

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 268/07
5081122**

BETWEEN JOSEPH MICHAEL WAIPOURI
 Applicant

AND RIGHTSIDE PROPERTIES LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Georgina Burness for Applicant
 No attendance by Respondent

Investigation Meeting: 29 August 2007

Determination: 30 August 2007

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Joseph Michael Waipouri ("Mr Waipouri") says he was unjustifiably dismissed by the respondent Rightside Properties Limited ("Rightside").

[2] Contrary to the prescribed regulations, Rightside did not lodge a statement in reply. Mr Waipouri's statement of problem was served on it on 29 June 2007. As no steps were taken, by a memorandum of 30 July 2007 I directed the matter proceed to an investigation meeting and that Rightside be served with the memorandum and a Notice of Investigation Meeting. The memorandum particularly advised that Rightside could attend to seek the Authority's leave to defend the application. An amended Notice of Meeting was served on Rightside on 3 August 2007 advising of the investigation meeting today.

[3] Rightside did not attend the investigation meeting today to seek the Authority's leave. I telephoned Rightside's director Mr Neal Alan Summers ("Mr Summers") to ascertain Rightside's intentions. Mr Summers was disdainful and dismissive of Mr Waipouri's pursuit of resolution. He denied any knowledge of the investigation meeting today and he made it clear to me that Rightside would take no part in the Authority's investigation meeting.

[4] I am satisfied from the Authority's records that Rightside has been provided with notice of today's investigation meeting and that it could seek leave. It has taken not steps to seek leave to defend Mr Waipouri's application. Accordingly, the matter remained undefended and Mr Waipouri's affirmed evidence is unchallenged.

The facts

[5] Rightside operates the Kaikohe Hotel ("the Hotel"). Mr Waipouri rented a room for \$150.00 per week at the Hotel in November 2006. In late November 2006 he began to assist the maintenance person voluntarily and eventually on or about 18 December 2006, he and Mr Summers agreed that Mr Waipouri would perform work at the Hotel as Cleaner/Security which was to include maintenance, opening and closing the premises, bar work, cleaning and security.

[6] It was agreed that Mr Waipouri's weekly rent would be deducted from his wages and he would be paid a remaining sum of \$120.00 per week. Mr Waipouri worked Tuesday to Saturday each week beginning early each morning, breaking for lunch and then recommencing in the early afternoon until closing time each evening.

[7] Eventually the existing maintenance person was terminated and Mr Waipouri's workload increased and as a consequence, Mr Summers agreed to reduce Mr Waipouri's rent to \$120.00 per week.

[8] Mr Waipouri was never paid the \$120.00 weekly wages and began to experience extreme financial difficulty. He had no money to feed himself. He is entitled to pursue a wage claim for arrears of wages. In January 2007, Mr Waipouri advised Mr Summers he was meeting with Work and Income New Zealand ("WINZ") in relation to alternative employment.

[9] Entirely without Mr Waipouri's knowledge, Mr Summers approached WINZ and secured an agreement that WINZ would subsidise Mr Waipouri's wages. Such schemes are intended to assist and employee into full time work. I find that Mr Waipouri was at the time of this agreement already working full-time for Rightside. A Job Plus Subsidy Agreement was signed by Mr Summers, Mr Waipouri and WINZ dated 7 February 2007 ("the Job Plus Agreement").

[10] The Job Plus Agreement specifies that the stated employer "Rightside Properties Ltd operating as Kaikohe Hotel" agrees to pay the employee "Mr Joseph Waipouri" "\$10.25" per hour for a "minimum of 30 hours per week".

[11] The Job Plus Agreement further contains declarations by Rightside as employer, that it will employ the employee Mr Waipouri for the period specified and that the intent of the subsidy "is to assist the Employee into full time employment". I regard the content of the Job Plus Agreement and the declarations in it as corroborative of Mr Waipouri's unchallenged evidence that he was employed by Rightside and I find accordingly.

[12] Mr Waipouri says he was dismissed on 21 February 2007. He says that when he asked Mr Summers for wages he had not been paid, Mr Summers said to him "I think it's time you moved on, get your things out of the room." Mr Waipouri said "okay" and then left.

The merits

[13] I find that at the time Mr Summers employed Mr Waipouri, Mr Summers did not disclose to Mr Waipouri that he was a director of Rightside. I find there was no mention of Rightside at all and Mr Waipouri had no knowledge of that entity. However, I find that Mr Summers was acting as agent for Rightside and he failed to disclose his agency and his principal. Mr Waipouri makes his claim against Rightside and not Mr Summers personally. He is entitled to do so. I find that Mr Waipouri was employed by Rightside through its agent Mr Summers.

[14] Irrespective of the Job Plus Agreement, Mr Waipouri's already existing employment was unaffected. The wage rate specified therein was the prevailing minimum wage at the time. I find that Mr Waipouri was employed by Rightside from about 18 December 2006 as cleaner/security. He was not provided with an employment agreement and his weekly remuneration was expressed as his rent together with \$120.00. I find he was never paid the \$120.00. I am also told that Rightside did not seek payment from WINZ for the subsidy but I make no findings about that.

[15] I accept Mr Waipouri's unchallenged evidence and I find that what Mr Summers told him on 21 February 2007 was a sending away which constituted a dismissal. Rightside does not attend today to justify its actions.

The determination

[16] I am satisfied that Rightside's actions on 21 February 2007 were not the actions of fair and reasonable employer and the termination of Mr Waipouri's employment was therefore contrary to section 103A of the *Employment Relations Act 2000* ("the Act"). **I find that Mr Waipouri was unjustifiably dismissed and he has a personal grievance. He is entitled to have his employment relationship problem settled by the Authority.**

The resolution

[17] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Waipouri's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly. I find that Mr Waipouri did not contribute to the situation that led to his personal grievance and there is no basis to reduce either the nature or the extent of any remedies to be awarded to him.

[18] After he was dismissed, Mr Waipouri informed WINZ of his change of circumstances. He was advised to raise a personal grievance which he subsequently did. He was granted an unemployment benefit of \$163.52 per week from 28 February 2007. Mr Waipouri tells the Authority he has only in the last two weeks managed to secure full-time paid employment. I am satisfied that he has been required to show efforts to find paid employment as a condition of his entitlement to continued income assistance from WINZ and on that basis he satisfies me that he has mitigated his losses. I award Mr Waipouri his actual loss of wages from the time of his termination on 21 February 2007 until 15 August 2007 which I calculate as 25 weeks at forty hours per week. The first five weeks shall be reimbursed at the prevailing minimum wage of \$10.25 and the following 20 weeks to be reimbursed at \$11.25. **I order Rightside Properties Limited to pay to Joseph Michael Waipouri the gross sum of \$11,050.00¹ as reimbursement.**

[19] I accept Mr Waipouri has suffered hurt and humiliation as a result of his personal grievance. Having regard to his evidence, the nature of the personal grievance and his length of service, I award him \$3,000.00 compensation. **I order Rightside Properties Limited to pay to Joseph Michael Waipouri the sum of \$3,000.00 as compensation.**

¹ (40 hours x \$10.25 per hour x 5 weeks = \$2,050.00) + (40 hours x \$11.25 per hour x 20 weeks = \$9,000.00)

Costs

[20] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Burness is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Rightside Properties Limited is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority