

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 612
3260539

BETWEEN TENNESSE LIUMAIHETAU
Applicant

AND PAN SQUARE LIMITED
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Jenny Johnston, advocate for the Applicant
John Langford, counsel for the Respondent

Investigation Meeting: 11 June 2024 in Masterton

Submissions and other Up to and including 15 July 2024
information received:

Determination: 11 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Liumahetau was employed as a head chef and the staff in the kitchen reported to him. He claims first he was disadvantaged in his employment by the appointment of his sous chef to the position of executive chef without him being advised beforehand. He says he first heard of this when he was absent from the workplace on stress leave. He says he felt undermined and humiliated because Pan Square Limited (Pan Square) did not communicate the change to him prior to it taking place.

[2] Secondly, he says when he faced an alleged sexual harassment complaint, Pan Square failed to follow a fair process to deal with the matter. He says Pan Square did not detail which process it was following, nor did it sufficiently investigate the matter. Further, he says Pan Square did not provide any terms of reference for the investigation, listen to his explanation, or consider any alternative to summary dismissal. He says he

was given the option of resigning or being dismissed, so he was effectively constructively dismissed from his employment. He says as a result his dismissal for serious misconduct was both procedurally and substantially unjustified. He seeks compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) together with lost wages and costs.

[3] Pan Square deny Mr Liumahetau was disadvantaged in his employment by the appointment of an executive chef and say his dismissal was both procedurally and substantively justified on the basis he was found guilty of serious misconduct and the company simply offered him an easy way out letting him resign rather than facing dismissal.

The Authority's investigation

[4] At the investigation meeting the Authority heard from Mr Liumahetau and his wife, Moana Liumahetau. For the respondent the Authority heard from Nicola Newell, a director of the respondent. These witnesses all gave evidence on oath or affirmation. Before the Authority was also two statements provided by complainants who were not there to give evidence.

[5] The following issues for determination were identified:

- (a) Was Mr Liumahetau disadvantaged by the appointment of a sous chef to the position of executive chef?
- (b) Did Pan Square carry out an appropriate investigation into allegations made by the complainants?
- (c) Was it open to a fair and reasonable employer to dismiss its employee under all of the circumstances?
- (d) If not, was the dismissal unjustified and if so what remedies should flow?

Background

Executive chef

[6] In early 2023 Mr Liumahetau was suffering workplace stress. He had been given two weeks off by his doctor with a return to work date set of 27 February 2023. On 22 February he received an email informing him his sous chef had been appointed

to the role of executive chef. He felt aggrieved by this because he had not been consulted on the change, nor given the opportunity to be considered for the role.

[7] From Pan Square's perspective, Mr Liumaihetau commenced his employment with them as a chef but was later made the head chef. Pan Square had no complaints whatsoever about his skills, but also ran a second restaurant and were looking to appoint an executive chef who would have responsibility for the second restaurant as well as administration duties. Mr Liumaihetau had had discussions with Pan Square about stress and Pan Square believed it would have been unfair to impose additional responsibilities on him. Further, from their perspective, they were happy with his performance and he remained as head chef. His role was not affected by the appointment of the executive chef who had different responsibilities.

The allegations, investigation process and dismissal

[8] Mr Liumaihetau had returned to work on Monday 27 February 2023. The Martinborough fair was coming up and it is fair to say Mr Liumaihetau was becoming impatient with two of the staff. He felt they were behaving in a childish manner, were getting in his way, and he accepts he was annoyed. He asked one of the young female staff what was she waiting for in the kitchen. He says her reply was along the lines of "I'm saving myself for" and named her boyfriend. Mr Liumaihetau queried "Your virginity." He says as soon as he made the comment he was embarrassed and made a joke of it.

[9] However, during the same week he says the same staff member asked him what he thought of her eye makeup to which he replied, "Makes your eyes look good – sexy eyes."

[10] Mr Liumaihetau says by the end of the week he was stressed beyond belief and when the staff member moved into his personal space he gently pushed her away.

[11] Although he was annoyed with another staff member who he felt did not need to be in the busy kitchen, he could not recall saying anything to her which could be considered inappropriate, but did brush past her in the crowded kitchen for which he apologised immediately.

[12] On 6 March 2023 Mrs Newell informally advised Mr Liumaihetau there had been two allegations of sexual harassment against him and on 9 March 2023 he was

emailed a meeting request with an attached letter with two excerpts from statements by the two complainants.

[13] The letter dated 8 March 2023 contained allegations Mr Liumahetau had made inappropriate sexual comments, called a staff member “sexy eyes”, and initiated unwanted physical contact, had made comments about both complainants’ appearance and had asked sexual questions regarding virginity.

[14] Mrs Newell also commented a pattern of this type of behaviour had been identified which spanned back to January.

[15] The allegations from the second staff member included claims Mr Liumahetau had pushed up against her whilst cleaning plates, had made sexual comments, had touched her “ass” whilst physically moving past her making comments about her body, and also made a comment regarding an incident which had occurred some years before at another bar in Martinborough.

[16] On 14 March 2023 Mr Liumahetau attended the meeting with his wife as a support person. Some of the allegations Mr Liumahetau denied. For instance, he denied grabbing anyone by the face and whilst accepting he used the phrase sexy eyes, he says this was at the end of a conversation when he was trying to get her out of the kitchen. In respect of the other complainant, Mr Liumahetau denied the allegations.

[17] On 15 March 2023, Mr Liumahetau attended a further meeting. During this meeting he was given a letter dated 15 March. The letter stated Pan Square had considered the nature of the serious misconduct allegations raised and the effect his behaviour had had on the company in respect of trust and confidence. The letter advised Mr Liumahetau his behaviour amounted to serious misconduct and was a breach of his duty of good faith towards his employer and was a breach of the terms and conditions of his employment agreement and the company’s house rules and policies. He was also asked for feedback regarding the proposed decision. At this stage Mr Liumahetau was given the option of resigning.

[18] A final meeting was held on 21 March 2023. Mr Liumahetau attended the meeting, provided his response and tendered his resignation as he felt he had no other option other than summary dismissal. Mrs Newell accepted this was the case, namely they were giving Mr Liumahetau a chance to limit the damage to him by resigning rather than being dismissed.

[19] Importantly, the letter advised Mr Liumahetau in reaching the decision his behaviour constituted serious misconduct, “We took into account the information we gathered during our investigation” and “We considered the nature of the serious misconduct allegations raised and the effect the behaviour has had on the trust and confidence we hold in you as an employee.” Further, the letter provided “ ... our preliminary finding is your sexual harassment behaviour towards members of staff does amount to serious misconduct.”

[20] In her brief of evidence Mrs Newell said the investigation meeting was conducted by herself, Adam Cruz and the decision makers were herself, Adam Cruz and her husband Adam Newell. Mrs and Mr Newell were the directors of the company which owned the restaurant and Mr Cruz was the general manager. Mr Liumahetau was never advised Mr Newell had a part in the decision making, nor did he have access to him to put his side of the story.

[21] Pan Square’s house rules and procedures provided that sexual harassment of any fellow employee is an example of behaviour “which will be considered by the employer to jeopardise the employee’s position, and which will lead to either warnings being given or in extreme cases, instant dismissal.”¹ Mrs Newell in giving evidence, said in paragraph 9 “As a panel, we could not accept that workplace stress was an excuse for sexual harassment (even if a fairly low level).”

[22] Accordingly at first glance, a finding of serious misconduct seems problematic as would be the sanction of dismissal which Mrs Newell confirmed was what would have happened had Mr Liumahetau not resigned.

Discussion and analysis

[23] Pan Square accepts if Mr Liumahetau had not taken the option of resigning he would have been dismissed. Under these circumstances, what might appear to be a resignation is a dismissal. It follows therefore the onus on justifying dismissal is on Pan Square. The evidence from both parties shows Pan Square has significant difficulty in justifying the dismissal because:

- (a) Mr Liumahetau denied the complaints as set out. However, his explanations were not put back to the complainants for comment.

¹ Document 1 in the bundle.

Accordingly when the time came for Pan Square to make a decision, it cannot be said it had all relevant information before it. Mrs Newell confirmed she had simply relied on the statements made and did not feel a need to go back to the complainants with Mr Liumahetau's replies. This was important because there were conflicts between their statements and what Mr Liumahetau was saying especially in regard to context.

- (b) Mrs Newell's evidence was she considered the allegations of sexual harassment to be at the lower end of the scale. She did not read the company house rules and procedures but accepted they provided that in cases of sexual harassment the rules provided for instant dismissal in only extreme cases. She confirmed she did not see the allegations as evidencing an extreme case. She confirmed no consideration was given as to whether or not a warning should issue instead of dismissal.
- (c) There were major problems with the identity of the decision maker. It seems, however, three people had a part to play, namely Mrs Newell, Mr Cruz and Mr Newell. Mr Newell appeared in part to be supportive of Mr Liumahetau, however he did not give evidence before the Authority. Mrs Newell advised when the three of them discussed the matter, Mr Newell commented along the lines of "You can do what you like I can't cope with this". Mr Liumahetau had no access to Mr Newell and accordingly no ability to put his case to him. Further, although Mr Cruz did not give evidence, Mrs Newell stated his view was straightforward. He said you cannot have a 40 year old manager saying these things to young girls. If indeed Mr Cruz held that view, it was important Mr Liumahetau's responses to the allegations was put back to the complainants for comment.

[24] In respect of Mr Newell's involvement, Mrs Newell said he was in no state to deal with these issues. Mrs Newell confirmed Mr Liumahetau would not have been in a position to know who was making the decisions and accordingly this again meant the process which led to the decision Mr Liumahetau's employment should end was not transparent. For instance, Mr Newell never spoke to him, but Mrs Newell said she gave him the transcription notes of the meeting and had meeting notes.

[25] It remained unclear who investigated the allegations and who the decision makers were.

Conclusions and orders

[26] In respect of Mr Liumahetau's claim he was disadvantaged by the action of Pan Square in appointing a sous chef, in his eyes demoting him, I find Mr Liumahetau has not made out his claim. There was no disadvantage to Mr Liumahetau. His position did not change, his salary did not change. Whilst it may have been perhaps desirable if Pan Square had communicated its thinking to Mr Liumahetau, under the circumstances I do not see there was a duty on them to do so. Certainly there was no legal obligation.

[27] For the reasons set out above, I find Mr Liumahetau's dismissal for serious misconduct was not justified. To the extent there was an investigation into the allegations, it was flawed and a fair and reasonable employer could not reach a conclusion serious misconduct had occurred.

[28] Mr Liumahetau's responses significantly differed to what the complainants alleged yet they were not put back to the complainants for comment. Whether the decision maker was Mrs Newell or whether the decision maker also included Mr Cruz and Mr Newell, remains unclear. However, without Mr Liumahetau having access to the decision makers and without the decision makers having all relevant information, any decision was likely to be flawed. Further, Mrs Newell's acceptance in her written evidence she did not see the allegations as reaching the extreme stage, meant there needed to be much more consideration before a finding of serious misconduct could be made.

[29] Mr Liumahetau has been unjustifiably dismissed and it follows therefore he is entitled to a consideration as to remedies. His evidence was he fortunately obtained new work virtually straight away and suffered no salary loss. He has however suffered damages for hurt, humiliation and injury to feelings and loss of dignity. Evidence regarding the effect on him was given not only by himself but also by his partner, Moana Liumahetau.

[30] The evidence was poignant and it was clear the dismissal had a significant impact on him. This was exacerbated by the dismissal becoming part of local gossip. Although Mr Liumahetau was of the view the information must have been leaked by

Pan Square, there was no evidence to support this view. I consider a sum of \$18,000 as appropriate compensation under s 123(1)(c)(i) of the Act.

[31] Section 124 of the Act requires me to consider whether or not Mr Liumahetau contributed to his grievance in any blameworthy manner. Despite my finding the dismissal was both substantively and procedurally unfair and those flaws in the process were not under the control of Mr Liumahetau, nonetheless he did admit asking one complainant whether or not she was saving her virginity and did make the comment regarding sexy eyes. Under these circumstances I consider a reduction in remedies of 15 percent as appropriate.

Summary of orders

[32] I order Pan Square Limited to pay Tennessee Liumahetau a sum of \$15,300. Payment is to be made within 28 days.

Costs

[33] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[34] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Liumahetau may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Pan Square will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[35] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.²

Geoff O’Sullivan
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1