positions with Dominos, which were all a significant distance away from his former place of work.
14. Section 4(1A) of the Employment Relations Act makes it clear that an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of its employees, to provide to the employees effective access to information and an opportunity to comment before such decisions are made. As the recent judgment of *Simpsons Farms Ltd v. Aberhart* (unreported, Coglan CJ, AC52/06, 14 September 2006), makes clear, this means that consultation is necessary in any redundancy situation.

15. It follows that Mr Iles was unjustifiably disadvantaged in his employment because of the failure to consult with him and the failure to pay him notice required under his employment agreement.
16. On the other hand I find, in accordance with *Simpsons Farms,* that this was a genuine redundancy, as the whole of the business of the employer was effectively sold off and therefore there can not be said to have been an unjustifiable dismissal. It therefore follows that ongoing lost wages can not be claimed. Nor can Mr Iles be compensated for the loss of his job, but rather for the way the failure to consult with him and give notice impacted on him.
17. In this regard, I accept Mr Iles' evidence about how the closing of the store took place with virtually with no notice to him and came as a real shock, particularly as he was not even paid the notice he was entitled to under his employment agreement. I therefore accept that his claim for $3,500 compensation is a reasonable one and award it in full.
18. I also find that Mr Iles should have been given two weeks' notice as well as his outstanding wages, which total approximately $840 gross.
19. Because of the assistance he has received from the Porirua Community Law Centre, the only expenses Mr Iles has incurred in this matter are the $70 filing fee, which should be met by Dry Run Holdings Limited, given Mr Iles' success in this claim.

20. I therefore order the respondent, Dry Run Holdings Limited, to pay to the applicant, Michael Iles, the following sums:
    (a) $3,500 in compensation under s.123(1)(c)(i);
    (b) $840 gross in unpaid wages;
    (c) $70 in expenses.

G J Wood

Member of the Employment Relations Authority
