

Attention is drawn to prohibition on publication of AB's name in para [40]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 109/10
5288528

BETWEEN AB
Applicant

AND EL CENTRO LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Matt Young, advocate for Applicant
No appearance for Respondent

Investigation Meeting: 4 March 2010

Determination: 10 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In AB's application to the Authority lodged on 30 November 2009, he alleged that in July 2009 he commenced employment as front of house manager for El Centro, a restaurant at Mission Bay in Auckland. His rate of pay of \$20 per hour was agreed to by Mr Graeme Edwards the owner/manager of the business. AB supplied his IRD number when he started. There was no agreement that he would render invoices for services rather than be paid an hourly rate for his service, and AB was not GST registered.

[2] AB also alleged that at the beginning of the employment he asked Mr Edwards for a written employment agreement. He was told he would be getting one but did not receive it and consequently the Employment Relations Act 2000 at s 63A was breached.

[3] From commencement on 7 July 2009 he worked full time and was responsible for other restaurant staff.

[4] AB found Mr Edwards, who was usually present at the restaurant, difficult to work with. Soon after starting AB began receiving comments he regarded as inappropriate and which he believed were directed at him because of his sexual orientation, being a gay man. He found that Mr Edwards had started using a nickname for him made up from the first letters of his Christian name and the words “*suck dick.*” A crude allusion to sexually transmitted disease seems intended by the three letter nickname.

[5] Mr Edwards appeared to regard this nickname and its use as a joke but AB found it embarrassing. He tolerated this behaviour to begin with only because he had just started in the new job and thought Mr Edwards would grow out of it. He found it got worse to the point where on some occasions in front of customers in the restaurant Mr Edwards had asked him to tell them what his given nickname was. AB says he refused to respond and felt deeply offended and embarrassed by the behaviour of Mr Edwards.

[6] On occasions Mr Edwards also referred to AB as a “*fuckin faggot.*” He made jokes to others present, such as by telling them not to bend over, and he was openly scornful of AB for lacking knowledge of women.

[7] Once, after AB had made some changes in presentation in the restaurant, he was berated by Mr Edwards for being useless and failing to live up to the expectations of Mr Edwards who told him:

... .. you come in here with your fucking gay little shorts and turn this place into a place for faggots.

[8] AB said he found this remark extremely offensive and felt completely betrayed and hurt by the conduct of Mr Edwards.

[9] AB told the Authority that generally he found during his employment Mr Edwards engaged in behaviour that was humiliating, sexually discriminatory and abusive, making AB feel insignificant, worthless and isolated.

[10] AB alleges that on Saturday 25 July 2009 he was abused in front of staff and customers by Mr Edwards who told him:

I couldn't manage my way out of a brothel and (not to) bother coming back.

[11] AB stated that he felt completely lost as to what to do and left the employment, as ordered to by Mr Edwards. He says that he was hugely shocked and stunned by this action which occurred without any reason or any warning.

[12] When he returned after the weekend to collect pay the restaurant acknowledged remained owing to him, he found that the rate was \$12.50 per hour instead of the agreed \$20 per hour. He also found that Mr Edwards wanted to deduct moneys from his pay for amounts that he did not agree he owed. He was requested to provide an invoice, as if he had been a contractor and not an employee, before he could get a cheque for the amount of \$593.65 calculated as due to him by El Centro Ltd.

[13] A few days later AB received an email from the person associated with El Centro restaurant who had obtained the job for him there. That person claimed that AB had been engaged on a contract basis and only for a fortnight. Although his total of the hours he had worked was accepted, the rate he claimed of \$20 per hour was rejected and \$12.50 offered instead in the email. This reduction was acknowledged but claimed to be justified because AB had misrepresented his abilities as a “restaurant manager.”

[14] There were also various items set out in the email as expenses incurred personally by AB on the restaurant’s account and which were deducted from his earnings calculated by the restaurant as due. Only two items, one a bill for meals supplied to friends of AB (\$148.50) and the other his staff tab (\$122.50), he accepted as legitimate and properly deductible.

[15] AB engaged Mr Matt Young who wrote to El Centro Ltd raising a personal grievance. His letter of 5 August 2009 set out in detail the matters complained of in relation to AB’s employment.

[16] El Centro Ltd was advised that if nothing was heard in response to the letter, AB intended immediately filing a claim in the Authority to resolve his personal grievance and enforce his employment rights. The company was also advised that AB intended taking a complaint about Mr Edwards to the Human Rights Commission.

[17] When nothing was heard in response to his letter Mr Young sent an email to Mr Edwards in which he referred to a telephone discussion the pair had had earlier that day, and Mr Young attached the letter of 5 August.

[18] After AB lodged his statement of problem a copy was served by the Authority at the address notified by the company as its registered office. El Centro Ltd was advised at the same time that it was required to lodge a statement in reply within 14 days of receipt of the statement of problem.

[19] Nothing was received or heard by the Authority from the company. After 14 days a Support Officer requested urgent advice from the company as to when a statement in reply would be filed.

[20] The only communication the Authority had with Mr Edwards was on 18 December 2009 by email, after a request had been made for advice as to when a statement in reply would be filed. By email Mr Edwards had replied simply:

Send a copy of the letter to this email address.

[21] This was done. When nothing more was heard the Authority proceeded to set the date of 4 March 2010 for the investigation meeting. Formal notice of it was sent to El Centro Ltd at its registered office on 21 January 2010. It was served the following day. A copy was also sent to Mr Graeme Edwards at the email address of El Centro.

[22] On 4 March the investigation meeting was attended by AB and his representative Mr Young. Neither Mr Graeme Edwards nor any other representative of El Centro Ltd took the opportunity that had repeatedly been offered the employer to attend the investigation meeting and give its views of the claim, its explanation and its account of what happened.

[23] At the meeting AB confirmed the contents of his statement of problem and he was examined by the Authority about the nature of his engagement by El Centro Ltd and the circumstances of his employment, including its termination.

[24] I am satisfied from what AB has told the Authority that he became an employee of El Centro Ltd and was not a contractor to the company. The real nature of the relationship was, I find, one of employment under a contract of service.

[25] I am further satisfied that AB was dismissed from his employment and that under the test of s 103A of the Employment Relations Act his dismissal was not justifiable. The employer has not taken the opportunity offered to even try and justify that action taken against AB who, I find, has a personal grievance.

[26] I find that there was no contribution in any way by AB to the situation that gave rise to his personal grievance.

[27] As remedies to resolve his grievance, I consider AB is entitled to the reimbursement of lost wages for the period of eight weeks immediately after the dismissal in which he had no employment as a result of that unjustified action taken against him. At 37.5 hours per week for eight weeks, the amount at the agreed \$20 per hour is \$6,000 gross.

[28] In respect of the hours the company has accepted were worked by AB, he is owed a balance of \$1,409 gross, after deducting the \$450 he did receive during the employment as pay and \$271 personal expenses for meals and a staff tab.

[29] I find that the behaviour of Mr Graeme Edwards amounted to sexual harassment under s 108 of the Employment Relations Act. AB's employer or a representative of that employer, by the use of language of a sexual nature, directly and indirectly subjected AB to behaviour that was unwelcome or offensive to him and that by its nature and by repetition had a detrimental effect on AB's employment, his job performance and his job satisfaction.

[30] AB was publicly humiliated, derided, belittled and made fun of, for Mr Edward's amusement. AB is entitled to compensation for personal harm suffered by this unfair, unreasonable and discriminatory treatment by his employer.

[31] AB is in his mid-20s and recently has completed his Bachelors degree in a profession or area of business in which he hopes to make his career. Over some 10 years he has gained considerable experience in the hospitality industry, including working for two years as a flight attendant for an international airline. He has a manager's certificate and has worked in several well known up-market restaurants and establishments in Auckland, as maitre d, bartender, head waiter, duty manager and trainer. AB told the Authority he had not experienced discriminatory behaviour like Mr Edwards' before and I fully accept from him that he found it humiliating, demeaning and generally distressing to a high degree.

[32] As compensation under s 123(1)(c)(i) of the Act, an amount of \$12,000 was sought by AB. I regard \$7,000 as appropriate in the circumstances, particularly bearing in mind other remedies ordered against the employer. I take into account that this was a short employment of three weeks only and that the discriminatory

behaviour of Mr Edwards was necessarily confined to that time, but AB's dismissal was sudden and without cause, adding to his humiliation and distress.

[33] In addition, based on his gross total earnings of \$2,130, AB is entitled to holiday pay of \$191.70. He is to be paid interest on the wages lost and the arrears and also on the holiday pay, from 30 November 2009 at the rate of 5% per annum.

[34] As part of the remedies sought by AB, he has asked the Authority to make recommendations under s 123(1)(d) of the Act for remedial action El Centro Ltd should take to educate Mr Graeme Edward and change his behaviour, and other action to prevent further harassment of any other employee.

[35] AB has not been employed by El Centro Ltd since July 2009 and there is no evidence that that company now employs anyone. AB has advised the Authority that to his knowledge El Centro is still trading as a restaurant in Tamaki Drive at Mission Bay, but a separate and more recently incorporated company, El Centro Cantina Ltd, may now be operating the same restaurant. Public information available from the Auckland City Council shows that a liquor licence was applied for in respect of a restaurant at that address in December 2009 by El Centro Cantina Ltd. The name Graeme Edwards is given in Companies Office records as a director of that company.

[36] As Mr Graeme Edwards is the sole director of El Centro Ltd, and as such is the mind of that company, recommendations are likely to achieve nothing and none is therefore made.

[37] Behaviour like Mr Edwards' complained of by AB may expose the perpetrator to risk of personal liability to pay a penalty of up to \$5,000 for every breach of an employment agreement by the employer that is incited or instigated by the perpetrator. Section 135 of the Act provides for that penalty. Depending on the circumstances, a breach of the agreement may be found to have occurred in relation to an implied if not expressed term of fair and reasonable behaviour required of an employer towards an employee, as an example.

Written employment agreement

[38] I find that El Centro Ltd failed to comply s 63A(2) of the Act which requires every employer to supply its employees the terms and conditions of their employment in writing. El Centro Ltd failed to provide AB with a copy of the intended

employment agreement. For this breach a penalty of \$1,500 is to be paid by the company, with half going to the Crown and half to AB.

Determination

[39] In summary, AB is to be paid the following amounts by El Centro Ltd;

\$6,000 as reimbursement of lost wages under s 123(1)(b) of the Act.

\$1,409 as wages owing at the termination of employment for time worked.

\$7,000 as compensation under s 123(1)(c)(i) of the Act.

\$191.70 holiday pay owing at the end of the employment.

\$750 as a penalty for breach of s 63A(2) of the Act.

\$750 is to be paid to the Crown as a penalty for the same breach.

4.25% interest on the total of \$7,600.70 wages and holiday pay recovered, from 30 November 2009 when this application was lodged by AB.

Prohibition on publication of AB's name

[40] The applicant AB's real name shall not be published in any way by any person, by order made under clause 10 of Schedule 2 of the Employment Relations Act. This order is made in the interests of justice, to prevent AB becoming a target and victim of further sexual harassment and other unlawful discriminatory behaviour, through publicity his case may attract.

Costs

[41] El Centro Ltd is ordered to pay costs, as a reasonable contribution to the actual costs incurred by AB in bringing this case and by retaining Mr Young as his representative. The investigation meeting time was kept to a minimum because El Centro Ltd did not take part at all in the investigation, although given ample opportunity to do so if it had wished.

[42] I award costs of \$950 to be paid by the company to AB, under clause 15 of the Second Schedule to the Act.

A Dumbleton
Member of the Employment Relations Authority