

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 238/09
5147623

BETWEEN CALIM JAMES LEATHARD
Applicant

AND S&S FOODS LIMITED
Respondent

Member of Authority: Yvonne Oldfield
Representatives: Applicant in person
Glenys Steele for Respondent
Investigation Meeting: 2 and 3 April 2009
Submissions received: 14 April 2009 from Applicant
17 April 2009 from Respondent
Determination: 16 July 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem concerns an alleged constructive dismissal or unjustified dismissal.

[2] The respondent is the largest New Zealand holder of a “Dominoes” franchise with (currently) thirteen stores nationwide. Mr Leathard first went to work for the respondent in Palmerston North in 2004, at the age of fifteen. After he left school he became a full time employee, progressing to become manager of the Tauranga store by early 2008.

[3] On 12 June 2008 Mr Sunny Olak, director of the respondent, met with Mr Leathard and told him that another staff member, Kegan Thorogood, was to be promoted to the role of manager within the store. Mr Leathard says that when he

sought clarification of what this meant for him, Mr Olak said that he would be subordinate to Mr Thorogood although there would be no change to Mr Leathard's title or remuneration.

[4] Mr Leathard considered this a demotion and unjustified at that. He was very distressed and humiliated. Later that day, he sent Mr Olak a text to say he was resigning, and subsequently (when asked to do so) confirmed this, although not in writing. Later still, after being asked when he intended to finish up, he advised that his last day would be 13 July 2008 (consistent with the usual notice period.) He requested and received a reference, left on the day planned and returned home to Palmerston North, where he found other full time work within four or five weeks.

[5] Mr Leathard represented himself. He has framed his claim in several alternative ways. He says that the alleged events amount either to a constructive dismissal or (at the point where he was asked to provide a leaving date) an unjustified dismissal or at the least (through the demotion alone) an unjustified disadvantage. He also says that when he first went to Tauranga he was told that his moving costs would be met but they were not. He therefore claims compensation for hurt and humiliation associated with the alleged demotion and with leaving his job, lost earnings for the interval until he found work, and the cost of moving both ways between Palmerston North and Tauranga.

[6] Mr Olak strenuously denies confirming that Mr Leathard was to be subordinate to the other manager. He says that his plan was for the two to share the responsibilities of the manager's position. He says he arranged this because the Tauranga store had a very wide catchment and he recognised that managing it was a big job for one person. He said he had co-managers in another large store and it worked well there. He told me he wished to support and assist Mr Leathard in his role as he was a promising employee whom he did not want to lose. He also denies any knowledge that Mr Leathard was offered removal expenses and denies liability for this. He said that the respondent has never provided removal expenses to any of its staff even though others have at times moved around from one branch to another. He noted that Mr Leathard never mentioned this issue to him personally in the time he was in Tauranga.

[7] The respondent also makes a counter claim against Mr Leathard. It is that Mr Leathard breached confidentiality by repeating what had occurred in mediation to members of the respondent's staff. The respondent seeks a penalty in relation to this alleged breach of Section 148 of the Employment Relations Act 2000, which provides:

“(1) Except with the consent of the parties or the relevant party, a person who-

...

(b) is a person to whom mediation services are provided...

must keep confidential any statement, admission, or document created or made for the purposes of the mediation, and any information that is disclosed orally in the course of the mediation...”

Issues

[8] Section 148 (3) provides:

“(3) No evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document or information that by subsection (1) is required to be kept confidential.”

[9] Subsection (3) renders inadmissible only that which is required to be kept confidential by subsection (1.) It follows that with the consent of the parties the Authority may accept evidence of statements made in mediation. In this case, consent was implied by the provision of details of the alleged breaches in both the statement of problem and the statement in reply. The parties later confirmed this consent in a conference call with the Authority (clearing the way for the investigation of the counterclaim) and asked that (for reasons of economy) it be investigated together with the personal grievance. Being satisfied that the information disclosed to me about what transpired in mediation was not such as to compromise my capacity to hear the personal grievance, I agreed.¹ I investigated both matters when I met with the parties on 2 and 3 April, and now record the outcome in relation to both.

¹ My Minute of 30 March 2009 (attached) refers.

[10] The first issue for determination is whether Mr Leathard was dismissed or resigned. Mr Olak's position was that Mr Leathard resigned by text and never subsequently suggested that he had changed his mind. In his evidence to me Mr Leathard confirmed this and said his intention was always to leave. He told me that he had received advice that a resignation by text had no effect and on that basis was unsure whether he had resigned or been dismissed.

[11] There is no impediment to a text message resignation so long as it is sufficiently clear. Neither Mr Leathard nor Mr Olak had any doubt at the time the message was sent that Mr Leathard was resigning. Mr Olak accepted the decision and responded by wishing Mr Leathard well in the future. I am satisfied that Mr Leathard resigned. No further examination of that issue is needed.

[12] The issues which remain for determination here are therefore:

- i. whether the resignation was the result of a breach of duty of sufficient seriousness as to render it a constructive dismissal or alternatively, whether the applicant suffered an unjustified action to his disadvantage;
- ii. whether Mr Leathard breached the confidentiality of mediation, and
- iii. what if any remedies are appropriate.

(i) Constructive dismissal and disadvantage allegations

[13] The role of "store manager" did not carry with it any significant managerial authority or discretion. The manager was essentially tasked with supervising the store. The operation of a "*Dominoes*" outlet, like other similar franchises, involved standardised procedures and its day to day supervision was a matter of compliance with those procedures. Overall responsibility for matters such as recruitment and marketing rested with more senior managers within the respondent organisation.

[14] Both parties agreed that there were inherent difficulties for the Tauranga store in serving such a wide area. They also agree that Mr Leathard had not been finding it easy managing it on his own. At the time of these events the respondent was shortly to open another outlet in nearby Bayfair. This was intended to take the pressure off the Tauranga store. When this happened Mr Leathard was to manage one of the stores and Mr Thorogood the other with Ms Flett in overall charge of both. Mr Olak acknowledged that a secondary reason for offering Mr Thorogood the title of manager (and the associated pay rise) was in order to secure his services in the meantime. Mr Thorogood was a former store manager who had recently returned to the company. Mr Olak told me it was not easy to find suitable people for the role of store manager and he wanted to hold on to both Mr Thorogood and Mr Leathard as he ultimately needed managers for both Tauranga and Bayfield. He told me that there was never any suggestion of disciplinary proceedings against Mr Leathard.

[15] As we have seen, Mr Olak disputes that he told Mr Leathard that he would be subordinate to Mr Thorogood. Mr Olak's account is backed up by that of Kushla Flett ('Manager in Training' for that region) and by that of Mr Thorogood. Ms Flett told me that she was of the understanding that Mr Leathard and Mr Thorogood were to share the responsibilities of managing the store, splitting the "opening" and "closing" shifts between them so that one of them was present at all times to supervise staff, and dividing responsibility for rostering and ordering (the two other main tasks of the store manager.) This was also how Mr Thorogood says it was explained to him.

[16] I conclude that I must prefer Mr Olak's evidence on this point, and that Mr Leathard has misinterpreted what he was told.

[17] Finally it is relevant that after the meeting of 12 June there were no material changes to Mr Leathard's responsibilities or work routine. Immediately prior to 12 June Mr Thorogood had been manager of his shifts and had supervised other staff when Mr Leathard was not on duty. Separate responsibilities had already been mapped out for the two and this pattern simply continued after 12 June. Mr Thorogood did not at any time give direction to Mr Leathard even when their shifts overlapped.

[18] In short, Mr Leathard did not suffer any change in his job title, pay rate, or duties, nor did he take direction from Mr Thorogood. I cannot conclude that he was demoted. Rather, given his acknowledged difficulties in running the store, the respondent took steps to provide him with assistance. I do not accept that the respondent's actions constituted a breach of duty of sufficient seriousness as to leave Mr Leathard with no choice but to resign.

[19] In addition I note Mr Leathard did not put his concerns to Mr Olak before making the decision to resign. There was no opportunity for Mr Olak to address those concerns and remedy any issues that Mr Leathard had. For this reason, also, the claim of constructive dismissal fails.

[20] Finally, turning to the question whether there was a disadvantage grievance, I note that two elements would need to be established for that claim to succeed. First the respondent would have had to have taken unjustified action and second this would have had to disadvantage the applicant in some way. Neither element had been established to my satisfaction. The claim of disadvantage also fails.

(ii) Alleged breach of confidentiality

[21] Two former co-workers gave evidence that Mr Leathard had spoken to them of what transpired at mediation. Each said that (in separate incidents) he had told them that the respondent had offered a token sum to settle, which he had declined, and that he bragged of his prospects of success in pursuing his claim. Subsequently the two concerned repeated this information to Mr Olak. Mr Olak told me that he had no reason to doubt their source because the details about the offer were accurate and he knew of no other way the two workers could have obtained that information.

[22] Mr Leathard did not dispute meeting with and speaking to the two witnesses on the occasions stated by them, but denied giving details of the mediation offer.

[23] I find the evidence of the two witnesses to be more credible than that of Mr Leathard. Each was consistent in her story under separate questioning from the Authority. I am satisfied that Mr Leathard breached section 148 of the Employment Relations Act 2000.

Remedies

Penalty claim

[24] The respondent seeks a penalty from Mr Leathard for the breach of confidentiality. Mr Olak told me that even though the sum offered was small (and not such as to indicate any acceptance of liability) it would present a threat to his business if knowledge of the offer were to spread amongst his staff. He told me that 90% of his staff (over 300 people) is casual and he felt he could be exposed to the risk of opportunistic claims. The respondent submits, therefore, that it is important to send a signal that breaches of confidentiality in mediation will not be tolerated.

[25] The Authority's jurisdiction in relation to penalties is set out at section 133 of the Employment Relations Act 2000. It provides:

“(1) The Authority has full and exclusive jurisdiction to deal with all actions for the recovery of penalties under this Act-

- 1. for any breach of an employment agreement; or*
- 2. for a breach of any provision of this Act for which a penalty in the Authority is provided in the particular provision.”*

[26] Although s.149 of the Act (dealing with mediation settlements) is one of the “particular provisions” identified in s. 133(1) (b), s.148 is not. Nothing in Ms Steele's submissions to the Authority has indicated any basis for me to order a penalty against Mr Leathard.

[27] I am not therefore empowered to grant the remedy sought.

Relocation expenses

[28] Mr Leathard told me that an undertaking to pay relocation expenses was given to him by a manager who has subsequently left the company. However there is no evidence that he raised the issue at the time of his move to Tauranga nor is there any

other evidence to back up his claim. I am not satisfied that the respondent made a commitment to paying for the relocation and make no order in respect of that claim.

Costs

[29] The issue of costs is reserved. Since there have been no orders in relation to either claim or counterclaim, this may be an appropriate case for costs to lie where they fall. If, however, the parties cannot agree and have more to say on the issue, they should ensure that any request for an order for costs, with submissions in support, reaches the Authority within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority