IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 219
5416244

	BETWEEN	BRENDON DAVID PAGE Applicant
	A N D	RHYMICS LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Warwick Heal, Counsel for Applicant Alyn Higgins, Counsel for Respondent
Investigation meeting:	16 October 2013 at Takaka
Submissions Received:	At the investigation meeting
Date of Determination:	22 October 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Brendon Page, claims he was dismissed (albeit constructively) from his employment with the respondent, Rhymics Limited, on 8 February 2013.

[2] Rhymics denies the claim and contends Mr Page left of his own volition.

Background

[3] Rhymics is owned by Michael Delhanty and Rhys Armitage and operates a hotel in Takaka which it acquired in November 2012. Mr Page was already there, having been engaged by the previous owner as a barman in June 2012.

[4] There is no evidence of a written employment agreement when Mr Page commenced but one was introduced when the sale was imminent. Mr Page says the departing owner advised staff of a potential sale in September and issued employment

agreements detailing tasks and hours *as she was concerned the new owners would change our hours or dismiss us, she did not trust the new owners and told us this*.

[5] He goes on to say:

> *My contract stated I was employed full time in the bar, Monday to Saturday. I signed my contract and handed it back and all contracts were given to Michael Delhanty on the changeover of the business ownership. … I was never given a copy of this agreement.*

[6] Mr Delhanty has a different view. He says he has never seen these agreements and did not intend guaranteeing jobs to existing staff. He sought the departing owner's permission to interview staff but this was denied. As a result he then decided to continue operating the business without change and, for the first fortnight, applied a roster prepared by the departing owner.

[7] A few weeks after assuming control Mr Delhanty addressed the question of documentation by sending draft employment agreements to the staff. He understood they largely reflected the existing terms and conditions. Mr Page's records his position as *bar person*. The hourly rate was $16.00. The proposed agreement says full time hours are forty and then includes a provision reading:

> *The hours and/or days of work of part time employees may be increased or decreased by the employer in order to meet variations and fluctuations in trading patterns and labour requirements.*

[8] Mr Page says he was not willing to sign as he was unhappy about the hourly rate as he now considered himself a duty manager. He goes on to say he approached Mr Delhanty and:

> *He approached me later in the week and offered $17 p/hr which I agreed to and Michael offered to have a sit down at a later date to amend the contract. He made no attempt to do so, and the contract was not signed. So my current signed contract was still effective.*

[9] According to Mr Page's written evidence that contract (agreement) guaranteed full time employment which, he says, meant no less than 35 hours per week. When questioned he however accepted the agreement offered by Mr Delhanty was similar, if not identical, to that offered by the previous owner. In particular, he accepted the hours of work and hourly rate were identical.

[10] Mr Delhanty's evidence is the hourly rate was a continuation of the status quo and Mr Page was not a duty manager as he had not, at that stage, attained a manager's certificate. Mr Delhanty accepts the pay rise was discussed but his offer was the increase would only apply once the manager's qualification was attained. As it hadn't, he did not immediately amend the offer.

[11] The evidence is Mr Delhanty is correct regarding Mr Page's status as a duty manager. His manager's certificate was temporary. It could not, therefore, pass from one employer to another and expired upon the sale of the business.

[12] Mr Page also claims Rhymics operated policy of only wanting females behind the bar and Mr Armitage was a bully who abused and harassed staff. These claims are vehemently denied by Rhymics. They will not be examined in depth as, notwithstanding their airing, Mr Page states they played no part in his decision to resign. He says his departure is solely attributable to Rhymics decision to reduce, indeed remove, his hours of work contrary to his employment agreement and its guarantee of full time employment.

[13] About that Mr Page says he was approached by Mr Armitage who, in a public place, proffered a new one week roster on which Mr Page had no shifts. Mr Page says he then asked if he would have work the following week and Mr Armitage said no. Mr Page goes on to say Mr Armitage then said he *wanted to show me the roster before I saw it later and I got upset* before attributing the changes to a need to *train up the girls*.

[14] Mr Page said he then went home as he considered advice of no work in the foreseeable future amounted to a dismissal.

[15] Again Rhymics' view differs. Mr Armitage accepts Mr Page was not given any hours on the roster he intended posting on 8 February. He says changes to the way he and Mr Delhanty intended operating the business meant three staff had to be trained in a range of duties they had not previously performed. The hours were therefore given to them. Mr Armitage says he knew Mr Page would be unhappy and therefore took him out to the back of the bar where no one else could listen. He also says he explained Mr Page could still receive something approximating his normal pay given accumulated lieu hours and annual leave.

[16] Mr Armitage says he clearly advised the changes were temporary and Mr Page would be on the roster the following week. He says Rhymics needed Mr Page.

[17] Mr Armitage goes on to say Mr Page commented *hmmm, what to do, what to do?* before leaving. He says he assumed Mr Page was having a cigarette while he thought about what was said and did not look for him for a while as the bar was busy. When Mr Armitage did look he discovered Mr Page's car had gone and assumed he too had left.

[18] As already said, Mr Page had gone home. He did not return to complete the shift and nor did he return for his rostered shift the following evening. Rhymics concluded the two absences meant Mr Page had left its employ of his own accord and, on the following Wednesday, completed his final pay. In the interim there had been no contact between the parties.

Determination

[19] Mr Page claims he was constructively dismissed.

[20] In *Wellington etc Clerical Workers etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965 the Court stated that for a dismissal to be constructive the employers conduct must be repudiatory.

[21] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA) the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

(a) An employer gives an employee a choice between resigning or being dismissed;

(b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

(c) A breach of duty by the employer causes an employee to resign.

[22] That a unilateral and substantial variation to an employee's terms and conditions of employment is a breach that can render a subsequent resignation a constructive dismissal is well established. That a reduction in hours, and with it pay, can constitute such a breach is also well established (see, for example, *Gorrie Fuel (SI) v Gittoes*, EmpC Christchurch CC21/07, 8 November 2007).

[23] Here there are two questions. Was the reduction in Mr Page's hours temporary and was it unilateral and improper.

[24] The parties have very different views about the permanence of the changes. Rhymics says the reduction was for one week only while Mr Page contends it would continue beyond the week in the roster of 8 February.

[25] On this I prefer Rhymics evidence. Some of Mr Page's assertions are false and detract from the veracity of his evidence. One example was a claim one of his colleagues was forced from the workplace which he tendered in support of the accusation Mr Armitage was a bully. That individual appeared for the employer and not only does she decry the claim - she is still employed at the hotel. There is the claim Rhymics had a policy of only employing female staff which is undermined by the fact male staff remain. There is also Mr Page's claims he was a full time employee, which did not withstand scrutiny.

[26] I say the claim of full time employment did not withstand scrutiny for the following reasons. Mr Page accepts the hours of work clause in the document offered by Mr Delhanty was identical to that in the agreement proffered by the previous owner. It says forty hours constitutes a full time week. Mr Page did not work forty hours a week and never did. He claimed thirty five in oral evidence but pay records for his last eight weeks with the previous owner show a considerable range in weekly hours (6.5 to 27.25) and an average of 20. Mr Heal conceded this in closing when he said I should use 20 hours per week should I get to awarding lost wages to his client.

[27] Having concluded Mr Page was part time I note the hours of work clause. It provides part time employees work variable hours and there are no guarantees. Given that, and the conclusion the reduction was temporary, I conclude Rhymics was acting within its rights and the claim of constructive dismissal is unsustainable.

[28] That, however, is not the end of the matter. Notwithstanding the claim of constructive dismissal I raised the possibility of an actual dismissal with the parties.

[29] A dismissal is an act of an employer which amounts to a permanent or terminal sending away. In the absence of a resignation the completion of a final pay must be considered both an act of the employer and a permanent sending away. There is no suggestion Mr Page mentioned resignation or otherwise suggested that is what he was doing. As Mr Armitage conceded, he simply concluded Mr Page had left.

[30] What Mr Armitage described amounts to abandonment, yet Rhymics cannot rely on that. According to the evidence both their employment agreement and that Mr Page entered into with the previous owner provide abandonment requires an absence of at least three shifts and reasonable inquiries from the employer in an attempt to confirm that is what has occurred. Mr Page was gone for less than two shifts and Rhymics accepts it made no real attempt to inquire as to his intentions.

[31] Even if that was not the case, Mr Armitage states he was concerned about how Mr Page would react to the roster. Surely that obliged him to enquire about the absences which followed the discussion of 8 February. He didn't – instead he simply arranged a final pay which constitutes an act of termination.

[32] This is a dismissal and it cannot be justified. Indeed, there is no attempt at justification.

[33] That conclusion raises the question of remedies. Mr Page seeks wages lost as a result of the dismissal and an unspecified sum as compensation for hurt and humiliation pursuant to section 123(1)(c)(i) of the Act.

[34] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. That may be increased but there is a requirement the successful applicant try to mitigate the loss and seek a new job.

[35] Mr Page's evidence is his applications were initially limited to the hospitality trade and more latterly he has been on a sickness benefit which implies he is unable to work. There is also uncertainty as to exactly what he has been doing in the interim with talk of *greens,* which is work for product or kind. The evidence does not justify an award which exceeds that specified in the Act and which is in the order of $3,840 (20 hours a week for 12 weeks). The first week is not included as Mr Page would not have worked in any event.

[36] Similarly a claim for compensation must have evidential support. Again the evidence was weak and limited to three or four relevant sentences which amount to little more than an expression Mr Page *suffered considerably as a result of* [his] *dismissal* [which he] *found very stressful and distressing*.

[37] The evidence does not support more than a limited award and I consider $1,000 appropriate.

[38] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Mr Page contributed to his dismissal in a significant way. There is no evidence to support such a finding and I conclude the answer is no.

Conclusion and Orders

[39] For the above reasons I find Mr Page has a personal grievance in that he was unjustifiably dismissed.

[40] As a result the respondent, Rhymics Limited, is ordered to pay the applicant, Mr Brendon Page, the following:

(a) $3,840.00 (three thousand, eight hundred and forty dollars) gross as recompense for wages lost as a result of the dismissal; and

(b) A further $1,000.00 (one thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[41] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority