

[4] Following the adjournment, the Authority attempted to set down a second date, however the Authority was given misinformation about who was representing the Respondent in the investigation and this led to delays in setting the matter down.

[5] The matter was eventually set down for investigation on 21 May 2010, which was also adjourned as a result of the ill health of Mr Michael Blagojevich, the major witness, shareholder and director for Le Grand Hotel Limited (“Le Grand”). It was agreed that the matter would finally proceed to an investigation meeting on 9 June 2010.

[6] On 3 June, in the absence of the Respondent’s witness statements, the Authority contacted Le Grand’s representative and requested that the documents be lodged that day. The Authority also reminded the representative that wage and time records were to be made available at the investigation meeting, as agreed by the parties on the conference call on 8 February 2010.

[7] In response Le Grand’s representative advised the Authority that it had no instructions to act and would not be in attendance at the investigation meeting on 9 June. The Authority immediately contacted the Respondent directly requiring that the documents be lodged that day. By 8 June no documents had been lodged in the Authority and a further request was made to the Respondent for the documents to be lodged. No further contact with the Authority has been made by the Respondent or his representatives.

[8] The respondent failed to attend the investigation meeting on 9 June. The Authority is satisfied the respondent and its representatives were served with the documents notifying it of the investigation meeting and the consequences of non-attendance. Pursuant to clause 12 of schedule 2 to the Employment Relations Act 2000 (“the Act”) I proceeded to hear, and have determined the matter, as if Le Grand Hotel Limited had attended or been represented.

[9] At the date of the investigation meeting the respondent continued to be a registered company. The Authority has been advised that on 10 August 2010 Le Grand was put into liquidation.

The employment relationship problem

[10] Mr Alan Scicluna was employed by Le Grand as its Operations Manager, on 28 April 2008. Mr Scicluna reported directly to Mr Blagojevich. Mr Scicluna had responsibility for all the operations of the Hotel.

[11] Each week Mr Scicluna, Ms Maria Cornes and Mr Smith would meet with Mr Blagojevich to discuss issues relating to the hotel business. As the hotel was not running profitably, initially the meetings focused on developing and implementing a new business plan, reducing overheads and paying of the hotels many debts.

[12] Mr Scicluna says he felt undermined by Mr Blagojevich as he [Mr Blagojevich] would employ staff and increase staff wages without consulting him. There is no doubt the Hotel was largely in debt. To compound matters, in early July 2008, when Mr Scicluna denied Mr Blagojevich funds from the Hotel to travel to Europe he withdrew Mr Scicluna's banking authority.

[13] Mr Scicluna's terms and conditions of employment included promised accommodation in a flat in Victoria Street. As the accommodation was being renovated, it was agreed that Mr Scicluna and his wife could reside in the Hotel. As the hotel room did not have kitchen facilities, Mr and Mrs Scicluna were provided with meals through the Hotel.

[14] At the time Mr Blagojevich withdrew the banking authority he also withdrew the provision of food for Mr Scicluna and his wife. This situation lasted at least a week.

[15] Mr Scicluna wrote to Mr Blagojevich setting out the actual financial situation of the Hotel and made recommendations for changes. The information provided to Mr Blagojevich shows that the Hotel was making inroads into its indebtedness and as its revenues were increasing.

[16] However, near the end of July, Mr Blagojevich contacted EVP Recruitment and advised Mr Manu Rastogi, General Manager, that he wanted Mr Scicluna replaced as his three month trial period was due to end. The Authority has been provided with a copy of an employment agreement which provides for a three month trial period, however, the agreement has not been signed and is therefore not enforceable.

[17] On 28 July Mr Scicluna attended a meeting with Mr Blagojevich, Mr Smith and Mr Mark Flyger, a financial adviser to Le Grand. The meeting had been arranged by Mr Blagojevich to discuss the Hotel's performance. All those present at the meeting were aware of the financial situation being faced by the Hotel.

[18] On 28 July a meeting was held between Mr Blagojevich, Mr Scicluna, Mr Smith and Mr Flyger. The meeting discussed the performance of the Hotel for the July month. Mr Scicluna made suggestions on cost savings and Mr Smith discussed the finances. Mr Scicluna discussed with Mr Blagojevich the fact that, if things stayed on track, more improvement in the financial situation would be realised.

[19] It was agreed the draft budget and plans tabled at the meeting would be provided to department heads on 30 July and an opportunity would then be provided for Department Heads to have input as to whether the targets were achievable or not. It was also agreed that following his meetings with department heads a review meeting would take place to discuss the feedback received from the department heads.

[20] During the meeting Mr Blagojevich commended to Mr Scicluna that his trial period was up and that he had to pay agency fees and he wanted Mr Scicluna's employment terminated for non-performance. Mr Scicluna says there was no notice that the meeting was to discuss performance related issues, nor that the meeting was to be disciplinary in nature. After some discussion Mr Blagojevich issued Mr Scicluna with a verbal warning.

[21] The meeting ended with Mr Blagojevich requesting Mr Scicluna and Mr Smith to present their plans at a meeting the following week.

[22] On 30 July Mr Scicluna met with the department heads as agreed. Mr Blagojevich attended the meeting for a short while but made no comment.

[23] The next meeting was held on 4 August 2008. Mr Smith and Mr Scicluna presented the proposed budget and plan. Mr Blagojevich told both men that he would discuss the information they had presented with Mr Flyger, and would get back to them.

[24] Mr Smith and Mr Scicluna adjourned to their shared office where they carried on with their work. At about 3.45pm Mr Flyger entered the office and advised both

men that their employment would terminate immediately as a result of Mr Blagojevich having no confidence in either of them. The dismissal was effective immediately.

[25] In a bizarre twist, Mr Blagojevich wrote to Mr Scicluna on 21 August advising him that he had been dismissed because he had abandoned his employment when he walked out of the business on 4 August 2008.

[26] Mr Scicluna claims he was disadvantaged unjustifiably when he was given a verbal warning on 28 July and he was unjustifiably dismissed on 4 August.

Disadvantage claim

[27] I am required to examine Le Grand's actions in accordance with the statutory test of justification set out at section 103A of the Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[28] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether Le Grand's actions disadvantaged Mr Scicluna in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.¹

[29] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If Le Grand establishes justification for a disadvantageous action, there is no grievance.²

[30] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.³

[31] It is well known that a warning may constitute a disadvantage. I find the verbal warning issued to Mr Scicluna on 28 July caused him a disadvantage, in that his

¹ *Mason v Health Waikato* [1998] 1 ERNZ 84

² *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

³ *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

employment was now in jeopardy but he had no indication as to why. I also find the action by Le Grand in issuing the verbal warning in all the circumstances of this case, to be unjustified and not an action a fair and reasonable employer would have taken.

[32] Mr Scicluna is entitled to remedies for his unjustified disadvantage.

The dismissal

[33] There is no dispute that Mr Scicluna was dismissed on 4 August 2008. The Authority is required then, to scrutinise the conduct of the Respondent pursuant to the Act.

[34] Section 103A of the Act requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer⁴.

[35] Although the Authority does not have unbridled licence to substitute its decision for that of the employer⁵ it may reach a different conclusion, provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred⁶.

[36] Mr Scicluna says his dismissal was unexpected. While Mr Scicluna may not have expected the dismissal on 4 August, he was certainly well aware that Mr Blagojevich was giving consideration to dismissal, albeit on the basis that the trial period in the unsigned agreement was coming to its conclusion.

[37] However, the obligation is on the Respondent to show that the actions taken and how it acted were what a fair and reasonable employer would have done in the circumstances of this case. Those circumstances included that the business was improving in its financial situation and there was a plan in place to continue those improvements.

[38] The Respondent was also under a duty to give notice to Mr Scicluna in a situation where he could address any concerns, from the position of having full information about any concerns, access to legal advice and representation if he so desired and an understanding of any possible consequences.

⁴ *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Shaw, J, Auckland Employment Court AC 39A/07.

⁵ *X v Auckland District Health Board* [2007] 1 ERNZ 66.

⁶ *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

[39] In the absence of any notion of procedural fairness I find the dismissal of Mr Scicluna to be unjustified. In all the circumstances of this case, the actions of Le Grand and how it acted in implementing the decision to dismiss falls well short of how a fair and reasonable employer would have acted.

Remedies

[40] I have found that Mr Scicluna was unjustifiably disadvantaged on 28 July 2008 and unjustifiably dismissed on 4 August 2008. He is therefore entitled to remedies.

[41] Mr Scicluna seeks reimbursement of lost wages. Mr Scicluna has provided extensive evidence that he has attempted to mitigate his loss. Mr Scicluna was unsuccessful in his attempts to find alternative employment and has been in receipt of an unemployment benefit.

[42] Mr Scicluna is entitled to be reimbursed for his lost income for the period of three months after his dismissal which amounts to \$12,089.99.

[43] Mr Scicluna gave compelling evidence as to the humiliation he experienced as a result of his sudden dismissal and the unjustified verbal warning. Mr Scicluna is to be compensated for the humiliation and distress occasioned by the unjustified dismissal and unjustified disadvantage. Le Grand is to pay to Mr Scicluna the sum of \$5,000.00.

[44] There shall be no reduction to the remedies for contribution.

Costs

[45] Mr Scicluna also seeks a contribution to his costs. The principles appropriate to the exercise of the Authority's discretion in relation to costs are set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*⁷. Costs will generally follow the event and awards are modest.

[46] The investigation into the Mr Scicluna's claim took less than ½ a day and was heard in conjunction with similar claims by Mr Smith. The Authority is advised that the costs expended to date are in the order of \$3,000.00. I am satisfied the costs expended by the Applicant are very reasonable.

⁷ [2005] 1 ERNZ 808.

[47] Having regard to the nature and length of the investigation meeting and in the principled exercise of my discretion Mr Scicluna is to be paid an amount of \$1,000, which includes any disbursements, as a contribution to his costs.

Summary of orders

Pursuant to section 123 of the Act Le Grand Hotel Limited is ordered to pay the following amounts to Mr Smith within 28 days of the date of this determination:

- Lost wages - \$12,089.99
- Compensation - \$5,000
- Costs - \$1,000

Vicki Campbell
Member of Employment Relations Authority