

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 38
5341441

BETWEEN BABITHA NARAYAN
 Applicant

AND PIERO DAMOSSO t/a
 AL PONTE ITALIANO
 RESTAURANTE
 Respondent

Member of Authority: G J Wood

Representatives: Steve Emslie for the Applicant
 Digby Livingston for the Respondent

Investigation Meeting: 16 February 2012 at Whanganui

Further Information: Received on 20 February 2012

Determination: 5 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Narayan, claims that she was unjustifiably dismissed by the respondent, Mr Damosso, from her position as a chef at his Italian restaurant, and that this was done in breach of his duties of good faith. She claims lost remuneration, compensation for humiliation, loss of dignity and injury to feelings, plus expenses of \$71.56.

[2] The respondent, Mr Damosso, claims that Ms Narayan was genuinely dismissed for redundancy, but accepts that there was a failure to consult her properly in advance of the decision to give her notice of termination of employment.

[3] I note that while the parties' employment agreement describes the employer as Al Ponte Italiano Restaurante, this is not a legal entity and Mr Damosso did not rely on that issue, or the existence of a company (Al Ponte Limited), as defences to the

claim against him personally. This was an appropriate concession, given that the company was not identified in any of the correspondence, including Ms Narayan's employment agreement.

Factual discussion

[4] Mr Damosso is an experienced Italian chef, but when he set up Al Ponte Italiano Restaurante in Whanganui, he worked principally as its front-of-house. He employed Ms Narayan from 9 May 2010 as its chef. Mr Damosso was, however, responsible for the preparation of pizzas, which Ms Narayan was neither experienced nor trained in.

[5] Unfortunately, the business did not operate successfully. In November 2010, in an effort to reduce wages paid to waitresses (who did much of the dishwashing functions), Mr Damosso took on a dishwasher. He attracted a subsidy from Work & Income New Zealand, and was thus much less costly than his existing waiting staff. From early December to early June, being the six months of the subsidy, the dishwasher worked regular hours, doing dishwashing, although on occasions he helped cook the pizzas that Mr Damosso was responsible for.

[6] By mid-January 2011, Mr Damosso was very concerned about the state of the business. It had not made sufficient money during the busy Christmas/New Year period to allow it to survive in its present state over the less busy Winter period. The first decision made by Mr Damosso was to close the restaurant for lunches. This, however, meant that Ms Narayan, as chef, was required for less time. As a result, Mr Damosso's daughter told Ms Narayan that she would have to forego her salary, and go onto an hourly rate and work reduced hours. Ms Narayan protested this decision and sought advice and representation over it. A meeting was then tentatively arranged for 1 February 2011.

[7] However, despite this planned meeting, Mr Damosso decided, because of the difficult state of the business, that even greater changes were required. Of particular concern was that the restaurant was not regularly meeting the rental payments on the lease of its premises, and had ceased making payments on its loan to pay for its chattels. He made the decision to make Ms Narayan's position redundant and to carry out the chef role himself, thus saving the business the cost of a chef. The front-of-house role was to be covered by the waiting staff.

[8] Without any consultation or forewarning, Ms Narayan was informed of this decision, at a meeting called without prior notice, on 25 January 2011. She was given a letter prepared that day that stated, amongst other things:

Unfortunately due to financial concerns we have been forced to restructure our staff situation, and in doing so your position at Al Ponte has become redundant as of the 25th January 2011. This in no way reflects your job performance which has been excellent. Your two weeks notice is effective from the above date and the terms of your redundancy will be negotiated Tuesday 1st February, 2011 at your request when your lawyer is able to be present.

[9] Ms Narayan declined to attend the meeting on 1 February, because she felt that there was no point to it, as she had already been made redundant. I accept that explanation as Ms Narayan had already made it clear that she could not work part time because of the terms of her work visa, and as she had already been told that she had been made redundant.

Determination

[10] There is no doubt this was an unjustified dismissal and/or unjustified action to Ms Narayan's disadvantage, because the circumstances of her redundancy, at the very least, called for consultation with her. As accepted by Mr Damosso, no such consultation occurred.

[11] Ms Narayan had every reason to question the genuineness of the redundancy because Mr Damosso had recently taken on additional staff in the form of a dishwasher, and when seeking annual leave over Christmas (to return to family in Fiji), she had been given no forewarning that her job was in jeopardy. I am satisfied, however, on the balance of probabilities, that it was not only necessary to save costs because of the restaurant's trading position, but also that Ms Narayan was not replaced by the dishwasher, but by Mr Damosso himself, who took up the chef duties. An employer is entitled to restructure his business so as to operate it in a way that he believes is more effective and efficient, and I accept that this is what occurred in this case.

[12] I conclude that Ms Narayan is mistaken in her evidence that the dishwasher was taken on after she had been on holiday over Christmas in order to provide a means of replacing her. This is so because:

- a. the dishwasher was in fact a dishwasher and not a chef;

- b. the dishwasher did not carry out chef duties, other than sometimes cooking pizzas (which Mr Damosso had always done);
- c. the dishwasher commenced work well before Ms Narayan claimed he had; and
- d. when Ms Narayan's employment was terminated, it was Mr Damosso who took over her chef duties.

[13] However, the restructuring was done far too hastily and with an absence of consultation. In these circumstances, I conclude that, had there been consultation, Ms Narayan would have been employed for another two weeks at least. She is therefore entitled to compensation for lost remuneration in the sum of \$1,800 gross.

[14] Ms Narayan is also entitled to be compensated for the way she was treated, but not for the actual loss of her job. Given the complete lack of notice and consultation, I would ordinarily award compensation in the sum of \$5,000, given Ms Narayan's evidence about how the lack of consultation and lack of notice before the loss of her job affected her. However, in setting compensation, I also have to take account of the financial position of Mr Damosso. His evidence was that he has no assets and a large debt to the restaurant's landlord. This evidence was confirmed by his daughter. Taking these factors into account, I set compensation at \$2,500, given that Mr Damosso may be able to meet the awards by payments over time.

[15] There is no issue as to Ms Narayan having contributed in any way to how Mr Damosso went about making his decision to make her redundant.

[16] Ms Narayan is also entitled to expenses as claimed in the sum of \$71.56 for the filing fee.

[17] I therefore order the respondent, Piero Damosso, to pay to the applicant, Babitha Narayan, the sum of \$1,800 gross in lost remuneration; \$2,500 in compensation under s.123(1)(c)(i) and \$71.56 in expenses.

G J Wood
Member of the Employment Relations Authority