

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 629
3153541

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| BETWEEN | GUY JACOBSON Applicant |
| AND | NICOLE LISA AHERN First Respondent |
| AND | EGN LIMITED Second Respondent |

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|--------------------------|---------------------------------------------------------------------------------------|
| Member of Authority: | Andrew Gane |
| Representatives: | David Fleming, counsel for the Applicant Ginrick Credo, counsel for the Respondent |
| Investigation Meeting: | 13 June 2023 at Auckland |
| Submissions received: | 22 June 2023 |
| Other material received: | 25 July 2023 |
| Determination: | 25 October 2023 |

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Guy Jacobson was employed as the General Manager for “Cuba Libre”, a bar and restaurant owned by EGN limited (EGN) on 20 January 2018. His employment with EGN ceased on 14 January 2021.

[2] Mr Jacobson claims:

- (a) he was unjustifiably disadvantaged in his employment in that the EGN subjected him to unfair and unreasonable treatment throughout his employment. He claims he was not paid correctly in accordance with statutory obligations and the terms and conditions of his employment;

- (b) he was unjustifiably disadvantaged in his employment because EGN failed to act as a fair and reasonable employer when subjecting him to an investigation process;
- (c) he was unjustifiably dismissed; and,
- (d) EGN breached its obligations of good faith owed to him.

[3] Mr Jacobson seeks compensation for his personal grievances including lost remuneration arising from his unjustified dismissal. He also seeks wage arrears for the incorrect payment of wages, penalties for breaches of minimum employment standards by EGN and costs.

[4] Mr Jacobson also claims Ms Ahern is a person involved in EGN's breaches of employment standards and seeks leave of the Authority to recover against monies awarded EGN from her to the extent EGN is unable to pay.¹

[5] EGN and Ms Ahern do not agree that Mr Jacobson was unjustifiably dismissed or unjustifiably disadvantaged. EGN says Mr Jacobson was justifiably dismissed from his position for serious misconduct.

[6] Ms Ahern denies being a person involved in a breach of employment standards.

[7] EGN counterclaims that Mr Jacobson breached the terms of his individual employment agreement in a manner that caused losses to it and claims damages in respect of this.

The Authority's Investigation

[8] I investigated Mr Jacobson's claims by receiving written statements and other documents from Mr Jacobson and former work colleagues, Enchante Chang, Richard Clark and Emily Perkins. For EGN I received written statements and supporting documents from Nikki Ahern, sole director and shareholder of EGN, and Patrick Allen and Joshua Gair, former employees of EGN. At the investigation meeting on 13 June 2023, I heard evidence from witnesses who answered questions asked by myself and the parties' representatives.

¹ Employment Relations Act 2000, s 142Y.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. I have not recorded all the evidence and submissions received. In determining this matter, I have carefully considered all the material, including all the evidence by the parties and their submissions.

Issues

[10] The issues for investigation and determination are:

- (a) whether Mr Jacobson has personal grievances for unjustifiable disadvantage by EGN's actions?;
- (b) whether Mr Jacobson has a personal grievance for unjustifiable dismissal?;
- (c) if Mr Jacobson has a personal grievance or grievances, what remedies should be awarded, considering:
 - i. reimbursement of lost wages under s123(1)(b) of the Act (subject to evidence of reasonable endeavours to mitigate his loss); and
 - ii. compensation under s123(1)(c)(i) of the Act.
- (d) are there unpaid entitlements owing to Mr Jacobson for wage arrears and/or holiday pay?;
- (e) whether leave should be granted for monies owed by EGN to be recovered from Ms Ahern, if and to the extent that EGN itself is unable to make payment?;
- (f) if a breach of employment standards is established are penalties warranted?;
- (g) did Mr Jacobson breach the terms of his IEA in a manner that caused losses to EGN, and if so, what damages should be awarded to EGN in respect of this?; and
- (h) should either party contribute the cost of representation of the other party?

Background

[11] The original Cuba Libre, a bar and restaurant business based in Auckland, was owned by Mr Jacobson and Mr Chang in 2015. In 2017 this business closed.

[12] On 18 January 2018 Ms Ahern incorporated the company EGN. It was called EGN to incorporate the initials of the first names of Mr Chan, Mr Jacobson and Ms Ahern who were to be the joint owners. A new version of Cuba Libre was to be re-established at new premises and the ownership transferred to EGN. Ms Ahern was the sole director and shareholder of EGN.

[13] There was an informal arrangement that Ms Ahern would initially invest \$70,000 into EGN. Mr Jacobson would then become a 50% shareholder, his contribution would be working in the business, and only drawing a lower wage rate for someone of his experience.

[14] Mr Chang was effectively going to be given shares by Mr Jacobson, balancing out a debt owed from the previous venture. However, it was agreed between the parties that it would be best to start with the company in Ms Ahern's name only, because the first Cuba Libre had gone under owing money to suppliers, and they wanted to avoid issues with creditors when setting up new accounts.

[15] EGN entered a lease for the premises of the new bar in January 2018. There was a large amount of refurbishing work that needed to be done to get the premises ready for opening.

[16] Mr Jacobson signed an individual employment agreement (IEA) as manager of Cuba Libre with EGN on 18 January 2018 and commenced work on 20 January 2018. The IEA stipulated his pay was \$21.00 an hour gross and his hours of work were 40 hours per week. An informal agreement between EGN and Mr Jacobson provided that Mr Jacobson would only be paid for 20 hours a week while the business was being set up.

[17] To help keep the setup costs down, Mr Jacobson was doing some building and decorating work. He and a friend tiled the bathrooms. Mr Jacobson made the tables himself. This work during the pre-trading period was to be Mr Jacobson's contribution to starting the business to match Ms Ahern's \$70,000 investment.

[18] Both Ms Ahern and Mr Jacobson were excited to be starting the new Cuba Libre business venture. The venue was meant to be somewhere that customers would be paying premium prices for quality beverages and food. To achieve this the venue needed to have the right environment as well as the right equipment and fittings. They both wanted the business venture to be a success.

[19] Mr Jacobson as manager was to be responsible for the day-to-day operations of the Cuba Libre business. This included staffing decisions, staff roster, wage and time records, running services, stock management, and front-of-house service work. Mr Jacobson said he also ended up doing a lot of the marketing and social media work. Ms Ahern, although experienced in business was inexperienced in the hospitality trade and her role was more in the background to look after the accounts.

[20] Unfortunately, there were a number of delays in getting the bar started, including an opposed liquor licence application and building consent requirements. During this time the business was accumulating debt, including building and refurbishment costs, and rental costs. There was no income coming into the business. This was causing considerable financial stress on the business and Ms Ahern had to inject further capital to keep the business afloat.

[21] At this time Mr Jacobson was living with Ms Ahern and she was supporting him. Mr Jacobson was in debt, owed rent on his previous dwellings and had nowhere to live. Ms Ahern was also financially contributing to paying his debt.

What happened

[22] Cuba Libre did not begin trading until 21 July 2018, approximately 6 months after the lease was signed.

[23] When Cuba Libre started trading, Mr Jacobson asked Ms Ahern to transfer to him the 50 per cent shareholding in EGN as arranged. Ms Ahern advised Mr Jacobson that she could not give him a 50 per cent shareholding as he had not worked off and paid back his share of the investment as had been agreed. When her investment was reduced to \$70,000, she would transfer him a 50 per cent shareholding. Discussions between Mr Jacobson and Ms Ahern continued regarding the transfer of shares throughout August 2018, to November 2018. This was an ongoing issue of concern to Mr Jacobson.

[24] During the first month of trading, Cuba Libre made approximately \$40,000. However, outgoings were approximately \$80,000.

[25] The following month, Cuba Libre again made approximately \$40,000. However, the outgoings were \$60,000. Cuba Libre was not making enough to pay its debts with the wages alone amounting to approximately \$9,000 per week.

[26] The agreement for Ms Ahern to transfer shares to Mr Jacobson was never fulfilled as Ms Ahern's investment into EGN had ballooned to \$150,000.

[27] By August 2018 the relationship between Ms Ahern and Mr Jacobson had deteriorated. This and poor communication issues led to there being dysfunctional management practices in the running of Cuba Libre, which had a detrimental effect on the business.

Meeting with business consultants

[28] In September 2018 Ms Ahern engaged two business consultants. The consultants called a meeting on 11 September 2018 together with Ms Ahern, Mr Jacobson and Mr Chang. After the meeting and investigating Cuba Libre business practices, the business consultants reported that during the first 6 weeks of trading, Cuba Libre had accumulated losses of more than \$100,000 and made a number of recommendations to try and get the business back on track. Several recommendations concerned alleged mismanagement of Cuba Libre.

[29] Ms Ahern wrote to Mr Jacobson on the 30 September 2018 suggesting a further meeting to get the business back on track. She also included the business consultants report and recommendations.

[30] In the letter she raised her concerns about how Mr Jacobson was running Cuba Libre. These included his alleged failure to carry out many aspects of his general managers role, excessive spending, poor stock taking systems and poor staff management. She also raised code of conduct concerns, including relationships with key staff and unprofessional behaviour in front of customers including use of profane language. Additionally, she raised legal concerns that he was failing to comply with his licencing requirements for the bar.

13 November 2018 meeting

[31] By November 2018 the relationship between Ms Ahern and Mr Jacobson had broken down and Ms Ahern had asked Mr Jacobson to leave her house. For a number of reasons, including a lack of engagement between Mr Jacobson and Ms Ahern, the follow up meeting was delayed until 13 November 2018.

[32] At the 13 November 2018 meeting Ms Ahern intended to discuss issues raised in the 30 September 2018 letter with Mr Jacobson, however, the meeting quickly deteriorated when Mr Jacobson refused to engage. Ms Ahern raised performance issues, and Mr Jacobson allegedly started verbally abusing Ms Ahern. Mr Jacobson accepted the meeting became heated and that he may have sworn at Ms Ahern and threatened her verbally. The meeting ended abruptly without resolution of any issues.

[33] Ms Ahern stated that by December 2018 matters had escalated in terms of Mr Jacobson's behaviour towards her. Ms Ahern did not feel safe around him. The business relationship had deteriorated to being dysfunctional.

December 2018 meeting

[34] Ms Ahern engaged legal counsel who advised her not to return to Cuba Libre on personal safety grounds. On 21 December 2018, Ms Ahern's legal counsel invited Mr Jacobson to an external disciplinary investigation meeting to be held on 24 December 2018. The letter stated that the conduct proposed to be discussed could constitute serious misconduct, and dismissal could be a consequence of such a finding.

[35] On the evening of 23 December 2018 Mr Jacobson held an end of year party at Cuba Libre to thank staff, suppliers and patrons of Cuba Libre. Ms Ahern was not invited.

[36] At about 5.30 am on 24 December 2018, Ms Ahern received complaints of noise coming from the Cuba Libre. Further, she was notified that Mr Jacobson was present and appeared to be "under the influence". She texted Mr Jacobson to leave the Cuba Libre.

[37] When Ms Ahern went to the Cuba Libre around 9 am she found Mr Jacobson still there. He appeared high and intoxicated. It was obvious Mr Jacobson had held a party in the bar.

[38] Ms Ahern asked Mr Jacobson to leave. Mr Jacobson responded yelling at her to "get the fuck out." Ms Ahern called the Police to remove Mr Jacobson from the premises, however, he left before the police arrived.

[39] Mr Jacobson did not attend the disciplinary investigation meeting to be held on 24 December 2018.

Dismissal

[40] On 21 December 2018 Ms Ahern invited Mr Jacobson to an external disciplinary investigation meeting to be held on 27 December 2018. The letter repeated the issues raised in the 21 December 2018 letter, as well as raising the further concerns related to Mr Jacobson's conduct on 24 December 2018 at Cuba Libre, which could amount to further serious misconduct. The letter further advised Mr Jacobson that he was suspended, on pay, and trespassed Mr Jacobson from Cuba Libre, until such time that matters could be resolved.

[41] At the 27 December 2018 Mr Jacobson attended the meeting with his lawyer and support person. EGN followed the disciplinary process set out in the IEA. Mr Jacobson was advised at the meeting about the specific allegations, and the seriousness of the situation. He was provided an opportunity to give an explanation as to what had happened. He did not deny the allegations and simply responded that it was Ms Ahern's fault that he had reacted to her in that way. He showed no remorse and did not make any suggestions as to how the matters between them could resolved.

[42] Ms Ahern considered Mr Jacobson's response in private with her lawyer.

[43] Returning to the meeting Ms Ahern advised Mr Jacobson that he was being summarily dismissed for serious misconduct.

[44] On 28 December 2018, EGN confirmed by letter, that Mr Jacobson had been dismissed for serious misconduct.

Unjustifiable action causing disadvantage.

[45] Section 103(1)(b) of the Act, states that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[46] Mr Jacobson alleges the EGN failed to keep his disciplinary process confidential, suspended him without following any due process and issued him with a trespass notice as well as changing the locks. He says these actions were unjustified and caused disadvantage to his employment.

[47] I find that the given the lack of engagement by Mr Jacobson in the disciplinary process and his aggravated intimidatory and threatening behaviour towards Ms Ahern justified EGN's actions in suspending him and trespassing him from Cuba Libre, without consulting him. The changing of the locks was of no consequence.

[48] Mr Jacobson claims that he was exploited by EGN. He said he worked excess of 60 hours per week. EGN did not pay him based on the hourly rates set out in the IEA and that he was paid a fixed amount of initially 20 hours, regardless of the number of hours he worked.

[49] I do find Mr Jacobson was disadvantaged by EGN's unjustifiable actions in failing to pay him his contractual entitlement as specified in the IEA and by EGN failing to correctly pay his public holiday entitlements when they were due. I understand the outstanding holiday pay has since been paid.

Was Mr Jacobson unjustifiably dismissed?

[50] Mr Jacobson claims he was unjustifiably dismissed due to a number of factors. He said the outcome of the disciplinary investigation was predetermined by Ms Ahern

[51] Mr Jacobson's states his conduct around 13 November 2018 needs to be seen in the context of the wider relationship between the parties. Mr Jacobson states that the breakdown of his relationship with Ms Ahern in September 2018, was the reason for the dismissal.

[52] I find the disciplinary process undertaken by EGN was acceptable and aligned with the disciplinary process set out in the IEA. Mr Jacobson had been made aware of the alleged misconduct and advised of the seriousness of the situation and that dismissal could be a possible outcome. He was legally represented and given an opportunity to respond. He did not deny the allegations, but stated it was Ms Ahern's fault that he had behaved in the way he had. He showed no remorse and did not make any suggestion as to how the matters could be resolved.

[53] My investigation is not a re-hearing of the disciplinary processes and therefore replacing the outcome with my own findings on what occurred and any sanction that has been imposed. Rather I must objectively consider whether the dismissal within the context of s 103(A) of the Act. My conclusion is, given the evidence, a fair and reasonable employer in this disciplinary process could have concluded that Mr Jacobson's behaviour amounted to serious misconduct and that dismissal was an appropriate outcome.

[54] In the circumstances I do not find that Mr Jacobson was unjustifiably dismissed. I find the dismissal was as a result of Mr Jacobson's serious misconduct and EGN's decision to end his employment was justified.

[55] Mr Jacobson's personal grievance for unjustified dismissal is not made out and is unsuccessful.

Remedies for the unjustified action personal grievance

[56] As Mr Jacobson has been successful with his unjustified action personal grievance, I turn to consider what remedies he is entitled to.

[57] Mr Jacobson did not lose any remuneration because of his personal grievance other than wage arrears, which are addressed below. Therefore, the only remedy he may be entitled to is compensation for humiliation, loss of dignity and injury to feelings.

Compensation for humiliation, loss of dignity and injury to feelings

[58] Mr Jacobson gave evidence about the effects on him of EGN's actions of making him work long hours and not being paid correctly caused him a great deal of stress and left him feeling depressed. Mr Jacobson stated he had suffered mental stress and emotional consequences, and that his reputation has been unfairly tarnished. I accept Mr Jacobson's evidence here.

[59] I determine that an appropriate award to compensate for the effects on him, accepting his evidence, was \$10,000.00.

Contribution

[60] As I have awarded compensation to Mr Jacobson, I must now consider whether Mr Jacobson contributed to the situation that gave rise to his grievances.

[61] Mr Jacobson accepted that contributory conduct must be taken into consideration as and submitted that in the present case any reduction in remedies made on this basis should be of no more than 25% overall.

[62] I find in the circumstances a reduction in compensation is appropriate and reduce the compensation award by 20% (\$2,000). EGN is ordered to pay to Mr Jacobson compensation of \$8,000.00.

Wage arrears

Recovery of contractual entitlement

[63] Mr Jacobson claimed he was owed \$41,580 in wage arrears. Mr Jacobson was not paid for the correct contractual hours during his employment; Mr Jacobson should have been paid \$21.00 an hour for forty hours per week pursuant to the IEA.

[64] Mr Jacobson's evidence was that he did not record all his hours or underreported them, which would lead to EGN not having accurate records, but also the payments to him would be based on the timesheets he submitted.

[65] Mr Jacobson said that due to EGN's failure to provide wage and time records, the onus is on the employer to prove that Mr Jacobson did not work the hours he claims to have; it is not on him to prove that he did.

[66] Section 132 of the Act does not mean that the Authority must accept as proved statements made by the employee about the wages actually paid to the employee and about the hours, days, and time worked by the employee. That is made clear by the reference to the discretionary term "may". Several witnesses said Mr Jacobson was not working the hours he claimed to have worked. Mr Jacobson when asked about this, said he may have been working from home.²

[67] While Mr Jacobson's wages were based on the timesheets he submitted, the evidence overall supports Mr Jacobson's contention that he worked over 20 hours a week.

[68] Despite the alleged "informal" agreement, there is no written variation to Mr Jacobson's IEA reducing his hours of work, therefore, and I find, Mr Jacobson is entitled to be paid for 40 hours per week as set out in his IEA. Mr Jacobson is therefore owed \$21,420. (3 x 40 unpaid hours per week at commencement of employment, plus 45 x 20 unpaid hours per week thereafter, at \$21 per hour = \$2520 + \$18,900 = \$21,420).

² *Rainbow falls Organic Farm Ltd v Rockwell* [2014] NZEmpC 136.

[69] EGN must also pay annual holiday pay of 8%, on the arrears of wages set out above. EGN is to pay Mr Jacobson is \$1,713.6 in holiday pay.³

Breach of minimum standards

[70] The period when Mr Jacobson worked for EGN was covered by two Minimum Wage Orders, the Minimum Wage Order 2017 in respect of the employment to 31 March 2018, and the Minimum Wage Order 2018, in respect of the period from 1 April 2018 onwards.

[71] Total wages paid were approximately \$18,900 gross (at \$420 per week for 45 weeks, including 22 weeks prior to opening and 23 weeks after opening). Minimum wages for the overall period of the employment, based on a 40-hour week, would be \$31,868.55. The difference between what was actually paid, and this amount is \$12,968.55.

[72] I find EGN has breached the Minimum Wage Act 1983.

Whether leave should be granted for monies owed by EGN Ltd to be recovered from Ms Ahern, if and to the extent that EGN itself is unable to make payment.

[73] The definition in s 142W of the Act of a person involved in a breach is broad. It includes those aiding, abetting, counselling or procuring a breach, inducing a breach and being directly or indirectly knowingly concerned in a breach.⁴ With a breach by a company such as EGN directors, may be persons involved in the breach.⁵

[74] Mr Jacobson, as the manager was responsible for providing accurate pay records for EGN to process. He had entered an informal agreement with EGN that he would only be paid for 20 hours a week. Further he stated he did not record all of his hours, which lead to EGN having inaccurate pay records. This contributed to EGN's breach of the Minimum Wage Act.

[75] I am not convinced Ms Ahern was a person who has procured the breach, induced the breach, or been in any way knowingly concerned, or party to the breach. Also, Ms Ahern suffered significant financial loss through the business failure of Cuba Libre. She has lodged with the Authority a statement of means and has limited excess income. In the circumstances I

³ Holidays Act 2003, s 28.

⁴ Employment Relations Act, s 142(1).

⁵ Employment Relations Act, s 142(2) & (3).

decline to exercise my discretion to grant leave under s 142W of the Act to treat Ms Ahern as a person involved in a breach.

Interest

[76] Mr Jacobson can recover interest on his contractual entitlement as set out in paragraphs [68] and [69] above, from the date of termination, being 24 December 2018, until the date of payment.⁶ The order for payment of interest is made under clause 11(1) of Schedule 2 of the Act. Interest is to be calculated by EGN using the Civil Debt Interest Calculator.⁷

Retention of Mr Jacobson's property

[77] On 21 January 2018, Mr Jacobson wrote to the EGN requesting the return of his personal property, including a Fisher pre rinse bench mount. EGN returned some of the property but disputed the ownership of some items. At the investigation meeting the parties undertook to resolve any outstanding property issues. If those issues have not been resolved, then leave is granted to return to the Authority for further directions within 14 days of the date of this determination.

Whether Mr Jacobson breached the terms of the IEA in a manner that caused losses to EGN

[78] A consultant engaged by EGN found that within 6 weeks of opening, EGN had incurred losses of \$100,000 and Ms Ahern's investment had blown out to \$200,000. Ms Ahern alleged the loss was attributed to Mr Jacobson's poor business management skills and that he was in breach of the terms of his IEA.

[79] I find that the cause of Cuba Libre failing was due to some poor business decisions made by senior management during the protracted set up time for Cuba Libre. Cuba Libre was in significant debt when it opened doors and was unable to trade out of that debt. This led to significant financial stress on the business and the breakdown of Ms Ahern and Mr Jacobson's working relationship.

⁶ Holidays Act, s 84.

⁷ <http://www.justice.govt.nz/fines/civil-debt-interest-calculator>.

[80] I do not find Mr Jacobson breached the terms of his IEA in a manner that caused losses to EGN.

Penalties

[81] I have found that EGN's failure to properly pay Mr Jacobson breached the Minimum Wage Act.

[82] When assessing an appropriate level of penalty, I have regard to the principles governing the imposition of a penalty.⁸

[83] Mr Jacobson has been compensated for his losses. The purpose of penalties is to deter, not to compensate. The penalty imposed is to reinforce to EGN and other employers the importance of complying with minimum standards.

[84] Accordingly, I order EGN to pay a penalty amount of \$3,000.00 to the Authority for subsequent transfer to a Crown Bank Account.

Summary of orders

[85] Mr Jacobson was unjustifiably disadvantaged for which remedies have been awarded. His claims for wage arrears have been upheld. Within 28 days of the date of issue of determination EGN must pay Mr Jacobson the following sums:

- (i) Reimbursement of lost wages of \$21,420;
 - (ii) Holiday pay of \$1,713.60; and
 - (iii) Compensation for humiliation, loss of dignity and injury to feelings of \$8,000.
- (b) Interest to Mr Jacobson as calculated pursuant to para [76] above.
- (c) a penalty amount of \$3,000.00 to the Authority for subsequent transfer to a Crown Bank Account.

⁸ Including those set out in *Borsboom v Preet PVT Limited* [2016] NZEmpC 143 and *Nicholson v Ford* [2018] NZEmpC 132.

Costs

[86] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Jacobson may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum EGN would then have 14 days to lodge any reply to memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[87] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless circumstances or factors required an upward or downward adjustment of that tariff.⁹

Andrew Gane
Member of the Employment Relations Authority

⁹For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-payingcost.