

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Gordon Parker (Applicant)

AND Michael Colosimo (First Respondent)
AND Taffy's Bar Limited t/a The Kingsley Jones (Second Respondent)

REPRESENTATIVES Hamish Russ, Advocate for Applicant
Kim Stretton, Counsel for First Respondent
Kim Stretton, Counsel for Second Respondent

MEMBER OF AUTHORITY Dzintra King

INVESTIGATION MEETING 24 May 2005

ADDITIONAL MATERIAL SUPPLIED 29 May 2005
14 June 2005

SUBMISSIONS RECEIVED 30 May 2005
7 June 2005

DATE OF DETERMINATION 11 August 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

The applicant, Mr Gordon Parker, was employed as a kitchen hand. There is a dispute about the identity of his employer. The applicant believes Mr Michael Colosimo was the employer. Mr Colosimo says he was not the employer and that Taffy's Bar Limited trading as the Kingsley Jones is the employer. Mr Parker says he is owed wages and holiday pay and that he has been unjustifiably dismissed. Taffy's Bar Limited and Mr Colosimo says that all monies due have been paid, that the dismissal was justifiable and was on the grounds of redundancy and that any other monies owing are the responsibility of Mr Kingsley Jones, who was the manager of the Kingsley Jones pub. There are currently proceedings in the High Court involving Messrs Colosimo and Kingsley Jones.

The Employment of Mr Parker

Mr Colosimo owns a number of bars and restaurants in Tauranga. Mrs Chris Wade, Mr Parker's mother, had a conversation with Mr Colosimo about the possibility of employment for her son. She asked him whether he had any work available in any of his businesses for her son. He told her he had a lot of positions at his new venture, the Kingsley Jones, and that Mr Parker was to contact Mr Peter Ward at the Kingsley Jones. Mr Ward is the manager of the Imbibe Bar and Restaurant,

another of Mr Colosimo's businesses. She told Mr Colosimo about her son and his credentials and got the impression that her son had a job.

Acting on the information conveyed to him by his mother after her conversation with Mr Colosimo, Mr Parker went to the Kingsley Jones, saw Mr Ward, worked in the kitchen for most of the day and was told he had a job at the end of the day. No employment contract was given to Mr Parker at that stage.

Mr Harvey told me that neither he nor Mr Colosimo hired staff and that even if they had wanted to it was not their prerogative as it was Mr Kingsley Jones' pub and it was up to him to hire staff. Clearly, Mr Parker was hired well before Mr Kingsley Jones arrived in Tauranga to manage the business.

He did not receive a contract until some weeks later when Mr Kingsley Jones and his partner, Ms Elsa Evans arrived. The employment agreement does not mention Taffy's Bar Limited. It is headed "Michael Colosimo Group of Companies". Under that heading is a list of bars and restaurants and at the bottom are the words "Individual Employment Agreement". Not one of these bars or restaurants cites the limited liability company which runs that enterprise. Clause 1.5 of the IEA reads:

This individual employment agreement shall apply to the employer and the employee who sign the agreement.

Neither of the respondents was able to produce a copy of the employment agreement signed by the employer. Ms Evans did not identify Taffy's Bar Limited to Mr Parker as the employer and said she took all the employment agreements to Mr Colosimo's office for him to sign. At the very end of the document are the cryptic words:

The establishment names mean's (sic) all the establishments that are owned or part owned by Michael Colosimo.

The copy of the contract supplied to me was made by Mr Parker before he returned it to Ms Evans. It bears his signature and no signature on behalf of the employer. Ms Evans said she had no office at the Kingsley Jones and that she took the paperwork on a daily basis to the office above the Amphora, an establishment named on the employment agreement. She took all the contracts to that office.

Section 65 (2) (a) (i) Employment Relations Act 2000 provides that an individual employment agreement must include the names of the employee and employer concerned. It is readily apparent that the vague, one size fits all contract given to Mr Parker does not satisfy the statutory requirements. Taffy's Bar Ltd is not named at the employer.

Relationship Between Mr Colosimo and Mr Kingsley Jones

Taffy's Bar Limited was incorporated in March 2004 as the vehicle for running the Kingsley Jones tavern. Mr Kingsley Jones and Ms Evans were to manage the bar. The directors are Mr John Harvey and Mr Michael Colosimo. The shareholders in Taffy's Bar Ltd are One Red Dot Limited, of which Messrs Colosimo and Harvey are directors, and in which Mr Harvey holds shares. One of the other shareholders is Arabba Investments Ltd of which Mr Colosimo is the director. A third of the shares in Taffy's Bar Ltd were to be transferred to the Garnfach Trust which comprised Mr Kingsley Jones and Mr Ian Duff, an accountant. Mr Kingsley Jones was also to be made a director. Mr Colosimo said the paperwork to effect this had not been done but the intention was there. Mr

Kingsley Jones said it was only after his relationship with Mr Colosimo soured that he learned that he was not a director and did not appear as a shareholder on the Companies Register.

The two directors, Mr Colosimo and Mr Harvey, formed the view that the bar was not being run at a profit and Mr Colosimo wanted to terminate the arrangement with Mr Kingsley Jones.

On 4 November 2004 Mr Colosimo and Mr Kingsley Jones had a telephone conversation. At that stage it was verbally agreed that Mr Colosimo would buy out Mr Kingsley Jones. What is disputed is what, if any, arrangements were made about the staff at the Kingsley Jones. Mr Colosimo told me that there had been an agreement that Mr Kingsley Jones would leave the pub on 14 November and that he would tell the staff on 5 November that their employment was to cease as of 14 November. Mr Kingsley Jones denied that there had been any discussion about staffing matters at all and said that he had not agreed to give notice of redundancy. I accept his evidence and I find that no notice of redundancy was given to Mr Parker.

Mr Kingsley Jones said he and Ms Evans had decided they would leave that weekend. They would simply hand over the bar and say nothing about the circumstances. He did not agree to tell the staff the bar was closing and that their employment was finishing. From his perspective, the fact that he as a director and shareholder was leaving did not mean that the Kingsley Jones could not continue to trade. Mr Colosimo said he told Mr Kingsley Jones to tell the staff that Mr Kingsley Jones was going to finish and that if the bar re-opened all staff could reapply for their jobs. Mr Kingsley Jones disputes that anything was said about reapplying for jobs. He said his understanding was that Mr Colosimo was going to manage and rename the pub and he saw it as Mr Colosimo's responsibility to deal with the staff. Despite this view, I find that Mr Kingsley Jones and Ms Evans adopted a compassionate approach to the staff and tried to do their best for them in difficult circumstances.

The day after the phone conversation Mr Kingsley Jones changed his mind about agreeing to the buy-out. This was because part of the settlement had been an agreement about confidentiality and a number of people had approached him about the Kingsley Jones closing down. He assumed, therefore, that the agreement had been breached.

Mr Kingsley Jones said he did not know how Mr Colosimo organised the accounts or where the funds to pay wages came from and that Mr Colosimo had full control of the wages.

On 14 November Mr Colosimo told me he had instructed the bank not to honour any cheques in the name of Taffy's Bar. Staff were unable to be paid. However, during the week of 14 November the Kingsley Jones continued to trade. In some instances staff in financial need were paid out of the till. A note was made of these transactions by Ms Evans.

Termination of Employment

Mr Parker said that on 15 November, which was his normal pay day, Mr Kingsley Jones said he had had some differences with Mr Colosimo and asked whether staff wanted to continue working, assuring them that they would be paid by their employer.

Mr Kingsley Jones said he had been advised that staff would be paid if they continued to work for the same employer. He said he decided to keep trading – he was also, so he believed- a director, and it was not up to Mr Colosimo to call the shots.

Mr Parker was rostered to work on 15 November from 5-10pm, on 16 November from 10am-5pm, on 19 November from 5pm-3am, similarly on 20 November and from 10am to either 4 or 5pm on 21 November, and from 5-10pm on 22 November.

Mr Parker turned up about an hour early for work on 20 November. Mr Harvey was present. Mr Harvey told him they were working on a skeleton staff and to go away and come back the following Wednesday at 1pm for a meeting with Mr Colosimo. Mr Parker said he did not recognize any of the staff who were working there at the time he went in. He said the pub seemed to be open. The door was open and there was someone behind the bar. Mr Harvey said they were not open to the public until 7pm. Mr Parker said he was suspicious about what was happening but agreed to do as Mr Harvey said.

Ms Evans said she handed the keys over on 20 November to Mr Harvey. Mr Harvey said he was at the premises cleaning up after Mr Kingsley Jones when some staff arrived asking for their wages. He said he told them he did not know when the money would be available but that he would know following week. He said he did not tell anyone to come to a meeting the following Wednesday. He said Mr Colosimo did not deal with staff and did not like to be involved with staffing issues. However, a meeting agenda dated 15 September 2004 itemises staff and employment rules as items for discussion by Mr Colosimo.

I find that Mr Harvey did tell Mr Parker that he was to return on the Wednesday for a meeting with Mr Colosimo. Mr Harvey said he was under the impression that the existing staff were not working. He said some staff from another restaurant were cleaning the pub. Mr Parker said it was still open and serving and he wondered why he was not there working. Mr Parker said Mr Harvey said there were financial problems. Mr Harvey did not tell Mr Parker that his employment had been terminated although he was, he said, privy to the purported instruction given by Mr Colosimo to Mr Kingsley Jones to give the staff notice.

Wednesday 24 November 2004

At 1.00 pm on Wednesday 24 November Mr Parker and other staff turned up at the Kingsley Jones for the meeting with Mr Colosimo. He said people had mixed views and understandings about what was happening. Some seemed to believe that employment had been terminated but he wanted to know what was happening as he liked his job and needed to work.

The Kingsley Jones signs had been taken down. When he entered the bar a woman named Ezra was present. He knew her as the Duty Manager for The Usual Suspects, another enterprise of Mr Colosimo's. When Ezra was told about the meeting with Mr Colosimo she said she knew nothing about it. Ms Jessica Harris, a Bar Manager at the Kingsley Jones, then asked to phone Mr Colosimo who apparently told her he was not coming in. Mr Colosimo then spoke to Ezra and shortly afterwards the police arrived. The police told staff they were trespassing and asked them to leave the premises and move down the road, which they did. I do not believe that this meeting was spontaneous, as alleged by Mr Colosimo. It had clearly been pre-arranged by Messrs Harvey and Colosimo. Not only Mr Parker but a number of other staff turned up for the meeting and there was clearly an expectation that Mr Colosimo would be present.

When I asked Mr Colosimo why, when he received the phone call from Ezra, he did not go to the pub, he blustered, said he was busy, he was at a meeting, he was out of Tauranga. Mrs Wade told me he was in Tauranga and I accept her evidence. I asked why he had not contacted Mr Harvey to get him to go and talk to the staff. His response was they were trespassing and ruining the business, thereby accepting that the business was still trading, although it had been renamed The Cornerstone. That does not make it a new legal identity. To call the police to evict people, who were still employees, and were there to ascertain when their wages, to which they were legally entitled, would be paid, is a gross overreaction. Given that the meeting had been arranged it is particularly

appalling. It was a gross breach of the relationship and trust and confidence. It was not the action of an employer acting in good faith.

Identity of the Employer

The onus of proving that Mr Colosimo was the employer rests on the applicant on the balance of probabilities. I need to resolve the issue of which respondent is the employer on the facts presented: *McManus v University of Otago* [1985] ACJ 219; *Inspector of Awards & Agreements v Ngati Awa Trust* [1988] NZILR 806; *NZ Insurance etc IUOW v Parsons & Hobdell (t/a The Insurance Centre)* [1988] NZILR 547 and *NZ Building Trades Union v Dallimore* [1991] 1 ERNZ 252.

In *Mehta v Elliot (Labour Inspector)*, [2003] 1 ERNZ 451 it was held that the identity of the employer was to be determined as at the outset of the employment. If it changed during the course of the employment, there needed to be mutual agreement to that change. The question to be asked was who would an independent, but knowledgeable, observer taking an objective view, have said was the employer when the employment commenced. The Court in *Mehta* held that although other employees hired later in 2000 had employment agreements with Exotiq Ltd, the Tribunal had correctly decided that Mr Sheikh had been employed personally by the appellant.

In the Tribunal it had been found that although Exotiq Ltd existed during the period of Mr Sheikh's employment, there was nothing when he commenced work to indicate to him the existence of Exotiq Ltd, or indeed any other entity than Mr Mehta, as his employer. The Tribunal determined that in the absence of anything to the contrary Mr Sheikh was entitled to assume that the person he had dealt with was his employer.

The circumstances of Mr Parker's employment are very similar. Although he did not deal directly with Mr Colosimo, his mother did so and reported her dealings to her son. It was at Mr Colosimo's suggestion that Mr Parker went to what Mr Colosimo had described to Mrs Wade as "his new venture" to get work. Although Mr Colosimo did not personally tell him he had the job Mr Colosimo came into the bar several times and on occasion asked Mr Parker how things were going.

Mr Parker said the contract referred to Mr Colosimo and he assumed he was the employer. There was no mention in the contract of an entity called Taffy's Bar Ltd. Nor was there any reference on the payslips to that entity.

Given the statutory obligation to make it clear who the employer is Mr Colosimo cannot hide behind an inadequate document and say that Taffy's Bar Ltd, an entity entirely unknown to Mr Parker until the proceedings were filed, was the employer. Furthermore, I was shown advertisements for restaurant staff which gave the name "Michael" and a cell phone number which was Mr Colosimo's as the relevant contact person.

At the time the employment commenced Mr Parker had no knowledge of an entity called Taffy's Bar Limited. It could not, therefore, be the employer. When he was presented with the written employment agreement (which should have been given to him before his employment commenced) he was not given any indication of the existence of Taffy's Bar Limited or that his employer was to alter.

An argument was mounted that Mr Kingsley Jones had become the employer after 14 November. This is a patently unsustainable argument. I accept the evidence that no notice of termination had been given; and there was no evidence that Mr Kingsley Jones had entered into new employment agreements with anybody.

The employer was the first respondent, Mr Michael Colosimo.

Decision - Dismissal

Mr Parker would have been entitled to treat his contract as terminated when he was not paid. However, he chose to affirm the contract and turned up to work until told by Mr Harvey to go away and come back the following Wednesday.

The action of Mr Colosimo in calling the police to remove the staff instead of fronting up constituted a dismissal of Mr Parker. It is hard to think of a more disrespectful way of terminating the employment relationship.

Mr Colosimo had not told Mr Kingsley Jones to tell staff they were redundant. The staff were the meat in the sandwich in a dispute between Mr Colosimo and Mr Kingsley Jones. Their interests were not considered by Mr Colosimo at all. There was an absolute failure to keep people informed and a total lack of consideration for their feelings. The staff were treated as expendable objects.

I am satisfied that the bar continued to trade. Mr Colosimo told me he had not employed other staff. However, it was the practice of Mr Colosimo to move people from one enterprise to another, although this was not within the ambit of the contract which I saw, and which, I was told, was the contract supplied to staff in all the enterprises named. Mr Colosimo told me that none of the existing staff continued to be employed because the business had been sold and the new owners wanted to select their own staff.

The bar was purchased on 22 December by Calabria Enterprises Ltd which traded as the Cornerstone. This was the day the company was registered. The directors of the company at that time were Messrs Harvey and Colosimo. The third director did not assume her directorship until 4 March 2005. Half the shares in Calabria Enterprises Ltd are owned by One Red Dot Limited, which also held shares in Taffy's Bar Limited. At the time of the application to incorporate Calabria Enterprises One Red Dot Ltd was the sole shareholder. The shares change was notified to the Companies Office on 14 April 2005, although the actual transfer took place about a month prior to that. Taffy's Bar Limited continued to trade under the name of The Cornerstone. Neither Calabria Enterprises Limited nor any of the shareholders (Mr Colosimo told me the Tockers, who are now shareholders were the new owners) could be accurately said to have been the new owners at the time Mr Parker's employment terminated.

Mr Colosimo said he told a Mr Andy Daw to tell people to apply for jobs, and that Mr Daw was the employee's spokesman. Mr Parker was not aware of this. It was Mr Colosimo's responsibility to ensure that staff were given full and accurate information about the status of their employment. If there were to be redundancies, that fact should have been relayed to staff and a proper process established. As the business continued to trade I do not accept that there was a redundancy situation and it was most certainly not notified to Mr Parker.

Wages

Mrs Wade spoke to Mr Colosimo a few times after Mr Parker's employment ended, wanting to know when his wages would be paid. Mr Parker then heard on the grapevine that holiday pay and wages for the week ending 14 November were available to be collected from the office above the Amphora. He thought he had collected the holiday pay around 10 December. Mr Colosimo had a legal obligation to ensure that time and wages records were properly kept. Section 130 requires that the employer must keep a record which shows the employee's postal address. Mr Colosimo told me

that staff could not be contacted because there was no record of their addresses. This is clearly a breach of the Act.

Mr Colosimo maintained that Mr Kingsley Jones and Ms Evans had taken all the records with them. This was denied and I accept that denial. Ms Evans and Mr Kingsley Jones said all invoices and till takings and eftpos slips were taken to Mr Colosimo's office daily and were stored there. It is difficult to see how the records could have been taken by Mr Kingsley Jones and Ms Evans when I have a copy of the final wages and holiday pay records provided to me by the respondents. The evidence was that time and wages records had been requested on at least two occasions and had been met with an assertion that Mr Kingsley Jones had them. This is obviously patently untrue, particularly given Mr Colosimo's evidence at the hearing that Ms Evans took the timesheets to the Taffys Bar office for processing.

Mr Parker has been paid up the 15 November 2004 only and he has been paid holiday until that date. He is owed wages from 15 November to 24 November 2004 and holiday pay on those wages. The wages owed are \$291.50 and the holiday pay is \$14.75.

Mr Parker made efforts to mitigate his losses. His earnings for the three months after his dismissal total \$3,691.38. His earnings would have been \$5,561.16. He is therefore owed \$1,869.78 in lost remuneration.

Mr Parker is to be paid interest on the sum of \$306.25 (unpaid wages and holiday pay) at the rate of 7%, the interest to run from 24 November 2004 until such date as the monies are paid in full.

Humiliation and distress

Mr Parker was understandably very distressed by what had happened. The respondent is to pay the sum of \$6,000 pursuant to s.123 (c) (i).

Penalty

Mr Colosimo failed to keep time and wages records in the required format and he did not supply them when requested. Such breaches enable the Authority to award a penalty pursuant to s.130 (4). Pursuant to s.135 (2) (a) Mr Colosimo is to pay the sum of \$4,000. Of this sum, pursuant to s.136 Mr Colosimo is to pay \$1,000 to the applicant and the remaining \$3,000 into the Authority, that money to be paid by the Authority into the Crown Bank Account.

Costs

Costs were reserved. The applicant should file a memorandum within 28 days of the date of this determination. The first respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of Employment Relations Authority