

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 282
3073252

BETWEEN LAURENT LOUDEAC
Applicant

AND JOHN DAVID
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Paul McBride and Saadi Radcliffe, counsel for the
Applicant
Sacha Beacham, advocate for the Respondent

Investigation Meeting: 16 October 2020

Submissions [and further 16 October 2020, 29 October 2020, 6 November 2020, 11
Information] Received: November 2020 from the Applicant
23 October 2020 from the Respondent

Date of Determination: 2 July 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Laurent Loudeac, a successful and accomplished chef, claims that his employment with John David ended following a demand by Mr David on 13 December 2018, that he return an employment agreement he had been given and if he did not do so before the following Monday, he should consider himself fired. At the time, Mr Loudeac was unwell and he immediately advised Mr David of this. He also confirmed his wife had already emailed a medical certificate. Approximately eight minutes later, Mr David texted him to say that he was no longer required.

[2] Mr Loudeac then says that on 17 December 2018, he received an email which attached a letter of dismissal dated 12 December 2018 confirming his dismissal, relying also on a 90-

day trial period. Mr Loudeac says his dismissal was unjustified and he was further disadvantaged in his employment by the actions of Mr David. He claims wage arrears, holiday pay, lost wages, KiwiSaver contributions, an order for amounts owing from a share of profits agreement, compensation for hurt and humiliation, together with restitution damages and reimbursement for personal expenditure on his employer's behalf, together with interest.

[3] Mr David denies that he was in an employment relationship with Mr Loudeac. His sole defence is that Mr Loudeac's employer was a company, David's 2018 Holdings Limited (the company). Mr David acknowledges that he was the Director of the company at the time. He acknowledges the dismissal occurred and, acting as a director of the company, was in a position to give evidence as to what occurred.

The Authority's Investigation

[4] The investigation took one day and I heard evidence from Mr Loudeac, his wife Deanna Loudeac, Mr David and his wife Sarah David.

[5] Pursuant to s 175E of the Employment Relations Act 2000 (the Act), I make findings of fact and law and outline conclusions to resolve disputed issues and make orders but I do not record all the evidence. I have, likewise, carefully considered the submissions and information received from both parties and refer to them where appropriate and relevant.

[6] As permitted by s 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

Issues

[7] The issues to be decided are:

- (a) Who was Mr Loudeac's employer?
- (b) If Mr David was the employer, was Mr Loudeac unjustifiably dismissed?
- (c) If Mr Loudeac's dismissal was unjustified, what remedies should be awarded?

Background to the Employment Relationship Problem

[8] Mr Loudeac is a highly rated chef who after working in France, Switzerland, Australia and England, moved to New Zealand where he has been for the last 17 or so years. He is a recipient of numerous awards and is well respected.

[9] It was common ground that Mr Loudeac and Mr David had a discussion in May 2018 regarding Mr Loudeac joining Mr David at a restaurant called Eat. Mr David was looking at purchasing the then Felix Café and there were discussions regarding going into a partnership arrangement although no details were discussed at that time. Mr Loudeac recalls the discussion being a 50-50 partnership.

[10] The parties kept in touch and in September 2018, Mr Loudeac resigned his then position at Hippopotamus Restaurant and the parties met to discuss how they would work together. During this phase the parties continued to attempt to negotiate a partnership agreement. It seems common ground that they eventually decided that Mr Loudeac would be paid a salary plus a profit share of 30 per-cent. Instructions were issued to Mr David's lawyer to draw up a partnership agreement. Mr Loudeac did not believe the draft partnership agreement which he received on 7 December 2018, accurately reflected what the parties had agreed to especially in respect of what would happen should the partnership dissolve. He met with Mr David on 11 December 2018 and at that stage was given an employment agreement between himself and the company. As Mr Loudeac had a number of concerns with the business arrangement, he did not sign the agreement.

[11] On 13 December 2018 Mr David sent Mr Loudeac a text saying amongst other things that he had given him the employment agreement and he wanted it back as soon as possible and if it was not returned before Monday he should consider himself fired. And on 17 December 2018, Mr David on behalf of the company sent Mr Loudeac an email ostensibly dismissing him.

The Evidence

Mr Loudeac

[12] Mr Loudeac gave evidence how he had met Mr David whilst shopping at Moore Wilson supermarket. He says in May 2018 Mr David texted him saying he was looking at buying the Felix Café in Cuba Street and wondered if Mr Loudeac would join him in the venture. The

initial suggestion was the two of them would go 50/50 with the investment. Mr Loudeac was not prepared to progress the matter at that stage because everything was vague and he was happy working where he was.

[13] The parties kept talking and met a few times to discuss matters such as the kitchen budget, salary, full-time working hours and a proposal that Mr Loudeac receive a share of 30 per-cent of the profits. Mr Loudeac says there was never any mention of a business called “David’s Holding Limited”. He says as far as he was aware he was working for and with Mr David personally who was the chief investor although Mr Loudeac acknowledges he was to be a part-owner. He also confirmed they discussed a partnership agreement which Mr David said would be drawn up by his lawyer.

[14] In August 2018 Mr Loudeac resigned from his position at the Hippopotamus Restaurant on the basis the new restaurant, Eat, was planned to open in September 2018. He interviewed staff for the kitchen but was aware there was no plan on paper about the restaurant. He says a week before the opening Mr David had organised some dinners for social media coverage. The parties also arranged a birthday lunch for one of Mr Loudeac’s friends. Although all three events were a success with the food, Mr Loudeac said no supplier account was set up and he had to order the food needed for those events onto his own business account. In that regard, Mr Loudeac owned an existing company called The French Pantry Limited.

[15] He says he also used a commercial kitchen he was renting at Petone to cook and prep those functions and try the new menu dishes. He said this was because the restaurant’s kitchen wasn’t ready. He says he purchased the plates needed for the restaurant himself and put those onto his personal credit card thinking that they would be reimbursed to him at some stage. Mr Loudeac says he practised some of the dishes at home over a period of three weeks.

[16] In late September 2018 the new restaurant, Eat, opened, although not everything was ready. Mr Loudeac’s evidence was that no employment or partnership agreement had been drawn up despite him asking Mr David many times what was happening regarding the business arrangement. He says from his perspective what had been agreed was that he would be employed on a salary of \$90,000 per annum plus 30 per-cent of profits on top of that. Mr Loudeac says he became concerned that there was no structure or organisation from Mr David in front of house. He felt that Mr David micromanaged everything, even his kitchen. The relationship between the parties began to sour.

[17] Mr Loudeac acknowledged there had been discussions regarding the structure of the business including his text of 27 August 2018 when he asked whether Mr David was wanting to him to be on contract, or work as an employee. Mr David replied stating he was looking at contracting “through [my] business if works ...”. (Doc 46.)

[18] Further, Mr Loudeac needed to clarify his position with his bank and as a result of this, Mr David on behalf of the company, gave him a letter dated 8 November 2018 which amongst other things confirmed David’s 2018 Holdings Limited had employed Mr Loudeac since 17 September 2018.

[19] On 5 November 2019 Mr Loudeac burned his hand whilst at work. On 9 November 2018 he took a day off because the burn was causing significant pain and he needed time to recover. He says Mr David was not happy about this.

[20] On 7 December 2018, Mr Loudeac says he finally got a draft partnership agreement. There were provisions in the partnership agreement which Mr Loudeac did not agree with.

[21] Mr Loudeac had earlier been diagnosed with stress and anxiety and was given a medical certificate by his doctor covering the period of 6 December 2018 to 14 December 2018. Mr Loudeac said he did not take the sick leave he should have because he felt that Mr David would have reacted badly to it.

[22] Mr Loudeac says he met with Mr David on 11 December 2018. During that meeting Mr David advised him he was no longer proceeding with the partnership agreement. Matters had taken too long and he no longer wished to enter into partnership with Mr Loudeac. Mr Loudeac says at this stage Mr David produced an employment agreement between the company and Mr Loudeac.

[23] By this stage, Mr Loudeac’s health was suffering and on 12 December his wife forwarded the certificate from Mr Loudeac’s doctor advising he would not be at work.

[24] The next day, 13 December 2018, Mr David texted him stating:

I have given you the employment agreement and want that back as soon as possible. If not before Monday consider yourself fired.¹

¹ Bundle of documents at [13]

[25] This was followed up with a further text advising:

As you have not communicated with me any sooner, you jeopardised the business and have put pressure on everyone, you are no longer required to work here any longer (sic).

[26] Mr Loudeac then received a letter by email (dated 12 December 2018) on 17 December 2018 confirming his dismissal in reliance on a trial period but also listing reasons why employment was not suitable. The reasons given had never previously been raised with Mr Loudeac. At no time did he have any opportunity to respond to them.

[27] Mr Loudeac gave evidence of the effects the dismissal had on him. He said that being dismissed by text message whilst on sick leave really hit him hard. He says that when he received the dismissal letter, he found the contents soul destroying. It caused him anxiety and depression that he says got him into a really dark place and it has taken him a long time to get over this.

Mr David

[28] Mr David gave evidence that he was the Company Director of David's 2018 Holdings Limited and stated that the company had been incorporated on 31 May 2018 for the purpose of trading as Eat Restaurant, the restaurant Mr Loudeac was to join. He produced the record from the company's register that showed he was the sole director.

[29] Mr David confirmed that he did approach Mr Loudeac because of his experience and reputation as a chef. He said the reason for the approach was to ask him to join him at Eat. He says that the parties initially looked at a partnership agreement but no hard and fast details were discussed in those initial stages. Mr David pointed to document 49 in the bundle which was correspondence between Mr Loudeac's lawyers and Mr David's. The correspondence was an email dated 11 December 2018 recording that a copy of a proposed partnership agreement had been sent to Mr Loudeac. It stated that the agreement contemplated that David's 2018 Holdings Limited would employ Mr Loudeac and that company would issue Mr Loudeac with 30 per cent of the shares on issue in the company.

[30] It was clear that Mr Loudeac's solicitor had issues with the proposed agreement. The main sticking point seemed to be that any agreement between the parties should be drafted as a shareholder's agreement rather than as a partnership agreement.

[31] Mr David pointed out that near the end of the email, there is acknowledgement that Mr Loudeac had been provided with a draft employment agreement which was between the company and Mr Loudeac.

[32] Mr David also submitted a further email trail to his lawyer as evidence that he had withdrawn from negotiations.

[33] Mr David also gave evidence that on Thursday 8 November 2018, Mr Loudeac asked for a letter to give to his bank for a loan. The letter was in the bundle of documents (18). The letter advised that David's 2018 Holdings Limited (trading as Eat) employed Mr Loudeac as at 17 September 2018. Mr David said it was further evidence that he never personally employed Mr Loudeac.

[34] Mr Loudeac was on sick leave because he had burnt his arm. Mr David gave evidence that he felt that Mr Loudeac was using his arm as an excuse not to come to work and did not in essence accept Mr Loudeac's medical certificates. Accordingly he says on 17 December 2018 he emailed Mr Loudeac and dismissed him. He says it had felt to him that Mr Loudeac had left work and was not going to return. He felt that Mr Loudeac had not been interested in making the arrangement work and referred to his perspective that Mr Loudeac had been unwilling to agree to the partnership agreement or indeed to the employment agreement.

Evidence of Ms Loudeac

[35] Ms Loudeac gave evidence that she was married to Mr Loudeac. She stated from her perspective she felt that as the partnership agreement was to be between Mr David and Mr Loudeac, so too was the employment agreement. She did give evidence however that it was to be a new business venture together which they would both embark on, and a partnership which was to be set up fairly as well as an employment relationship.

[36] Ms Loudeac's evidence regarding the effect of the dismissal on Mr Loudeac was compelling. She said her husband's mental health had been significantly damaged along with their livelihood and marriage. She said she felt her husband's personality had changed completely and his previously happy and professional manner became a thing no longer seen.

Evidence of Ms David

[37] Sarah David gave some evidence regarding the intention of the parties to be in a partnership type agreement and that Mr Loudeac's issues related to the content of the partnership agreement presented to him. She gave evidence regarding the negotiations and the intention to present Mr Loudeac with an employment agreement between himself and the company until the partnership agreement could be finalised.

The dismissal

[38] The evidence surrounding Mr Loudeac's dismissal and the fact of dismissal itself are not really in dispute between the parties. Mr David's evidence, essentially boiled down to the fact that he believed that Mr Loudeac was playing games with him. Mr Loudeac had suffered a significant burn injury however Mr David regarded this as simply an excuse. Further, he had formed views regarding Mr Loudeac's attitude, work ethic and performance which were simply not open to him to reach. I have not set out in full the criticisms Mr David levelled against Mr Loudeac, other than to say they were not soundly based and were not conclusions an employer acting reasonably could reach.

[39] Further, the termination of Mr Loudeac's employment through texts and finally by letter, could never satisfy the test outlined in s 103A of the Employment Relations Act 2000. Although for reasons outlined further in this determination, I find that Mr David was not the employer of Mr Loudeac, nonetheless his evidence as a director of Mr Loudeac's employer, clearly demonstrates the significant shortcomings in the approach David's 2018 Holdings Limited took in respect of Mr Loudeac's dismissal. I note the company would not have been entitled to rely on any 90 day trial period contained in the agreement, as Mr Loudeac was employed no later than 17 September 2018, well prior to any agreement being prepared.

[40] Mr Loudeac gave compelling evidence of the effect his employer's behaviour had on him not only during the time leading up to the dismissal but at the time of the dismissal itself. An award of damages against Mr Loudeac's employer would have been significant had the David's 2018 Holdings Limited been a party to these proceedings.

Correct identity of the employer

[41] Mr Loudeac has brought his proceedings against Mr David personally. He has not brought those proceedings against David's 2018 Holdings Limited. The company was not

joined to these proceedings. If it had been, as I said earlier, it would not have been able to defend Mr Loudeac's claims and would have faced a significant award against it. I can say this, because Mr David was a director of the company and was the person directly involved in the dismissal. Accordingly, even though the company was not joined to these proceedings, the Authority had before it, all the evidence relating to Mr Loudeac's unjustified dismissal.

[42] I am clear, however, that David's 2018 Holdings Limited was Mr Loudeac's employer at the time of the dismissal.

[43] As indicated earlier, Mr Loudeac and Mr David had been discussing how they would do business together. It was clear the parties were initially looking at a partnership agreement of sorts. It seems that the arrangement was intended to accommodate Mr Loudeac having a shareholding in the corporate entity. However, disputes arose between the parties regarding this and Mr David decided that Mr Loudeac, rather than being a shareholder, would be an employee of the company with a share of profits.

[44] There are a number of indications that support the notion Mr David was not the employer personally.

[45] The email exchange between the parties' representatives in relation to the company and the proposed partnership agreement is evidenced in document 49. It shows the parties were considering a commercial arrangement between them. The third page of that document refers to the employment "contract" being given to Mr Loudeac. That document was in the name of the company. Further, document 50 shows that Mr Loudeac ran a company himself, namely the French Pantry Limited, which indicates that Mr Loudeac was familiar with commercial arrangements. There were references in document 46 to the parties contemplating a relationship other than as employer/employee but still involving a company. Further, when Mr Loudeac required evidence of income for his bank, he was provided with a letter from Mr David, on behalf of David's 2018 Holdings Limited, confirming his salary but also confirming the identity of the employer at least from Mr David's perspective (document 18). Although it seems that Mr Loudeac did not pay enough attention to that document when he received it, nonetheless it gave a clear indication, at least as at November 8, that Mr David was not the employer personally.

[46] Document 19 of the bundle was a partnership agreement. This was not signed by the parties but again showed the clear intention regarding the operation of David's 2018 Holdings Limited and the relationship Mr Loudeac had with that company.

[47] The employment agreement ultimately presented to Mr Loudeac for signing (page 24 of the bundle of documents) clearly showed at clause 3.2 that the employer was David's 2018 Holdings Limited.

Conclusion

[48] John David was not the employer of Laurent Loudeac. David's 2018 Holdings Limited was the employer, at least at the time of the dismissal.

[49] Whilst it is clear that Mr Loudeac was unjustifiably dismissed and suffered significant loss as a result of that dismissal, any liability of Mr David, would need to be through the above company.

Costs

[50] Costs are reserved.

Geoff O'Sullivan
Member of the Employment Relations Authority