

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Cheryl Oldham (Applicant)
AND Jan Bain Holdings Ltd (Respondent)
REPRESENTATIVES Geoffrey Rothwell for the applicant
Bryce Quarrie for the respondent
MEMBER OF AUTHORITY James Wilson
INVESTIGATION MEETING 16 January 2004
DATE OF DETERMINATION 22 April 2004

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The applicant, Ms Cheryl Oldham, filed a statement of problem with the Authority on 5 June 2003. In this statement Ms Oldham said that she had been, in effect, unjustifiably dismissed from her employment with the respondent, Jan Bain Holdings Ltd (Jan Bain). In a subsequent, amended, statement Ms Oldham also claimed that Jan Bain owed her substantial amounts by way of payment for outstanding holiday entitlements and for work on statutory holidays.

[2] Jan Bain Holdings says that Ms Oldham was not unjustifiably dismissed. By way of counterclaim in their statement in reply, Jan Bain argue that Ms Oldham caused a good deal of damage both to the business and to its property and sought to recover damages in this regard.

Background

[3] For several years up until late January 2003 Ms Oldham was employed as Manager of the Bay of Islands Motel (the motel). The motel was owned and operated by Negotiable Enterprises Limited, a company owned by Mr and Mrs T & A Butler. In late January 2003 the motel was sold to Jan Bain Holdings Limited.

[4] It is at this point that the first substantial difference in evidence becomes apparent.

- Mr Gordon Taylor (the Managing Director of Jan Bain Holdings) says that he told Ms Oldham that she could stay in her existing role for three months during which time Jan Bain would review the staffing arrangements, existing staff would be paid out and that there may be some changes to staffing requirements. Mr Taylor says that he advised Ms Oldham that this arrangement had been written into the sale and purchase agreement.

- Ms Oldham says that she was not advised by Mr Taylor that her employment was anything other than “to be continued as previously”. She says she was given no indication that she was to be employed only for an initial period of three months. She says that she had no knowledge of any agreement to this effect between the previous owners and Jan Bain Holdings, or any knowledge of such an agreement being written into the sale and purchase agreement.
- Mr and Mrs Butler (the previous owners) say that, having agreed with Jan Bain that the three-month ongoing employment clause be written into the sale and purchase agreement, they advised Ms Oldham of this arrangement at or about the time of the sale.

[5] The next conflict in evidence revolves around Ms Oldham’s occupation of accommodation within the motel complex. This arrangement had been a part of Ms Oldham’s employment agreement with the previous owners. Mr Taylor says that he told Ms Oldham, at a meeting on 4 February, that she would have to find alternative accommodation as he intended residing within the motel himself. Ms Oldham says that Mr Taylor merely indicated that he would wish to carry out some building alteration so as to provide himself with office space within the accommodation unit.

[6] Ms Oldham’s recollection is that the first time that Mr Taylor indicated that she must move out of her motel accommodation was during a general conversation on 10 April 2003. Ms Oldham says that Mr Taylor suggested that she should move out on or before Anzac weekend. She says that two days later Mr Taylor emphasised that she should move out by Anzac weekend. Ms Oldham says that she was extremely upset by this suggestion but that she immediately started investigating alternative accommodation arrangements for herself and her two children. During this period Ms Oldham says that she *began to get migraine headaches and was continually vomiting*.

[7] On or about 25 April 2003 Ms Oldham advised Mr Taylor that she was having difficulty finding alternative accommodation. She says that Mr Taylor reacted extremely badly to this information and insisted that she move out by the following Monday (the conversation took place on a Friday). Mr Taylor offered her temporary (a maximum of two weeks) accommodation in one of the motel units.

[8] On or about 28 April 2003 Mr Taylor received a letter from Ms Oldham’s lawyer. The parties subsequently attended mediation. While there is some debate regarding what occurred over this period, Ms Oldham ceased working at the motel on or about 28 April.

[9] In her statement of evidence Ms Oldham says that she has never received the outstanding holiday pay due to her, including the leave outstanding at the time the motel was sold to Jan Bain Holdings. This outstanding leave has been the subject of a good deal of discussion and correspondence and I will deal with this issue later in this determination.

[10] In his statement to the Authority Mr Taylor makes a number of accusations regarding Ms Oldham’s performance and her behaviour following the termination of her employment. These accusations include poor management and accounting practices, inappropriate use of motel funds, damage to the accommodation and advising prospective clients not to make use of the motel facilities. Ms Oldham vehemently denies all of these accusations. These accusations are, for the most part, irrelevant in the context of the issues I am required to decide. However it is important to record and that none of these accusations is supported by any substantive evidence. In my opinion they are a belated attempt by Mr Taylor to justify his behaviour and his treatment of Ms Oldham and an ill-considered attempt to undermine Ms Oldham’s credibility.

The termination of Ms Oldham's employment: the respective positions

Jan Bain's position

[11] On behalf of Jan Bain Holdings Ltd Mr Quarrie argues that when Jane Bain purchased the motel, Ms Oldham's employment with the previous owners ceased. Jan Bain offered Ms Oldham new employment for only three months (until the end of April 2003). The termination of Ms Oldham's employment was due to the completion of this temporary employment and the inability of the parties to negotiate new terms and conditions of employment. Mr Quarrie says that the temporary nature of Ms Oldham's employment is reflected in the special clauses written into the sale and purchase agreement. In Mr Quarrie's submission Mr Taylor clearly spelt out to Ms Oldham the temporary nature of her employment, and his requirement that she would need to vacate the motel accommodation, shortly after taking over the motel. He says that, even if it is accepted that notice to vacate the accommodation was given only at 10 April, this was all that was required in terms of the Residential Tenancies Act 1986 because Ms Oldham's tenancy was a "service tenancy" as defined by that Act.

Ms Oldham's position

[12] Ms Oldham's primary argument is that she was unjustifiably dismissed. She says she was unaware of the sale and purchase agreement until the time of the Authority's investigation and was certainly not told that her employment by Jan Bain was temporary. On her behalf Mr Rothwell argues that Ms Oldham could not be bound by an agreement to which she had no knowledge or input and that, in the absence of a written employment agreement there is no basis to conclude her employment was temporary. He argues that the sale and purchase of the motel was the sale and purchase of a going concern and that under these circumstances it is normal that employees being "taken over" by the purchaser are taken over on the same terms and conditions as they were on when working for the vendors. On this basis Ms Oldham was a permanent employee and was dismissed in that a fundamental component of her employment agreement (her on-site accommodation) was removed.

[13] Ms Oldham's secondary argument is that, should the Authority find that her employment was temporary, the manner in which her employment was terminated was unjustifiable, was to her disadvantage and had caused her a good deal of stress and humiliation. Mr Rothwell argues that Ms Oldham has a personal grievance against her former employer and should be compensated for the humiliation, loss of dignity etc.

Discussion

[14] There is some evidence that Ms Oldham's employment with Jan Bain was temporary i.e. for an initial period of three months. The sale and purchase agreement does not itself form an employment contract. I accept Mr Rothwell's point that it could not – Ms Oldham was not a party to that agreement and could not be bound by it. However the sale and purchase agreement does confirm that Jan Bain purchased the motel buildings and management contracts and not a "going concern". Ms Oldham was employed by Negotiable Enterprises Limited. This employment ceased when the motel was sold. Part of the agreement was that outstanding leave and other payments due to staff would be calculated and the appropriate amount paid to the new owner for subsequent disbursement. The sale and purchase agreement was conditional *on the purchaser retaining the manager..... for 3 months*. I find that, based on the evidence of Mr and Mrs Butler (the owners of Negotiable Enterprises) Ms Oldham was aware of this commitment to employ her for three months.

She tacitly accepted this position, and the conditions of employment, by continuing to manage the motel, albeit without any written agreement.

[15] It is impossible to say, based on the conflicting evidence I have heard, exactly what it was the parties thought might happen during this initial three-month period. It is reasonable to assume however that Ms Oldham had a genuine expectation that not only would her employment continue beyond the initial three-month period (perhaps with the renegotiation of some conditions of employment) but also that her continued occupation of on-site accommodation was not in jeopardy. It is incomprehensible that a solo mother with two children would not have been extremely concerned had she been given any indication that either her job or her family's accommodation was at risk. For this reason I find that Ms Oldham was not told by Mr Taylor in early February that he wished her to vacate the on-site accommodation. I find that this requirement was not conveyed to Ms Oldham until 10 April 2003.

[16] Regardless of whether or not Ms Oldham's employment with the Jan Bain was temporary, the manner in which Mr Taylor advised Ms Oldham that he was withdrawing a fundamental condition of her employment (the right to free on-site accommodation) was unfair and therefore unjustified. Ms Oldham was an employee with a legitimate expectation that her employment would continue beyond the three-month "trial" period. Mr Taylor could have, and should have, clarified with her, in writing, her employment status, the conditions of her employment and the terms on which that employment might be continued after the initial three months. Instead he left Ms Oldham with the legitimate expectation that her employment would be continued. Mr Taylor made no effort to consult with Ms Oldham regarding whether her employment would continue or the terms of any such employment agreement. He merely announced, at very short notice, that she must vacate the on-site accommodation. This accommodation was an integral part of her implement package and no doubt would figure highly in Ms Oldham's consideration of any ongoing employment agreement.

[17] Mr Taylor's reaction, when Ms Oldham attempted to extend her occupation of the accommodation and to assert her employment rights, was to bully her into not only vacating the accommodation but also into terminating her employment. Mr Taylor's subsequent attempts to undermine Ms Oldham's credibility (by making wide ranging accusations regarding Ms Oldham's performance etc – see paragraph [10] above) were a continued demonstration of this unjustified behaviour. Ms Holden has a personal grievance against Jan Bain Holdings in that the manner in which she was treated was unjustified and caused her significant disadvantage and significant humiliation loss of dignity etc. In terms of section 123(c) of the Employment Relations Act 2000 (the Act) she is entitled to compensation for this humiliation etc.

Remedies: termination of employment

Recovery of lost wages

[18] Had Mr Taylor properly spelled out to Ms Oldham, at the time Jan Bain purchased the motel, the conditions surrounding her ongoing employment, he could have carried out a proper consultation process and legitimately terminated Ms Oldham's employment or renegotiated the terms of that employment. I accept that Mr Taylor has in effect disestablished the position previously held by Ms Oldham albeit that the manner in which this occurred was unjustified. It is therefore not appropriate to order that Ms Oldham be awarded compensation for wages lost.

Humiliation, loss of dignity etc

[19] I have found that the manner in which Jan Bain Holdings precipitated the termination of Ms Oldham's employment was unjustified and caused Ms Oldham significant humiliation, loss of dignity etc. This humiliation etc was compounded by Ms Oldham's need to urgently re-house herself and her children and by Mr Taylor's subsequent ill considered attempts to undermine her credibility. In terms of section 123(c) of the Act, Jan Bain Holdings is ordered to pay Ms Oldham \$10,000, without deduction.

Outstanding leave payments

[20] In her (amended) statement of problem, Ms Oldham claimed that she was owed substantial amounts for work carried out on public holidays over several years. During the course of my investigation Ms Oldham did not pursue these claims against Jan Bain. In any event, as I have already found that Jan Bain did not take over the motel as a going concern, any such claim could only be bought against her previous employer, Negotiable Enterprises Limited.

[21] There is no dispute that, at the time the ownership of the motel was transferred, the vendor paid Jan Bain Holdings an amount to cover the accrued outstanding leave entitlements of employees. In respect to Ms Oldham this amount was \$1393.62. At the commencement of my investigation Mr Taylor insisted that no money was owed to Ms Oldham. However during the investigation meeting the transfer of money mentioned above came to light and Mr Taylor insisted that he had sent a cheque for the outstanding amount to Ms Oldham shortly after the termination of her employment. After a number of weeks, and several requests that Jan Bain provide a copy of the cashed cheque, Mr Taylor eventually advised that the Bank had held the monies in a suspensory account. Jan Bain now accepts that the amount of \$1393.62 is owing to Ms Oldham. Mr Quarrie argues that, as the money was not withheld through any fault of Jan Bain Holdings, no interest should be payable.

[22] Frankly, I do not accept Mr Taylor's explanation for the lengthy delay in the payment of this money. Even if his version of events is accepted, Mr Taylor has had ample opportunity to investigate why the money had not been paid and to rectify any error. Ms Oldham has been denied the use of these funds for 12 months and is entitled to interest on the outstanding amount. Jan Bain Holdings is ordered to pay Ms Oldham \$1393.62 within 14 days of the date of this determination. In addition Jan Bain is ordered to pay Ms Oldham interest on this amount at the rate of 7.5% per annum from 1 May 2003 until the amount is paid in full.

Summary

[23] By way of summary of the findings and orders set out above:

- Ms Oldham has a personal grievance against her former employer, Jan Bain Holdings Ltd in that in the manner in which her employment was terminated was unjustified.
- In terms of section 123(c) of the Employment to Relations Act 2000, Jan Bain Holdings is ordered to pay Ms Oldham \$10,000.00 without deduction as a compensation for the humiliation, loss of dignity etc caused to her by Jan Bain's unjustified actions.
- Jan Bain Holdings is ordered to pay Ms Oldham \$1393.62 being outstanding leave entitlements, together with 7.5% p.a. interest on this amount from 1 May 2003 until the amount is paid in full.

Costs

[24] Costs are reserved and the parties are requested to attempt to settle this matter between themselves. If they are unable to do so, Ms Oldham may file and serve an application for an award in respect to costs within 21 days of the date of this determination. Jan Bain will then be given 14 days in which to file and serve a response.

James Wilson
Member of Employment Relations Authority