

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 104
5358160

BETWEEN

MARUNUI GRAEME
MEROITI
Applicant

A N D

LINDALE LODGE LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Graham Ogilvie, Advocate for Applicant
No appearance for the Respondent

Investigation Meeting: 20 August 2013 at Wellington

Submissions 21 August 2013

Date of Determination: 26 August 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Marunui Graeme Meroiti (Graeme) is claiming the difference between what he was paid and the minimum wage for the time he was employed by Lindale Motor Lodge Limited. In addition he claims holiday pay for one complete year of service less the time taken for leave, plus the incomplete period before his employment ended.

[2] Graeme claims that on 15 August 2011 he was summarily dismissed by John Meroiti (John), his brother, from his employment as manager of the Lindale Motor Lodge at Paraparaumu. The sole director of Lindale Lodge Limited was Graeme's sister-in-law, Ms Jill Meroiti, the wife of John. Graeme alleges that his dismissal followed on from a verbal and physical altercation between the two brothers which brought an end to their relationship.

[3] Graeme is seeking payment for short paid wages that were less than the minimum wage, payment of holiday pay owing, lost wages following the dismissal, \$10,000 compensation for humiliation, loss of dignity and injury to feelings and costs. In the statements in reply, filed on 13 October 2011 and 24 April 2012, the respondent completely denies the allegations made by Graeme Meroiti.

No appearance from the respondent

[4] There has been no appearance and/or representation from the respondent. The start of the Authority's investigation meeting was delayed to enable the respondent or a representative of it to appear. Attempts were made to make contact with Mr John Meroiti and Jill Meroiti. The support officer was able to contact Jill Meroiti by telephone after 10.am. She said she had no knowledge of the investigation meeting taking place and has been overseas.

[5] Jill Meroiti was advised to put in writing her explanation about non-appearance today. By 12.15 pm the Authority had heard nothing more from her. Indeed in the time between the Authority's investigation meeting and the Authority's determination nothing more has been heard from her.

[6] The notice of investigation meeting was served on the Lindale Lodge Limited registered company address, the same address on the statement in reply signed off by John Meroiti. The address is a private residence apparently of John and Jill Meroiti. A copy of the notice was also sent to the company's lawyer.

[7] John and Jill Meroiti have known that these legal proceedings have been filed and that they follow on from a preliminary determination of the Authority *Meroiti v Lindale Lodge Limited* [2012] NZERA Wellington 64 and a Judgment of His Honour Judge A D Ford in *Marunui Graeme Meroiti v Lindale Lodge Limited* [2013] NZEmpC 65 (Judgment dated 19 April 2013). They must have known that the matter was still to be completed in the Authority. At the time of the Authority's first determination Lindale was represented and its representative has not withdrawn from acting for Lindale in the Authority's matter. Indeed the company's lawyer was contacted by the support officer about the notice of the investigation meeting. Information was provided that the copy of the notice of investigation meeting was received. The lawyer indicated that apparently no one would turn up and he had no

instructions in regard to the matter. I am satisfied that it is more likely than not that no-one was prepared to turn up to the Authority's investigation meeting.

[8] There was also no appearance for the defendant in the Court's hearing. In this regard their lawyer sought leave to withdraw in the Court because he had no instructions and the company was no longer trading, had no assets, and an application was to be made to get the company struck off the company's register. The latter has not happened yet.

[9] I am satisfied that notice of today's investigation meeting was served. The mail was not returned to the Authority's office. There is a track and trace record of service delivery at the address, and a copy was sent to the company's lawyer.

[10] I do not accept that Jill Meroiti has advanced good cause for the non-appearance of anyone for Lindale Lodge Limited at the Authority's investigation meeting. My reasons are as follows:

- i. That Jill Meroiti did not follow up the support officer's telephone call with any written explanation in the time that was available to do so.
- ii. That the service of the notice made to the company's address was not returned to the Authority as undelivered. A copy of the notice was sent to the lawyer. The lawyer's information makes it probable that no-one was going to turn up.
- iii. That the company is no longer trading and has no assets, and this is not enough to halt proceedings when the company remains registered because there is no information from the company that it will not be able to pay any liability in the future..
- iv. That the respondent has a responsibility to keep the Authority informed of any change of address or circumstances likely to lead to delays and problems. This was not done.
- v. That it is the respondent's responsibility to manage its own communications that is between Jill and John Meroiti.

[11] Like the Court I decided to proceed on the basis of formal proof from Graeme Meroiti and conduct an investigation that has been on notice, with the information available.

[12] Pursuant to clause 12 of Schedule 2 of the Employment Relations Act 2000, the Authority has the power to proceed if any party fails to attend. There has been no good cause shown for the failure of the respondent to attend or be represented, and thus I have decided to fully act in the matter before me as if that party had duly attended or been represented.

The Issue

[13] Is Graeme Meroiti entitled to arrears of wages and holiday pay? If so, how much is he entitled to?

[14] Can Lindale Lodge Limited justify its action to dismiss Mr Graeme Meroiti?

The Law

[15] Since Graeme Meroiti was an employee he is entitled to the minimum wage and holiday pay.

[16] In *Angus McKean v Ports of Auckland* [2011] NZEmpC 160 the Full Court dealt with the application of s103A in practice. It held at para [57] ff:

[57] *The Authority or the Court must first determine, as matters of fact what the employer did leading to the employer's dismissal or disadvantaging of the employee, and how the employer did it. This may include findings about what occurred which brought about the employer's acts or omissions that led to the dismissal or disadvantage, if the facts about material events are disputed.*

[58] *Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon the specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections 3, 4 and 5 must be applied to this exercise.*

[59] *Finally, in determining justification under new s103A, the Authority or the Court must determine whether what the employer did and how the employer did it, were what that notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The Court or*

the Authority must do so objectively, that is ensuring that they do not substitute their own decisions for that of a fair and reasonable employer in all the circumstances.

[17] Section 103A of the Act provides as follows:

- (3) *In applying the test in subsection (2), the Authority or the Court must consider -*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition, to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of the defects in the process followed by the employer if the defects were:*
 - (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

[18] Mr Graeme Meroiti was dismissed on 14 August 2011. This is after 1 April 2011; the commencement of the amendment to the Employment Relations Act, and the above principles apply.

The facts

[19] Lindale Lodge Limited is owned by Jill Meroiti. Mr John Meroiti was involved in some motel matters and in the discussions with his brother Graeme. He hired and dismissed Graeme. The agreement was that Graeme would live in and be paid \$350 per week, in the hand after tax had been deducted. He was required to work hours as required. There is some doubt about any written employment agreement and it has not been referred to.

[20] Graeme commenced work at the motel in October 2009. Graeme Meroiti says that he signed the list of duties when he started. This list contained jobs of grounds, security, help in the office when needed, help with conferences, other duties as required. Another person had been engaged to clean the motel rooms, but that person left and Graeme was then required to do the cleaning.

[21] On Sunday 14 August 2011, Graeme and John had an altercation, Graeme says that John arrived at work in a bad mood and he asked John to keep calm because there were guests around. Graeme says John got worse and threw a key at him. Graeme says he told John *you don't have to do that to me*. Graeme says that John then grabbed him and threw him against a wall. He says John then let him go. Graeme says that John then pushed another person who was present and that Graeme told John that he didn't have to assault anyone. John then left the motel.

[22] The next morning, Monday 15 August 2011, John arrived and started to apologise. Graeme says he made it clear that he wasn't happy with how John had behaved the day before. He says that at that point John said *I want your resignation*. Graeme says that he told John that he wasn't getting it, and says he said to John that *if he wanted me gone he would have to sack me*. Graeme alleges John said *okay, be out of here by lunchtime*. Graeme says he had no option but to leave because he had been clearly dismissed without notice. Graeme says he was totally shocked and gutted at the behaviour of his brother, the way his brother treated him and the way he was dismissed without notice, without any disciplinary process, or any prior indication that he would be dismissed. He claims it has been an extremely humiliating experience to first be assaulted, and then to be dismissed and for his actions, and to then cause a family breakdown. Graeme says that John agreed to pay him 2 weeks' notice.

[23] Graeme Meroiti says that after the dismissal he tried to find work and he had to find new accommodation. He says he approached many people he knew to try and find work but was unable to find any work until well into 2012.

[24] He is claiming three months' lost wages following the dismissal. That amounts to 105 hours per week x \$13 per hour, being a total of \$1,365 per week at 13 weeks (quarter of a year) being \$17,745 gross wages.

[25] Mr Graeme Meroiti has attempted to reconstruct the amount of his wages over the weeks that he was paid, the total that he received, and has compared the minimum

wage and his wage of \$350 per week. He has used invoices and documents provided by Lindale and relied on his own bank statements to reconcile what Lindale says he was paid and what he received. In summary, he has told me that he was paid \$30,800 after tax. This has been grossed up to \$36,256 (to account for tax).

[26] In calculating the amount he should have been paid he believes he should have received in total \$123,191.25 before tax (gross). Therefore the difference is \$86,935.25 wages owed.

[27] He claims that he has not been paid holiday pay on the termination of his employment. He believes he is owed four weeks' holiday pay less two weeks that was paid for his first year of service. Holiday pay for leave accrued is \$2,730 gross. In addition, Graeme has claimed he is owed 8% of his earnings for the period 24 September 2010 – 19 August 2011 (that is 46 weeks). He says he was entitled to:

- a. 24 weeks @ \$1,338.75 = \$32,130
- b. 22 weeks @ \$1,365 = \$30,030

The total \$62,160 x 8% equals \$4,972.80 plus \$2,730 for the first year annual leave. In total, he is claiming \$7,702.80 gross for holiday pay and annual leave.

[28] Graeme's representative requested on 18 August 2011 that Lindale Lodge Limited produce the wage time and holiday records for Graeme. The Authority also requested on 10 February 2012 documents from Lindale relating to payments, invoices and tax. A number of documents were provided in a statement in reply filed on 24 April 2012, but no wages time and holiday record. The calculation of the minimum entitlement to wages has been completed by Graeme Meroiti and his representative.

Determination

[29] Marunui Graeme Meroiti was employed by Lindale Lodge Limited, and dismissed from his employment on 15 August 2011.

[30] Graeme has been short paid his wages and holiday pay during his employment. I accept his entitlement for the gross wages as claimed in the absence of being challenged and there being no certainty about the written employment agreement. His earnings should have been a total of \$123,191.25 for 88 weeks' work.

This has been calculated on the basis \$412 gross before tax, and for 88 weeks his earnings were \$36,256 gross (\$30,800 nett after tax). He is owed \$86,935.25 gross.

[31] Also, he is owed holiday entitlements of \$7,702.80.

[32] Graeme has been unjustifiably dismissed from his job at Lindale Lodge Limited by his brother John Meroiti. John initiated the employment ending for no apparent reason, except as a retaliation following a reasonable request from Graeme about John's behaviour. A fair and reasonable employer could not act in such a way, I hold. The dismissal has not been justified and Lindale has not shown that it followed the statutory regime as to the requirements for procedural fairness.

[33] Graeme Meroiti is entitled to lost wages from the date of his dismissal. His claim is for a total of 13 weeks wages (a quarter of a year) in the sum of \$17,745 gross.

[34] He has sought to mitigate his loss by looking for another job. He tried his contacts. He registered with agencies. He used the internet to search for work. He updated and sent out his CV. He suspects his age has been against him despite being capable and able to work. He has been able to recently get a new job.

[35] I find he did not contribute to John Meroiti's behaviour during the dismissal and the prior altercation that occurred before being dismissed.

[36] Graeme is entitled to compensation for hurt humiliation and loss of feelings because he says the breakdown of family relationships caused by John has been distressing. He has had to find work that has caused him to be humiliated and has had to rely on other family members for help and assistance. He told me he was "gutted" and "shocked" by John's decision. He claimed \$10,000, but I hold his evidence without any supporting evidence means he should get \$6,000.

[37] Graeme has been put to the expense and costs of bringing the matter before the Authority. He was represented. The investigation meeting took a half day scheduled for one day. He has been clearly put to expense by Lindale Lodge Limited. The notional daily tariff applies and based on a half day hearing Graeme Meroiti is entitled to \$1,750 contribution towards costs plus the \$71.56 filing fee.

Summary of Orders

[38] Lindale Lodge Limited is to pay to Marunui Graeme Meroiti:

- i. \$86,935.25 gross wages in arrears under s 131 of the Act.
- ii. \$7,702.80 gross holiday pay
- iii. \$17,745 gross lost wages following the dismissal
- iv. \$6,000 compensation under s 123 (1) (c) (i) of the Act for humiliation and loss of dignity and injury to feelings.
- v. \$1,750 costs.
- vi. \$71.56 filing fee.

P R Stapp
Member of the Authority