

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 191/09
5155162

BETWEEN PAUL OUAKLI
 Applicant

AND SCIPIO LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Phil Butler, Advocate for Applicant
 Jessica Mills (part only), Counsel for Respondent

Investigation Meeting: 13 July 2009, 19 August 2009 and 18 September 2009 at
 Christchurch

Determination: 5 November 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Ouakli) alleges he was unjustifiably dismissed from his employment, suffered a disadvantage in his employment and seeks to recover payment of a bonus and certain holiday pay.

[2] The respondent (Scipio) resists all of Mr Ouakli's allegations.

[3] It is proper to record the difficulty the Authority has had in having this matter heard and determined. The issues were not complex or particularly time consuming, but the behaviour of Scipio throughout the proceedings made it difficult to progress the matter effectively and efficiently. Adjournments were reluctantly granted to allow Scipio to be properly represented but, in the result, counsel for Scipio attended on only one of the three hearing days. That is not a reflection on counsel for Scipio, but on Scipio itself. Scipio did not engage in the Authority's process with good faith and was obstructive and difficult throughout.

[4] Mr Ouakli commenced employment as head chef for Scipio on 27 June 2007. Mr Ouakli's evidence before the Authority was that he resigned his previous job effective 4 June 2007 and he was originally supposed to start work on 13 June but subsequently that was changed to 17 June. Mr Ouakli initially claimed he was entitled to wages for the period between 17 June and 27 June 2007.

[5] An individual employment agreement was signed on 26 June 2007 and the terms of the engagement included access to a bonus which was not paid and which Mr Ouakli initially contended should have been in the order of about \$40,000.

[6] Mr Ouakli says that during the employment he regularly sought assistance from Scipio in recruitment of additional kitchen staff but that the importance of that was always minimised by Scipio. Scipio says that Mr Ouakli was himself responsible for the recruitment of kitchen staff and that he successfully drove most of the potential applicants away. Scipio says that typically there were two persons working in the kitchen and one of those other staff, Alan Cappuccio told me at the investigation meeting that he had difficulty working with Mr Ouakli but if Mr Ouakli had wanted fewer hours (which Mr Cappuccio doubted), Mr Cappuccio was himself keen to pick up those hours because he had a large family and a large mortgage and needed all the hours he could get. However, Mr Cappuccio said that had he offered Mr Ouakli the opportunity of taking some of Mr Ouakli's unwanted hours but Mr Ouakli had refused.

[7] Scipio also pointed out to me that the claim that the kitchen was undermanned was somewhat fanciful as it was a small kitchen (10m²) servicing a total of seven tables and that the issue was really about being organised rather than about numbers of staff.

[8] In any event, matters came to a head in early March 2008 and by letter dated 1 March 2008, Mr Ouakli resigned his position giving one month's notice as per his employment agreement. What happened next was that Mr Ouakli went off on sick leave. He had seen his doctor on 29 February 2008 and the doctor decided that Mr Ouakli was unfit for work until 5 March 2008, but the medical certificate that issued mistakenly referred to 5 April 2008.

[9] Because Mr Ouakli was unwell and away from work he rang Mr Flemming Sudsgaard, the principal of Scipio, to advise him that he was *handing in his notice* and

that the resignation letter would be forwarded by mail together with the medical certificate explaining his absence from work. Mr Ouakli's wife overheard that telephone discussion and told me about it at the investigation meeting. Mr Sudsgaard confirmed that he received the letter of resignation from Mr Ouakli and the medical certificate from the doctor as Mr Ouakli had indicated would be the case. However, as I have already noted, the medical certificate made it clear that Mr Ouakli would not return to duty until 5 April 2008, not 5 March 2008. That was an error but Mr Sudsgaard's evidence was that he had no reason to know that the doctor's certificate was wrong. Mr Ouakli's evidence was that he made clear in his initial telephone discussion to Mr Sudsgaard that he would be returning to work on 5 March 2008 and he did precisely that, only to discover that somebody else was filling his position.

[10] Mr Sudsgaard said that Scipio had to replace Mr Ouakli because the only evidence it had was the medical certificate saying Mr Ouakli would not be fit for duty until 5 April and he could not simply shut his restaurant down for five weeks. Mr Ouakli, as I mentioned, gave evidence that he told Mr Sudsgaard that he would be back on 5 March but if that message was conveyed, it certainly did not register with Mr Sudsgaard.

[11] Mr Ouakli worked the balance of that day (5 March 2008), having pointed out to Mr Sudsgaard the error in the medical certificate. Mr Ouakli arranged for a fresh medical certificate with the correct date and there were in fact two versions of this corrected document produced, one on 7 March 2008 and one on 31 March 2008. Mr Sudsgaard confirmed that the 7 March document was received by him on 8 March.

[12] Mr Ouakli returned to the workplace on the following day, 6 March 2008 and at about midday on that day, Mr Sudsgaard sent him home. Mr Ouakli says this action constituted an unjustified dismissal. Mr Sudsgaard, for Scipio, said that he took legal advice and was told that he must stick to the doctor's certificate and could not rely on Mr Ouakli's claim that the doctor had got the date wrong. Only the doctor could change the effective operative date on the medical certificate. That being the position, and having regard to Scipio's obligations to run a safe and healthy kitchen, Mr Sudsgaard felt he had no option but to send Mr Ouakli home. It was clear also from Mr Sudsgaard's evidence that he was influenced by Mr Ouakli's telephone call to him notifying him of the resignation. He says that from that call he got the distinct

impression that Mr Ouakli was not returning to the workplace, partly because of the ill health but also because Mr Ouakli had applied for, and expected to be successful in, another position.

[13] Mr Ouakli then promptly raised a personal grievance alleging that Scipio's actions on 6 March 2008 constituted an unjustified dismissal of him.

Issues

[14] The Authority needs to investigate the following matters:

- (a) Was Mr Ouakli unjustifiably dismissed;
- (b) Has Mr Ouakli been paid his legal entitlements;
- (c) Has Mr Ouakli been disadvantaged?

Was Mr Ouakli unjustifiably dismissed?

[15] I am satisfied on the evidence before the Authority that Mr Ouakli was not unjustifiably dismissed from his employment. It seems to me the factual position is that Mr Ouakli resigned his position on 1 March 2008 giving one month's notice as he was required to do pursuant to his individual employment agreement such that his notice would have ended on 1 April 2008. Then, contemporaneously with that, Mr Ouakli went on sick leave, obtained a medical certificate from his doctor which he provided to the employer together with the resignation which erroneously put him off work until 5 April 2008 instead of 5 March 2008.

[16] Mr Sudsgaard, for Scipio, received the resignation and the medical certificate in the same envelope and had previously had a conversation with Mr Ouakli in which the latter made it clear that he was unhappy and on Mr Sudsgaard's evidence left the impression that he was not coming back in any circumstances. In those circumstances it seems to me that a fair and reasonable employer would have done precisely what Scipio did and urgently recruited a replacement for Mr Ouakli. After all, on the facts before it, it seemed as if Mr Ouakli was not going to return to the workplace at all as the medical certificate submitted with the resignation covered the whole period of the notice. In my opinion, it is unreasonable to expect Mr Sudsgaard to make temporary arrangements for cover in those circumstances. He believed, on reasonable grounds,

that Mr Ouakli was not coming back and he acted on that by recruiting somebody to replace Mr Ouakli.

[17] Of course, the recruitment of a replacement for Mr Ouakli was not in itself a repudiation of Mr Ouakli's employment agreement; that was only effected at around noon on 6 March 2008 when Mr Sudsgaard sent Mr Ouakli home having taken legal advice on Mr Ouakli's return to work the previous day and being told by his lawyer that irrespective of Mr Ouakli's verbal information about the alleged mistake in the medical certificate, Mr Sudsgaard should take the doctor's word for the information in the medical certificate and only the doctor ought to be able to change that.

[18] In my opinion, in sending Mr Ouakli home, Scipio acted entirely reasonably. It was running a public restaurant where health and safety issues are paramount and to have a person working there who, according to his own doctor was unwell and unfit to work, was entirely inappropriate.

[19] However, the position seems to me to be different when, on 8 March 2008, a further and accurate medical certificate was provided from the same doctor and relating to the same consultation on 29 February 2008 which confirmed that Mr Ouakli was fit to return to duty on 5 March 2008, not 5 April 2008. From the receipt of that document (which is acknowledged by Mr Sudsgaard), it seems to me self-evident that Scipio had an obligation to redress matters with Mr Ouakli.

[20] I am not satisfied that Mr Ouakli has a personal grievance by reason of having been unjustifiably dismissed. I consider that the employer acted reasonably on the basis of the information provided to it by Mr Ouakli and Mr Ouakli's doctor, albeit that the information from the doctor in particular (certainly in the first communication) was plainly wrong, but the error in the medical certificate was simply unknown to Scipio and there was no way that it could be expected to have established that that date was incorrect. I am satisfied that the actions it took in replacing Mr Ouakli at that point were what a fair and reasonable employer would do faced with those circumstances.

[21] However, once that error was corrected, I hold that Scipio has an obligation to Mr Ouakli but I prefer to consider that obligation in the context of the consideration of whether Scipio has committed unjustified actions to Mr Ouakli's disadvantage.

Has Mr Ouakli been paid his legal entitlements?

[22] I deal with these various monetary entitlements in sequential order. First, Mr Ouakli claims to have not been paid for the period from 17 June to 27 June. I do not accept Mr Ouakli's claim in this regard. I am satisfied with Mr Sudsgaard's evidence that he told Mr Ouakli that he would not be required until the café opened, that that opening date was delayed because of fitout problems and that the café did not in fact open until 27 June, from which date it is agreed Mr Ouakli was paid. It follows that this claim fails.

[23] Next, is a claim for unpaid holiday pay. When the proceedings in the Authority were initiated, there was an amount of holiday pay outstanding of over \$2,500. Approximately \$1,500 of that sum has been paid, but an amount of \$966 has been withheld from payment on the basis of a series of individual calculations alleging earlier overpayment. During the course of the investigation meeting, each of these alleged overpayments was individually analysed and I received assistance from both parties, both by way of oral evidence and by way of written calculation, in respect of this particular issue. I am satisfied that none of the claims for overpayment can be made out by Scipio and accordingly I direct that Scipio is to pay to Mr Ouakli the outstanding sum of \$966. Because I consider that the delay in the payment of this holiday pay was thoroughly unreasonable, I also award Mr Ouakli an additional sum of \$100 as a penalty in lieu of interest on the outstanding moneys. It follows that under this head the total amount owing is \$1,066.

[24] The final item on which there is dispute between the parties in respect of Mr Ouakli's legal entitlements is his claim to be entitled to a bonus which he has not received. Certainly, his employment agreement provides for the payment of such a bonus. The relevant provision, which is not artfully worded, provides that:

... If average food (cost) is lower (than 28%) a yearly bonus of 50% will be paid of the difference between 28% and achieved cost, based on a yearly average.

[25] Two issues arise. The first is whether any bonus was due at all and the second is who was responsible for the calculation of the bonus. As to the second, Mr Ouakli took it upon himself to take home the accounting information that he had available to him and maintain his own record of his alleged bonus entitlement on his home computer. Scipio, on the other hand, says that it would have expected to rely on its

own accountant's information rather than on Mr Ouakli's and in any event there is no bonus payable because the trigger point is not reached.

[26] It is apparent from the wording of the relevant provision in the employment agreement that an annual calculation (or perhaps more accurately an annual payment of bonus) is contemplated. Mr Sudsgaard for Scipio agreed that it was implicit in such a provision that there would be payment for a part year as well, assuming the threshold targets were met.

[27] In the end, it does seem to me an extraordinary situation for an employee to, as it were, take responsibility for the calculation of his own bonus and on this point anyway, I much prefer Mr Sudsgaard's evidence to the effect that whatever Mr Ouakli's calculations were, they were erroneous. Mr Sudsgaard told me that for the eight months of the employment total food sales amounted to \$135,459.27 while total food purchased was \$43,198.77. That constitutes a food cost for the period of approximately 31.5% which is well outside the trigger figure of 28% average monthly food costs of total food sales. For his part, Mr Ouakli, when initially giving evidence at my investigation meeting, told me that his claim for bonus was in the order of \$40,000. When that claim was subject to further scrutiny after the initial investigation meeting adjourned, Mr Ouakli produced further particulars of his claim and sought to justify barely 10% of that figure at \$4,544.35 together with a claim for interest at 5%. Given that Mr Sudsgaard's evidence was that Mr Ouakli had no authority to prepare these bonus calculations on his home computer and there is no evidence from Mr Ouakli to the contrary, I conclude that Mr Sudsgaard's evidence on the bonus issue is to be preferred and I reject Mr Ouakli's claim for bonus based, as it is, on his own calculations.

Has Mr Ouakli been unjustifiably disadvantaged?

[28] I have already concluded that Mr Ouakli has been disadvantaged by the behaviour of Scipio in its treatment of the medical certificate issue. It ought to have been apparent to Scipio on and from 8 March 2008 that Mr Ouakli had become ready, willing and able to continue his duties, at least from that date onwards down to 1 April 2008 when his period of notice would have expired by the passage of time.

[29] However, rather than deal with that issue in a proper way, Scipio, in my judgement, chose to ignore it and having originally been innocently misled by the

earlier mistake in the first medical certificate, once that mistake was rectified, Scipio took no further steps.

[30] A fair and reasonable employer would have taken further steps to put right the earlier innocent default. At the very least, if action had been taken at the time, the proper course of action would have been either to call Mr Ouakli back to work for the balance of his notice period (assuming that was physically possible), or to agree with Mr Ouakli an appropriate payment to reflect the actual situation.

[31] Because neither of those steps were taken, I hold that Mr Ouakli has suffered a disadvantage as the consequence of an unjustified action by his employer, Scipio, and he is entitled to remedies.

Determination

[32] Mr Ouakli's claim for unjustified dismissal fails because I have found as a fact that Mr Ouakli was not in fact unjustifiably dismissed at all. However, the circumstances in which his resignation and the contemporaneous but erroneous medical certificate were received do constitute a personal grievance but one of disadvantage as a consequence of unjustified actions of Scipio in its treatment of the medical certificate issue.

[33] I have considered whether Mr Ouakli contributed in any way to the circumstances giving rise to that personal grievance, and I am satisfied that there was no contribution whatever to the disadvantage grievance.

[34] It follows that Mr Ouakli is entitled to the full effect of the remedies that I award and I determine that a compensatory sum of \$3,000 should be paid to Mr Ouakli by Scipio, that payment being made pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[35] I have also decided that Mr Ouakli is owed holiday pay in the sum of \$966 gross and is entitled to an additional sum of \$100 to compensate him for the unreasonable delay in the payment of that sum.

Costs

[36] In the particular circumstances of this case, it is appropriate to fix costs at this point. I accept the submissions of Mr Ouakli that the behaviour of Scipio put him to additional cost in prosecuting this partly legitimate claim and while I do not think that this is a case where full solicitor/client costs ought to apply, it does seem to me to justify a higher award than I might otherwise make, given that unreasonable delay by Scipio in dealing with the matter.

[37] I do not accept Scipio's counterclaim that it was put to additional cost and inconvenience because Mr Ouakli's initial representative unreasonably delayed. It is true that Mr Ouakli's first representative was completely dilatory but there is no evidence that that impacted in any way on Scipio and in those circumstances that submission is rejected.

[38] I consider an appropriate contribution to be the figure of \$3,000 and I direct that Scipio is to pay to Mr Ouakli that sum as a contribution to the latter's legal representation costs.

James Crichton
Member of the Employment Relations Authority