

evidence at the Authority investigation meeting that there is also an issue to resolve as to whether or not Mr Thomson was an employee.

[4] Mr Commandeur did not dispute payment for four days is owed to Mr Thomson. As at the date of the investigation meeting there had been no payment for those days or holiday pay.

[5] Ruby Rock counterclaims against Mr Thomson for the sum of \$65,000 which relates to losses in Mr Commandeur's business in Australia because he said that he had to return to New Zealand to deal with the situation in the shop and the impact on sales figures in New Zealand.

[6] The parties attended mediation but were unable to resolve the matter.

The issues

[7] The issues for determination in this matter are:

- Was Mr Thomson an employee;
- If Mr Thomson was an employee, what were the reasons for his dismissal, on notice on 8 May 2006 and summarily on 9 May 2006;
- Was the decision of Ruby Rock to dismiss Mr Thomson justifiable in all the circumstances – s.103A Employment Relations Act 2000;
- If the decision to dismiss Mr Thomson was not justifiable, then what remedies is Mr Thomson entitled to;
- Does Ruby Rock have a counterclaim against Mr Thomson in relation to any losses incurred by Ruby Rock?

Was Mr Thomson an employee?

[8] Mr Thomson says that he was employed by Ruby Rock in November 2004 to manage the retail gallery of the company in Hokitika. His role included sales, ordering stock and administration of the yearly turnover. Mr Thomson was told by Mr Commandeur that if he performed well he may eventually become a shareholder in the company. That did not eventuate.

[9] Mr Thomson did not have a written employment agreement. Mr Commandeur referred to the agreement between Ruby Rock and Mr Thomson as one that was made on a *gentleman's basis*.

[10] Mr Thomson said his hours were generally from 9am until 5pm six or seven days a week. At the time that the relationship was terminated Mr Thomson was paid \$21.88 per hour and given a daily travel/petrol allowance of \$10. Mr Thomson did not work for anyone else other than Ruby Rock during the 18 months he was there.

[11] Mr Thomson was responsible for the maintenance of PAYE records. The wage and time records reflect that he was paid weekly and that PAYE was deducted from the weekly sums he was paid.

[12] The evidence as a whole is overwhelming that Mr Thomson was an employee and an argument to the contrary cannot be sustained.

[13] In conclusion, the real nature of the relationship between Mr Thomson and Ruby Rock was that of employment.

If Mr Thomson was an employee, what were the reasons for his dismissal on 9 May 2006?

[14] Mr Thomson said that his employment was satisfactory until in or about May 2005. He said at that time things became difficult between Mr Commandeur and his wife who were both 50% shareholders in Ruby Rock.

[15] The evidence supports that there was some conflict between Mr and Mrs Commandeur and that Mr Thomson, at times unwittingly, became involved in the arguments.

[16] Mr Thomson said that he was told on many occasions to stop Mrs Commandeur from working in the shop. He did not feel that this was his responsibility as he viewed Mrs Commandeur as one of his *bosses*. Mr Thomson said in his evidence that Mr Commandeur suggested to him that if he did not exclude Mrs Commandeur from the business then Mr Commandeur would put both Mr Thomson and Mrs Commandeur out of the business. Mr Commandeur said that Mr Thomson should have listened to him because he was the director of Ruby Rock.

[17] It is clear that this conflict created some stress in the relationship between Mr Commandeur and Mr Thomson.

[18] Mr Thomson said that in early 2006 Mrs Commandeur was coming in for about 1 hour a day and covering for him in the shop during the lunchtime. Mr Commandeur instructed Mr Thomson to try and employ someone to cover his lunch break so as to avoid Mrs Commandeur coming in over these periods. Mr Thomson did not get anyone in because Mrs Commandeur said it was not necessary and she was at that time covering for Mr Thomson's lunch break.

[19] At the end of April 2006 Mr Thomson received a pay increase of \$100 per week and said he felt Ruby Rock was happy with his performance.

[20] Mr Commandeur disputed that it was an increase to Mr Thomson's hourly wage and said it was a bonus to be paid each week.

[21] Mr Thomson's evidence was that he was told by Mr Commandeur to raise his wages by \$100 per week and he duly recorded in the wage and time records the increase to his net pay of \$100 per week. I accept that this was Mr Thomson believed Mr Commandeur intended in terms of the pay increase. Mr Thomson's pay was not a matter that Mr Commandeur raised as an issue with Mr Thomson before his dismissal. I do not find it was one of the reasons, therefore, for Mr Thomson's dismissal.

[22] The sequence of events leading to Mr Thomson's dismissal was not really in dispute. What is less clear is the reason or reasons for the dismissal as there were several advanced by Mr Commandeur.

[23] On 8 May 2006 Mr Commandeur advised Mr Thomson that Mrs Commandeur was to become the retail manager at Ruby Rock. Mr Thomson was given a copy of a shareholders' resolution to this effect. I find that during the conversation Mr Commandeur made reference to Mr Thomson having been a weak manager. He was also critical of Mr Thomson's inability to remove his wife from the premises. Mr Commandeur I find advised Mr Thomson that was why the decision had to be made.

[24] Mr Commandeur advised Mr Thomson that he had work and/or would be paid until the end of May 2006. Mr Thomson understood, I find, from Mr Commandeur that the store was to be closed on 1 June 2006 and that a buyer would be found for the

retail operation. Mr Commandeur does not accept that that was the intention for Ruby Rock.

[25] Mr Commandeur did tell Mr Thomson to prepare wage records up to the end of May 2006 at which his employment would end. Mr Thomson made entries into the wage and time records which were consistent with this request.

[26] On 9 May 2006 Mr Thomson, who I accept was quite shocked by the previous day's events, asked Mr Commandeur for the reasons for the termination of his employment in writing. Mr Commandeur went home and returned with a letter dated 9 May 2006. The letter provided:

To Joel Thompson of Greymouth

The reason for the dismissal of Joel Thompson by New Zealand Ruby Rock Ltd is that the company is closing the retail outlet in Hokitika for the winter time from the first of June 2006 and do not need a full time employee anymore from the 1 June.

A possibility is open also for Joel Thompson for a part time worker on contract only and commission from the sales for the winter time June till September 2006.

Signing. Gerry Commandeur Director

[27] A heated argument started between Mr Thomson and Mr Commandeur. I think it likely the argument started because Mr Thomson advised Mr Commandeur that the reasons given to him in writing for the termination of his employment were different to those verbally discussed the previous day.

[28] Mr Thomson and Mr Commandeur had different recollections of the discussion on 9 May 2006, but there is sufficient similarity for me to conclude with a degree of certainty, that certain statements were made.

[29] Mr Thomson told Mr Commandeur that he would seek legal advice. Mr Commandeur explained in his evidence that he felt that was blackmail because he had an agreement with Mr Thomson that was other than in accordance with employment law. I have found though that the real nature of the relationship between Mr Thomson and Ruby Rock was employment. Mr Thomson advising Mr Commandeur that he intended to seek advice about his legal rights was not blackmail.

[30] Mr Thomson said that he told Mr Commandeur to stop yelling at him or leave the store or he would leave the store. Mr Commandeur was angry because he felt that Mr Thomson had told him what to do in his own shop.

[31] He told Mr Thomson that he would not be told what to do in his own shop and that if he did not like the situation to get out and if he did leave, not to come back.

[32] During the argument Mr Thomson said to Mr Commandeur something along the lines that *if he wasn't a 70 year old man his teeth would be over the back wall*.

[33] Mr Thomson told Mr Commandeur that he wanted to work out his notice, but Mr Commandeur told Mr Thomson to *get out*. It was not possible for Mr Thomson to calculate what was owed to him and he took the wage and time records so that he could assess what he was owed and then, as instructed by Mr Commandeur, left the shop.

[34] The records were later returned to the shop. Mr Thomson sought advice from Mr Wetherall. Mr Wetherall wrote to Ruby Rock on 24 May 2006 and raised a grievance that Mr Thomson had been unjustifiably dismissed. Mr Wetherall set out in his letter the amounts claimed for unpaid wages and holiday pay. There was no response to that letter.

[35] There is no dispute that Mr Thomson was dismissed from his employment on 8 May 2006 on notice and then summarily dismissed from his employment on 9 May 2006 during that notice period.

[36] The main reason advanced for the dismissal by Ruby Rock was that Mr Thomson's position was redundant. Performance issues about how Mr Thomson managed the store and dealt with Mrs Commandeur were part of the reasons given to Mr Thomson on 8 May 2006 for his employment ending.

[37] Mr Commandeur said one of the reasons that Mr Thomson was then dismissed on 9 May 2006 during his notice period was that he was intimidating and threatened him with violence. Mr Commandeur also said that one of the reasons for dismissal on 9 May 2006 was that Mr Thomson would not cooperate when he told him that his hours would change.

[38] Mr Commandeur said in his evidence that there were other reasons for Mr Thomson's dismissal. Mr Commandeur said that Mr Thomson had taken/stolen a gold Ruby Rock pendant and had given it to his aunt. Mr Thomson denied ever stealing anything from Ruby Rock. Mr Thomson said he recorded the sale to himself in the shop book and had showed Mr Commandeur the eftpos receipt for the jewellery. Mr Thomson said that Mr Commandeur had wanted to see his bank statements but Mr Thomson was not prepared to show those to him because he had already shown him evidence of payment and he said that his bank statements were confidential. Mr Thomson said that Mr Commandeur never brought the matter up again until after his dismissal.

[39] After the investigation meeting I was provided with one of Mr Thomson's bank statements showing an eftpos transaction with Ruby Rock of \$230 on or about 27 April 2005. I do not find that this was a reason for Mr Thomson's dismissal on 9 May 2006 but something that was considered after the event.

[40] Another reason advanced by Mr Commandeur for the dismissal was that Mr Thomson paid himself wages for periods he was not in the shop. Mr Thomson denies that and there were no details provided as to when that may have been. This could not, therefore, have been a reason for dismissal on 9 May 2006.

[41] Another reason advanced by Mr Commandeur was that Mr Thomson lost his driver's licence in 2005. There is no evidence that this was relied on in terms of Mr Thomson's dismissal. The lack of a driver's licence did not appear to have prevented Mr Thomson from fulfilling his obligations at Ruby Rock. Mr Thomson applied, with the assistance of an affidavit from Mr Commandeur, for a limited licence. I do not find the lack of a driver's licence to be a reason for Mr Thomson's dismissal on 9 May 2006.

[42] Another reason advanced by Mr Commandeur was that Mr Thomson had not told him the truth in terms of what he was receiving in his previous position. Mr Thomson said that he was indeed getting the hourly rate he advised Mr Commandeur of in his previous position. I do not find that to be a reason for Mr Thomson's dismissal on 9 May 2006.

Was the decision of Ruby Rock to dismiss Mr Thomson justifiable in all the circumstance – s.103A Employment Relations Act 2000?

[43] I have considered whether the dismissal was justified in terms of redundancy, performance and the heated argument on 9 May 2006. I have assessed justification on an objective basis for the dismissal on notice on 8 May 2006 and the summary dismissal on 9 May 2006.

[44] The shop in Hokitika stayed open for the winter months after Mr Thomson's dismissal. Another employee was employed to work there during the week. Although the sales were down over the winter months, it is difficult to see how redundancy in those circumstances could be genuine when Mr Thomson was effectively replaced by another employee.

[45] The process in terms of implementing the redundancy was unfair and it was not undertaken in good faith. There was no consultation prior to the decision being given to Mr Thomson to terminate his employment. Mr Thomson was not given, in breach of s.4 (1A) (c) of the Employment Relations Act 2000, information about what was proposed and an opportunity to comment on it. It is clear from the evidence that Mr Thomson did not understand why his employment was to end. The process was not what a fair and reasonable employer would have done in all the circumstances.

[46] I have also considered the criticism Mr Commandeur had about the way Mr Thomson failed to deal with the situation involving Mrs Commandeur and his view that Mr Thomson was a weak manager. I do not find that a fair and reasonable employer would have expected Mr Thomson to deal with the situation involving Mrs Commandeur without considerable assistance and intervention from Mr Commandeur. There was no proper process in terms of any performance concerns and I accept that Mr Thomson did not consider his employer was unhappy with his overall performance. Those matters do not justify Mr Thomson's dismissal.

[47] I cannot be satisfied in this case that the reason for Mr Thomson's dismissal on notice on 8 May 2006 was for redundancy and not dissatisfaction with his performance. In those circumstances I do not find I can conclude that the redundancy was genuine. The process adopted in all the circumstances was also unfair.

[48] The discussion between Mr Thomson and Mr Commandeur on 9 May 2006 was heated. Mr Thomson did make an unwise comment to Mr Commandeur which I accept was one of the main reasons for his dismissal during his notice period. Mr

Thomson though did make it clear that he wanted to work out his notice period and he was prevented from doing so.

[49] The other reason for dismissal on 9 May 2006 was that Mr Thomson would not co-operate with the changed hours. This was a situation, however, where Mr Commandeur offered a possibility of part time hours on contract and commission only. In those circumstances the failure by Mr Thomson to agree to changed hours could not be a justification for dismissal.

[50] There should have been a cooling off period and further discussion when both Mr Thomson and Mr Commandeur had calmed down. A fair and reasonable employer would have taken into account that Mr Thomson had, without any advance notice, been advised the previous day that his position was redundant and that his performance contributed to that. I do not find that a fair and reasonable employer would have dismissed Mr Thomson in all the circumstances on 9 May 2006.

[51] In conclusion, I do not find the decision to dismiss Mr Thomson on notice on 8 May 2006 justifiable because it was not what a fair and reasonable employer would have done in all the circumstances. I do not find that the decision of Ruby Rock to summarily dismiss Mr Thomson on 9 May 2006 justifiable because it was not what a fair and reasonable employer would have done in all the circumstances.

Counterclaim

[52] I do not find that Ruby Rock has a valid counterclaim against Mr Thomson.

Determination

[53] Mr Thomson has a personal grievance that he was unjustifiably dismissed and he is entitled to remedies.

Remedies

Contribution

[54] The Authority is required under s.124 of the Employment Relations Act 2000 to consider the extent to which the actions of an employee contributed towards the situation that gave rise to the personal grievance and if the actions reduce the remedies that would otherwise have been awarded. I have carefully considered this

matter. I do not find that Mr Thomson contributed toward the termination of his employment on notice on 9 May 2006. I do consider, however, that there was some contribution towards the dismissal within the notice period on 9 May 2006. There is a duty of good faith on the employer to be communicative and responsive in maintaining a productive employment relationship.

[55] Mr Thomson made what could have been seen as a threatening statement to Mr Commandeur. I consider there was contribution because that statement impacted on the ability of the parties to then sensibly communicate. I only consider it to be a moderate contribution, and I assess contribution at 10%.

Lost wages

[56] Mr Thomson was without any work at all from 9 May until 12 June 2006. That is a period of four weeks and three days. Mr Thomson then found alternative employment but at a lower hourly rate of \$13.

[57] I am not satisfied in terms of the redundancy that it was a genuine redundancy and therefore not satisfied that Mr Thomson's employment would not have continued beyond May 2006. I have, however, taken into account that sales in the shop were down over the winter period and in those circumstances I intend to limit recovery of lost wages to three months.

[58] I have calculated the lost wages for the period of unemployment as four weeks and three days at the rate of \$875 per week. That is a total sum of \$4,025.

[59] The balance of the period of three months is eight weeks and two days. Mr Thomson worked 43 hours a week in his new position and received \$13.00 per hour. There was a shortfall each week of \$316. I have calculated the shortfall for eight weeks to be \$2,528 and two days to be \$126.40. The total is \$6,679.40 for lost wages for the three months period.

[60] Applying the contribution assessed at 10%, I order New Zealand Ruby Rock Limited to pay to Joel Bernard Thomson the sum of \$6,011.46 gross being the reimbursement of lost wages under s.123(1)(b) of the Employment Relations Act 2000.

Compensation

[61] I accept Mr Thomson was clearly shocked and humiliated by his sudden dismissal and his financial difficulties for him were exacerbated because he was not paid for work performed or his holiday pay. Mr Thomson had a young family to support.

[62] In all the circumstances, I find an appropriate award for compensation is the sum of \$7,000. Taking contribution into account, I order New Zealand Ruby Rock Limited to pay to Joel Bernard Thomson the sum of \$6,300 being compensation under s.123(1) (c)(i) of the Employment Relations Act 2000.

Unpaid wages

[63] Mr Thomson is owed wages for work performed for which he has not been paid in the sum of \$700.16 gross, or \$555.24 net. I order New Zealand Ruby Rock Limited to pay to Joel Bernard Thomson the sum of \$555.24 net being four days unpaid wages up to 9 May 2006.

[64] This payment should have been made earlier. Mr Wetherall formally requested payment for the four days on 24 May 2006. In those circumstances, I consider it appropriate that interest should be paid on the sum of \$555.24 net from 24 May 2006 to the date of payment at the rate of 8% in terms of clause 11 of the Second Schedule to the Employment Relations Act 2000.

Holiday pay

[65] Mr Thomson did not take any holidays for the 18 month period he worked for Ruby Rock. The holiday pay has been calculated on the basis of 6% of the gross earnings for that entire period. That is not the correct calculation to apply in these circumstances where employment ends and there has been an entitlement to holidays.

[66] The calculation of annual holiday pay in these circumstances should be on the basis as set out in s.24 of the Holidays Act 2003 for the first 12 months of employment. That is three weeks holiday pay at the rate based on the greater of the employee's ordinary weekly pay as at the date of the end of the employment or average weekly earnings during the 12 months immediately before the end of the last pay period before the end of Mr Thomson's employment.

[67] Mr Thomson's employment then ended before a further entitlement to three weeks holiday had arisen. From November 2005 to 9 May 2006, the calculation of holiday pay can be on the basis of 6%.

[68] In those circumstances where the calculation will be different from that provided to the Authority, I will give Mr Wetherall ten days to calculate holiday pay in accordance with ss.24 and 25 of the Holidays Act 2003. Mr Wetherall is then to advise the Authority and Mr Commandeur of the calculation. The Authority will then make orders as to holiday pay accordingly. Holiday pay should have been paid to Mr Thomson promptly. This is a situation where Mr Thomson should receive interest on the amount of unpaid holiday pay. I shall deal with this when I make formal orders as to holiday pay.

Costs

[69] I reserve the issue of costs.

[70] Mr Wetherall has 21 days from the date of this determination to make submissions as to costs and then lodge these with the Authority and serve on Mr Commandeur. Mr Commandeur then has until 21 January 2008 to make any submissions in reply as to costs

Summary of findings and orders made

- I have found Mr Thomson was unjustifiably dismissed.
- I have not found that Ruby Rock has a valid counterclaim.
- I have assessed contribution at 10%.
- I have ordered Ruby Rock pay Mr Thomson three months lost wages taking contribution into account in the sum of \$6,011.46 gross under s. 123 (1) (b) of the Employment Relations Act 2000.
- I have ordered Ruby Rock pay Mr Thomson compensation taking contribution into account in the sum of \$6,300 under s.123 (1) (c) (i) of the Employment Relations Act 2000.

- I have ordered Ruby Rock to pay Mr Thomson the sum of \$555.24 net being four days unpaid wages. Interest is payable on that sum from 24 May 2006 until the date of payment at 8%.
- I have asked Mr Wetherall to calculate holiday pay in accordance in a different way under the Holidays Act 2003 and then to advise the Authority and Mr Commandeur of the calculations. I will then make a formal order for holiday pay.
- I have reserved the issue of costs and timetabled for an exchange of submissions.

Helen Doyle
Member of the Employment Relations Authority

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