IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 298
5314299

BETWEEN	ANTONIO AGREITER Applicant
AND	GINO LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	M Moncur, advocate for applicant A du Plessis, advocate for respondent
Investigation Meeting:	5 May 2011
Additional information provided:	13 May 2011
Submissions received:	1 June 2011 from applicant 13 May 2011 from respondent
Determination:	8 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Antonio Agreiter seeks various payments of wages, holiday pay and reimbursing payments from his former employer Gino Limited (GL). He also says he resigned in circumstances amounting to an unjustified constructive dismissal.

[2] Penalties are also sought for the failure to produce a wage and time record, and for breach of good faith.

[3] GL denies that any payments are owed. To the extent that it sought to allege Mr Agreiter had breached restraint of trade and non-solicitation provisions in the parties' employment agreement no adequate claim or counterclaim has been filed in

that respect. I do not consider the matter to be properly before the Authority and do not take it any further. If GL wishes to pursue the matter it will need to do so separately.

Background

[4] Mr Agreiter began his employment with GL in January 2008. He was to be employed in the Santa Lucia Ristorante Italiano, a restaurant owned by GL, but pending the opening of the restaurant several months later, Mr Agreiter worked in the company's adjacent café/gelateria.

[5] According to a written employment agreement between the parties, Mr Agreiter's title was duty manager. In practice he was responsible for the day to day running of the restaurant, including for the staffing of the restaurant. The agreement provided for his remuneration as follows:

> *7.1 Annual salary*
> *The employee's salary shall be $40,000 before tax per annum*

[6] Unfortunately the page containing the hours of work clause was missing from the copy of the agreement provided to the Authority, as well as from every other copy that could be located including one provided to Immigration New Zealand. However since a salary is defined as an annual payment usually payable in proportional weekly, fortnightly or monthly amounts - and there is no evidence of any provision to different effect - I find the salary was to be inclusive of all hours worked. More particularly there was no evidence of any agreement to any further payment in the event that a specified number of hours of work was exceeded in any period.

[7] A similar difficulty arose in respect of the page on which the remuneration provision appeared. The numbering of the clauses suggests several provisions, notably leave provisions, have been deleted. There was no explanation. Again, no complete copy of that and any additional relevant pages could be located.

[8] Mr Agreiter said his salary was increased to $45,000 per annum from about February 2009. His bank account statements show that the sum of $850 was deposited in his account on most weeks in 2009, although payment was far less even

in 2010. In 2008 the sum of $750 had been deposited into his account with a reasonable degree of frequency, although still with some variation. Further, it was common ground that from time to time full or part payments were made by cash or cheque although there was very limited documentation in support.

[9] Bajram Jusufi (known as Gino), GL's director, denied initially that there was ever an increase in salary. However the change in the semi-regular payments made to Mr Agreiter, and information subsequently provided by GL's accountant, reflect an increase to $45,000 pa. Accordingly I find Mr Agreiter's salary increased to $45,000 pa in February 2009.

[10] Under the employment agreement, and in the accountant's calculations, both rates were gross or 'before tax' payments. Payment appears to have been made to Mr Agreiter on an 'after tax' basis as between the parties.

[11] Mr Jusufi said further that the payments were inclusive of holiday pay. There was no evidence of any agreement to that effect, and no record showing the relevant calculations. Nor were the deposits made into Mr Agreiter's account consistent with Mr Jusufi's assertion.

[12] Mr Agreiter said that, from 13 June 2010, deductions of $350 per week were made from his salary, without any reason being given and without authorisation. His bank statements show that sporadic and varying payments were made in 2010, with a number of payments missed. They confirm that from June Mr Agreiter was paid $500 per week.

[13] Mr Agreiter also said that, because the uncertainty about payment could not continue, he tendered his resignation on or about 23 May 2010. His employment ended on or about 31 July 2010.

[14] Mr Jusufi said the payments to Mr Agreiter were reduced because he was being overpaid. He said he warned Mr Agreiter that this would be corrected. There was nothing in the evidence to explain or support that view of the payments owed or made to Mr Agreiter.

[15] Finally, Mr Jusufi complained that Mr Agreiter did not give the required notice of termination of his employment. Even if he was correct, and Mr Agreiter said he was not, no claim has been made in that respect and nothing turns on it for the purposes of this employment relationship problem.

The claims for payment

1. Wages underpaid

[16] Mr Agreiter seeks $16,563, calculated as:

(i) $5,733 for 10 January 2008 to 3 December 2009; and
(ii) $10,830 for 3 December 2009 – 5 August 2010

[17] The calculations in support were based on Mr Agreiter's assertion that he worked for 65-70 hours per week, and included a component in respect of hours worked in excess of 40 per week.

[18] There was no record of the actual hours worked. As the on-site manager, Mr Agreiter should have kept a record not only for his own purposes but also for those of the business. However because of my findings regarding payment by way of salary I do not in any event accept that the calculations are properly founded. There was no entitlement to additional payment for hours worked in excess of 40 per week.

[19] So little reliable information was available from GL regarding the calculation of Mr Agreiter's weekly payments that I required a reconciliation from its accountant.

[20] The accountant presented a calculation based on a gross salary of $45,000 pa from the '2009 year'. This appears to be a reference to the financial year ending in 2009 rather than the 2009 calendar year, and there were further calculations for the '2010 year' and the '2011 year'. The calculations disclosed a total underpayment of $264.62 over the period of Mr Agreiter's employment. Had the calculation been based on a salary of $40,000 for the first year of Mr Agreiter's employment this outcome would probably have been different. In any event Mr Agreiter agreed that he

took cash from the till on occasion, and that amounts totalling $1,070 were taken. My overall finding is that no outstanding salary is owed.

[21] Accordingly there will be no order for payment.

2. Holiday pay

[22] Mr Agreiter seeks holiday pay of:

(i) $1,428.50 for statutory holidays not paid; and
(ii) $7,689 in respect of annual holidays.

[23] The calculation in respect of statutory holidays assumed Mr Agreiter worked on all statutory holidays during his employment, except for one which occurred during an absence in Italy.

[24] There was nothing on which I could base any finding that Mr Agreiter did not work when he said he did. Payment of $1,428.50 is therefore ordered, but on the basis that it is a gross figure, not a nett figure.

[25] The claim for $7,689 was based on Mr Agreiter's total earnings over the period of his employment at a salary first of $40,000 pa then of $45,000 pa. It assumed no paid annual leave was taken, and there was no evidence to the contrary. The calculation is:

$96,120 x 8% = $7,689

[26] Mr Jusufi's assertion that leave payments were incorporated in Mr Agreiter's weekly payments does not assist him because the arrangement (if there was one) was not made in accordance with s 28 of the Holidays Act 2003. That failure means subsection (1) of the provision does not apply regardless of Mr Jusufi's assertion, and subsection (4) would apply even if I accepted the assertion. It reads:

> *(4) If an employer has incorrectly paid annual holiday pay with an employee's pay in circumstances where subsection (1) does not apply and the employee's employment has continued for 12 months or more, then despite those payments the employee*

becomes entitled to annual holidays in accordance with section 16 and paid in accordance with this subpart.

[27] Mr Agreiter is entitled to payment in respect of unpaid annual leave. Mr Jusufi asserted further that some of the relatively larger deposits made into Mr Agreiter's bank account in 2010 in particular were for holiday pay. However there was no record of how the payments were calculated or to what they referred, and in any event they have been taken into account in determining whether there were any underpayments of wages.

[28] GL is therefore ordered to pay to Mr Agreiter the sum of $7,689, but on the basis that this is a gross figure not a nett figure.

3. Reimbursing payments

[29] Mr Agreiter says he is owed the following sums by way of reimbursement:

(i) $729 for a bar bench; and
(ii) $1,800 for a half share of the cost of an airline ticket.

[30] Mr Agreiter produced a receipt for $729 in respect of the bar bench. He said he purchased the bench himself, to replace one that was broken. Mr Jusufi said Mr Agreiter was responsible for the damage, and that in any event he was not authorised to make the purchase.

[31] I am not satisfied that Mr Agreiter was authorised to make the purchase. In turn I am not satisfied that he is entitled to be reimbursed for the purchase. There will be no order for payment.

[32] As for the air ticket, Mr Agreiter had purchased a ticket to Italy which was valid for the 12 months to 6 June 2009. He notified Mr Jusufi of his wish to utilise the ticket in a message dated 22 May 2009, and suggested a meeting to plan the needs of the restaurant. I infer that Mr Jusufi baulked at this, because Mr Agreiter asserted in a subsequent message that he had advised of the ticket some 6 months earlier. He said in evidence that Mr Jusufi offered to pay the cost of half of a new ticket if Mr Agreiter agreed to delay his trip until after June. Mr Agreiter said he agreed to this,

and purchased a new ticket which eventually cost him $3,699. He used it, and was on an unpaid holiday in Italy from 1 September to 3 December 2009.

[33] Mr Jusufi denied asking Mr Agreiter to delay his trip and denied offering to reimburse Mr Agreiter for one half of a replacement ticket. He also alleged that Mr Agreiter was to be absent for four weeks but extended his absence to 3 months, effectively deserting his job. However the parties' emailed correspondence at the time indicated that, even if there were unacceptable delays, it was always their expectation that Mr Agreiter would be returning. Mr Jusufi did nothing to indicate the relationship was at an end and I do not accept that any termination of employment occurred.

[34] More relevantly, in a message dated 20 September 2009 Mr Agreiter asked Mr Jusufi for the money for the air ticket. There was no record in any of the associated correspondence of a refusal, or a denial by Mr Jusufi of any obligation to make that payment. That leads me to consider that, by a small margin, it was more likely than not that an agreement of the kind asserted by Mr Agreiter was made. It was binding because there was an offer which was accepted, and consideration in the form of the change Mr Agreiter made to his travel plans in reliance on the arrangement.

[35] GL is therefore ordered to reimburse Mr Agreiter for half of the cost of the air ticket in the sum of $1,800.

The personal grievance

[36] Although Mr Agreiter resigned, the termination of his employment amounts to a constructive dismissal if it meets tests such including one set out in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Offices IUOW* as*:*

> *… we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer … If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words whether a substantial risk of resignation was reasonably*

foreseeable having regard to the seriousness of the breach.[1]

[37] During 2010 Mr Agreiter's remuneration was paid so sporadically and unpredictably that the accumulated failures amounted to a breach of duty by the employer of sufficient seriousness to make it reasonably foreseeable Mr Agreiter would not be prepared to continue to work under those circumstances. I also accept that his resignation was caused by that breach of duty.

[38] That means I find Mr Agreiter was constructively dismissed. The only justification Mr Jusufi was able to offer concerned assertions about the financial state of the company. There was no evidence in support but in any event that is not a justification for a dismissal effected in the manner this one was.

[39] Mr Agreiter sought by way of remedy three weeks' remuneration lost as a result of the termination of his employment, and $10,000 as compensation for injury to his feelings.

[40] His bank statements indicate he commenced new employment earlier than he said he did, so I am not persuaded that he was out of work as he said he was. There will be no order for the reimbursement of remuneration lost as a result of his personal grievance.

[41] The evidence of injury to Mr Agreiter's feelings resulting from his personal grievance was minimal, and was largely concerned with anxiety over his immigration status. GL is therefore ordered to compensate Mr Agreiter for that injury at the low end of the scale, in the amount of $2,000.

Penalties

1. Failure to produce wage and time record

[42] Claims for penalties for breach of a statutory provision should be supported by detailed reference to the provision on which they rely.

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[1] [1994] 2 NZLR 415, 419

[43] Section 130 of the Employment Relations Act 2000 provides:

> 1. *Every employer must at all times keep a record (called the wages and time record) showing, in the case of each employee employed by the employer, -*
>   a. *the name of the employee:*
>   b. *the employee's age, if under 20 years of age;*
>   c. *the employee's postal address;*
>   d. *the kind of work on which the employee is usually employed;*
>   e. *whether the employee is employed under an individual employment agreement or a collective agreement;*
>   f. *in the case of an employee employed under a collective agreement …*
>   g. *where necessary for the purpose of calculating the employee's pay, the hours between which the employee is employed on each day, and the days of the employee's employment during each pay period:*
>   h. *the wages paid to the employee each pay period and the method of calculation;*
>   i. …
>   j. …
>
> 2. *Every employer must, upon request by an employee or a person authorised … to represent an employee, provide that employee or person immediately with access to or a copy of or an extract from any part or all of the wages and time record relating to the employment of the employee by the employer at any time during the preceding 6 years …*
> 3. …
> 4. *Every employer who fails to comply with any requirement of this section*

[44] In or about February 2009 Mr Agreiter applied to Immigration New Zealand for permanent residence. He was asked to provide copies of his three most recent wage slips in support of his application. The claim for a penalty seems to concern his lack of success in obtaining the payslips, although Mr Jusufi said the information was provided to Immigration New Zealand.

[45] More importantly the claim assumes that a payslip is the same thing as a wage and time record as defined in s 130(1) of the Act. That is not a valid assumption. Some payslips may be sufficiently detailed to comply with the provision, but many contain far more limited information. Such payslips would not comply with s 130(1) and could not therefore be described as a wage and time record under the Act. There is nothing inherently wrong in this, provided a compliant wage and time record is otherwise kept.

[46] I am not satisfied here that the request for copies of payslips amounted to a request for a wage and time record under s 130(1). On the facts it amounted to nothing more than a request for copies of documents to verify Mr Agreiter's income for immigration purposes.

[47] Since there was no request for a wage and time record as defined in s 130(1), there was no breach of s 130(2). There will be no order for a penalty.

2. Breach of good faith

[48] The obligation of good faith is detailed in s 4 of the Act, but penalties are available only in respect of breaches in terms of s 4A. That section reads:

> *4A. A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if –*
> *(a) the failure was deliberate, serious and sustained; or*
> *(b) the failure was intended to undermine –*
> *(i) bargaining…; or*
> *(ii) an individual employment agreement …; or*
> *(iii) an employment relationship; or*
> *(c) …*

[49] There was no analysis of which actions of GL's breached s 4(1), or in turn of whether those actions met the threshold for payment of a penalty under s 4A. I am not satisfied that a penalty under that section is warranted, and consider that the concerns about the payments made in 2010 would have been better addressed with reference to the Wages Protection Act 1983.

[50] There will be no order for a penalty.

Summary of orders

[51] GL is ordered to pay to Mr Agreiter:

a. $1,428.50 (gross) for statutory holidays not paid; and
b. $7,689 (gross) in respect of annual holidays; and
c. $1,800 as reimbursement for a half share of the cost of an airline ticket; and

d. $2,000 as compensation for the injury to his feelings.

Distribution of monies held

[52] For reasons detailed in a notice of direction dated 11 April 2011, and arising from GL's unresponsiveness to that date, the Authority required GL to make a payment into it of $10,000. Payment was duly made.

[53] Paragraph 6 (e) of the direction noted that a final distribution of the sum would be by order of the Authority in its determination of Mr Agreiter's claims.

[54] The amounts I have awarded exceed $10,000. Accordingly the full sum is to be paid to Mr Agreiter. He is to advise the Authority of any request regarding arrangements for payment.

[55] Since the payments listed under [51] (a) and (b) above have a tax component, Mr Agreiter should account to the IRD for the tax owed.

Costs

[56] Costs are reserved.

[57] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan
Member of the Employment Relations Authority