

**Attention is drawn to  
the order prohibiting  
publication of certain  
information in this  
Determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 532  
3136846

BETWEEN	GLEN KEIGHRAN Applicant
AND	KENSINGTON TAVERN LIMITED Respondent

Member of Authority: Andrew Gane

Representatives: Applicant in person  
David Reeves, counsel for the Respondent

Investigation Meeting: 27 April 2022 at Auckland

Submissions and other: 20 May 2022  
material received:

Determination: 14 October 2022

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1] KTL sought a non-publication order over any information identifying WMK. This was not opposed. I am satisfied it is appropriate to make an order under clause 10(1) of the second schedule of the Employment Relations Act 2000 (the Act) that any information identifying WMK prohibited from publication.

## **Employment relationship problem**

[2] Glen Keighran claims he was unjustifiably disadvantaged and unjustifiably dismissed from his employment with Kensington Tavern Limited (KTL). He seeks wage arrears, compensation, as well as reimbursement of legal costs.

[2] Mr Keighran also sought penalties against KTL for breaches of good faith, and failure to provide a signed copy of his individual employment agreement (IEA) and payslips under the Act.

[3] KTL does not agree that it constructively dismissed Mr Keighran or that he suffered an unjustified disadvantage. KTL also denies unlawfully making deductions from his wages or that it has committed breaches of the Act alleged.

## **The Authority's investigation**

[6] During a case management conference (CMC) on 2 February 2022, the matter was set down for an investigation meeting from 6 May 2022. A second CMC was convened on 14 April 2022 to address evidential issues. During which it was agreed with the parties that an extra day would be required to investigate this employment relationship problem. I directed that the investigation meeting was brought forward to 5 May 2022 and set down for two days.

[8] During the investigation meeting, I heard evidence from Mr Keighran. For KTL I heard evidence from the Manager Ms McLean-Woods, head chef, Lorr Ramage and former staff member Rose Gallaher.

[9] As permitted by s 174E of 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. It has not recorded all evidence and submissions received. In determining this matter, I have carefully considered all the material before it, including all the evidence by the parties and their submissions. With the concurrence of the Chief of the Authority, this determination has been issued outside the timeframe set out in s 174C(3)(b) of the Act.

## **Issues**

[10] The issues for investigation and determination were:

- (i) Was Mr Keighran unjustifiably disadvantaged by KTL's decision to stand him down?
- (ii) Was Mr Keighran unjustifiably disadvantaged and unjustifiably dismissed by way of constructive dismissal?
- (iii) Did KTL make unlawful deductions from Mr Keighran's wages?
- (iv) Did KTL unjustifiably disadvantage him by unilaterally reducing his hours of work?
- (v) If KTL's actions were found to have unjustifiably disadvantaged and/or dismissed Mr Keighran, what remedies should be awarded considering:
  - (a) lost wages (subject to evidence of reasonable endeavours to mitigate this loss); and
  - (b) interest awarded on any lost wages; and
  - (c) compensation for hurt, humiliation and injury to feelings?
- (vi) If any remedies are awarded, should they be reduced under s 124 of the Act for any blameworthy conduct by Mr Keighran that contributed to the situation giving rise to his grievance?
- (vii) Did actions by KTL breach good faith obligations and if so, should a penalty be imposed under the Act?
- (viii) Did KTL fail to provide Mr Keighran with a signed copy of his IEA?
- (ix) Did KTL fail to provide Mr Keighran with copies of his pay slips?
- (x) Should either party contribute the cost of representation of the other party?

## **Background**

[11] Sandra McLean-Woods and her partner, Craig Woods own KTL. Ms McLean-Woods ran the Kensington Tavern and the attached restaurant "Red Dining", both of which are owned by KTL. In June 2020, the Red Dining was rebranded to "Red Maxi Casa". Initially Red Maxi Casa performed well with increased custom and revenue for KTL.

[12] Mr Keighran signed an IEA with KTL for the position of duty manager on 4 March 2020. The job description included general hospitality duties. The place of work was Red Dining.

[13] Ms McLean-Woods described her and Mr Woods relationship with Mr Keighran as “friendly”. She said they had supported him in some personal matters outside of work, including providing him with a character reference for a personal matter.

[14] On both the 26 June and 2 July 2020, there were incidents involving Mr Keighran distributing free alcohol to staff at the end of a shift. He was invited to a meeting by Ms McLean-Woods on 5 July 2020 to discuss these incidents. Ms McLean-Woods claimed the estimated the consumption of free alcohol during these incidents was around \$500. At the meeting Ms McLean-Woods asked Mr Keighran to reimburse KTL for \$300. Ms McLean-Woods gave evidence that in the meeting Mr Keighran consented to the money coming out of his wages. Ms McLean-Woods also relied on a general deductions clause in Mr Keighran’s IEA. Ms McLean-Woods then deducted \$150 from Mr Keighran’s wages on 6 July and 20 July 2020. Mr Keighran disputed that he consented to the deduction but when questioned, said he would have paid, but wanted to see an itemised account. A draft resignation letter from Mr Keighran dated 20 July 2020 was later found on the work computer.

[15] On 25 July 2020, Mr Keighran emailed Ms McLean-Woods asking for a pay rise. While Ms McLean-Woods stated they were appreciative of Mr Keighran’s efforts in helping the restaurant rebrand, Ms McLean-Woods verbally declined the pay rise on the basis that the business was concerned about the ongoing effects of COVID-19 on the hospitality industry.

[16] On 26 July 2020, there was an external incident involving Mr Keighran and WMK, who was also an employee of KTL. Ms McLean-Woods became aware of this incident on Sunday 2 August 2020.

[17] WMK has several relatives working at the tavern. Ms McLean-Woods had been told that WMK’s relatives were angry at Mr Keighran. Ms McLean-Woods and Mr Woods were concerned about potential conflict at the restaurant if Mr Keighran was present at work. Ms McLean-Woods telephoned Mr Keighran around 2 or 3 August 2020 to discuss the matter. Mr Keighran wanted KTL to ensure his safety at work. As

an employer Ms McLean-Woods was aware of KTL's health and safety obligations to both employees. After discussing the matter with Mr Keighran, Ms McLean-Woods advised him that he could have the Monday shift off and paid, while KTL took some steps to investigate the matter.

[18] Ms McLean-Woods met with WMK and family members on 4 August 2020. They discussed the incident and provided KTL with a formal complaint against Mr Keighran. They also requested that WMK not be rostered on the same shifts. This request put KTL in a difficult position, as both employees worked most shifts during the week.

[19] Ms McLean-Woods contacted Mr Keighran advising KTL's intention to remain impartial to both parties. Ms McLean-Woods advised she thought it best that a temporary change be made to the roster to keep Mr Keighran and WMK separated for a few days. Mr Keighran agreed to performing business related tasks from home for a week before another review of the situation.

[20] On 11 August 2020, Ms McLean-Woods had a further meeting with WMK's family. Ms McLean-Woods explained that Mr Keighran was important to the business and needed to return. WMK and WMK's family advised they would act professionally and keep the restaurant 'a place of work'.

[21] Ms McLean-Woods met with Mr Keighran on 13 August 2020 to discuss the outcome of the meeting with WMK and Mr Keighran's return to the restaurant. After the meeting Mr Keighran texted Ms McLean-Woods saying he was still concerned for his safety and asking for cameras to be installed. He also texted seeking a pay rise.

[22] Ms McLean-Woods arranged for the installation of security cameras at the restaurant. She again verbally declined the request for the pay rise for the same reasons she gave Mr Keighran on 25 July 2020.

[23] Mr Keighran messaged Ms McLean-Woods on 16 August 2020 stating that he was taking two weeks of annual leave. Mr Keighran stated that he required a pay rise, otherwise he would be resigning.

[w]hile I respect your decision to not grant my pay rise, I trust that you will take the opportunity over the next two weeks to reconsider what I put forth as I intend to formally hand in my notice of resignation as the risk to reward ratio is unviable to continue my employment under the current agreement. I believe I could easily attain a

new job with a similar pay rate and none of the associated dramas... If you believe I've done all I can to help your business prosper then I'm happy knowing, you'll accept my resignation without regrets....

[24] Ms McLean-Woods advised she was disappointed at the late notice of leave as it was a busy time for the restaurant, however granted the requested leave as she stated she wanted to support him through what was a difficult time in his life.

[25] Ms McLean-Woods contacted Mr Keighran on 28 August 2020 to find out if he was returning to work. Ms McLean-Woods and Mr Woods met with Mr Keighran that weekend and he agreed to return to work the following Monday, 31 August 2020.

[26] On 31 August 2020, Ms McLean-Woods arranged a pre-shift "ice-breaker" meeting between Mr Keighran and WMK and family. Ms McLean-Woods advised she stayed at work for two hours to support Mr Keighran.

*5 September 2020*

[27] Mr Keighran continued to work four shifts, however Ms McLean-Woods had received feedback from members of staff that Mr Keighran's return to work was not going well. Evidence was heard from some members of staff who were uncomfortable working with Mr Keighran.

[28] On 5 September 2020, Ms McLean-Woods called a pre-shift meeting to discuss rosters for the next week. Prior to the meeting Ms McLean-Woods was told that Mr Keighran was not feeling well and would need to go home early.

[29] Ms McLean-Woods evidence was that it was normal practice to have a pre-shift briefing. She described that night as being particularly stressful as the restaurant was fully booked and understaffed. Present at the meeting were Ms McLean-Woods, Mr Keighran, and two senior staff members.

[30] During the meeting Ms McLean-Woods informed Mr Keighran that there had been some changes implemented while he had been away from the restaurant. She advised Mr Keighran that his position had been made redundant and she would now be responsible for managing the restaurant, he would be responsible for overseeing the bar. Ms McLean-Woods told Mr Keighran he would continue working the same hours and receive the same pay and described it as a sideways move, he remained a manager. The role was consistent with his job description.

[31] After the meeting Mr Keighran advised Ms McLean-Woods he could no longer work Saturdays, due to childcare arrangements. Ms McLean-Woods agreed to the change and the work rosters were amended.

[32] After the meeting Mr Keighran went home sick. He did not return to work. Mr Keighran resigned on 17 September 2020.

*The test for constructive dismissal*

[33] It is well established that an employee may be constructively dismissed by his or her employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

- (a) an employer gives an employee a choice of resigning or being dismissed;
- (b) an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;
- (c) a breach of duty by the employer causes an employee to resign.<sup>1</sup>

[34] Mr Keighran says in his case the second and third categories apply. Firstly, KTL followed a course of conduct with the deliberate and dominant purpose of coercing him to resign, and secondly the 5 September 2020 meeting, which resulted in a breach of the duty of good faith and the demotion in his role as restaurant manager to bar manager. Mr Keighran states that is why he left his role at KTL.

[35] As the resignation is forced the technical resignation is in substance a dismissal. So, while an employee appears to have terminated the employment relationship by walking out, in a constructive dismissal case the real reason for the termination is the employer's conduct, and its actions are treated as tantamount or equivalent to an actual dismissal. Accordingly, there is no substantive difference between an employer who, intending to terminate an employment relationship dismisses the employee and one who by conduct, compels an employee to leave the employment.

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<sup>1</sup> *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ERNZ.

## **The Authority's view of the employment relationship problem**

*Was Mr Keighran unjustifiably disadvantaged by KTL's decision to stand him down?*

[36] Due to the external incident involving Mr Keighran and WMK of 26 July 2020, Ms McLean-Woods was concerned for potential of an altercation at the restaurant if Mr Keighran was present at work with WMK. Ms McLean-Woods sought advice from Hospitality New Zealand, an advisory service for the hospitality industry, to manage the issue.

[37] Mr Keighran alleges he was unjustifiably suspended and argues that he was unlawfully locked out of the workplace.

[38] Mr Keighran wanted KTL to guarantee his safety both at work and travelling to and from work. In the circumstances Ms McLean-Woods thought it best that a temporary change was made to the roster to keep Mr Keighran and WMK separated for at least a few days. Mr Keighran agreed to a temporary change in performing business related tasks from home for a week before another review of the situation.

[39] I find there was no disciplinary process undertaken and Mr Keighran was neither suspended nor locked out of the workplace. Mr Keighran agreed to work from home while KTL put in place steps to manage a serious workplace issue,

[40] At a meeting on 13 August 2020 with Ms McLean-Woods, Mr Keighran again raised concerns regarding his safety at the workplace. On 16 August 2020, Mr Keighran advised Ms McLean-Woods he was taking two weeks leave.

[41] I find that Mr Keighran was not unjustifiably disadvantaged by working from home while KTL endeavoured to resolve some difficult workplace issues in a reasonable and safe manner.

*Did KTL breach the terms of the employment agreement causing Mr Keighran to resign? If so, was Mr Keighran's resignation reasonably foreseeable given the nature of the breaches?*

[42] At the meeting of 5 September 2020, Ms McLean-Woods actions fell well short of what should be expected of a fair and reasonable employer when engaging with an employee. KTL's actions on 5 September through Ms McLean-Woods advising Mr Keighran his position had been made redundant, that she would take over the running of the restaurant and he was no longer managing the restaurant was conduct which was a breach of KTL's good faith obligations to Mr Keighran.

[43] Mr Keighran secretly recorded the 5 September 2020 meeting. Mr Keighran submitted that the events of the 5 September 2020 meeting included multiple unjustified disadvantages by unilaterally reducing his role and subsequent duties. He also claimed he was humiliated in front of other staff members.

[44] The recording of the meeting was played at the investigation meeting. The discussion during the meeting became heated between Ms McLean-Woods and Mr Keighran. Giving evidence, Ms McLean-Woods accepted she had overstepped in the way she informed Mr Keighran of the change in role and lack of consultation. Ms McLean-Woods stated she was tired and stressed having worked 30 previous shifts to cover his absence. She said she was also upset by changes Mr Keighran had made to the restaurant at the previous shift without consultation or seeking her permission. However, in her view she thought she was making the decision in Mr Keighran's interests. She thought that he enjoyed working the bar and from KTL's perspective the change meant he didn't have to go into other areas of the restaurant where WMK was working, reducing the potential for conflict. It was meant to be a temporary solution, a sideways shift.

[45] Ms McLean-Woods gave evidence that she apologised to Mr Keighran after the meeting although Mr Keighran disputed this. Mr Keighran did confirm he spoke with Ms McLean-Woods after the meeting in which he told her he could no longer work Saturdays for family reasons.

[46] Mr Keighran has also claimed for an unjustified disadvantage personal grievance on the basis of the same actions by his employer that led to his alleged constructive dismissal.

[47] Mr Keighran gave evidence that this was a stressful period of his life. Mr Keighran had previously talked about resigning and therefore a resignation in the circumstances was possibly foreseeable. It is noted, however, that during this period Mr Keighran continued working in his secondary employment at Northland Spa & Pool Company.

*Has KTL followed a course of conduct with the deliberate and dominant purpose of coercing Mr Keighran to resign?*

[48] Mr Keighran alleged that KTL deliberately removed him from the Facebook chat, online booking system and roster. Evidence was heard at the investigation meeting from which I made the following findings:

- (a) Ms McLean-Woods did not remove Mr Keighran from the Facebook group chat, another staff member did that. That staff member created a separate group deliberately excluding Mr Keighran and WMK.
- (b) Ms McLean-Woods did not remove Mr Keighran from the online booking programme. Another staff member simply changed one of the portals on the booking system from a label 'GLEN' to 'Maître de'. This was because the Mr Keighran had already been away for two weeks and was taking a further two weeks holiday. In any event, the name change did not affect his access to the booking system.
- (c) Ms McLean-Woods did not remove Mr Keighran's name from the roster. He always remained on the roster. If there was an 'X' next to his name, it simply meant he was "off" or on leave.

[49] I find that KTL did not engage in a course of conduct with the deliberate and dominant purpose of coercing Mr Keighran to resign. On the contrary I believe KTL went above and beyond what could be expected in managing Mr Keighran back into the workplace. Overall, I find KTL tried to support Mr Keighran during what was a difficult time in life.

*Was there a breach of duty by KTL that caused Mr Keighran to resign?*

[50] There were a number of personal issues external to the work environment and outside KTL's control that may have affected Mr Keighran's decision making. This includes the stress Mr Keighran was under from personal matters external to his work and the unhappiness and resentment he was feeling at not receiving a pay rise which contributed to his decision to resign.

[51] I find that the initiative for the ending of the employment came from Mr Keighran. Mr Keighran was unhappy doing what he considered were "menial" aspects of the role. I find that Mr Keighran left because he was no longer enjoying the job and felt that he was not appreciated. That was his choice. I considered it more likely than not that Mr Keighran walking off the job was a genuine resignation because the initiative for leaving came entirely from him. Mr Keighran was not asked to resign, nor was he encouraged to resign.

[52] I find the events of the 5 September 2020 meeting were not the sole cause for Mr Keighran's decision to resign.

[53] Mr Keighran had on two previous occasions threatened to resign (20 July 2020 and 16 August 2020). He resigned on 17 September 2020. This did not amount to a case of constructive dismissal, rather, it was a delayed resignation by a dissatisfied employee.

[54] As it was not a constructive dismissal, Mr Keighran's dismissal grievance does not succeed, because his employment ended due to his resignation and not as a result of dismissal.

*Was Mr Keighran unjustifiably disadvantaged by KTL's decision to remove him as restaurant manager?*

[55] I agree with Mr Keighran that the events of the 5 September 2020 meeting caused a number of unjustified disadvantages to him by unilaterally reducing his role and subsequent duties. He gave evidence that he was embarrassed and humiliated in front of other staff members in what should have been a private WMK employee meeting. Ms McLean-Woods conduct was a breach of KTL's good faith obligations to Mr Keighran under the Act.

[56] Mr Keighran succeeds in his grievance for unjustified disadvantage.

*Was Mr Keighran unjustifiably disadvantaged by KTL's decision to reduce his hours of work?*

[57] On 5 September 2020 Mr Keighran told Ms McLean-Woods that he could no longer work Saturdays. He did not consult or negotiate a change of shifts. His current days off at the time were Wednesdays and Sundays. By saying he could no longer work Saturdays he effectively reduced his working hours to four shifts a week.

[58] Ms McLean-Woods gave evidence that she understood that Mr Keighran wanted to have Saturdays off in addition to Wednesdays and Sundays. Mr Keighran's claim for unjustified disadvantage on this issue has not been upheld.

*Did KTL make unlawful deductions from Mr Keighran's wages?*

[59] Mr Keighran as manager was responsible for distributing free alcohol to staff outside of work hours on two occasions. Although KTL could have initiated a disciplinary investigation it chose not to do so, partly because of the ongoing employment relationship with Mr Keighran.

[60] Ms McLean-Woods consulted with Mr Keighran regarding recovery of the money owing under the general deductions clause in his IEA. In the circumstances I find KTL lawfully recovered the debt from Mr Keighran's salary.<sup>2</sup>

[61] Mr Keighran's claim for wage arrears has not been upheld.

## **Remedies**

*Compensation for humiliation, loss of dignity and injury to feelings*

[62] Mr Keighran said he feels the way he has been treated by KTL has had a significant, negative impact on him and has caused him financial hardship. Mr Keighran said his treatment by KTL and Ms McLean-Woods comments on the 5 September 2020 were a humiliating experience.

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<sup>2</sup> *Jonas v Menefy Trucking Ltd* [2013] NZEmpC 200,

[63] I am satisfied Mr Keighran has experienced harm for humiliation, loss of dignity and injury to feelings. Having regard to the circumstances of this case, and other awards of compensation, I consider that an award of \$5,000 appropriate.

[64] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[65] Mr Keighran's actions did not contribute in a blameworthy way to the circumstances which led to him being unjustifiably disadvantaged.

### **Penalties**

*Should a penalty be imposed for the breach of good faith?*

[66] Mr Keighran made numerous claims for penalties under the Act. The failure to provide a signed IEA and payslips was remedied prior to the investigation meeting. Of the alleged breaches I find only the claim for a breach of good faith under s 4(1) of the Act has any merit. However, the award I have granted for compensation is sufficient in all the circumstances. Having regard to s 133A of the Act, awarding a penalty would be disproportionate in my view. It suffices to record that KTL had the good faith obligations set out in s 4 of the Act which requires all parties to an employment relationship to deal with each other in good faith.

[67] Overall, I find KTL met its good faith obligations in most of its dealings with Mr Keighran, at times going beyond the obligations of a normal employer. The 5 September 2020 meeting was an aberration on what had been a genuine good working employment relationship.

[68] For these reasons I decline to exercise my discretion to impose penalties for the breach of good faith and the failure to provide Mr Keighran with a signed IEA and payslips.

## **Summary of orders**

[69] Mr Keighran was unjustifiably disadvantaged by KTL's decision to remove him as restaurant manager on 5 September 2022, for which remedies have been awarded in paragraph [63]. The Authority orders as follows:

- (a) Within 28 days of the date of determination Kensington Tavern Limited is ordered to pay Mr Keighran the sum of \$5,000 pursuant to s 123(1)(c)(i) of the Act.

## **Costs**

[71] Mr Keighran was unrepresented and therefore has no claim for costs, but he is entitled to reimbursement of the filing fee of \$71.56. I order Kensington Tavern Limited to reimburse Mr Glen Keighran for his filing in the sum of \$71.56.

**Andrew Gane**  
**Member of the Employment Relations Authority**