

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Tabitha Ravenwood (Applicant)
AND The Citrus Bar & Café Limited (Respondent)
AND
BETWEEN Rachel Wood (Applicant)
AND Gregory Lee (Respondent)
REPRESENTATIVES Nick Fagerlund, Advocate for the Applicants
No appearance for either Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 26 January 2005
DATE OF DETERMINATION 9 March 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The statement of problem was originally lodged on behalf of three applicants. One of the applicants subsequently withdrew her claim. The remaining two applicants are Tabitha Ravenwood and Rachel Wood.

[2] Both applicants claim that they were unjustifiably constructively dismissed from their employment with the respondent. Ms Wood also claims unpaid holiday pay. Ms Ravenwood claims unpaid holiday pay, student loan repayment deductions that she says were deducted from her wages but not passed onto the Inland Revenue Department and a small shortfall in wages.

[3] The statement in reply acknowledged that holiday pay was not paid to Ms Wood or Ms Ravenwood. The respondent appeared to attempt to justify the non payment of holiday pay on the basis that the two applicants owed the respondent money. The statement in reply also suggested that there were reasons unrelated to the respondent as to why the applicants resigned from their employment.

[4] It became clear during a telephone conference held with the Authority following mediation that there was a dispute over the identity of the respondent. Gregory Lee, a director of the company The Citrus Bar & Café Limited, was linked into the telephone conference from Hong Kong. I stated during the conference and in my subsequent minute that the Authority may be required to identify the respondent. The respondent had been referred to in the statement of problem as Citrus

Bar and Café (Greg Lee). Mr Lee said that the applicants were employed by the company The Citrus Bar & Café Limited.

[5] I made it clear that the briefs of evidence I timetabled to be exchanged in advance of the investigation meeting on 26 January 2005 should address this issue about the identity of the respondent so as to properly advise the other party of the respective positions on this matter.

[6] It was agreed that the applicants cases would be heard together on the basis that the respondent was Gregory Lee or alternatively The Citrus Bar & Café Limited.

[7] The applicants filed and served their statements of evidence in accordance with the timetabling directions. There was no statement of evidence provided by the respondent. This was despite the Authority making it clear in late November that the investigation was to proceed on 26 January 2005.

[8] On 21 January 2005 the Authority received a letter from a solicitor, Mr Richard McGuire who had been instructed by Mr Lee. The letter confirmed that there were no employment agreements signed between the parties to the employment relationship. Mr McGuire said that the respondent should be The Citrus Bar & Café Limited and he provided with his letter company bank statements showing wage payments made to the applicants from the company account. It was clarified that Mr McGuire did not intend to appear on behalf of Mr Lee at the investigation meeting and he made it clear in his letter that he did not act for The Citrus Bar & Café Limited.

[9] I proceeded with my investigation on 26 January 2005 and heard from Ms Ravenwood and Ms Wood having satisfied myself that the notice of investigation meeting had been correctly served and that Mr Lee, the sole director of The Citrus Bar & Café Limited, clearly understood that there was an issue as to the identity of the respondent.

[10] Following the investigation meeting I requested wage and time records from the company accountant and Mr McGuire but these were not provided to the Authority.

Identity of the respondent (Tabitha Ravenwood)

[11] There was no written employment agreement between Ms Ravenwood and the respondent. Section 65 of the Employment Relations Act 2000 requires that there be an individual employment agreement in writing. The agreement must include the names of the employee and employer concerned.

[12] I am satisfied from the evidence and documents I saw that Mr Lee did operate the business the applicants were employed in as a limited liability company, The Citrus Bar & Café Limited. The company was responsible for payment of wages to employees and payments to the Inland Revenue Department. That does not necessarily mean the company was the employer.

[13] There is a principle of law that is relevant and applicable in a situation where there is an allegation of undisclosed principal as the evidence in this case suggests. The principle is that where an agent contracts personally with someone without disclosing that they are acting as an agent for a company or other identity, then the agent is liable for any breaches of the contract in addition to the company.

[14] I carefully questioned Ms Ravenwood about the identity of the employer. The company, The Citrus Bar & Café Limited, was incorporated on 24 November 2003 about one week after Ms Ravenwood commenced employment.

[15] Following an interview with Mr Lee Ms Ravenwood was offered a full time position as duty manager and commenced her employment on 17 November 2003. She did not recall being told at the interview the name of the establishment in which she would be working and she thought she was going to work for Mr Lee. At the time that Ms Ravenwood was employed the bar was still under construction. Ms Ravenwood was one of the first employees employed by the respondent.

[16] Income details for the Inland Revenue Department for 1 April 2003 through to 31 March 2004 show Ms Ravenwood's employer as The Citrus Bar & Café Limited.

[17] Ms Ravenwood was initially paid in cash and then by direct credit into her bank account. Such payments appeared in Ms Ravenwood's account as Wages - Citrus. Time sheets completed by employees were headed up Citrus Bar/Restaurant.

[18] Ms Ravenwood told me that she took it Mr Lee was employing her in a business he intended to open up. She further said that she understood/knew it was a company after a while. I have carefully considered the evidence from Ms Ravenwood. I am satisfied that she did have knowledge of the existence of the company which was incorporated a week or so after her employment. Ms Ravenwood acknowledged to me that Mr Lee might have been acting for the company. Ms Ravenwood's position had a degree of authority and she had more direct contact with Mr Lee and the person who did the company accounts and payroll, Justine Whitaker, than other employees. In those circumstances I consider it less likely that Ms Ravenwood did not understand from early on in her employment that her employer was not Mr Lee in his personal capacity.

[19] Having carefully considered all the evidence about this matter I am not satisfied on the balance of probabilities that Mr Lee was Ms Ravenwood's employer and not his company. I am satisfied on the balance of probabilities that Ms Ravenwood did understand that she was employed by a company.

[20] I find that Ms Ravenwood was employed by The Citrus Bar & Café Limited and her claims therefore are against that company.

Identity of Respondent (Rachel Wood)

[21] Ms Wood was not party to an employment agreement. She commenced her employment in early January 2004 at The Citrus Bar & Cafe as a part time barperson and waitress following a short interview with Mr Lee. I accept her evidence that there was no discussion about the identity of her employer. Ms Wood said that she believed Mr Lee employed her personally. I am satisfied on the balance of probabilities that Ms Wood did not understand that she was employed by a company. Mr Lee was not often present in the bar after late January 2004 and Ms Wood had little authority in the business.

[22] Having carefully considered Ms Wood's evidence I am not satisfied on the balance of probabilities that she understood that her employer was a company and not Mr Lee.

[23] I find Ms Wood was employed by Gregory Lee. The respondents are named in the alternative. Ms Wood wishes to pursue her claim solely against Mr Lee. Ms Wood's claim is therefore against Gregory Lee.

Constructive dismissal claims

[24] Ms Ravenwood and Ms Wood told me that the business operated by the respondent company was extremely disorganised and barely functional. In January and February 2004 for example there was limited food and drink available. Ms Wood described taking a customer through a menu and

advising that most of the dishes were unavailable. Ms Ravenwood said a teenager was employed in the kitchen after the Chefs resigned and that he had to be shown how to boil an egg.

[25] Ms Ravenwood said that Mr Lee could be abusive and offensive in his language and that there was some unprofessional behaviour from him.

[26] The evidence is also clear that Mr Lee stopped in or about January 2004 having much to do with the business and was not often physically present on the premises.

[27] I have no doubt that Ms Ravenwood and Ms Wood worked extremely hard and diligently to keep the business going in these trying circumstances. Ms Ravenwood in particular seemed to feel an obligation to do so and her timesheets reflect that she worked extended hours. She was not always paid on time and I find that, with an indication that the business may be failing, she became concerned about actually being paid.

[28] Mr Lee put an acting manager into the business whilst he was away. Ms Ravenwood and Ms Wood said that the acting manager did not know anything about the business and would sit and stare at the staff. She also raised some alleged irregularities with Ms Ravenwood. After hearing from Ms Ravenwood I am of the view that it was highly unlikely that there was anything of substance in the allegations.

[29] I accept Ms Ravenwood reached a point in late February 2004 when she decided that she had had enough and she wrote a letter of resignation dated 27 February 2004 which provided.

To Greg/Marcus

This is to inform you that I am handing in my notice as I would like to make the 21st March my last working day at Citrus, I am sorry about this but I have decided to move to Australia with my partner and do the travel bug thing.

I must thank you for letting me be a part of your team as I have enjoyed my time here and am sorry to leave, but the opportunity has arisen and I felt it is time to do it.

I have given over 3 weeks notice as I don't want to leave you in the dumps and before I leave I will try to get everything sorted with the bar.

Sorry and Thank you for everything

Tabitha Ravenwood

[30] It was a most unusual resignation letter given the circumstances that Ms Ravenwood outlined to me that she had been working under. Ms Ravenwood said in her evidence that she was scared to raise the reasons for her resignation and was concerned about not getting paid for her final week and having a poor work record. Ms Ravenwood said that things became so unbearable at the workplace that she left on 14 March 2004. Ms Ravenwood said that she was then placed on a sickness benefit because of the stress she had incurred as a result of working.

[31] Ms Wood said that the main reason she left was because the workplace was so disorganised. Ms Wood resigned on 10 March 2004. Her resignation letter provided:

10/03/04

To whom it may concern,

This is a written confirmation following my verbal resignation on 09/03/04 during a conversation with acting manager Roz Sheppard.

I am giving a weeks notice, therefore my last day will be on Mon 15/03/04.

Yours sincerely

Rachel Wood

Analysis and Conclusions

[32] In the Court of Appeal decision *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 Cooke J stated three situations where a constrictive dismissal might occur, although noted these were not exhaustive. They were:

1. *Where the employee is given a choice of resignation or dismissal;*
2. *Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign;*
3. *Where a breach of duty by the employer leads a worker to resign.*

[33] The evidence with respect to the claims by Ms Ravenwood and Ms Wood seemed to me to fall into the third of these categories overlapping to a degree with the second category.

[34] The Court of Appeal has made it clear that the conduct complained of by employees must amount to a repudiation of the employment agreement rather than conduct that is just unreasonable.

[35] There are two relevant questions. The first is whether the resignation has been caused by a breach of duty on the part of the employer and the second question if the answer to the first is yes is whether the breach of duty by the employer was of sufficient seriousness to make a risk of resignation reasonably foreseeable.

[36] I have little difficulty in concluding the work environment was extremely disorganised and unsatisfactory and that both Ms Ravenwood and Ms Wood were unhappy with their respective employment situations. They clearly worked hard in their positions for which they received no acknowledgement and limited assistance.

[37] Ms Ravenwood told me that she had intended to travel to Australia but needed her holiday pay to be able to afford to do so. I have difficulty finding a causative link between the resignation and the alleged breach of duty or coercion to leave given both the intention at the time to travel and the wording in the letter. Even if the resignation had been caused by a breach of duty by the employer then I see that the difficulty in light of the resignation letter would be establishing that the breach was of a sufficient seriousness to make resignation reasonably foreseeable on 14 March 2004. I have relied particularly on the words *enjoyed my time here* and *sorry to leave*.

[38] I do not find that Ms Ravenwood had made out her claim that she was constructively dismissed. She does not have a personal grievance.

[39] Ms Wood said that she left because the business was disorganised. I accept that a reasonable employee would have concluded that the business was likely to fail. Stock was being run down and not replaced and conditions were difficult. Ms Wood and Ms Ravenwood were determined to keep things going. I need to ask the question whether Ms Wood's resignation was caused by a breach of duty on the part of her employer? I am of the view that the answer to that question must be no. Ms Wood did continue to have some work to perform and whilst there may have been some concerns about payment in the future she had been receiving her wages in return for the work performed. The disorganisation caused Ms Wood stress and she decided to leave. I am not however satisfied that these issues are sufficient to establish a breach of duty on the part of Mr Lee. I do not find that

Ms Wood has made out her claim that she was constructively dismissed. She does not have a personal grievance.

Holiday Pay and other claims

Tabitha Ravenwood

Holiday pay

[40] Ms Ravenwood is entitled to her holiday pay. It should have been paid to her when she left her employment. Section 4 of the Wages Protection Act 1983 prohibits deductions from wages unless an employer has the consent of the employee. There is no dispute that the holiday pay has not been paid.

[41] The amount owing to Ms Ravenwood for holiday pay is shown on the employer's final pay slip in the sum of \$694.11 gross.

[42] The Citrus Bar & Café Limited is ordered to pay to Tabitha Ravenwood the sum of \$694.11 gross holiday pay.

[43] Ms Ravenwood is also entitled to interest on the sum of \$694.11 gross from 14 March 2004 to the date of payment at the rate of 7.5% per annum in accordance with clause 11(1) of the second schedule of the Employment Relations Act 2000.

Student loan deductions

[44] Ms Ravenwood claims the sum of \$296.00 being student loan deductions which she says were made but not paid to the Inland Revenue Department. Ms Ravenwood's final pay slip shows the sum of \$421.70 deducted from Ms Ravenwood's wages with respect to student loan repayments.

[45] The Inland Revenue documents reflect that they received \$283.20 from Citrus Bar & Café Limited in repayment deductions for Ms Ravenwood's student loan. One payment of \$125.70 on 15 January 2004 and one payment of \$157.50 on 15 February 2004.

[46] There is \$138.50 which is therefore unaccounted for. This should have been paid to the Inland Revenue Department by the company.

[47] The Citrus Bar and Café Limited is ordered to pay to Tabitha Ravenwood the sum of \$138.50 without deduction.

[48] Ms Ravenwood is entitled to interest on the sum of \$138.50 from 14 March 2004 to the date of payment at the rate of 7.5% in accordance with clause 11(1) of the second schedule of the Employment Relations Act 2000.

Shortfall in wages of \$91.00

[49] Ms Ravenwood worked 29.50 hours at a rate of \$14.00 per hour during her final week. The gross payment due to Ms Ravenwood was \$413.00. The amount deposited into Ms Ravenwood's bank account was \$321.62. I find that Ms Ravenwood was paid her final pay net of tax and student loan repayments which accounts for the difference of \$91.00. I do not find therefore that there is a shortfall owing to Ms Ravenwood in terms of her wages.

Rachel Wood

[50] Ms Wood has claimed \$150.00 in terms of holiday pay. Ms Wood is entitled to her holiday pay which should have been paid to her when she left her employment. Deductions from wages are prohibited unless the employer has the consent of the employee.

[51] The amount owing to Ms Wood for holiday pay is \$150.00 gross.

[52] Gregory Lee is ordered to pay to Rachel Wood the sum of \$150.00 gross holiday pay.

[53] Ms Wood is also entitled to interest on the sum of \$150.00 gross from 15 March 2004 to the date of payment at the rate of 7.5% per annum in accordance with clause 11(1) of the second schedule of the Employment Relations Act 2000.

Summary of findings and orders

[54] In summary therefore:

- Ms Ravenwood's claim is against The Citrus Bar & Café Limited.
- Ms Wood's claim is against Gregory Lee.
- Ms Ravenwood does not have a personal grievance that she was constructively dismissed.
- Ms Wood does not have a personal grievance that she was constructively dismissed.
- I have ordered that The Citrus Bar & Café Limited pay holiday pay in the sum of \$694.11 gross to Ms Ravenwood. Interest is payable on that sum from 14 March 2004 to the date of payment.
- I have ordered that The Citrus Bar & Café Limited pay the sum of \$138.50 without deduction to Ms Ravenwood for student loan repayments deducted from her wages but not paid to the Inland Revenue Department. Interest is payable on that sum from 14 March 2004 to the date of payment.
- I have ordered that Gregory Lee pay holiday pay in the sum of \$150.00 gross to Ms Wood. Interest is payable on that sum from 15 March 2004 to the date of payment.

Costs

[55] I reserve the issue of costs. Ms Ravenwood and Ms Wood are entitled to costs. Submissions are to be provided on their behalf within 14 days from the date of this determination. If the respondents wish to make submissions in response then they shall have a further 14 days to do so from the date they receive the applicants submissions.

Helen Doyle
Member of Employment Relations Authority