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Riddell v Mahuika-Forsyth & Anor CA 138/07 (Christchurch) [2007] NZERA 815 (13 November 2007)

Last Updated: 23 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 138/07 5079619

BETWEEN NICHOLAS RIDDELL

Applicant

AND MARIE MAHUIKA- FORSYTH and WILLIAM GRAFTON

Respondent

Member of Authority: Helen Doyle

Representatives: Graeme Malone, Counsel for Applicant

No appearance for Respondent Investigation Meeting: 8 November 2007

Determination: 13 November 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Nicholas Riddell, says he was employed by the respondents at their bar in Akaroa known as the A-Char Bar. He says that he was unjustifiably dismissed from his employment on 25 January 2007. Mr Riddell seeks compensation and reimbursement for lost wages. He says he is also owed unpaid wages, holiday pay and three days pay in lieu for working on statutory holidays.

[2] The two respondents, Maria Mahuika-Forsyth and William Grafton were partners in the mobile bar and catering business in Akaroa known as the A-Char Bar.

[3] There was no dispute that Mr Riddell was initially employed by Ms Mahuika- Forsyth and Mr Grafton to work in the A-Char Bar. Mr Grafton said during a telephone conference with the Authority that the nature of the relationship subsequently changed from employment to a partnership.

[4] Ms Mahuika-Forsyth and Mr Grafton participated in a telephone conference on 25 July 2007 with the Authority. The Authority directed the parties to attend mediation and to lodge either a joint statement in reply or two separate statements. Mr Grafton was overseas during this telephone conference and the connection with him was not a clear one.

[5] An investigation meeting was scheduled for 15 October 2007 and was to be held in Nelson. The parties appeared to have had in the past some connection with Nelson and that is where the applicant, Mr Riddell, still resides.

[6] The parties attended mediation in Nelson but the matter was not resolved.

[7] There was a further telephone conference held with the parties on 11 September 2007. It was agreed that the investigation meeting scheduled for 15 October 2007 be adjourned. The adjournment was granted on the basis that there were still some matters concerning the sale of a property owned by Mr Grafton and Ms Mahuika-Forsyth. An arrangement was made for an investigation meeting to take place on 8 November 2007.

[8] Mr Grafton wanted the investigation meeting to be held in Christchurch and Mr Malone, on behalf of Mr Riddell, agreed with that. Timetabling arrangements were made for the lodging of statements of evidence by Mr Riddell and Mr Grafton.

[9] Ms Mahuika-Forsyth had already provided a statement to the Authority at the time of the telephone conference. Mr Malone, on behalf of Mr Riddell, advised that Mr Riddell did not disagree with her statement. For completeness, Ms Mahuika-Forsyth had not been present when there were discussions about some of the significant matters that form the basis of this employment relationship problem. She did overhear part of a conversation on 25 January 2007. The Authority advised Ms Mahuika-Forsyth that she could attend the investigation meeting if she wished, but that she did not have to.

[10] The Authority did not hear further from Mr Grafton after this telephone conference and he did not provide a statement. Mr Grafton had confirmed during the telephone conference with the Authority on 11 September 2007 that any correspondence in terms of the employment relationship problem before the Authority could be sent to his Diamond Harbour address.

[11] The support officer duly posted the notice of direction and notice of investigation meeting in a courier pack to the Diamond Harbour address for Mr Grafton. The Courier Post pack was returned with a note that it was unclaimed and there was no point of delivery.

[12] The Authority was then advised by Mr Malone of the name of the solicitor who he believed was acting on the sale of the respondents' property. The Authority then directed that a copy of the notice of direction and notice of investigation meeting be served on the solicitor and this was duly done.

[13] The investigation meeting on 8 November 2007 was scheduled to commence at 9.30am. The commencement time was delayed until 9.55am but there was no appearance by Mr Grafton. There was no reason for his non-attendance advanced to the Authority or to the support officer.

[14] I am satisfied that Mr Grafton knew of the meeting date by virtue of his participation in the telephone conference on 11 September 2007. He confirmed his address for service during that telephone conference and the notes of investigation meeting and directions notice were also sent to the solicitor who Mr Malone was led to believe was acting on the sale of the respondents' property.

[15] In those circumstances, notwithstanding the non-appearance of Mr Grafton, I decided to proceed to investigate the employment relationship problem and heard evidence from Mr Riddell. As part of my investigation, I put to Mr Riddell the matters in Ms Mahuika-Forsyth's statement.

The issues

[16] The issues for determination in this matter are as follows:

- What were the terms and conditions of Mr Riddell's employment;
- Did Mr Riddell's relationship with the respondents change from that of an employment relationship;
- If the relationship was an employment relationship, then was Mr Riddell unjustifiably dismissed from his employment;
- If Mr Riddell was unjustifiably dismissed from his employment, then was Mr Riddell on a fixed term employment agreement until Easter 2007, what remedies is he entitled to and are there issues of contribution;
 - Is Mr Riddell owed unpaid wages, holiday pay and payments for alternative days for working on statutory days?

What were the terms and conditions of Mr Riddell's employment?

[17] There was no written employment agreement between the parties to this employment relationship problem.

[18] Mr Grafton first offered Mr Riddell employment in the new bar venture known as the A-Char Bar which he was setting up in Akaroa in September 2006. Mr Riddell travelled from Nelson and worked over Labour Weekend in the bar and was paid for that period.

[19] Mr Grafton then telephoned Mr Riddell in early November 2006 and advised him that there was a job for him from 17 November 2006 going through to Easter 2007. Mr Riddell was told that he would be provided with accommodation as well as wages but that he would need a car.

[20] Mr Riddell had to obtain finance for a car. Mr Grafton wrote to Mr Riddell's bank, the National Bank of New Zealand, on 8 November 2006. Mr Grafton confirmed in his letter that Mr Riddell would be employed as a manager with the business the A-Char Bar in Akaroa.

[21] Mr Riddell obtained a copy of the letter from the National Bank and it was provided to the Authority. At the bottom of the letter there is handwriting which appears to be the writing of the bank officer. The note written supports that Mr Riddell was to be paid \$14 an hour and there was to be a minimum of 40 hours work per week available. Mr Riddell was then provided with another letter from Mr Grafton that confirmed his wages as \$750 per week dated 19 December 2006.

[22] Mr Riddell commenced his employment at the A-Char Bar on 17 November 2006. He travelled from Nelson to Akaroa to do so. Mr Riddell was advised that he would be working with both respondents. Mr Riddell managed front of house and

Ms Mahuika-Forsyth was in charge of the catering aspect of the bar. Mr Riddell was further advised there would be assistance from time to time from other family members.

[23] In conclusion, I find that Mr Riddell was to receive \$14 per hour for his management role. He was to work a minimum of 40 hours per week and was to be provided with accommodation, being a room with his own bathroom facilities at the same house that the respondents leased. There was a suggestion that the value of the accommodation was the difference between the amount for a 40 hour week at \$14.00 per hour and the \$750 per week that Mr Grafton referred to in his second letter. That would be a value of \$190.00 per week. Mr Riddell said in his evidence that he thought that figure a little high. Having questioned Mr Riddell about the matter and in the absence of any evidence from Mr Grafton I place a value on the accommodation of \$150 per week.

Did Mr Riddell's relationship with the respondents change from being an employment relationship?

[24] On 3 December 2006, there were some issues between Mr Grafton and Ms Mahuika-Forsyth. Mr Grafton advised Mr Riddell that Mr Riddell would need to run the business without the assistance of Ms Mahuika-Forsyth and that Mr Grafton would also be taking some time away from the business himself.

[25] Mr Riddell said that there was a discussion between himself and Mr Grafton that in addition to his weekly wages, he would be paid 20% of the gross earnings of the business for the season. Mr Riddell said that he understood if 20% of the gross earnings exceeded the weekly wages paid to him, then a further bonus would be paid on a monthly basis and that his weekly wage was a retainer.

[26] Mr Riddell did not accept that he was a profit-sharing partner as alleged by Mr Grafton. He said that as far as he was concerned he was always an employee. He said he needed his wages to cover his car payments and expenses and did not agree to work on the basis that he would only get paid if the business made a profit. Mr Riddell said he did not have any say in how the business was to be run and he did not provide any capital.

[27] I accept Mr Riddell's evidence that his relationship did not change from that of an employment relationship. I think it highly unlikely Mr Riddell, having gone to

some lengths to secure finance for a new car and therefore being dependent on a weekly wage, would agree to a scheme where he would only get paid if the business made a profit.

[28] I also accept that Mr Riddell did not have a say in any of the business matters and it was never his understanding that he would be paid 20% of the profit.

[29] In conclusion, therefore, I find that Mr Riddell was an employee from 17 November 2006 until his last day at work on 25 January 2007.

Was Mr Riddell unjustifiably dismissed from his employment on 25 January 2007?

[30] Mr Riddell continued to work until the end of 24 January 2007. During that period, Mr Riddell worked a total of 503 hours. He was not paid weekly. Mr Riddell did receive payments that totalled \$2,700 but was never paid a bonus for the month of December 2006.

[31] On or about 24 January 2007, Mr Riddell was advised by Mr Grafton that the business was to be shut down.

[32] Mr Riddell became, in my view understandably, concerned about receiving payment for the work he had already performed. There is only one bank in Akaroa. Mr Riddell said that he needed to travel to Christchurch in order to go to his bank and deposit some money.

[33] On the morning of 25 January 2007, Mr Riddell asked Mr Grafton for his wages and 20% of calculated earnings so that he could take the money to the bank and avoid any penalty. Mr Grafton responded by saying that Mr Riddell had been spreading stories around Akaroa and giving away coffee at \$2 instead of \$3 to some customers. He said that Mr Riddell had been *thieving off the place* and the business had not made any money. He told Mr Riddell that he might as well *fuck off now and take your clothes with you*. Mr Grafton also told Mr Riddell that he was drunk. This conversation, I find, took place at or about 8.30am on 25 January 2007.

[34] Mr Riddell went immediately to the Akaroa Police Station and obtained confirmation that he was not drunk. I accept his evidence that the discount coffee rate was for some customers from one business who purchased coffee every day from the A-Char Bar.

[35] Mr Riddell was very upset following the termination of his employment and telephoned his parents. They made a special trip to Akaroa to try and work things out. Mr Riddell's mother telephoned Mr Grafton and was advised by him that Mr Riddell was just a drunk and thieving off him.

[36] Mr Riddell then went and obtained five letters from businesses where employees were customers of the bar and the owner of a hotel in Akaroa to confirm that Mr Riddell had acted professionally in his role. I was provided with the originals of those letters and amongst other matters there is reference to Mr Riddell being polite and courteous in his role. The letters certainly do not support that Mr Riddell was drunk during his management of the bar.

[37] The only possible substantive justification for the dismissal that I find was on the basis of redundancy. It did appear that the A-Char Bar ceased to operate possibly as early as the end of January 2007. That said, the process adopted in terms of any redundancy was clearly procedurally inadequate and most unfair. It would appear that Mr Grafton, when asked for payments that were owing to Mr Riddell, decided the best approach in the circumstances was to make unfounded allegations but I do not find that any of these allegations were the real reason for the dismissal. The business was going to cease and that was the reason for Mr Riddell's dismissal. Mr Riddell should have been given reasonable notice or payment in lieu thereof that the business was to close.

[38] I find that the dismissal was unjustified as it was not what a fair and reasonable employer would have done at the time – [s.103A](#) of the [Employment Relations Act 2000](#).

Determination

[39] Mr Riddell has a personal grievance that he was unjustifiably dismissed from his employment on 25 January 2007. He is entitled to remedies.

Was Mr Riddell employed on the basis of a fixed term employment agreement?

[40] I am not satisfied from the evidence that the arrangement between Mr Riddell and the respondents was a fixed term employment agreement in terms of [s.66](#) of the [Employment Relations Act 2000](#). I find that Mr Riddell was advised that the

employment would continue until Easter 2007 but there were variables and Mr Riddell could be employed for a longer or shorter period.

[41] In conclusion, Mr Riddell was not employed for a fixed period of employment.

Contribution

[42] I have considered whether or not Mr Riddell contributed to the situation that gave rise to the personal grievance by his actions. I do not find there is any contribution by Mr Riddell.

Reasonable notice period

[43] In determining what the notice period should have been, I have taken into account that there was an expectation by Mr Riddell that he would be employed until at least Easter. I am of the view that a reasonable notice period in all the circumstances would have been six weeks. I have calculated a payment for six weeks' notice on the basis of a 40 hour week at an hourly rate of \$14 and \$150 per week for the value of the accommodation. That is a gross sum of \$4,260.

[44] I order Marie Mahuika-Forsyth and William Grafton to pay to Nicholas Riddell the sum of \$4,260 gross which is six weeks payment in lieu of notice.

Compensation

[45] Mr Riddell gave compelling evidence about the significant distress and humiliation caused to him by his dismissal. He faced considerable financial difficulties as a result of the fact that his wages were not paid and that he had no reasonable notice that the business was to close or payment in lieu thereof. He suffered embarrassment caused by the unfounded allegations about thieving and drunkenness. Mr Riddell went to a doctor to be treated for stress and depression and he attributes that to his treatment at the time of dismissal.

[46] Mr Riddell claims the sum of \$10,000 and in all the circumstances, given the allegations made and complete lack of procedure, I am of the view that this would be an appropriate award for humiliation and loss of dignity.

[47] I order Marie Mahuika-Forsyth and William Grafton to pay to Nicholas Riddell the sum of \$10,000 without deduction being compensation for humiliation, loss of dignity and injury to feelings under [section 123](#) (1)(c)(i).

Is Mr Riddell owed unpaid wages, holiday pay and payment in lieu for working on statutory days?

[48] Mr Riddell kept a notebook of all the hours that he worked. I accept his evidence that he took the hours recorded in his notebook and attempted to balance them against the money paid.

[49] As already set out, Mr Riddell worked 503 hours from the commencement of his employment until 24 January 2007. Mr Riddell's notes do not reflect that he worked on Boxing Day due to poor weather and therefore I find that he worked two statutory days only on 1 and 2 January 2007 for which he is entitled to alternative days payment. Mr Riddell worked long hours on both of those days and I have calculated the daily pay rate on the basis of the hours that he actually worked at \$224 per day. Mr Riddell was not paid holiday pay.

[50] I have calculated the money payable to Mr Riddell as follows:

503 hours @ \$14 per hour \$ 7,042.00

2 alternative days' payment 448.00

\$ 7,490.00

6% holiday pay on gross amount of \$7,490 449.40

\$ 7,939.40

less payments made 2,700.00

Total moneys due and owing to Mr Riddell in terms of
unpaid wages, holiday pay and payment for alternative days
\$ 5,239.40

[51] I order Marie Mahuika-Forsyth and William Grafton to pay to Nicholas Riddell under [s.131](#) of the [Employment Relations Act 2000](#) the sum of \$5,239.40 gross being wages and other money payable to Nicholas Riddell under an employment agreement.

Costs

[52] Mr Riddell and his representative Mr Malone flew from Nelson to Christchurch to attend the meeting on 8 November on the basis that Christchurch was the venue which would suit Mr Grafton. In these very unusual circumstances I am

prepared to treat the airfares as an expense which can be claimed by Mr Riddell. I accept Mr Malone's submission that there could have been alternative arrangements made if Mr Grafton had not insisted on Christchurch because all parties had some connection with Nelson at some stage.

[53] The total cost of the airfares is \$732 and in terms of the costs of representation I am of the view that a suitable award would be \$1,000.

[54] I order Marie Mahuika-Forsyth and William Grafton to pay to Nicholas Riddell the sum of \$1,732 being costs and expenses.

Summary of findings and orders made

- I have found Mr Riddell was unjustifiably dismissed.
- I have ordered the respondents to pay Mr Riddell \$4,260 gross being a six week payment in lieu of notice.
- I have ordered the respondents to pay Mr Riddell \$10,000 without deduction under [section 123](#) (1)(c)(i).
- I have ordered the respondents to pay Mr Riddell the sum of \$5,239.40 gross being unpaid wages, holiday pay and payment for alternative days.
- I have ordered the respondents to pay Mr Riddell the sum of \$1,732 being costs and expenses.

Helen Doyle

Member of the Employment Relations Authority