

Attention is drawn to paragraph [3] prohibiting publication of certain information contained in this determination.

Determination Number: CA 47/05
File Number: CEA 239/04

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN A (Applicant)
AND R (Respondent)
REPRESENTATIVES The applicant in person
Karen Castiglione, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 25 January 2005
26 January 2005
DATE OF DETERMINATION 12 April 2005

DETERMINATION OF THE AUTHORITY

Prohibition on publication

[1] I issued a determination dated 5 April 2005 dealing with the substantive issues between these parties. That determination is now recalled and replaced with this determination.

[2] Various individuals were identified by name in the evidence filed and during the investigation meeting. It was not possible to deal with the employment relationship problem between the parties without considering some matters which could be damaging particularly to persons who gave evidence at the investigation meeting but were not parties.

[3] That being the position and for the avoidance of doubt I now confirm the oral order that I made at the investigation meeting on 25 January 2005 namely that all of the evidence given, all the pleadings filed and the names of both parties and all witnesses shall not be published. This order is made pursuant to clause 10 of the second schedule of the Employment Relations Act 2000. This determination now reflects that order.

Employment relationship problem

[5] The applicant (Mr A) alleges that he was unjustifiably dismissed by the respondent (R) and R say that the dismissal was justified.

[6] The parties attended mediation but were unsuccessful in resolving their employment relationship problem.

[7] There were a number of telephone conferences prior to the investigation meeting during which it became clear that Mr A, in addition to his claim of unjustifiable dismissal also alleged that he had been racially harassed, constructively dismissed, had intellectual property stolen from him and had been subjected to racial discrimination in the workplace.

[8] Because none of these additional allegations had been notified to the employer with the degree of particularity necessary to enable the employer to respond, I directed that further and better particulars be filed and served.

[9] When the investigation meeting commenced, the parties agreed by consent to the striking out of the claims in respect to intellectual property and constructive dismissal and I ruled that the racial discrimination allegation had not been made within 90 days of the events complained of and was not therefore able to be proceeded with further.

[10] That left for investigation and determination an allegation of unjustifiable dismissal, an allegation of racial harassment in the workplace and an overarching complaint of bad faith by R in respect to Mr A.

[11] Mr A was, at the time of his employment by R, in his early twenties and by all accounts was, at that time, an experienced and talented young chef. He was appointed chef by R in March 2003.

[12] For much of the period of his employment, Mr A was in sole charge in the kitchen. He was made responsible for creating menus, producing lunch for the diners who presented and ultimately for training junior kitchen staff.

[13] Mr A says that he was never able to obtain satisfaction from the employer in respect to the terms of his employment agreement, his rate of pay and his title. Mr A sought to have the title of head chef and have a wage rise commensurate with that but R indicated that they had no need for such a title, given the size of the organisation, and that the simpler title of chef was entirely appropriate.

[14] There was discussion about a pay rise in the summer of 2003 but I find that no promise was made by R that they would give Mr A a pay rise. All that was promised was that the matter would be reviewed or looked at and I find that that is precisely what happened. The review resulted in no increase being offered.

[15] On the subject of the employment agreement, which was problematical according to Mr A's view of matters, R simply say that they were satisfied with the terms of the employment agreement that Mr A was offered and saw no reason to change it. This stance is of course perfectly reasonable provided of course that the employment agreement complied with the law and I find that this one did.

[16] Throughout the period of his employment, Mr A alleges that he was racially harassed by the employer or his representative. In particular, he directs attention to Mr Z who was the relieving manager for R for a period. Mr A says that Mr Z referred to him as a *nigger* and there is

independent evidence of this sort of language being used in and around the kitchen at R and/or about the chef and kitchen staff at R.

[17] In response, R says that Mr A was as much a part of the use of inappropriate language as anyone else and again, there is independent verification of that fact including from witnesses who gave evidence for Mr A who confirmed that they themselves were part of that language culture.

[18] However, those witnesses, along with Mr A himself, sought to draw a distinction between the kind of language that would be appropriate between friends and the kind of language that would be appropriate between an employer and an employee.

[19] For instance, Mr A told me that he used the word *nigger* in his private life and that he might answer his cellphone with the expression *yo nigger*. He said he regarded this language as acceptable within his own racial group. Mr X, one of Mr A's witnesses, told me that he would call Mr A a *nigger*, that this was playful banter and that it was acceptable because he and Mr A were friends. Mr X told me that Mr Z (the employer's representative) ought not to use the same language to Mr A because he was Mr A's superior and not his friend. Mr A added to this point by telling me that he called Mr X a *hillbilly* which was also a term of derision.

[20] R acknowledged that Mr A had made a complaint to it in relation to the language being used against him by Mr Z in particular and that that complaint was made verbally to Mr W who was, at the relevant time, the general manager of R. Mr W was sufficiently concerned about the complaint (notwithstanding the informality of its presentation to him) to raise the matter with Mr Z and to ask him to *tone it down*. Mr W said that when the complaint was received by him it was made in a flippant way by Mr A and another staff member, Mr Y. Mr Y also gave evidence that as a friend of Mr A he called Mr A a *nigger* but it was less offensive because they were friends.

[21] Mr W was firmly of the view that Mr A was part of the language culture and he did not think that Mr A was damaged by the terminology that Mr A was complaining about.

[22] Mr U who was effectively the owner of R or perhaps more accurately the owner's representative seemed genuinely horrified by the racial language issue when he found out about it. He found out about it towards the end of Mr A's employment relationship with R when the matter was formalised as part of the mediation process. Mr U regarded it as very offensive that people would use that language in his business and he seemed genuinely bewildered that Mr A had not raised it with him when he had been on site from time to time.

[23] As soon as Mr U found out about the racial harassment allegations via a letter from Mr A, he directed Mr W, the general manager, to meet with Mr A to try to resolve the matters in contention by agreement. That meeting took place on 26 January 2004 and this was followed shortly thereafter by a mediation on 12 February 2004 when the January meeting failed to resolve the parties issues.

[24] However, events took another and sudden turn on 2 February 2004 when Mr A went into Mr W's office ostensibly to send a fax to a food supplier. The fax machine was in Mr W's office. Mr A's evidence was that he sat down at Mr W's desk and rummaged around looking for a pen to write the fax and in doing so came across a written note in Mr W's handwriting to prepare a contract for Mr V.

[25] Mr V was a second chef that R had employed and there clearly was some ill feeling from Mr A about their decision to do that. Mr A's evidence was very clear that there was no financial information on Mr W's desk which would enable him to find out how much Mr V was to be paid.

[26] Mr A emerged from Mr W's office and his evidence was that his next step was to ring Mr Y, his friend and co-worker to see if Mr Y knew how much Mr V was to be paid.

[27] Mr Y's evidence is that Mr A did in fact ring him and that he was able to answer Mr A's question because he had spoken to Mr V and knew the answer.

[28] However, another member of the kitchen staff called to give evidence by R who I find had no reason to make up her story, told me that when Mr A came out of the office he asked her and Ms A (a witness for Mr A) to keep a lookout for him to enable him to go back to Mr W's office. Ms B's evidence was clear on this point and she is certain that that is what happened.

[29] Ms A does not remember Mr A asking her to keep a lookout although she certainly remembers something else that Ms B also refers to, namely a request from Mr A for a cellphone capable of taking pictures. The implication was that he wanted to photograph something that he had seen in Mr W's office.

[30] Ms B also told me that when Mr A emerged from Mr W's office the second time he came to find her and ask about her parents' photocopier. She was very clear about this statement and she explained to me that her parents ran a motel and had a photocopy machine as part of that complex.

[31] For his part, Mr W told me that the pay records would have been on his desk when Mr A went in that day because he had been doing the pays immediately prior to leaving his office vacant and going off to meet people elsewhere on the site. He thinks the pay records would have been on his desk but probably would have been covered up. He thought they would be relatively easy to find and presumably the information about Mr V's rate of pay would have been accessible therein.

[32] What happens next is uncontested evidence. Mr A goes to find Mr W who is elsewhere in the complex and they have a blazing row. Various witnesses who gave evidence at my investigation meeting heard it and told me about it in their own way.

[33] Mr W's evidence is that Mr A told him that he had found Mr V's rate of pay in the material on Mr W's desk. Conversely, Mr A was equally clear that he had told Mr W no such thing but rather had told Mr W that he had established Mr V's rate of pay by talking to his friend and co-worker, Mr Y. Mr Y confirmed that Mr A had asked him for the information and he had given it. Ms A gave evidence that Mr A had told her he got the information from Mr Y

[34] In any event, Mr W reports and Mr A does not deny that Mr A was furious about discovering that Mr V was being paid more than he was to do the same job. Mr W says that Mr A was almost physically incapable of talking he was so wild. I tested Mr W on whether Mr A had actually told him that he had obtained the data from Mr W's office or whether he simply had said that he had obtained the data about Mr V's rate of pay and he was honourable enough to say that he was now not sure. He accepted that it was possible that he had been told by Mr A that he had obtained the data but not necessarily from Mr W's office.

[35] However, one factor which encouraged Mr W to believe that it had come from his office was the fact that when Mr A was challenged about where he saw the note about Mr V's contract, Mr A said that he had seen this handwritten note in Mr W's silver diary. Mr W's silver diary was produced to me at the investigation meeting and I could not find any such entry. Mr W invited me to reach the conclusion that in consequence, Mr A had not found any such note at all but had only found the wage records which very clearly were in the office.

[36] Whatever the truth of that particular exchange, this was a very intemperate discussion which Mr W acknowledges both parties were told to tone down by a bystander. It seems to have ended

when Mr A said that he was too angry to talk about it and he wanted a meeting the following morning to discuss the matter. Mr W, who of course was also angry, said that if Mr A needed to go then then he was fired and that constitutes the dismissal.

[37] Subsequently, Mr W produced a computer generated note of various discussions and difficulties that he had had with Mr A over the course of his employment. Mr A challenged the factual accuracy of that list and various other witnesses gave evidence about the accuracy or otherwise of Mr W's summary. Nothing turns on Mr W's notes and I take them no further in this determination.

[38] ***Was Mr A racially harassed in the workplace?***

[39] I find as a fact that there was racial language used in the workplace but given the ready acceptance of that language by Mr A (and by his own admission) the use of such language of itself cannot constitute racial harassment.

[40] In order for racial harassment in a legal sense to be found, the language referred to would need to be present and evidence that that is hurtful or offensive to the employee and that the language has a detrimental effect on the employee's employment.

[41] In my opinion, it is difficult for Mr A to contend that the language is hurtful or offensive where he encourages the use of the language himself and given that fact, it seems equally implausible for there to be any detriment to Mr A in those circumstances.

[42] Furthermore, Mr A did not raise the issue with his employer until by his own admission it had been going on for months and when he did raise it he raised it in an informal fashion which left the employer uncertain about the extent of the problem and even uncertain about the actual details of the problems.

[43] However, notwithstanding those difficulties, the employer acted promptly to deal with the matter as best it could with the information Mr A had provided.

[44] When the matter was formally raised with the employer as part of a mediation process, the employer immediately took steps to deal formally with the issue and to put in place a racial harassment policy.

[45] In all the circumstances then I do not consider that Mr A's claim of racial harassment is made out.

[46] ***Was Mr A unjustifiably dismissed?***

[47] I find that Mr A was unjustifiably dismissed simply because Mr W in acting for the employer effected the dismissal in the heat of the moment without conducting a proper investigation, without giving an opportunity to explain and without reflecting on that explanation.

[48] There is no suggestion that there was any other motivation for the dismissal other than the events of 2 February 2004 and as I think my earlier analysis of the facts make clear, there is more than one explanation for Mr A being in possession of the information which lead to his downfall and arguably not all of those explanations would justify a dismissal. If as Mr A contends all that he saw in Mr W's office was some note or other about a contract for Mr V and if he found that without rummaging through Mr W's papers as he also contends then that in my judgement is not a basis for dismissal.

[49] Conversely, if Mr A had indeed been rummaging through Mr W's papers and obtained the information about Mr V's rate of pay from that source then Mr W might well feel that the employer had lost all trust and confidence in Mr A.

[50] Whatever the circumstances, the fact is that by reason of the intemperate way in which Mr W responded when provoked by Mr A (and he was honourable enough to acknowledge that Mr A could *wind him up*) the dismissal is in my view unsafe.

[51] ***Contribution***

[52] That leaves the question of contribution for consideration. I reach the conclusion that Mr A has contributed to his own misfortunes. We cannot say with certainty that his behaviour in Mr W's office was improper and therefore he cannot be said to have contributed in that respect but he can be said to have contributed to the extent that he provoked Mr W in an excitable way when Mr W was busy on another matter and actually involved in a meeting. It may be that it is reasonable for Mr A to be disgruntled about somebody else being paid more than he but actually it is not his business and he certainly is not entitled to disturb the equilibrium of his employer's daily routine in the way that he did.

[53] ***Is either party guilty of bad faith?***

[54] I do not think that there is any evidence of bad faith by either party.

[55] Nor do I think that the failure of the parties to agree a new employment agreement or the failure of R to agree to make Mr A a head chef or a failure to give Mr A a pay rise constitute bad faith by R in respect to Mr A.

[56] ***Determination***

[57] I find there has been no unjustifiable action to Mr A's disadvantage by way of racial harassment at the workplace.

[58] I think that this whole episode has been an object lesson to all involved and I certainly would say to Mr A that to a greater or lesser extent in this matter anyway, he is very much the architect of his own misfortunes. He should not use racially based language in the workplace in any circumstances and should not tolerate it from friends and associates in the workplace either. Such behaviour encourages a lowering of standards and makes findings of culpability against an employer less straightforward.

[59] I have already mentioned that I consider that Mr A has materially contributed to his own dismissal. He clearly has no right to quarrel with his employer about someone else's rate of pay no matter how aggrieved he might feel about that. It is an employer's duty to act fairly and dispassionately in respect to all of its employees' and no doubt Mr A can make an argument for the provision for the second chef being unfair but that does not entitle him to quarrel publicly with his employer's representative and or to seek to make a public case for different treatment.

[60] Were there no contribution towards the dismissal, I would have been disposed to order a compensatory payment of \$3,000.00 to be paid by R to Mr A but given the level of contribution, I determine that a contributory figure of 66% is appropriate in this case and accordingly I make an order for a payment from R to Mr A of \$1,000.00 under this head.

[61] I was not offered any evidence of a wage loss and accordingly I make no award in respect to wages.

[62] Costs are reserved.

James Crichton
Member of Employment Relations Authority